

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIC DEVELOPMENT, LLC,)
)
 Petitioner,)
)
 vs.) Case No. 06-1916BID
)
 DEPARTMENT OF TRANSPORTATION,)
)
 Respondent.)
 _____)
 _____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on October 30 and 31, 2006, in Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue in this bid protest is whether Respondent acted illegally, arbitrarily, dishonestly, or fraudulently when it decided to reject the sole proposal it had received in response to a solicitation asking "master developers" to submit competitive proposals for the development of various commercial projects that Respondent plans to make part of the Miami

Intermodal Center, a complex of major transportation facilities being built near the Miami International Airport.

PRELIMINARY STATEMENT

On November 26, 2002, Respondent Department of Transportation issued a request for proposals that solicited offers from qualified developers interested in designing, constructing, financing, and managing the "joint development" component of a major transportation project being built adjacent to the Miami International Airport. On March 3, 2003, Petitioner MIC Development LLC submitted the only proposal that the Department received in response to this solicitation.

On June 14, 2005, MIC Development LLC filed a notice of intent to protest Respondent's preliminary decision—which had been communicated via letters dated May 31, 2005—to reject "all" proposals. On June 23, 2005, Petitioner filed its formal written protest. The Department referred the matter to the Division of Administrative Hearings ("DOAH") on August 11, 2005, for the sole purpose of litigating the issue of whether Petitioner's notice of intent to protest had been timely filed. This maneuver, which effectively severed the Department's affirmative defense (waiver) from Petitioner's protest of the agency's decision to reject all bids, went unchallenged, and a final hearing on the narrow issue of timeliness followed.

The undersigned, who heard the previous case, entered a Recommended Order on April 20, 2006, which urged the Department

to refer the matter to DOAH for a final hearing on the merits of Petitioner's protest. See MIC Development, LLC v. Department Of Transportation, 2006 Fla. Div. Adm. Hear. LEXIS 156 (Fla. Div. Adm. Hear. 2006). The Department complied, returning the protest on May 22, 2006.

The final hearing on the merits of Petitioner's protest took place as scheduled on October 30 and 31, 2006. At the hearing, Joint Exhibits 1-26 and 28-37 were admitted into evidence. In addition, MIC Development LLC called the following witnesses: David C. Garrett, III of MIC Development LLC; Nick Serianni, a consultant to the Department; Steven E. Thompson, also a consultant to the Department; Gary Donn, Korouche Mohandes, and John Martinez, each of whom is an employee (or former employee) of the Department; and (by deposition) Department employees Gus Pego and Javier Rodriguez.

During its case, the Department presented the testimony of Mr. Serianni, who was re-called as a witness. The Department also offered Respondent's Exhibits 1-17, which were received in evidence.

The final hearing transcript was filed on November 29, 2006. Thereafter, the parties timely filed proposed recommended orders, which have been considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2006 Florida Statutes.

FINDINGS OF FACT

1. On November 26, 2002, the Florida Department of Transportation (the "Department" or "FDOT") issued a Request for Proposals for Joint Development (the "RFP"), the purpose of which was to solicit competitive proposals from "nationally recognized Master Developers" interested in participating in certain aspects of the ongoing Miami Intermodal Center project (the "MIC"). The MIC is a complex of major transportation facilities being built adjacent to the Miami International Airport ("MIA"). It is envisioned that, eventually, all of the various means of ground transport (e.g. private vehicle, rental car, bus, train, taxi, shuttle, etc.) will converge at the MIC.

2. The "joint development" component of the MIC, with which the RFP was concerned, focuses on certain commercial (i.e. money-making) facilities ancillary to what is referred to as the "MIC Core." The MIC Core constitutes the "hub" of the MIC, to which all the roads (and tracks) will lead. The RFP described the MIC Core as follows:

At full build-out, the MIC Core will become a major transportation hub and accommodate a variety of transportation modes, including rail, bus, and other vehicular traffic The MIC Core will accommodate extensions of the Metrorail, become the future terminus for AMTRAK and ultimately house a future East-West rail line. It will likewise provide station facilities for existing and future Tri-Rail commuter rail service. The MIC/MIA Connector station, serving the RCF [that is, the Rental Car Facility] and the MIC Core, will link MIC Core facilities and services to the main

terminal at MIA. Bus terminal facilities will accommodate local (MDTA) and intercity (Greyhound) bus services, as well as a variety of courtesy buses/vehicles (rental car companies, hotels, cruise lines, etc.). Selected MIA related terminal functions are also proposed to be relocated to the MIC Core in the future (ticketing, baggage handling, etc.).

RFP at 8. As the above description makes clear, the joint development component, though significant in its own right, is nevertheless only a piece of the MIC; it is not the entire project, by any means. Other important pieces of the MIC include such transportation components as the MIC Core, a Rental Car Facility ("RCF"), the MIC/MIA Connector (a light-rail "people mover"), and the MIC Terminal Access Roads ("MTAR").

3. The goal which the Department sought to realize through the RFP was to negotiate and enter into a long-term lease agreement with a master developer who would design, finance, build, and manage the commercial elements of the MIC, paying rent to FDOT for the right to use and occupy the public property on which the joint development project will be situated. To make the joint development project economically sustainable, interested developers were required to submit plans for such revenue generating facilities as a hotel/conference center, retail establishments, and commercial office buildings. The RFP's approach to the scope of the undertaking was flexible, giving proposers leeway in the following respects:

- Proposers may offer to finance, construct and manage the transportation

facilities, as well as commercial development, as an integrated overall project;

- Alternatively, FDOT may provide funding for, construct and own distinct transportation components of the MIC Core, or the Proposer may offer to finance and build the entire project and lease the transportation facilities back to FDOT.
- Proposers may modify the mix of commercial uses contemplated for the MIC based upon their own experience and market information, as long as the proposed program remains within the parameters set by the MIC Record of Decision and related development agreements obtained for the MIC

RFP at 5.

4. At the time it issued the RFP, the Department expected that "landside" operations currently being conducted in the MIA terminal would be moved to the MIC Core. Landside operations include ticketing, passenger check-in, and baggage handling. The RFP explained:

Spatial planning to date has been premised on the future relocation to the MIC Core of selected MIA terminal/land-side functions. The MIC Core Pre-Schematic Program Analysis (Exhibit IV) contains an analysis of site alternatives and a preferred pre-schematic proposal for the MIC Core site organization that optimizes the integration of surface transportation modes, MIA land-side functions and a MIC joint development program.

RFP at 9. The upshot is that FDOT envisioned that a substantial amount of the MIC Core's square footage would be given over to landside functions, based on the premise that such functions one day would be carried out in the MIC Core.

5. Proposers were required to submit a "base plan" "providing for hotel, office, parking, and ancillary retail" uses. The RFP instructed further that the base plan needed to conform to the pre-schematic proposal (referenced in paragraph 4 above). Thus, in their base plans, proposers had to accommodate the Department's premise that landside functions requiring substantial square footage eventually would be moved to the MIC Core. Proposers were allowed, additionally, to submit one "alternative plan" that could deviate from the base plan "both as to site organization and mix of proposed uses."

6. To choose a developer for the joint development component of the MIC, the RFP called for a multi-step selection process involving two formal committees: a Technical Review Committee ("TRC") appointed by FDOT, and a Selection Committee consisting of FDOT management. In the initial, "feasibility determination" phase, the TRC would determine whether each proposal met "threshold criteria" for "feasibility." After making its feasibility determination with regard to each of the proposals, the TRC would recommend to the Selection Committee which proposals should be deemed feasible and which infeasible (without ranking them). Then the Selection Committee, taking into account the TRC's recommendations, would decide which proposals were feasible and responsive to the RFP, and which were not one or the other (or were neither). Any proposal deemed by the Selection Committee to be infeasible, non-responsive, or both

would be dropped from further consideration at that point.

Feasible and responsive proposals would be returned to the TRC for the next level of review.

7. During the ensuing "evaluation" phase of the selection process, the TRC would invite each proposer whose proposal was deemed feasible and responsive to make an oral presentation to the committee. Following the oral presentations, the TRC would evaluate, score, and rank the competing proposals. The TRC's recommended ranking of the proposals would be submitted to the Selection Committee, which would make the "final selection" and determine the "official ranking" based on the TRC's recommendation.

8. After the completion of the evaluation phase, the selection process would proceed to the negotiation phase, during which FDOT would

negotiate a lease agreement with the first ranked Proposer. If negotiations [could] not be concluded in a reasonable period of time, then FDOT [would] have the option to cease negotiations with the first ranked Proposer and begin to negotiate with the second ranked Proposer. The process [could] continue until a contract [were] successfully negotiated, or FDOT [could] re-advertise for proposals or use a different procurement process.

RFP at 27-28.

9. In the RFP, the Department reserved "all rights available to it by law." Among the rights specifically reserved were

the rights to reject any and all proposals at any time, to request or retain additional information for any proposals, to require reasonable changes in the selected proposal to more fully achieve the purposes and objectives of [the] RFP, and to elect not to enter into a lease agreement, unless FDOT is fully satisfied that all conditions precedent have been fully met.

RFP at 7. In addition, prospective proposers were notified that the

RFP is solely a request for expressions of interest and statements for feasible proposals. . . . No contractual or other legal obligations or relations between FDOT and any Proposer shall be created except by and through, in the sole discretion of FDOT, a negotiated and fully executed lease agreement between a proposer and FDOT.

In considering any proposals submitted in response to this RFP, FDOT reserves the absolute and unfettered discretion to:

* * *

- Receive and review proposals in accordance with this RFP, without being obligated in any way to select the Proposer or proposal.
- Request clarification after the dates and times set out in this RFP from any one or more of the Proposers with respect to proposals submitted.

RFP at 28.

10. On March 3, 2003, Petitioner MIC Development LLC ("MDL") timely submitted a proposal in response to the RFP. MDL's proposal was the only one that FDOT received.

11. MDL is a joint venture between Mallory & Evans Development LLC and Codina Group, Inc. that was formed

specifically for this procurement. In preparing its proposal, MDL assembled a team of professionals that possess the necessary experience and expertise to develop a project of the nature and magnitude contemplated by the RFP.

12. MDL offered both a base plan, as required, and an alternative plan, as the RFP permitted. Though its base plan conformed to FDOT's premises, MDL doubted that landside operations requiring a substantial amount of space would ever be moved to the MIC Core, as FDOT had directed proposers to assume. MDL stated in its response that the prospect was "unlikely that actual terminal ticketing would occur at the MIC."

13. MDL also expressed in its proposal a desire to assume overall responsibility for managing the development of the MIC:

The current planning calls for independent development of MIC-related facilities. We believe, from both a public—as well as private—sector perspective, the project would benefit from having a single point of responsibility: a Master Developer responsible for delivering the entire project on-schedule and within budget. Both the schedule and the budget would be approved by FDOT prior to entry into the Master Lease.

. . .

* * *

Therefore, our proposal provides for Master-Developer funding for the following project elements: MTAR, RCF and MIC/MIA Connector. Each of these projects would be turned over to FDOT upon completion.

Though authorized under the RFP's specifications, MDL's offer to take control of the management of the entire project, including

pieces outside of the joint development component (e.g. the MTAR, RCF, and the MIC/MIA Connector), would have expanded the role of the "master developer" beyond that for which FDOT had planned when it issued the RFP.

14. Regarding the potential for the project to generate revenue for the Department, MDL's response was guarded:

After substantial and intense analysis, the [MDL] team has concluded that the RFP's approach, while admirable in many ways, contemplates a project that may not be viable without substantial, long-term government subsidies. Why? Because, the "joint development" elements of the project require an extraordinary amount of time to develop into positive revenue generators. The project economics will not allow for payments to FDOT until the construction has been completed; even then, it will be necessary to ramp up payments over time.

15. MDL's proposal for the base plan was conditioned on several assumptions, namely:

- Relocation of terminal ticketing and baggage claim from MIA to the MIC;
- Restriction of access to current airport terminal areas to official MIA or public safety-related vehicles or vehicles entering on-airport decks;
- Verification of market demand for full build-out of the MIC Hotel/Conference Center and the MIC Office Buildings;
- Acceptance by FDOT of the Master Developer-financed and managed, comprehensive project delivery, as set forth above, or agreement by FDOT to assume responsibility for all damages to Master Developer arising out of delays associated with currently proposed project delivery method;
- No Ground Rental payments due to FDOT until completion of Construction.

16. MDL's alternative plan proposed to re-organize the joint development uses in ways that MDL believed would make the project more conducive to commercial endeavors, while at the same time enhancing the utility and convenience of the transportation elements. Consistent with its skepticism concerning the putative need to devote huge amounts of space to landside operations, MDL offered in its alternative plan to scale down the size of the area set aside for such purposes. Like the base plan, MDL's alternative plan was subject to several conditions, to wit:

- Relocation of terminal ticketing and baggage claim from MIA to the MIC or mutually acceptable re-planning of the facility to remove this function and its associate space from the MIC Core project scope;
- Restriction of access to current airport terminal areas to official MIA or public safety-related vehicles or vehicles entering on-airport decks;
- Acceptance by FDOT of the Master Developer-financed and managed, comprehensive project delivery, as set forth above or agreement by FDOT to assume responsibility for all damages to Master Developer arising out of delays associated with currently proposed project delivery method;
- No Ground Rental payments due to FDOT until completion of Construction.

17. On or about April 2, 2003, the Department sent MDL an extensive request for clarification of its proposal, which consisted of 43 numbered questions, some entailing many subparts. A few days later, MDL informed FDOT that it would submit a formal

written response to the request for clarification on or before May 2, 2003.

18. Meantime, by letter dated April 22, 2003, an FDOT district manager reminded the Miami-Dade Aviation Department ("MDAD") that the Department had "initiated the procurement process for the selection of a Master Developer" with a view toward "negotiat[ing] a lease agreement with the selected Master Developer and begin[ning] in earnest the design process for the MIC Core/transportation hub." In light of that, to "reconfirm [FDOT's] planning assumptions," MDAD was asked to answer the following questions regarding its plans for the relocation of landside functions to the MIC:

1. Does the County/MIA still plan to relocate selected airport landside facilities to the MIC Core/transportation hub?
2. If so, what type of landside facilities would be relocated?
3. What is the approximate timeframe for this relocation to occur?

19. MDAD's response, delivered via letter dated May 5, 2003, was noncommittal, to say the least. Mostly, the letter recounted the history of the "MOVE Committee" that had been appointed by the mayor in 1998 to study, and make recommendations concerning, the development and financing of the MIC. In this regard, the letter stated, in pertinent part, as follows:

[V]arious alternatives for transferring baggage between the MIC and Miami International Airport (MIA) [were studied]. . . . [A]ll options studied were not logistically feasible and/or [were] cost prohibitive. Most importantly, the airlines

expressed no desire to relocate these functions from the MIA terminal. . . . [Ultimately, in late 1999, it was] resolved to allow users and planners to continue to develop future baggage handling plans for the short-term and long-term scenarios.

After providing this historical background, the letter concluded:

To date, there has [sic] been no baggage handling solutions submitted to [MDAD], airlines, or the Transportation Security Administration for review and approval. Furthermore, MDAD's approved Capital Improvement Program does not provide for the relocation of landside functions to the MIC.

Please keep us informed as the MIC Core design progresses.

20. The Department interpreted MDAD's letter as expressing MDAD's final decision that landside operations would never be relocated to the MIC Core; throughout these proceedings, the Department has adhered to this interpretation. The undersigned, having only MDAD's letter as proof of MDAD's intentions (for no one from MDAD testified at the hearing), does not detect as much decisiveness in the text; rather, as the undersigned reads the letter, MDAD gave an ambiguous, non-responsive answer to FDOT's specific questions, expressing no enthusiasm for moving landside operations to the MIC, to be sure, but not quite saying *no, thank you* either—at least not forthrightly. Given the importance that FDOT had attached to the relocation of landside functions to the MIC Core, and because MDAD's supposed "decision" upset FDOT's assumptions about MDAD's plans, it puzzles the undersigned that the Department passively accepted the May 5, 2003, letter as a

definitive position-statement, without aggressively following up to find out what exactly MDAD had in mind with regard to this issue. At any rate, the parties have stipulated that MDAD decided not to move landside functions to the MIC—and so the undersigned finds that to be the case.

21. There is conflicting evidence regarding the extent to which MDAD's change of heart concerning landside functions caught the Department off guard. Yet, whether the letter of May 5, 2003, came as a genuine surprise or not, the Department can fairly be criticized for having failed to nail down this important matter before issuing the RFP, an oversight for which the undersigned can find no explanation in the record. But such criticism cannot change the fact that, as of May 5, 2003, a major premise on which the RFP was based had been discredited, making obsolete the base plan's site organization of the MIC Core. Without landside functions, the MIC Core probably would not need to be as large as FDOT had thought, and the planned mix of uses for the hub would need to be reconsidered.

22. On May 2, 2003, MDL submitted its lengthy, formal response to FDOT's first request for clarification. The TRC then met on May 28, 2003, to determine the feasibility of MDL's proposal, as clarified. At that meeting, the TRC voted in favor of recommending to the Selection Committee that MDL's proposal be found feasible.

23. Shortly thereafter, the Selection Committee accepted the TRC's recommendation. The Department notified MDL of this decision via an email dated May 30, 2003, which provided in pertinent part as follows:

On behalf of the [Department], this formal notification addresses FDOT's determination of feasibility of [MDL's] proposal

The Selection Committee, in accordance with the RFP . . . , has determined that [MDL's] response and clarification is feasible, subject to the reservations stated below. In accordance with the RFP, the proposal will be evaluated and an oral presentation/interview will be convened.

This letter also requests that [MDL] provide clarification of its proposal in response to the May 5, 2003, letter from [MDAD] Specifically, please describe the impact on your proposal, if any, of the lack of any airport landside functions being located at the MIC and any changes that you would make to the [MDL] proposal.

24. Although the formal notification of feasibility did not explicitly say so, the Selection Committee's determination necessarily implied a finding that MDL's proposal was responsive as well as feasible, because the selection process established under the RFP required the Selection Committee to determine both feasibility and responsiveness following the TRC's initial feasibility determination. The Selection Committee's duty to determine responsiveness arose from the RFP's prescriptions that (a) only feasible and responsive proposals would be further evaluated after the feasibility determination phase (RFP at 25), and (b) the opportunity to make an oral presentation to the TRC

would be provided, not to all proposers, but to proposers "receiving notice that their proposals have been determined to be responsive and feasible" (RFP at 27).¹

25. On June 13, 2003, MDL submitted a response to FDOT's request for clarification relating to the likely absence of landside operations at the MIC. Given that its alternative plan took account of this contingency, MDL naturally viewed MDAD's decision as "not unexpected" and urged that the situation be embraced as a positive opportunity to place additional revenue generating, commercial uses in and around the MIC Core.

26. The TRC met on July 9, 2003, to consider this second clarification of MDL's response to the RFP. By this point, FDOT had a number of concerns about moving forward with the procurement, concerns that were making the Department reluctant to proceed with formal negotiations. Instead of strictly following the prescribed multi-step evaluation process, which contemplated that formal negotiations with the first ranked proposer would commence after (a) the TRC had evaluated, scored, and ranked the feasible, responsive proposals, and (b) the Selection Committee had established the official ranking thereof based on the TRC's recommendation, the Department, acting through the TRC as its agent, effectively engaged in informal negotiations with MDL, conflating the evaluation and negotiation phases. In retrospect, it can be seen that a de facto negotiation phase had begun with FDOT's initial request for

clarification on April 2, 2003, which was the first of several such requests that were tantamount to bargaining.

27. These negotiations were decidedly one-sided. Because FDOT evidently was in no hurry at that time to complete the joint development component of the MIC, it was prepared to tolerate, as an alternative to accepting conditions in MDL's proposal that were believed to be disadvantageous, the uncertainty and delay that would follow from rejecting all proposals and starting over with a new RFP, a course of action which, despite its drawbacks, at least held out the hope of securing a better deal. As the only proposer, moreover, MDL was forced to compete, in effect, not against any actual proposal, but against a hypothetical one more to the Department's liking, which might (or might not) materialize in a future procurement. Occupying the superior bargaining position, the Department was able to ask MDL repeatedly for more information, and MDL had no choice (if it wanted to remain under consideration for the contract) but to comply.

28. It is no surprise, therefore, that the Department's requests "for clarification" were in essence demands that MDL make concessions regarding aspects of its proposal that the Department was not inclined to accept. Broadly speaking, the major sticking points stemmed from: (1) the apparent need to consider a wider variety of commercial uses for the MIC Core, to compensate for the absence of landside functions (and attendant

loss of passenger traffic therefrom); (2) MDL's desire to be in charge of managing the construction of entire project, including the transportation elements; and (3) disagreements regarding the amount and timing of ground rental payments.

29. To give a flavor of the parties' disagreements without going into great detail, the following is a very brief sketch. Regarding the mix of uses, MDL believed that, in the interest of making the joint development a financial success, it was necessary to explore such commercial options as residential apartments and "big box" retail, which could potentially bring people (i.e. customers) to the MIC—an especially critical need if landside operations would not be the draw. For its part, FDOT was skeptical about the market demand for these particular uses and believed that they might be inconsistent with the overall concept, if not legally impermissible.

30. MDL consistently maintained that, in order to make reasonable projections regarding the timing and amount of income expected to flow from the commercial elements—projections which were necessary, among other reasons, to secure project financing—a schedule for completing the various phases of the MIC would need to be drawn up and adhered to; furthermore, if the construction schedule were not met, MDL would be exposed to liability for damages caused by the delay. MDL was unwilling to assume the risks of loss arising from any delays whose causes it could not control. MDL's solution was to take control of the

entire MIC construction project, which would put MDL in a position to bring about the timely completion of the various phases—or be directly responsible for any delays.

Alternatively, MDL wanted FDOT to give performance guarantees, effectively putting the risk of loss from construction delays on FDOT. FDOT, however, was reluctant to surrender complete control of the project to MDL, and it refused to assume the risk of loss from delays.

31. On the matter of ground rents, the parties were never able to agree on the amounts MDL would pay. Probably the bigger point of contention, though, concerned the timing of the payments. MDL held that rents could not become due and payable until various phases of the construction were completed, when anticipated income streams would begin to flow. FDOT, in contrast, insisted that ground rent be payable from the date of the execution of the lease, including during the "holding period" when the joint development component would not be generating revenue for the lessee.

32. These points were not resolved at the TRC meeting on July 9, 2003; to the contrary, more questions were raised, resulting in FDOT sending yet another request for information to MDL, to which the latter responded by memorandum dated September 19, 2003. The TRC met again—and for the last time—on October 27, 2003, to consider MDL's latest submission. The TRC reached no conclusions and made no recommendations, leaving the

still unresolved points of concern unresolved. Practically speaking, the selection process had stalled.

33. After that, there would be a couple of meetings, scheduled at the instance of MDL, between the principals of MDL and public officials who had not been directly involved in the selection process as members of either the TRC or the Selection Committee. At the first of these, which occurred on November 4, 2003, FDOT management and MDL representatives discussed the Department's concerns and considered ways to jump start the procurement. Agreeing that an independent appraisal of the property might help bring the parties together on the issue of ground rent, it was decided at this meeting that such an appraisal would be conducted.

34. For reasons not entirely clear, however, the appraisal process did not begin straightaway, and consequently MDL arranged through the Governor's Office to meet with Secretary Simon of the Department of Management Services. This meeting took place sometime in February 2004. Two months later, in April 2004, the Department initiated an appraisal process that continued through the end of the year, resulting in a pair of appraisal reports, one that was issued in December 2004, another in February 2005.

35. The appraisals did not resolve the outstanding issues relating to ground rent. Nor, between November 2003 and February 2005, had the parties been able to reach agreement on the other points of contention. At the risk of oversimplifying some fairly

complex issues, it is reasonably accurate to say that, as of February 2005, the Department remained unconvinced that, among other things: (1) MDL's proposed mix of uses for the MIC Core was appropriate; (2) placing MDL in overall control of construction management would add value to the project; and (3) the economics of the joint development project required that ground rents not become due and payable until after the completion of various phases of the construction. In short, the parties had reached an impasse.

36. On September 20, 2005, the Selection Committee met and determined, by a unanimous vote, to reject all proposals.

Ultimate Factual Determinations

37. MDL argues that the process by which FDOT arrived at its decision to reject all bids was arbitrary and flawed. MDL complains, in part, that the TRC actively worked against MDL because some of the TRC's members were (and as of the final hearing continued to be) private consultants to FDOT on the MIC project who have earned substantial fees for providing the Department with construction management services and are in line to continue receiving such fees—unless a firm such as MDL is chosen to take control of the entire project or portions thereof. In other words, MDL alleges that the TRC had a conflict of interest that prevented it from fairly and objectively analyzing MDL's proposal.

38. MDL contends, additionally, that in rejecting all proposals, the Section Committee—which did not act on a recommendation of the TRC—relied on false or incomplete information concerning MDL's proposal, and hence behaved irrationally or capriciously. In furtherance of this argument, MDL points out—correctly—that the minutes of the Selection Committee's relatively brief (less than 30 minutes) meeting are silent as to the grounds for rejecting all proposals.

39. MDL's criticisms of the process, though ultimately not decisive, are not trivial either. For instance, FDOT in fact has paid its consultants nearly \$60 million in fees for work on the MIC. While it is understandable that, in carrying out the joint development project, the Department would desire and solicit the advice of its trusted and knowledgeable consultants, it is also true that placing some of these consultants on a review panel responsible for selecting a developer who might propose to assume some portion of the consultants' responsibilities gives rise to the appearance, at least, of a potential conflict of interest. To avoid even the appearance of such a conflict, the Department, in exercising its wide discretion over procurement decisions, could have used an independent "board of advisors" for the technical review of proposals, as permitted under Section 337.251(3), Florida Statutes, and Florida Administrative Code Rule 14-109.0011(4)(d)1. While the undersigned believes that, as a general proposition, relying on an outside board of advisors is

a wise approach, which is no doubt why the legislature authorized the use of boards of advisors in this type of procurement, it is nevertheless determined that the Department's appointment of private consultants to serve on the TRC was not an abuse of discretion, but a legally permissible policy decision; there is no persuasive evidence that FDOT acted dishonestly, fraudulently, or arbitrarily in this regard.²

40. There is some truth as well in MDL's charge that the selection process did not unfold in strict conformity to the RFP. What the evidence fails to establish, however, is that the process was so compromised as to produce an arbitrary (or otherwise impermissibly founded) decision, the purpose or effect of which was to defeat the object and integrity of competitive procurement. As the undersigned sees it, the selection process was not undone by malfeasance or misfeasance, as MDL posits; instead, the process was modified somewhat in consequence of FDOT's receipt of just one proposal. Because there was only one proposal to review, some elements of the evaluation process, e.g. scoring and ranking, were essentially superfluous. Indeed, once feasibility and responsiveness were decided, the real question became whether FDOT and MDL could come to a meeting of the minds with regard to the lease agreement pursuant to which the joint development would occur. Accordingly, in an honest attempt to answer the salient question, the TRC engaged in negotiations with MDL over the points of the latter's proposal that the Department

considered most problematic. While this deviated from the RFP, the TRC's conduct of de facto negotiations was not unfair to MDL, even though FDOT clearly had the upper hand in the exchange, because the informal bargaining kept the process alive at times when the alternative would have been simply to reject all proposals and start over. There is no persuasive evidence that the selection process, though imperfect, was illegal, arbitrary, dishonest, or fraudulent.

41. As for the Selection Committee's decision to reject all proposals, while the grounds therefor should have been better documented (in the minutes, for example), the record as a whole makes clear the numerous reasons behind the committee's action. In a nutshell, FDOT was dissatisfied with certain elements of MDL's proposal, as set forth above, and believed that a more attractive offer might be elicited if another request for proposals were issued. Being under no apparent time-pressure to do the deal, the Department took hard bargaining positions and basically refused to budge. Whether the Department will later regret releasing a bird in the hand, time will tell. But on business decisions regarding matters such as the mix of uses for the MIC Core, the timing and amount of ground rent, and control of the construction management, the Department has wide discretion, to which the undersigned must defer, lest he substitute his judgment for the agency's. The wisdom—and even, to a large degree, the reasonableness—of the Department's

judgments in these matters is not subject to review. The issue, rather, is whether the ultimate decision was illegal, arbitrary, dishonest, or fraudulent. Here, the evidence fails to persuade that it was.

42. To the contrary, the evidence establishes that FDOT had several honest and rational grounds for rejecting all proposals. The first—and simplest—reason was that only one response to the RFP had been received. By itself, that fact was sufficient to warrant the decision not to proceed. Beyond that, however, the Department articulated legitimate reservations about MDL's proposal—reservations grounded in logic and reason, not whim—which caused the Department to conclude in good faith that MDL's proposal failed to meet its (FDOT's) expectations. Now, it might turn out that the Department's logic is flawed, or that its present expectations are unrealistic—indeed, the day might come when FDOT regrets having turned MDL down. But nothing in the law or the RFP compelled the Department to accept, for example, MDL's condition that responsibility for overall construction management be ceded to MDL, or MDL's offer to begin paying ground rent, not upon the signing of a lease, but only as various phases of the construction were completed. MDL's business decision to re-advertise the joint development project in hopes of finding a better deal might prove to be brilliant, or it might someday be thought ill-advised, but it was not illegal, arbitrary, dishonest, or fraudulent.

CONCLUSIONS OF LAW

43. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and the parties have standing.

44. Section 120.57(3)(f), Florida Statutes, provides that in a proceeding brought to protest the intended rejection of all competitive proposals, the standard of review shall be whether the proposed agency action is "illegal, arbitrary, dishonest or fraudulent." This standard derives from Department of Transportation v. Groves-Watkins Constructors, 530 So. 2d 912, 914 (Fla. 1988), a case in which the Florida Supreme Court held that the administrative law judge's "sole responsibility [in reviewing a decision to reject all bids] is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly."

45. The burden of proof rests with the party opposing the proposed agency action. See State Contracting and Engineering Corp. v. Department of Transportation, 709 So. 2d 607, 609 (Fla. 1998). As the protesting party, MDL must sustain its burden of proof by a preponderance of the evidence. Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

46. In Scientific Games, Inc. v. Dittler Brothers, Inc., 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991), the First District

Court of Appeal described the deference to be accorded an agency in connection with a competitive procurement:

The Hearing Officer need not, in effect, second guess the members of the evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result. Rather, a "public body has wide discretion" in the bidding process and "its discretion, when based on an honest exercise" of the discretion, should not be overturned "even if it may appear erroneous and even if reasonable persons may disagree."

(Citations omitted; emphasis in original).

47. In Gulf Real Properties, Inc. v. Department of Health and Rehabilitative Services, 687 So. 2d 1336, 1338 (Fla. 1st DCA 1997), the court upheld an agency's intended rejection of all bids, stating that "an agency's rejection of all bids must stand, absent a showing that the 'purpose or effect of the rejection is to defeat the object and integrity of competitive bidding.'"

48. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chemical Co. v. Department of Environmental Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Under the arbitrary and capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enterprises, Inc. v. State Department of Environmental Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Still,

the reviewing court must consider 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 consideration of each of these factors to its final decision.

Id.

49. The second district has supplied the following test for determining whether a decision was arbitrary: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." Dravo Basic Materials Co., Inc. v. State Department of Transportation, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992). As the court observed, this "is usually a fact-intensive determination." Id. at 634.

50. The undersigned believes that a reasonable person, seeking competitive proposals on a major construction project, could reasonably decide, after receiving just one proposal, that he would prefer, as an alternative to entering presently into a contract with the sole proposer, to repeat the solicitation process in hopes of obtaining a wider selection of proposals from which to choose, even though doing so will cause delay, not to mention put at risk the only proposal he has, while offering no guarantee that he will wind up with a better deal. Thus, the undersigned has concluded that FDOT's decision to reject all proposals in this instance was justifiable, if for no other

reason, on the ground that MDL's proposal was the only one received. See Rosiek Construction Co., Inc., v. Department of Transportation, 2005 Fla. Div. Adm. Hear. LEXIS 1110, *24 (Fla. Div. Adm. Hear. 2005)("DOT did not act illegally or arbitrarily when it rejected the [protester's] bid solely on the basis that it was the only bid received.").

51. Moreover, the evidence shows, as found above, that FDOT considered other relevant factors and determined, not whimsically, but on the basis of logic and reasoning, that MDL's proposal was insufficiently attractive under the circumstances—a decision that falls squarely within the agency's wide discretion. Accordingly, as set forth in the Findings of Fact, the trier has determined as matter of ultimate fact that FDOT's decision was not illegal, arbitrary, dishonest, or fraudulent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department enter a final order affirming that its decision to reject all proposals was not illegal, dishonest, fraudulent, or arbitrary.

DONE AND ENTERED this 18th day of February, 2007, in
Tallahassee, Leon County, Florida.

S

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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of February, 2007.

ENDNOTES

^{1/} In its Proposed Recommended Order, the Department argues at length that MDL's proposal was non-responsive and hence subject to rejection on that basis. As far as the undersigned can tell, however, this rationale was not invoked during the run-up to the instant litigation, nor was it raised previously herein. Tellingly, the parties' Joint Pre-Hearing Stipulation does not identify any issues of law or fact concerning the alleged non-responsiveness of MDL's proposal. Doubting the propriety of taking up this issue, of which MDL had no advance notice, the undersigned will not discuss the subject of responsiveness in detail. Suffice it to say that there is no persuasive evidence that the Selection Committee's implicit determination regarding the responsiveness of MDL's proposal was in error, much less illegal, arbitrary, dishonest, or fraudulent.

^{2/} As an aside, if the instant procurement were as thoroughly tainted by the consultants' participation as MIC contends, one permissible (though not the only conceivable) remedy for that would be—ironically—to scuttle the procurement and start anew.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.