STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAINGUY ENVIRONMENTAL CARE, INC., d/b/a MAINGUY LANDSCAPE SERVICES,

Petitioner,

vs.

WALNUT CREEK COMMUNITY DEVELOPMENT DISTRICT,

Respondent,

and

SQUIRES ENTERPRISES, INC., d/b/a TURF MANAGEMENT,

Intervenor.

Case No. 07-4753BID

SUPERIOR LANDSCAPING AND LAWN SERVICE, INC.,

Petitioner,

vs.

WALNUT CREEK COMMUNITY DEVELOPMENT DISTRICT,

Respondent,

and

SQUIRES ENTERPRISES, INC., d/b/a TURF MANAGEMENT,

Intervenor.

Case No. 07-4753BID

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Fort Lauderdale, Florida, on November 8, 2007.

APPEARANCES

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For Walnut Creek Community Development District:

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For Turf Management:

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STATEMENT OF THE ISSUE

The issue is whether Walnut Creek's decision to award a landscaping contract to Turf Management is arbitrary or capricious.

PRELIMINARY STATEMENT

By Petition for Formal Administrative Hearing and Formal Written Protest dated August 27, 2007, Mainguy Landscape Services formally protested the decision of Walnut Creek Community Development District to award a landscape maintenance contract to Turf Management as contrary to governing statutes, the bid specifications, arbitrary, capricious, and an abuse of discretion. In its petition, Mainguy requests an order recommending the award of the contract to it.

By letter dated August 17, 2007, Superior Landscaping and Lawn Service, Inc., formally protested the same decision of the Walnut Creek Community Development District.

The proposed winning bidder, Turf Management, later intervened in these cases, which were consolidated prior to final hearing.

At the hearing, Mainguy Landscape Services called one witness, and Walnut Creek Community Development District called one witness. The parties offered Joint Exhibits 1-10, and Walnut Creek Community Development District offered Walnut Creek Exhibit 1. The Administrative Law Judge admitted all of these

exhibits. After the hearing, for the reason set forth below, the Administrative Law Judge added ALJ Exhibit 1, which was a demonstrative exhibit, to which no party had objected at the hearing, depicting all of the lots of the Walnut Creek Community Development District.

The court reporter filed the transcript on December 3, 2007. All of the parties except Superior Landscaping and Lawn Service, Inc., filed proposed recommended orders.

FINDINGS OF FACT

1. Effective June 7, 2007, by Ordinance No. 1339, The City of Pembroke Pines, Florida established the Walnut Creek Community Development District (Walnut Creek).

2. By an invitation to bid, entitled Bid Specifications for Landscape Maintenance of Rights-of-Way, Water Management Areas and Similar Planting Areas within the District," dated June 2007 (ITB), Walnut Creek announced that it would accept bids for the work described in the ITB. ITB Section 5 describes the work, which is to furnish all labor and materials "to perform complete maintenance of landscape area . . .."

3. ITB Section 5 details maintenance requirements, such as a mowing height of three inches, the use of rotary mowers with sharp blades, 40 mowings of Floratam grass, all mowing to take place on Thursdays, and specified fertilization schedules based on the type of grass being fertilized.

4. Two ITB provisions were of particular interest at the hearing. ITB Section 10.b.5 addresses annuals and provides: "Annuals shall be replaced three times during the year in the months of October, February and June . . . ." ITB Section 12 provides: "Contractor shall respond to District Resident Project Representative within twenty-four (24) hours to remove storm damage debris."

5. The ITB bid form, on which bidders were to write their prices, contradicts the statement in ITB Section 10.b.5 because it contains a line for "4[-inch] annuals 4 x a year." At a mandatory prebid conference conducted prior to the deadline for submitting bids, a consultant retained by Walnut Creek to assist in the bid process clarified that the contract requires four plantings of 2000 annuals annually, for a total of 8000 annuals per year. Although Walnut Creek did not memorialize this clarification that was announced at the prebid conference, any resulting confusion among prospective bidders has proved to be immaterial.

6. A third ITB provision is also of especial importance. ITB Section 1.08 requires that bidders enclose with their bids a description of the educational background and professional experience of owners, supervisors, and key employees; a list of "similar contracts for landscape maintenance now held by your firm" (with a definition of "similar contracts" as "residential

communities, similar or greater in size, the nature, extent and variety of landscaping installed and maintained within the community, to that of Walnut Creek, with annual contract amounts at or in excess of $200,000") and customer contacts for these contracts; an undertaking to assign only "fully trained personnel" to the contract; and other "satisfactory evidence" of "experience in like work" and "the necessary organization, capital, equipment and machinery to complete the work to the satisfaction of the Owner . . . ."

7. By written Addendum, Walnut Creek clarified the requirement of "similar contracts" by limiting the comparable landscape maintenance service to "residential or mixed-use developments of similar size to the District or greater and which require a similar level of maintenance and maintenance of plant and landscaping material similar to [that] found on District property . . . ."

8. ITB Section 1.10 provides that Walnut Creek reserves the right to reject any and all bids, "with or without cause," and to waive technical errors and informalities." ITB Section 1.11 provides that Walnut Creek will award the contract, if it is awarded, to the:

> lowest responsive and responsible high quality Bidder whose qualifications indicate the award will be in the best interest of the Owner and whose proposal shall comply with the requirements of these

> specifications. In no case will the award be made until all necessary investigations have been made into the responsibility of the Bidder to do the work and to have the necessary organization, capital and equipment to carry out the provisions of the contract to the satisfaction of the Owner . . . .

9. ITB Section 2.07(3) states: "In the event that there is a discrepancy on the Proposal Form due to the unit price extensions or additions, the corrected extensions and additions shall be used to determine the project bid amount."

10. ITB Section 2.14.3 provides:

> The Contract will be awarded to the lowest responsive and responsible high quality Bidder that best serves the interest of the Owner. The following elements, in addition to those noted in the Contract Documents, will be considered:
>
> a. Whether each Bidder:
>
> 1. Maintains a permanent place of business; and
>
> 2. Has adequate plant, machinery[,] manpower and equipment, and [sic] to do the Work properly, expeditiously and in a high quality manner; and
>
> 3. Has suitable financial backing status to allow him to meet the obligations as outlined in and incident to the Work; and
>
> 4. Has successful contractual and technical experience in Work in Similar Contracts, size, and scope in Broward County and/or surrounding areas; and
>
> 5. Holds all valid necessary state, county, and local licenses or certificates of competency covering all operations of the Bidder and the Work required under the Contract Documents[; and]
>
> 6. Has evidence that all the Subcontractors he proposes to use hold all

> valid necessary state, county and local licenses or certificates of competency covering all operations of said Subcontractors.
>
> a. The amount of Work each Bidder intends to perform with his own organization and the amount of Work he intends to Subcontract.
>
> b. The qualifications of the Subcontractors that the Bidder proposes to use.
>
> c. The Owner also reserves the right to reject the Proposal of a Bidder who has previously failed to perform properly or to complete contracts of a similar nature on and in a competent and high quality manner.

11. ITB Section 2.18 states that the term of the contract will be three years. ITB Section 2.19 provides:

> The Contractor shall at all times enforce strict discipline and good order among his employees and the employees of any subcontractors, and shall not employ on the Work an unfit person or anyone not skilled in the Work assigned to him. . . .

12. At present, Turf Management has the contract with Walnut Creek to maintain the landscaping under its jurisdiction and has the contract with the Walnut Creek homeowners' association, which is a separate entity, to maintain the landscaping under its jurisdiction. These two areas often exist side-by-side throughout the development. For about four years, Turf Management has had the contract with Walnut Creek, which was unaware, until the subject procurement, of the legal requirement that it obtain these services by competitive bidding.

13. There is no dispute that all bidders timely submitted their bids. The four apparent lowest bids received by Walnut Creek were, in order from lowest to highest, Landscape Service Professionals, Mainguy, Superior Landscaping, and Turf Management. Landscape Service Professionals did not include with its bid any similar contracts, so its bid was found to be nonresponsive. Landscape Service Professionals has not protested the proposed award or intervened in these cases, so its bid is not further considered in this recommended order.

14. On its face, the bid of Superior failed to include references to similar contracts. The references in Superior's bid are an impressive array of governmental agencies and public entities, as well as a single Marriott hotel, but not one is a residential development of any kind. This was a material variance from the ITB that rendered Superior's bid unresponsive.

15. The bid of Turf Management includes one similar contract--that of Walnut Creek. However, of the remaining four references, two are clearly commercial or industrial (Best Equipment and Hugh[es?] Supply), one is unclear as to its nature but does not appear to be residential ("Lesco"), and one is residential, but with no indication as to size ("Pembroke Isles HOA [Homeowners Association]").

16. The issue of the size of Walnut Creek emerges when considering Mainguy's bid, as Superior's bid contained no

residential references and the only potentially similar contract in Turf Management's bid was its existing Walnut Creek contract. Nothing in the ITB supplies the size of Walnut Creek, by population or area to be landscaped. There is an incidental statement by a Board member, as noted below, of 985 homeowners in Walnut Creek. This fact is generally reinforced by the map of Walnut Creek that is ALJ Exhibit 1, which depicts approximately 893 lots.

17. The bid of Mainguy includes one similar contract--that of Inverrary Association, which represents over 8000 units and 17,000 residents. However, of the remaining 12 references, three are commercial (Broward Mall, Lakeside Office Center, and Town Center at Boca Raton) and nine are residential, but either smaller than Walnut Creek (Versailles at Wellington with 450 single family homes and Victoria Grove with 617 single-family homes) or of an unspecified size.

18. Except for some mention of Superior's failure to identify similar contracts in its bid, neither the Board during its deliberations nor the parties and witnesses during the hearing addressed these variances from the ITB, which clearly requires "similar contracts," implying more than one. However, there is a considerable difference between Superior's bid, which, on its face, cites no similar contracts, and the bids of Turf Management and Mainguy, which, on their face, cite one such

contract each. Further, the consultant checked Mainguy's references prior to the Board meetings and found similar "contracts." Under the circumstances, the failure of these two bids to cite more than one similar contract were minor irregularities or technical errors that Walnut Creek could, and did, waive. The errors themselves and their correction conferred no competitive advantage on Mainguy and Turf Management.

19. The bid forms submitted by Mainguy, Superior, and Turf Management were also flawed in their treatment of annuals. Mainguy's bid form showed a unit price of $1.75 for the first two years, but multiplied this unit price by 6000 plants each year; for the third year, the total suggested that Mainguy raised the unit price to about $1.79 per plant, which, again, it multiplied by only 6000 plants. Superior's bid form showed a unit price of $2.25 the first year, $2.35 the second year, and $2.45 the third year, but multiplied each unit price by only 2000 plants for each year. Turf Management's bid showed a unit price of $1.25 for the first year, $1.31 for the second year, and $1.38 for the third year, but never multiplied these unit prices by anything.

20. Pursuant to ITB Section 2.07(3), the consultant tabulated the bids by extending the unit prices proposed by each bidder (and correcting a mistake in arithmetic by Superior). As

a result, Mainguy's bid was $1,246,494, Superior's bid was $1,249,318, and Turf Management's bid was $1,283,789

21. Ignoring its own flaw in extending the annual unit prices, Superior cited Mainguy's failure to extend unit prices of annuals as the reason why Superior, as the second lowest bidder, should be awarded the contract rather than Mainguy. Under the circumstances of these cases, however, the errors or omissions of each bidder in failing to extend the unit prices of the annuals correctly were minor irregularities or technical errors that Walnut Creek could, and did, waive. The errors themselves and their correction conferred no competitive advantage on any of the bidders.

22. After the bids had been tabulated, the Board of Supervisors of Walnut Creek (Board) met on July 24, 2007, to conduct its business, which included consideration of the subject bids. At the start of the meeting, the Board recognized their consultant, who recommended that, based on the bids, the Board select Mainguy. The consultant stated that he had contacted two references involving similar contracts, and both customers were satisfied with their landscape maintenance service. At the time, the consultant had not checked the contracts of Superior because Mainguy was the lowest bid. (The consultant testified that, after both Board meetings, he contacted the references of Superior and found that the

contracts were not similar; as noted above, it was clear from the face of the Superior bid that the cited contracts could not be similar because none of them was residential in nature.)

23. The minutes of the ensuing discussion at the July 24 Board meeting are Joint Exhibit 9. The discussion covers a wide range of issues. A brief discussion concerned how certain bidders had combined items, but this did not seem to cause any Board member a serious problem, at least until just prior to the award decision, as noted below. The first serious concern was raised by Board member Gross, who said he had a "problem" with bringing another company in to do the landscape maintenance when Turf Management would continue to do the same work for the adjacent homeowners' association property. When the District Manager, who is employed by the same company that employs the consultant, stated that the law required Walnut Creek to go to bid for this work and then to take the lowest bid from a qualified bidder, Board member Gross replied that the cost difference between the Mainguy and Turf Management was $13,000 between "who we prefer to keep and the people who you are recommending." In fact, the annual difference is a little less than $13,000, and the difference over the three-year term of the contract is $37,272.

24. Board member Ross then asked, "the final decision is ours to make?" Walnut Creek counsel replied, "it is but since

this is a bidding process, you need to have a rationale for selecting for instance Turf Management over the three other bidders . . .." Board member Gross responded, "Turf Management has been here for six years, we're extremely pleased with their service, we know what we're getting, we know the people who are here, so for $13,000 a year, that's why I'm trying to understand what we have, what can we do, like I said, I don't want to have to bring another company, crew and cross over."

25. After some more discussion, Walnut Creek counsel summarized by noting that they had heard some explanations as to why the bids of Landscape Service Professionals and Superior were not responsive, and, if the Board preferred, they could defer consideration of the matter until the next meeting, at which Mainguy and Turf Management could make presentations. Board member DeFalco then stated that they had just experienced a year of poor landscaping due to the poor performance of a former management company unrelated to these cases, and they did not want to subject the 985 homeowners to another situation like that. The consultant assured the Board member that that was why the ITB and contract were so detailed and agreed with the attorney's suggestion that the Board ask Mainguy and Turf Management to make presentations. After a brief discussion, in which Board member DeFalco expressed concern about having strangers in their property, Board member Gross moved to invite

representatives from Mainguy and Turf Management come to the next Board meeting and submit to interviews. The motion passed.

26. The minutes of the next meeting of the Board, on August 7, 2007, are Joint Exhibit 10. The Mainguy representative, who is president and owner of the company, spoke first and gave a short history of his company. In response to a question from Board member Gross about the reasonableness of a bid item regarding tree trimming, the Mainguy representative explained that they do substantial work in tree-trimming, but try not to overbid this item because it is an expensive workers-compensation classification. He later added that palm trimming was under a different category in the bid form.

27. The next question, also from Board member Gross, concerned hurricane response and the presence of two landscape maintenance companies in the development. Halving the difference in cost to $20,000 on a $1.2 million contract, Board member Gross asked what Mainguy's response time would be to check out the development after a hurricane and why should residents have two companies present after the hurricane, especially when Turf Management had been out within four hours after the storm to clear streets so residents could operate their vehicles. The Mainguy representative replied somewhat unresponsively, stressing the quality of the general work that they do.

28. Given a second chance to answer the hurricane-response question (or perhaps because he had been interrupted before finishing his response), the Mainguy representative said that, in advance of each storm season, they ask each customer to instruct them as to whether it wants Mainguy to respond automatically to storms and to provide some financial parameters for the cost of the debris-clearing work that it wants Mainguy to perform. The Mainguy representative stated: "As soon as the wind ceases, you're obviously extraordinarily top priority to us and our shop is about 20 minutes from here."

29. Board member Gross followed up by asking the Mainguy representative how they would gear up, in terms of personnel, to service the Walnut Creek contract. The Mainguy representative said that they would not have to hire significantly, but existing ground crews would handle grounds maintenance, and established trimming crews would handle the tree trimming. Clearly trying to show that the employees to be assigned to Walnut Creek would be trained and experienced because he would draw them from his existing staff, the Mainguy representative assured the Board that Mainguy would "not be placing any new crews on your property, that is not our intention, nor do we have a need to do so."

30. In response to a question from Board member Ross about hurricane response time, the Mainguy representative stated that

they would rank customers based on the size of the contract, and Walnut Creek's contract would be of such a magnitude that it would justify an "immediate response." Board member Ross asked whether Mainguy would need to hire additional employees to respond timely to all of its customers, and the Mainguy representative replied that they had sufficient personnel and resources to handle the Walnut Creek property, although it was possible that they would add a small trim crew.

31. Board member DeFalco restated the concern about having two companies onsite and asked what would happen if a tree fell half in Walnut Creek property and half in a resident's property. She added that, in the past, one company had both accounts and just removed the tree without issues. The Mainguy representative responded by observing there was a billing question, perhaps implying that such a distinction would exist whether one or two companies serviced the development. But Board member Gross replied that there was still a question, if there are two companies, about who should be called. Board member DeFalco agreed with Board member Gross, adding that she did not want two lawn companies arguing over whose responsibility it is to remove fallen trees.

32. After the consultant suggested that there was a logical way to allocate these responsibilities, the Mainguy representative added that it would be their intent to try to win

the homeowners' association business and they would be highly motivated.

33. Board member Gross then stated that Mainguy did not have its own mulching company, although he conceded that none of the bidders did, but asked whether Mainguy's bid for mulching was just an "estimated bid, a guesstimate for the property?" The Mainguy representative replied that it was a firm bid from a mulching firm.

34. A representative of the property management company then asked the Mainguy representative if they had any contracts where there were two landscape maintenance companies onsite. The Mainguy representative said they did and it was not uncommon. The consultant asked if Mainguy was familiar with FEMA reimbursement procedures, and the representative said they were, although he admitted that they had not participated in a FEMA reimbursement. In response to an irrigation question from Board member Gross, the Mainguy representative said that they were familiar with the requirements and had been at the first site inspection. This concluded the Mainguy presentation.

35. The Turf Management representative, who was the president and owner of the company, gave a brief history of his company, its longstanding employees, and factors that set it apart from other companies--that is, the presence of a certified arborist and landscape designer, experience in fertilizer

applications and storm debris cleanup, and an outside supervisor with whom Walnut Creek has worked for most, if not all, of the four years that Turf Management had had the contract.

36. After the Turf Management representative had answered a few questions, counsel to the Board stated that the Board could find that Turf Management was the lowest responsible bidder, as long as they had "rational reasons." Counsel suggested that, if that was what the Board wanted to do, someone should make a motion and "state for the record what you think some of those reasons are that you like to go forward with Turf Management as opposed to Mainguy . . . ."

37. Board member Munju, newly appointed to the Board at that meeting, spoke first and said that he has seen the job done by Turf Management, especially after Hurricane Wilma, when they responded very quickly while the rest of the city struggled with storm debris. Because the price difference was small, he preferred Turf Management.

38. Board member Gross spoke next and agreed with Board member Munju. He said that he found Mainguy's treatment of palm maintenance confusing, although it does not appear that he was actually confused as to this part of the Mainguy bid, nor was there anything confusing about it. Mainguy's bid clearly included a reasonable cost for trimming and maintaining the palm trees.

39. Next, the consultant spoke, again naming Mainguy as the most qualified responsible bidder and suggesting that the level of comfort that Board members had with Turf Management is not what Walnut Creek would be paying for. The District Manager spoke next, reminding the Board that the difference between the two bids was about $40,000 over three years. Counsel then confirmed with them that they had made no substantive changes when tabulating the bids.

40. At this point, Board member Ross moved to table the question until they could visit some of Mainguy's properties. Board member Gross said that he was not going to Palm Beach County to see their work. After a comment by the District Manager, Board member Gross said, "There's a motion on the floor right now. You made a motion to approve who?" Board member Munju replied, "Yes, I made a motion to approve Turf Management." Board member Gross answered, "Ok." Without further discussion, the motion carried unanimously to accept the bid and proposal of Turf Management.

41. The minutes reveal that, in response to the advice of its counsel to identify "some" of the reasons for selecting Turf Management over Mainguy, the Board identified two reasons: 1) Turf Management's demonstrated good record in responding to storm damage and 2) a perceived defect in the Mainguy bid as to palm maintenance.

42. Walnut Creek's proposed recommended order identifies the Board's grounds for rejecting the Mainguy bid as:
1) Mainguy could not meet its contractual obligations because it did not intend to hire additional employees; 2) Mainguy did not have sufficient experience in responding to storms and processing claims through FEMA; and 3) two landscape maintenance contractors within the development presented the potential for conflicts and an adverse impact on the residents.

43. The grounds identified in Walnut Creek's proposed recommended order reflect objections raised at various points during the Board deliberations over the bids, although, except for experience in responding to storms, these objections were not voiced during the brief time that the Board actually discussed the two bids after the presentations and before accepting the Turf Management bid. This Recommended Order addresses all of the objections raised at various times to the Mainguy bid, even though the Board did not raise several of them brief discussion preceding its vote to accept the Turf Management bid. Therefore, the grounds for implicitly rejecting the Mainguy bid are: 1) perceived confusion as to the treatment of palm tree maintenance costs; 2) inadequate staffing due to Mainguy's stated intention not to hire new employees (except possibly a small trim crew); 3) insufficient experience responding to storms and processing FEMA reimbursement claims;

and 4) the appearance of a second landscape maintenance contractor on the Walnut Creek property with the potential for conflicts and adverse impacts on the residents.

44. As noted above, the Board's ground for rejecting the Superior bid was that it was unresponsive for its failure to include similar contracts. The consultant testified that he later checked the Superior references and confirmed that the contracts were not similar. Notwithstanding the concession by Turf Management in its proposed recommended order that all three bidders were qualified to perform the work, the Board properly concluded that Superior's bid, on its face, was nonresponsive and implicitly rejected it for this reason.

45. The Mainguy bid properly accounted for the expenses associated with maintaining palm trees, and the Mainguy representative clearly explained this fact to the Board. To attempt to justify rejecting the Mainguy bid on this ground is irrational and completely unsupported by the record.

46. It is also irrational and unsupported by the record to reject the Mainguy bid due to the failure of the bid, or the Mainguy representative at the Board meeting, to undertake to hire new employees. The ITB does not require that a bidder hire new employees for this contract. The requirement, in ITB Section 1.08, of trained staff somewhat militates against such a requirement. A bidder may have overstaffed in anticipation of

new work or decided to terminate a less profitable contract, if it won the Walnut Creek contract.

47. It is not irrational to prefer a contractor that has substantial experience in responding to storm damage and experience in filing FEMA reimbursement claims. However, the ITB requires neither, although it addresses this subject by requiring only that the contractor respond to Walnut Creek within 24 hours after a storm. Mainguy has accepted this contractual requirement. When asked about it, the Mainguy representative explained, logically enough, that Mainguy could respond quickly because it was located only 20 minutes from Walnut Creek and would respond quickly because the Walnut Creek contract would be a very large one for his company, which would be sufficient motivation to serve Walnut Creek first after a storm has cleared the area.

48. It is not necessary to consider the rationality of preferring that a single contractor serve Walnut Creek and the homeowners' association. The ITB does not contain this requirement, which would limit the potential bidders to one, Turf Management. As noted in the Conclusions of Law, under the present circumstances at least, a requirement of this type by Walnut Creek would essentially permit it to circumvent the statutory requirement to obtain these services by competitive bid.

49. Mainguy and Superior timely protested Walnut Creek's decision to award the contract to Turf Management. Walnut Creek then contracted with the Division of Administrative Hearings to conduct the hearing and issue a recommended order.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2007). Walnut Creek has entered into a contract for the Division of Administrative Hearings to conduct this hearing and issue a recommended order.

51. The represented parties both opine that these cases are governed by Section 120.57(3), Florida Statutes. However, Walnut Creek does not meet the definition of "agency," as set forth in Sections 120.52(1) and 120.57(3), Florida Statutes. Under the circumstances, of these cases, though, the results would be the same under Section 120.57(3), Florida Statutes, and the authority discussed immediately below.

52. Section 190.033(3), Florida Statutes, requires community development districts to procure by competitive solicitation contracts in excess of $150,000 for "maintenance services for any district facility or project." This statute requires each district to adopt rules, policies, or procedures "establishing competitive solicitation procedures for maintenance services."

53. By Rule of Procedure (Rule) 1.12, Walnut Creek adopted a rule of procedure, pursuant to the mandate set forth in Section 190.033(3), Florida Statutes. Rule 1.12 provides that Walnut Creek "may, in its sole discretion, award the contract [for maintenance services] according to the Rules in this subsection in lieu of separately bidding for maintenance, goods, supplies or materials, and contractual services."

54. Rule 1.12(2) identifies the procedure that Walnut Creek will use in putting contracts out to bid. Rule 1.12(2)(c) details specific requirements imposed upon prospective bidders, such as holding the required licensure and meeting "any prequalification requirements set forth in the Invitation to Bid or Request for Proposal." Rule 1.12(2)(c) concludes: "Evidence of compliance with this provision of the Rules shall be submitted pursuant to the requirements of the Invitation to Bid or Request for Proposal."

55. Rule 1.12(2)(d) states: "Bids and proposals shall be evaluated in accordance with the invitation or request and these Rules." Rule 1.12(2)(e) adds: "To assist in the determination of whether a prospective bidder will be qualified, the District Representative may invite public presentation by firms (prior to the date for submitting bids) regarding their qualifications, approach to the project, and ability to perform the contract in all respects."

56. Rule 1.12(2)(f) provides:

> In determining whether a bidder is qualified, the District may consider all relevant information, including but not limited to the following:
>
> 1. The ability and adequacy of the bidder's personnel.
> 2. Past or current performance for the District and with respect to other contracts of the bidder.
> 3. Ability to meet time and budget requirements.
> 4. Geographic location of the bidder's headquarters or office in relation to the project.
> 5. Current and projected workloads of the bidder.
> 6. Whether the firm is a certified minority business enterprise.
> 7. Volume of work previously awarded to the bidder.
> 8. Additional factors described in the Invitation to Bid or Request for Proposal.

57. Rule 1.12(2)(g) states: "In evaluating the bids or proposals, the Board shall have the right to accept that bid which the Board determines, in the exercise of its reasonable judgement, is in the best interest of the District, or the Board may reject all bids because they are too high or because the Board determines it is in the best interests of the District to reject all bids."

58. The rules clearly apply, in conjunction with the ITB, to the present procurement. The key provision among the rules is the last cited: the Board must exercise "reasonable judgement" in selecting the winning bid. Similarly, under

Section 120.57(3), Florida Statutes, the issue is whether the proposed award is clearly erroneous, contrary to competition, arbitrary, or capricious. Regardless of other provisions vesting discretion in the Board to act in the best interest of Walnut Creek, the Board must exercise its judgement reasonably, as its counsel advised, and in recognition of the legal requirement, as noted by its counsel, consultant, and District Manager, that the Board obtain these landscape maintenance services by competitive bidding.

59. Pursuant to Section 120.57(3), Florida Statutes, Mainguy and Superior have the burden of proof in this _de novo_ proceeding.

60. As noted above, factually, two grounds for the rejection of the Mainguy bid were clearly erroneous, contrary to competition, arbitrary, capricious, and not an exercise of reasonable judgement. These grounds are Mainguy's treatment of palm tree expenses and failure to specify that it will hire new employees to service the Walnut Creek contract.

61. Factually and legally, two grounds for the rejection of the Mainguy bid were clearly erroneous, contrary to competition, arbitrary, capricious, and not an exercise of reasonable judgement. These grounds are Mainguy's experience responding to storm damage and filing FEMA reimbursement claims. Rule 1.12(2)(f) authorizes Walnut Creek to consider certain

factors besides those set forth in the ITB in awarding the contract. Pertinent to these two grounds are consideration of the ability and adequacy of Mainguy's personnel and its current and projected workloads. However, the ITB actually addresses these items by requiring that bidders be able to respond within 24 hours of the storm. By adding to the procurement these two criteria, when the ITB specified only a 24-hour response, the Board effectively changed the ITB after bids were submitted. This act is contrary to competition and an unreasonable exercise of discretion because, under the circumstances of these cases, it permits Walnut Creek essentially to pick someone other than the low bidder.

62. The last ground is the avoidance of having two contractors perform landscape maintenance within the development. A requirement of a single contractor is contrary to competition and unlawful due to: 1) the presence of Turf Management as the sole contractor for both properties and 2) the statutory requirement that Walnut Creek solicit bids for the work. Under the facts of these cases, requiring one contractor to perform the landscape maintenance at both properties would defeat the statutory mandate that Walnut Creek obtain these services by competitive bid.

63. It is clear from the minutes of the two meetings that the Board members do not want to change contractors, and all of

the cited grounds and objections to Mainguy reflect a simple discomfort with changing contractors, especially because Turf Management has performed well. Although bid law permits an entity procuring services to place reasonable weight on the experience of an existing contractor, the emphasis cannot be so great as to frustrate the statutory mandate to procure services competitively, and the specific experience criteria must be stated in advance in the rules or ITB, so that prospective bidders may make informed decisions whether to protest the specifications or participate in the procurement. The understandable desires of the Board members to avoid change conflict with both of these principles. Mainguy has proved that, in rejecting its bid, the Board was clearly erroneous, acted contrary to competition, arbitrarily and capriciously, and did not exercise reasonable judgement.

64. The sole relief that the Administrative Law Judge can provide is a recommendation that Board enter a final order dismissing the bid protest of Superior and sustaining the bid protest of Mainguy. As the courts have noted, it is left to the sound discretion of the procuring entity to determine whether to proceed with the current procurement or reject all bids and perhaps start over. Procacci v. Department of Health and Rehabilitative Services, 603 So. 2d 1299 (Fla. 1st DCA 1992); Moore v. Department of Health and Rehabilitative Services, 596

So. 2nd 759 (Fla. 1st DCA 1992); and Courtenay v. Department of Health and Rehabilitative Services, 581 So. 2d 621 (Fla. 5th DCA 1991).

RECOMMENDATION

It is

RECOMMENDED that the Walnut Creek Community Development District enter a final order dismissing the protest of Superior Landscaping and Lawn Service, Inc., granting the protest of Mainguy Landscape Services, and taking such further action as is permitted by law.

DONE AND ENTERED this 21st day of December, 2007, in Tallahassee, Leon County, Florida.

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ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 21st day of December, 2007.

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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 must be filed with the agency that will issue the final order in this case.