

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HFT MANAGEMENT, INC., D/B/A GATEWAY
OUTDOOR,

Petitioner,

vs.

Case No. 22-1650BID

BROWARD COUNTY FLORIDA,

Respondent,

and

VECTOR MEDIA HOLDING CORP.,

Intervenor.

FINAL ORDER

Pursuant to notice, a final hearing was held in this matter by Zoom video conference on July 18, 2022, before Robert L. Kilbride, the assigned Administrative Law Judge (“ALJ”) of the Division of Administrative Hearings (“DOAH”).

APPEARANCES

For Petitioner: Joseph M. Goldstein, Esquire
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For Respondent: Fernando Amuchastegui, Esquire
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For Intervenor: Mark J. Stempler, Esquire
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STATEMENT OF THE ISSUES

This proceeding is to determine whether Respondent's, Broward County ("County"), decision deeming Petitioner, HFT Management, Inc., d/b/a Gateway Outdoor Advertising ("Gateway"), to be nonresponsive to the County's Request for Proposals No. TRN2122974P1, Transit Advertising Program for the Transportation Department ("RFP"), is contrary to the County's rules, policies, or the specifications of the RFP and is clearly erroneous, contrary to competition, arbitrary, or capricious. A related issue is whether a waiver of the discrepancy as to the amount Gateway listed on the electronic Periscope S2G/BidSync form versus the amount Gateway listed for its three-year minimum annual guarantee ("MAG") in its Revenue Generating Proposal would directly or indirectly affect the dollar amount submitted by Gateway in its response.

PRELIMINARY STATEMENT

On October 21, 2021, the County issued an RFP, soliciting proposals from vendors to provide advertising services that would generate revenue for the County from the sale of commercial advertising placed on County buses and other means of transportation. Two proposals were received by the County on the submission deadline, one from Gateway and one from Intervenor, Vector Media Holding Corp. ("Vector").

After processing and reviewing the proposals, on March 22, 2022 the County's procurement staff issued a Memorandum to the County's Evaluation Committee recommending the rejection of Gateway's proposal as being "nonresponsive."

The Evaluation Committee met on March 23, 2022, and accepted the staff's recommendation, finding Gateway to be nonresponsive to the RFP, effectively excluding Gateway from further consideration.

The County posted the Final Recommendation of Ranking for the RFP on May 2, 2022, recommending award of the contract to Vector. Gateway filed a timely formal protest on May 9, 2022, challenging the award. The County's Purchasing Director denied the protest on May 12, 2022. Gateway appealed the Purchasing Director's determination on May 23, 2022.

The County referred the matter to DOAH on June 3, 2022. Vector subsequently intervened in these administrative proceedings.

During the proceedings, the County moved to dismiss Gateway's appeal. The County alleged that the appeal was filed late, when the deadline to file the appeal (the tenth calendar day) fell on a weekend. A hearing on the County's motion was held on July 7, 2022, during which the parties provided additional arguments.

On June 8, 2022, the undersigned denied the County's motion without prejudice.¹

On July 18, 2022, a final evidentiary hearing on the merits of Gateway's protest was held and attended by all parties. Gateway called three witnesses: Craig Heard, Jr., Senior Vice President of Marketing in Management Information Systems for Gateway; Robert Gleason, Purchasing Director for the County; and Peggy Cadeaux, Purchasing Manager for the County. In lieu

¹ That ruling stands and is not changed by this Final Order.

of appearing live as a witness, Gateway offered the deposition of Evaluation Committee member Lina Kulikowsky, taken on July 14, 2022.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, listing agreed upon facts, issues of law, and exhibits. Pursuant to the parties' stipulation, Gateway's Exhibits 1 through 12, the County's Exhibits 1 through 19, and Vector's Exhibits 1 through 5 were received into evidence. Respondent's Exhibit 18, a video tape of a meeting of the Evaluation Committee was viewed by the undersigned.

Facts stipulated to in the Joint Pre-hearing Stipulation are outlined below and may be cited as "Stip." in this Final Order. Gateway's, the County's, and Vector's exhibits will be referred to as "Pet. Ex.," "Resp. Ex.," "Interv. Ex.," respectively, followed by the assigned exhibit number, and page number when necessary.

FINDINGS OF FACT

Based on the evidence presented at the hearing, and the record as a whole, the undersigned makes the following findings of material and relevant facts:

I. Facts from the Parties' Pre-hearing Stipulation

1. On October 5, 2021 (Item No. 40), the Broward County Board approved the RFP. On October 21, 2021, the RFP was advertised. In response, two proposers submitted proposals, Gateway and Vector.

2. The RFP required vendors to submit their three-year MAG amount electronically on Periscope S2G Item Response Form.

3. The Periscope S2G Item Response Form (Resp. Ex. 6, at 000185) was not among the forms downloadable from the link for Periscope S2G for this solicitation on the County's website.

4. The amount Gateway listed on the electronic Periscope S2G bid submittal form was \$7,346,000.

5. Vendors were also required to submit a Revenue Generating Proposal with additional details regarding their pricing.

6. Gateway's three-year MAG listed in its Revenue Generating Proposal was \$3,336,000.

7. Gateway's Total Revenue Generating Proposal (for Years 1 to 5) listed in its Revenue Generating Proposal was \$7,346,000.

8. The RFP expressly provided that if there was a discrepancy between the Periscope S2G Item Response Form and the MAG table amount, the Proposer shall be held to the amount proposed in the Periscope S2G Item Response Form.

9. The RFP also provided that if a discrepancy (per county or proposer) between the Periscope S2G Item Response Form and the MAG table identified and a proposer requires a change to their Periscope S2G Item Response Form, that proposer shall be determined to be nonresponsive to the solicitation revenue proposal requirements.

10. The Evaluation Committee determined Gateway's Periscope S2G amount of \$7,346,000 was materially unbalanced because it was approximately 70 percent higher than the most recent three-year MAG received by the County for the same advertising services.

11. The RFP states "The County reserves the right to waive minor technicalities or irregularities as is in the best interest of the County in accordance with section 21.37(b) of the Broward County Procurement Code."

II. Background Regarding the County's Online Bidding System

12. The County uses an online application to receive responses to procurement solicitations. It is known as Periscope Holdings, Inc., d/b/a Periscope S2G ("Periscope Holdings"). *See generally* Pet. Ex. 7.

13. The online application allows the County to provide copies of the RFP and instructions to proposers by way of an online portal. Proposers who access the portal are able to view and download certain RFP documents provided by the County. The system also allows proposers to upload their proposal documents and submit them electronically to the County. *See* Pet. Ex. 12.

14. The online application was originally known as BidSync. However, after the application was acquired by Periscope Holdings, BidSync became Periscope S2G. Pet. Ex. 8. BidSync and Periscope S2G are advertised by Periscope Holdings as one and the same. Pet. Ex. 8.

15. Significantly, however, and for purposes of the RFP, there were differences in how proposers viewed the County's instructions on the online platform—depending on whether the proposer used BidSync or Periscope S2G. *Compare generally* Resp. Ex. 6 at 000185, with Pet. Ex. 11 at 000196.

16. As described more fully below, in addition to the RFP documents uploaded by the County, the application included a non-downloadable generic electronic form (the electronic form is the same for any agency using the online bidding application) that provides a text box where proposers may input pricing related to their proposals.

17. In this case, if proposers accessed the system through Periscope S2G, they would see a form titled "Item Response Form." Resp. Ex. 6 at 000185. However, if they accessed the system through BidSync, they would see a different form.

18. There was no way of reasonably verifying, from the proposer's perspective, whether the electronic form they were viewing was the same as the other proposers or the County was viewing.

19. Both forms included text boxes for the proposer to input the pricing information related to their proposal—in this case, the amount of revenue being offered to the County. Because the forms were generic, the County included instructions on the Periscope S2G Item Response Form regarding

the specific portion of the proposers' Revenue Generating Proposal that should be inputted in the form. Resp. Ex. 6 at 000185.

20. As Gateway learned later in the procurement process, BidSync's form did not display, in plain view, the same instructions that appeared in the Periscope S2G Item Response Form. *See generally* Pet. Am. Ex. 6 at 0008, and Pet. Ex. 11.

21. The information that proposers provided in either the BidSync or Periscope S2G electronic form is collected by the application, which automatically creates an electronic cover letter for the proposal, uploaded into the system by each proposer. The electronic cover letter and the uploaded documents are then delivered directly to the County. Resp. Ex. 17 at 000655, and Pet. Ex. 10 at 000067.

22. The cover letter shows the contact information for each proposer and the "price" inputted by each proposer on either the BidSync form or the Periscope S2G Item Response Form. *See* Resp. Ex. 17 at 000655, and Pet. Ex. 10 at 000067.

23. In summary, the online application created by the County provided two different doors or portals (BidSync and Periscope S2G) for the vendors to review the RFP and submit proposals. Importantly, however, the instructions that the proposers saw on the application's electronic pricing form were different, depending on whether they used the BidSync door and form or the Periscope S2G door and form. The information that is pulled from either form into the cover letter is the information that the County ultimately receives as the cover letter for the proposal.

III. The County's RFP

24. On October 21, 2021, the County issued the RFP, soliciting proposals from vendors to provide advertising services that would generate revenue for the County from the sale of commercial advertising on County buses and other modes of transportation.

25. The RFP required proposers to present their revenue generating proposal in two ways.

26. First, proposers had to download and complete a form titled “Revenue Generating Proposal,” that was included among the RFP documents that the County uploaded into the online application. Pet. Ex. 12 at 000197. According to the RFP instructions, once this was completed, proposers had to upload the completed Revenue Generating Proposal with their proposal documents. Resp. Ex. 6 at 000261 (A.2.3).

27. The Revenue Generating Proposal consisted of three-pages. The first page included three tables, where proposers were required to insert three distinctly different elements of their revenue proposal: (1) a MAG for an initial three-year term, (2) a MAG for two additional option years, and (3) revenue for the County derived from an element entitled “Media Trade Options.”

28. At the bottom of this form, on the first page, there was a line titled “Total Revenue Generating Proposal (for Years 1-5),” where proposers had to include the sum of the values provided in the three tables at the top of the form. Resp. Ex. 6 at 000246-000248. Additionally, the Revenue Generating Proposal had to be signed by the proposer at the end, on the third page. Resp. Ex. 6 at 000248.²

29. The second way in which a proposer was to present its offering was referred to in the RFP as the “Periscope S2G Item Response Form.” The Periscope S2G Item Response Form was *not* included in the downloadable solicitation documents. Stip., ¶ (5)c. Instead, proposers had to navigate to the Periscope S2G Item Response Form through the County’s online bidding system.

² This form is displayed *infra*, ¶ 41.

30. The RFP Special Instructions to Vendors directed proposers to enter “the three-year [MAG] amount” via the Periscope S2G Item Response Form in order to be responsive to solicitation revenue proposal requirements.

31. The RFP explained that “the total points awarded for the [MAG] will be based on the Proposer’s proposed (3) year MAG total submitted electronically on the Periscope S2G Item Response Form and must match MAG table totals within the Revenue Generating Proposal.” Resp. Ex. 6 at 000260 (A.2.2.3).

32. RFP Special Instructions Section A.2.3 instructed proposers how to download, complete, and upload the Revenue Generating Proposal. However, there were no similar instructions on how to submit the Periscope S2G Item Response Form. Resp. Ex. 6 at 000261 (A.2.3).

33. In addition to the two revenue proposal forms mentioned above, the RFP also required proposers to complete an Evaluation Criteria Response Form (a form that was included in the downloadable solicitation documents). Resp. Ex. 6 at 000267.

34. According to the RFP, the purpose of the Evaluation Criteria Response Form was to assist the Evaluation Committee in evaluating and scoring the proposals. Resp. Ex. 6 at 000265.

35. The Evaluation Criteria Response Form provided a table listing the evaluation criteria, the points available for each evaluation criterion, and a column where proposers needed to indicate which portions of their proposal addressed each criterion. *See* Resp. Ex. 6 at 000268-000273.

36. In short, the Evaluation Criteria Response Form served as an index or summary of the proposal that allowed the Evaluation Committee members to easily locate some portions of the vendor’s proposal and evaluate those criteria.

37. The RFP cautioned proposers that failure to submit the completed Evaluation Criteria Response Form would result in their proposals not being

evaluated or scored for the corresponding evaluation criteria and, therefore, not eligible for award of the solicitation. Resp. Ex. 6 at 000265.

38. Since the Media Trade Options, MAG, and Annual Net Collections were part of the RFP evaluation criteria for scoring purposes, in addition to providing such information in the Periscope S2G Item Response Form and Revenue Generating Proposal, proposers also had to indicate in the Evaluation Criteria Response Form where information about their proposed MAG, Media Trade Options, and Annual Collections could be located within their proposal. Resp. Ex. 6 at 000271-000273.

39. The RFP informed the proposers that “the County reserves the right to waive minor technicalities or irregularities as is in the best interest of the County in accordance with Section 21.37(b) of the Broward County Procurement Code.” Stip., ¶ (5)k.

IV. Gateway’s Proposal

40. Gateway received two different email notifications regarding the issuance of the RFP. One came from BidSync and another from Periscope S2G. Pet. Ex. 2 at 000023-000040.

41. The values that Gateway included in the Revenue Generating Proposal, submitted as a part of its proposal, were displayed as follows:

Annual Periods for Initial 3-Year Term (three-year MAG):

Annual Periods for Initial 3-Year Term	(A) Minimum Monthly Guarantee	(B) Minimum Annual Guarantee
Year One	\$84,000	\$1,008,000
Year Two	\$94,000	\$1,128,000
Year Three	\$100,000	\$1,200,000
TOTAL (Years 1-3)		<u>\$3,336,000</u>

Optional Renewal Periods:

Annual Periods for Optional Renewal Terms	(A) Minimum Monthly Guarantee	(B) Minimum Annual Guarantee
Optional Year Four	\$110,000	\$1,320,000
Optional Year Five	\$120,000	\$1,440,000
Total (Years 4-5)		\$2,760,000

Media Trade Options:

Annual Periods for Initial 3-Year Term	(A) Annual Media Trade Options
Year One	\$250,000
Year Two	\$250,000
Year Three	\$250,000
Total (Years 1-3)	\$750,000

Option Renewal Periods:

Annual Periods for Optional Renewal Terms	(A) Annual Media Trade Options
Optional Year Four	\$250,000
Optional Year Five	\$250,000
Total (Years 4-5)	\$500,000

Total Revenue Generating Proposal (For Years 1-5): \$7,346,000

42. The undersigned finds that on this form from Gateway, it clearly distinguished between the revenue it was offering as part of the three-year MAG (\$3,336,000) and the total revenue it was proposing over a five-year period (\$7,346,000).

43. Gateway properly signed the Revenue Generating Proposal, as required by the RFP.

44. The BidSync site that Gateway was permitted to use did not have a “Periscope S2G [Item] Response Form.” Instead it had a form labeled “BidSync” at the top left. Pet. Ex. 11 at 000196.

45. Notably, while the Periscope S2G Item Response Form instructed proposers to input the three-year MAG in the one blank data field provided, the form in BidSync did not. Instead, the BidSync form asked for the “Total Price,” under a dark shaded banner section entitled “Offer.” *Compare* Resp. Ex. 6 at 000185, with Pet. Ex. 11 at 000196.

46. Therefore, as requested on the BidSync form, Gateway entered \$7,346,000, in the BidSync form data box. This is the amount it had listed as its “Total Revenue Generating Proposal (for Years 1-5).” It inserted this total amount, rather than the \$3,336,000 three-year MAG amount. Pet. Ex. 11.

47. In the Evaluation Criteria Response Form, where it was asked about the three-year MAG, Gateway referenced Tab 5 of its proposal. Notably, this Tab 5 included Gateway’s Revenue Generating Proposal showing a three-year MAG of \$3,336,000. Resp. Ex. 17 at 000668.

48. On December 29, 2021, Gateway and Vector were the only two proposers who submitted a response to the RFP.

49. Significantly, in comparing the two proposals, Gateway offered \$896,000 more in advertising revenues to the County over the full five-year term (option years included) than Vector.

V. The BidSync Form Was Different from the Periscope S2G Item Response Form

50. On February 1, 2022, Vector submitted a letter requesting that the County find Gateway nonresponsive because of “material errors regarding price on the Periscope S2G Platform” and requested that Gateway’s proposal “be deemed non-responsive.” Resp. Ex. 13 at 000570.

51. On the same date, at 11:28 a.m., the County asked Gateway via email whether it required a change in the amount submitted in the Periscope S2G Item Response Form. Pet. Ex. 6 at 00053. In response, Gateway expressed some confusion and sought input from the County, but, ultimately, did not ask to make any changes to the amount(s) it submitted. *Id.*

52. As the day progressed, Gateway and the County exchanged a flurry of emails during which Gateway attempted to explain why it inserted the total price (five years) in the BidSync form and why it used the BidSync form. It also sought input and clarification from the County on what it was required to do. Pet. Second Amendment to Ex. List, Ex. 6 at 000001- 000014. This exchange did not adequately resolve any of those issues.

53. Ultimately, all that was accomplished is that Gateway explained why it processed things the way it did, and the County representative made it clear that regardless of the explanation, Gateway could not make any changes. If it did, it would be considered nonresponsive. *Id.* at 000008-000010.

54. It was sometime after the County’s email inquiry and email exchange on February 1, 2022, that Gateway discovered that the Periscope S2G Item Response Form was different from the BidSync form which Gateway reviewed when submitting its proposal.

55. Gateway, nonetheless, replied to the County expressing its firm commitment to the terms of its revenue proposal: “We would like to confirm that we are not making any changes to the financial proposal or guarantees submitted for the 3 year or option year terms.” Pet. Am. Ex. 6 at 000001.

56. Despite Gateway's confirmation and commitment to the terms of its proposal, on March 22, 2022, the County's Procurement Director issued a Memorandum to the Evaluation Committee recommending that Gateway's proposal be found nonresponsive. Resp. Ex. 13 at 000567-000569.

57. According to the Memorandum, Gateway's proposal had to be disqualified, in part, because the amount of \$7,346,000 Gateway entered in the electronic form was materially unbalanced as it was 70 percent more than the most recent three-year MAG for the previous solicitation. Resp. Ex. 13 at 000568.

58. In the Memorandum, the Procurement Director recognized and understood that Gateway's three-year MAG was \$3,336,000, rather than the \$7,346,000 that was entered by Gateway in the BidSync form. There was no confusion on his part.

59. In demonstrating how the \$7,346,000 was unbalanced, the Procurement Director stated: "It should be noted that Gateway's three-year MAG as stated in its Revenue Generating Proposal was \$3,336,000." Resp. Ex. 13 at 000568.

60. For his unbalanced bid analysis, the Director of Purchasing relied heavily on the language of section 21.94 of the Broward County Procurement Code in determining that Gateway's bid was materially unbalanced. Resp. Ex. 13 at 000568.³

61. Gateway was given two days to respond to the recommendation in the Memorandum before it was presented to the Evaluation Committee on March 23, 2022.

62. Gateway submitted a response explaining that the BidSync form did not instruct Gateway to enter the three-year MAG. Gateway also explained that the amount it entered in the BidSync form was consistent with its Revenue Generating Proposal, and that Gateway's Revenue Generating

³ As noted *infra*, this reliance was flawed based on the express language used in the definition of "Materially Unbalanced Response."

Proposal provided sufficient assurances to the County regarding the terms of Gateway's revenue proposal. *See generally* Resp. Ex. 13 at 000604.

63. In essence, Gateway conveyed to the County that the intent and terms of its proposal were clearly expressed within the four corners of its proposal, despite any minor discrepancies or irregularities in the forms submitted.

VI. Evaluation Committee Meeting

64. During the Evaluation Committee meeting, the committee was instructed that the recommendation of the Director of Purchasing was not binding, and they were free to accept or reject his recommendation. However, to reject the recommendation, they were required to state with specificity the basis for any rejection. Resp. Ex. 12 at 000554 and 000555.

65. One of the Evaluation Committee members, Ms. Lina Kulikowsky, asked a question and the following discussion ensued:

Ms. Kulikowsky – I need a clarification for a statement that Mr. Heard just made that his firm [referring to Gateway] submitted their proposal on BidSync instead of the “other system” is that the case? [inaudible] and on BidSync it was not clear if it is the 3-year or 5-year minimum. Can someone confirm that?

Senior Assistant County Attorney – ... Bidders were required to enter it into Periscope. And if you look at the Item Response form and in the Special Instructions it clearly identified Periscope. So I can't I don't know how if the vendor how they were directed to BidSync and they did indicate a screen shot of BidSync on page 3 of their [letter]. I do see and I do note that I don't see a 3-year MAG reference but I can't comment on that but I just know what the solicitation said and that it was required to submit on Periscope; Periscope is the system that is to be used but I don't know if purchasing has any additional information.

Purchasing Manager – ... Just to clarify that BidSync is Periscope and Periscope is BidSync; it's

one and the same; it was just a name change for the system so there is, to our knowledge, no distinction between the two.

Resp. Ex. 18 at or about 00:44:50 (video of Evaluation Committee meeting).

66. Ms. Kulikowsky testified during her deposition that she asked for clarification from the procurement staff regarding the Periscope S2G/BidSync forms because she needed to validate or determine if Gateway's claim was true (regarding the difference between the BidSync forms and the Periscope S2G forms). Dep. Tr. of Lina Kulikowsky at 14 (Jul. 14, 2022).

67. Ms. Kulikowsky recalled being informed at the meeting by the Purchasing Manager that the two forms were the same. *Id.* at 15. Based on the information received, she did not have enough information to give or propose a waiver. *Id.* at 16.

68. Despite Gateway being the highest revenue proposer and offering the most money to the County, the Evaluation Committee voted to reject Gateway's proposal as nonresponsive. Resp. Ex. 12 at 000055.⁴

69. Based on the totality and weight of the evidence presented, and the record as a whole, the undersigned finds that Gateway's bid conformed in all material respects to the RFP issued by the County.

70. Further, any irregularity in Gateway's bid did not give it an advantage or benefit not enjoyed by the other bidder, Vector.

71. On May 2, 2022, the County issued a Final Recommendation to Award, awarding the contract to Vector.

CONCLUSIONS OF LAW

72. DOAH has jurisdiction over this proceeding to issue a final order pursuant to paragraph 2 of the Administrative Law Judge Services Contract

⁴ It is also worth noting that at the same meeting, the Evaluation Committee found both Gateway and Vector to be "responsible bidders." Resp. Ex. 18 at 00:51:15 (video of Evaluation Committee meeting).

dated June 12, 2018, between the County and DOAH, section 21.81.b of the Broward County Procurement Code, and under other provisions of law.

73. The Administrative Law Judge Services Contract between the County and DOAH provides in relevant part:

2. Procedures. The Parties agree the proceedings shall be conducted exclusively in accordance with the applicable rules and regulations of County's Code of Ordinances and County's Administrative Code, as each may be amended from time to time. The Parties further agree that the administrative law procedures outlined in Chapter 120 of the Florida Statutes ("Administrative Procedure Act"), as amended from time to time, including specifically those that pertain to protests to contract solicitations or awards, shall not apply. The Parties agree that upon receipt of a formal written protest or appeal, County's Director of Purchasing shall promptly request assignment of an ALJ. The assigned ALJ shall commence a hearing within thirty (30) days after receipt of the formal written protest or appeal by County's Purchasing Division. **The ALJ shall enter a final order** within thirty (30) days after the hearing, or within thirty (30) days after receipt of the hearing transcript by the ALJ (if requested by the ALJ), whichever is later. (Emphasis added).

74. Because Gateway challenges the County's decision finding its proposal nonresponsive, it has the burden of proof. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Gateway is required to sustain its burden of proof by a preponderance of the evidence. *See Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

75. Under any reasonable analysis of this case, the case is unique in that it presents the less common question of how the protest of a *revenue generating* public procurement should be evaluated, as compared to the much more common bid protest involving *an award to the lowest cost bidder* for services, commodities, or products.

76. As a result, and for this revenue generating case, the most important factors to consider are not necessarily the same as the typical bid protest case involving an offer to provide a public agency with services, commodities, or products *at the lowest cost*.

77. While there is a significant body of Florida case law and DOAH orders outlining various legal standards that apply to bid protest proceedings, the most persuasive and helpful body of law relates to when and under what circumstances (1) minor irregularities in a proposal should be waived and (2) under what circumstances should decisions by governmental agencies rejecting the highest *revenue* proposal be considered arbitrary and contrary to competition.

78. It is this latter body of case law that the undersigned has primarily relied upon in entering this Final Order.

VII. Most Relevant Law Applicable to This Bid Protest

79. The primary objective of the competitive bidding statutes is to “protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.” *Wester v. Belote*, 103 Fla. 976, 138 So. 721, 723-24 (Fla. 1931), and *Harry Pepper & Assoc., v. City of Cape Coral*, 352 So. 2d 1190-1192 (Fla. 2d DCA 1977).

80. A well-established principle of Florida procurement law is that in soliciting and accepting competitive bids, an agency has wide discretion, and its decision, if based on an honest exercise of this discretion, will not be overturned even if reasonable persons may differ with the outcome. *See Dep’t of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912 (Fla. 1988).

81. Notably, however, while an agency's discretion is broad, it is not unbridled. Instead, "the discretion vested in a public agency in respect to letting public contracts may not be exercised arbitrarily or capriciously, but that its judgments must be bottomed upon facts reasonably tending to support a conclusion." *Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505 (Fla. 1982); *Miami-Dade Cnty. v. Church & Tower, Inc.*, 715 So. 2d 1084, 1089 (Fla. 3d DCA 1998).

82. In keeping with these principles, the law permits public bodies to waive minor defects in bid submissions and allows bidders to cure minor irregularities, but material deviations from specifications cannot be waived or altered. *Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007).

83. Although a bid containing a material variance is unacceptable, not every deviation from a proposal related to an invitation to bid or request for proposals should be considered material. A deviation or irregularity in a proposal is material only if it affects the price of the proposal, gives the offeror an advantage or benefit not enjoyed by other offerors, or adversely impacts the interests of the agency. See *Intercontinental Props., Inc. v. Dep't of Health & Rehab. Servs.*, 606 So. 2d 380, 387 (Fla. 3d DCA 1992); *Tropabest Foods, Inc. v. Dep't of Gen. Servs.*, 493 So. 2d 50 (Fla. 1st DCA 1986); and *Robinson Elec. Co., v. Dade Cnty.*, 417 So. 2d 1032 (Fla. 3d DCA 1982).

84. It is indisputable that there is a strong public interest in favor of saving tax dollars in awarding public contracts where a cost to the agency is involved. Similarly, as this case demonstrates, there is also a strong public interest in obtaining the highest revenue from bidders where the proposal contemplates payments to the agency.

85. There is no public interest, much less a substantial public interest, in disqualifying low cost bidders or high revenue bidders for technical deficiencies, where the lowest cost bidder or highest revenue bidder did not derive any unfair competitive advantage by reason of a technical omission in

its proposal. *See generally Intercontinental Props., Inc.*, 606 So. 2d at 386; *Overstreet Paving Co. v. Dep't of Transp.*, 608 So. 2d 851, 853 (Fla. 2d DCA 1992).

86. Given the critical importance of these points, a court or hearing officer is obligated to conduct an independent inquiry, rather than simply defer to the opinion of the procuring agency. *See, e.g., Harry Pepper*, 352 So. 2d at 1192-93 (overturning city's determination regarding materiality of bid deviation and holding that the city had no authority to accept materially nonconforming bid).

87. This point is also underscored by the recognition that hearings under section 120.57(3)(f), Florida Statutes, are de novo, and may encompass the presentation of new or additional evidence, so that the matter might be correctly determined, as if it had not been previously addressed. *See also Citrus Cent. v. Gardner*, 569 So. 2d 936 (Fla. 1st DCA 1990). Upon receiving the evidence in a bid protest proceeding, the ALJ's objective is to "evaluate the action taken by the agency." *State Contracting & Eng'g Corp.*, 709 So. 2d at 607, 609.

VIII. Gateway's Proposal Is Responsive, since the Total Amount Entered by Gateway in the BidSync Form Did Not Affect Gateway's Revenue Proposal

88. Relying on Florida procurement law, several cases decided at DOAH have determined that failing to submit information related to price, that is required by an agency in a solicitation, does not automatically render a proposal nonresponsive. *Nat'l Data Prods., Inc. v. Dep't of Mgmt. Servs.*, Case No. 93-0534BID, 1993 WL 943766 (Fla. DOAH Mar. 21, 1993; Fla. DMS Jun. 9, 1993) (finding that the agency decision to reject a bid as nonresponsive was arbitrary and capricious when the price lists were readily identifiable and sufficiently precise in the bidder's written proposal). *See also Telecom Response, Inc. v. Dep't of Mgmt. Servs.*, Case No. 00-3439BID, 2000 WL 1867291 (Fla. DOAH Dec. 1, 2000; Fla. DMS Jan. 18, 2001).

89. Instead of mechanically disqualifying a proposal for an irregularity, the agency must look at the specific facts involving the solicitation to objectively determine whether the irregularity affects the price of the proposal, or gives the offeror an advantage or benefit not enjoyed by other offerors. *Nat'l Data Prods., Inc.*, 1993 WL 943766.

90. Moreover, a proposal should not be deemed nonresponsive when the omitted information is readily identifiable in the proposal or when the evidence shows that there are alternative sources of information that the agency can rely on to ascertain or resolve any discrepancies resulting from the information being omitted. *See Id.*

91. Even where a solicitation document warns that a proposal will be disqualified as nonresponsive if it fails to include the correct pricing information, disqualifying the proposal is arbitrary and capricious if it cannot be shown that a proposer's failure to use the correct form compromised its response.

92. Instead, when the disputed information can be reasonably ascertained from the terms of the solicitation and the proposal, the proposal should be accepted as responsive. *Telecom Response, Inc.*, 2000 WL 1867291. *See also Uneq, Inc. v. Dep't of Health & Rehab. Servs.*, Case No. 92-6824BID (Fla. DOAH Jan. 14, 1993; Fla. DHRS Mar. 3, 1993) (finding that the agency adequately awarded the contract to a bidder who failed to submit the correct price form, even though the solicitation provided for disqualification of proposals that failed to include such form when the terms of the bid were otherwise clear and unambiguous).

93. In *National Data Products*, the agency required bidders to submit a price list in support of their discount price schedule. *Nat'l Data Prods., Inc.*, 1993 WL 943766. The petitioner in that case failed to provide a complete price list. During bid opening, the Department of Management Services applied its normal evaluation criteria to the proposal, and the petitioner was found to be the lowest bidder. However, the agency later discovered that

petitioner failed to include a complete price list and disqualified the proposal as nonresponsive. In justifying its action, the agency relied on its uniform policy of rejecting bids that failed to include the price sheet. The purpose of the policy was to ensure that all vendors are bidding on the material that it offered. *Id.*

94. The hearing officer found that, depending on the facts of the case, while the agency's concerns might be legitimate, those concerns did not rationally support a uniform policy that a failure to include price lists with a bid can never be a minor irregularity. *Id.*

95. The facts in *National Data Products* showed that the agency was able to rely on other information in National Data Products' responsive documents to evaluate the proposal and that the price list was more in the nature of a technicality. *Id.*

96. In *National Data Products*, the petitioner's failure to include the price lists with its bid was, therefore, a minor irregularity that did not affect the price of the bid, give the bidder an advantage or a benefit not enjoyed by other bidders, or adversely affect the interests of the agency. Therefore, the agency's failure to waive the irregularity in the petitioner's proposal was arbitrary and found to be contrary to the purpose of competitive bidding. *Id.*

97. Moreover, the fact that a solicitation calls for the disqualification of a proposal based on an irregularity found in the proposal is not dispositive on the question of whether the proposal must be disqualified as nonresponsive.

98. For instance, in *Telecom Response, Inc.*, the solicitation advised proposers that "[p]rices shall be submitted in the form of a percentage (%) discount off manufacturer's current published price list. ... A copy of the Manufacturer's unaltered list price sheet as originally published, in general distribution and in effect on the date of bid opening, must be submitted with the bid. Failure to include this with bid package will result in rejection of bid." *Telecom Response, Inc.*, 2000 WL 1867291 (RO).

99. The petitioner in that case failed to submit the complete manufacturer's price list and was disqualified as being nonresponsive. The ALJ concluded that the agency's decision was arbitrary and capricious when it was otherwise clear which products were being offered by the proposer. Therefore, the proposer's failure to submit the complete list was a minor irregularity. *Id.*

100. Here, Gateway's proposed three-year MAG and the separate total revenue proposal for the five-year term, including the option years, were clearly expressed and distinctly separated and documented within the four corners of its proposal.

101. Like *National Data Products*, the County's unbalanced bid analysis showed that the County was able to ascertain, based on Gateway's Revenue Generating Proposal, that Gateway's three-year MAG was \$3,336,000 and that its separate Total Five-Year Revenue Proposal was \$7,346,000. There was no confusion by the County over what amount of revenue was being proposed by Gateway.

102. Because the material terms of Gateway's revenue proposal were readily identifiable and the County was able to rely on Gateway's Revenue Generating Proposal and the Evaluation Criteria Response Form to ascertain the specific terms of Gateway's proposal, the fact that Gateway inadvertently entered its five-year revenue proposal into the electronic form as opposed to its three-year MAG constituted a minor irregularity. Therefore, the County's decision to disqualify Gateway's proposal was arbitrary and contrary to competition, in part, because it rejected the bidder who indisputably offered the highest advertisement revenue to the County.

IX. The County's Rejection of Gateway's Proposal Is Against County Policy

103. Section 21.37(c) of the Broward County Procurement Code provides that:

If the Director of Purchasing makes all of the following five (5) written findings regarding a particular response to a solicitation, the Director of Purchasing shall grant a waiver of a technicality or irregularity affecting responsiveness:

I. A waiver would not deprive the County of its assurance that the contract will be entered into, performed, and guaranteed according to its specified requirements;

II. A waiver would not adversely affect competition by providing one vendor with a competitive advantage over another vendor or otherwise restrict competition;

III. A waiver would not create the appearance of favoritism or impropriety;

IV. A waiver would not violate a requirement mandated by another governmental agency or grant-making institution, as applicable, that is providing funds for the solicitation in question; and

V. A waiver would not directly or indirectly affect the dollar amount submitted by the vendor in its response, except as provided in Section 21.41(a) regarding corrections of mathematical errors.

§ 21.37(c), Broward Cnty. Procurement Code.⁵

104. Section 21.37(c) of the Broward County Procurement Code is consistent with Florida case law regarding the elements that must be present to find that a deviation in a proposal is a waivable minor irregularity. It is also in line with the Recommended Orders in *National Data Products* and

⁵ It was undisputed that the fulfillment of criterion "V." was the only one in dispute.

Telecom Response, Inc., that require an agency to waive such irregularities when the proposal otherwise remains clear and unambiguous.

105. The greater weight of the evidence proved that criterion “V.” was, in fact, satisfied. More specifically, the dollar amount of Gateway’s proposal for the three-year MAG was sufficiently outlined and committed to by Gateway within its proposal. Waiving the irregularity regarding the figures it entered in the data field on the BidSync form did not “affect” or change the ultimate revenue it was offering to the County during the three-year MAG period, nor did it have the effect of relieving Gateway from its obligation to pay the revenue it offered, if it was awarded the contract.

106. Further, as a part of its reasoning finding that Gateway’s proposal was nonresponsive, the County Director of Purchasing determined that Gateway’s proposal was both materially and mathematically unbalanced. He relied heavily upon provisions of the Broward County Procurement Code, which stated, in relevant part:

Materially Unbalanced Response means a response to a solicitation that, in the best judgment of the Director of Purchasing and the Using Agency, creates a reasonable doubt that award to the vendor who submits such a response will result in the lowest ultimate cost to the County, or which is so mathematically unbalanced that it would require an advance payment by the County. Mathematically Unbalanced Response means a response to a solicitation that contains a lump sum or unit bid for items that, in the best judgment of the Director of Purchasing and the Using Agency, does not reflect reasonable actual costs plus a reasonable proportionate share of the vendor’s anticipated profit, overhead costs, and other indirect costs.

§ 21.94, Broward Cnty. Procurement Code.

107. At first blush, reliance on these provisions of section 21.94 of the Broward County Procurement Code may seem reasonable. However, a closer look reveals that these provisions defining a material imbalance, address and

apply to “cost” imbalances only. The provision is expressly worded in a way making it inapplicable to a “revenue” calculation.

108. Moreover, the reference to “an advance payment” in the last phrase of the section does not expand the scope of the definition, but relates back to and defines what happens when there is *cost* miscalculation that would require an advance payment by the County. Regardless, any ambiguity must be resolved against the drafting party—the County.

109. The County has not pointed to any similar provisions in the Broward County Procurement Code related to a request for proposal *seeking revenue* or how, when, and under what circumstances *a revenue proposal* is defined by the County as being materially unbalanced.

110. Under well-accepted principles of statutory construction, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded. *Gay v. Singletary*, 700 So. 2d 1220 (Fla. 1997).

111. By utilizing the word “costs” in defining “material imbalance,” it is reasonable to infer that the County meant to exclude “revenue” generating proposals, a distinctly different word and concept. See also *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144 (Fla. 2d DCA 2006). The County’s incorrect application of this definition in finding Gateway nonresponsive further supports a determination that its decision was arbitrary.

112. Accordingly, the County’s determination to reject Gateway’s proposal is arbitrary and contrary to competition because it (a) fails to consider the clear, separate, and distinct revenue proposals within the four corners of Gateway’s proposal, which differentiated between the three-year MAG and the total revenue promised over the five-year term; (b) runs contrary to the County’s own policy requiring the waiver of minor irregularities; and

(c) relies upon a definition of “materially unbalanced” that does not apply to a revenue generating proposal.

X. Inconsistencies in the County’s Online Bidding System Contributed to the Technical Deficiencies in Gateway’s Proposal

113. There is an additional and independent basis which supports the conclusions outlined herein. Florida courts have held that when a deficiency in a proposal may be attributable to the public entity and the information can be found in other parts of the proposal, it is arbitrary for the public entity to reject the proposal. *Asphalt Pavers, Inc. v. Dep’t of Transp.*, 602 So. 2d 558, 562 (Fla. 1st DCA 1992).

114. In *Asphalt Pavers*, the agency rejected a bid, arguing that the bidder failed to include a form evidencing its intended use of disadvantaged business enterprise (“DBE”) subcontractors. All of the DBE information requested in the form, however, was contained or outlined elsewhere in the bid documents by Asphalt Pavers. Moreover, during the bid protest proceedings, it was determined that the agency was responsible for losing the form.

115. The court held that the agency’s rejection of the bid for failure to include a form that the agency itself lost was arbitrary.

116. Moreover, and more to the point, the court also concluded that it was significant that the agency was provided the information required by the form in *other parts* of the proposal submitted by Asphalt Pavers.

117. This case is similar to the case in *Asphalt Pavers* in two important respects. First, the County and Periscope Holdings represented to Gateway that the BidSync and Periscope S2G sites were identical.⁶ Therefore, Gateway reasonably concluded that it could submit required segments of its proposal via the BidSync site.

118. Likewise, BidSync did not include the Periscope S2G Item Response Form instructing proposers to input only the three-year MAG from their

⁶ Unfortunately, this characterization by the County was not entirely accurate.

Revenue Generating Proposal. Instead, BidSync provided a different bidding form which asked for a “Total Price” without the instructions to limit the input to only the three-year MAG.

119. It was not unreasonable for Gateway to conclude that this meant what it said—that it was required to insert the total revenue or “total price” it was proposing over the entire five-year potential term of the award.

120. As in *Asphalt Pavers*, Gateway’s failure to submit the Periscope S2G Item Response Form with the proper information was caused, in part, due to the instructions it received from the County.

121. Secondly, and despite this confusion, the information that Gateway was supposed to include in the Periscope S2G Item Response Form was clearly and distinctly provided in Gateway’s signed Revenue Generating Proposal. Following the holding and rationale in *Asphalt Pavers*, the County should have waived the deficiency in Gateway’s proposal.

122. Moreover, by waiving the irregularity in Gateway’s bidding forms, the County was not sanctioning or permitting collusion, favoritism, or fraud in this public procurement. *Groves-Watkins Constructors*, 530 So. 2d at 914. Moreover, such a waiver would not have subverted the public bidding process. *Id.*

123. Rather, declining to find Gateway to be a responsive bidder under the unique circumstances of this case results in the County creating a situation that is itself contrary to competition and would result in the County foregoing nearly a million dollars in revenue destined to benefit the citizens of Broward County.

124. The totality of these facts compel the undersigned to reasonably conclude that Gateway has proven by a preponderance of the evidence that the actions of the County in finding it to be nonresponsive were arbitrary and contrary to competition.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED as follows:

1. Broward County's Recommendation to Award issued in this case is rejected and overruled.
2. Gateway's proposal is determined to be responsive.
3. The matter is returned to Broward County's Evaluation Committee for an objective and fair reevaluation of the proposals.

DONE AND ORDERED this 13th day of October, 2022, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of October, 2022.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, of Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.