

**BID PROTEST REVIEW COMMITTEE**  
**B-20-08-COC: Riverfront Promenade Overlook Improvement Project**  
**City of Cocoa, Florida**

Rush Marine, LLC,

Protestant;

and

Canaveral Construction Company,

Awardee,

\_\_\_\_\_ /

**Final Administrative Response to Rush Marine, LLC Bid Protest/  
Recommendation**

THIS BID FORMAL PROTEST, was considered, after being duly noticed, before the appointed Bid Protest Review Committee of the City of Cocoa, Florida, on January 6, 2020, to determine whether the deficiencies or omissions in Canaveral Construction Company's bid response to the above-mentioned Invitation to Bid were properly waived as minor irregularities or informalities. The Bid Protest Review Committee, having allowed ten minutes to the Protestant and Awardee for public comment and heard the arguments of each and reviewed the documents and evidence presented and being otherwise fully advised, makes the following Findings of Fact and Conclusions of Law incorporated into this Order as set forth herein.

**Findings of Fact**

Based upon the evidence and testimony presented at this hearing, the Bid Protest Review Committee finds:

1. The City of Cocoa advertised an Invitation to Bid on October 31, 2019, for the construction of the Cocoa Riverfront Promenade and Overlook Improvements. The opportunity to submit bids closed on December 5, 2019 at 3:00 p.m.

2. The bids were opened and read aloud on December 5, 2019 at 3:30 p.m., at a duly noticed public meeting. Bid Responses were reviewed for completeness and price. During the review, respondents were present and provided with Bid Tabulation Sheets to document the preliminary outcome of the bid. Results were recorded on the Bid Tabulation Sheets and read aloud with key personnel from Public Works present to also review the total base line, alternate pricing and itemized material cost for this project. During the review it was initially determined that, of the seven (7) respondents, two (2) were disqualified for not attending the mandatory pre-bid conference (Florida Home & Dock Life, LLC and Edwards Concrete), leaving five (5) eligible respondents. It was determined that the top three (3) tiered proposers were Canaveral Construction Company Inc., Rush Marine, LLC and C&D Construction Inc.

1. Canaveral Construction Company Inc.	Total Base Bid = \$952,909.00
2. Rush Marine, LLC	Total Base Bid = \$989,618.00
3. C&D Construction Inc.	Total Base Bid = \$993,000.00

After closer examination of required documents, Canaveral Construction omitted pages 12 – 16 of The Instructions to Bidders, but provided page 17 signature block (signed / dated). The signature block on page 17 referred to a request for local preference and requested Brevard County, Florida vendors only to complete the form and signature block and attach a copy of a local business tax receipt. The signature block did not reference pages 12-16 of the Instructions to Bidders. Furthermore, the Form of Agreement and Performance and Payment Bond were omitted and unsigned from Canaveral Construction's bid submittal. The Form of Agreement in Rush Marine's bid submittal was returned signed. The Performance and Payment Bond in Rush Marine's bid submittal was returned signed by Rush Marine's President, Anthony Landry, but was not signed by a surety. The Bid Tabulation Sheet was filled out for Canaveral Construction with a "N" (No) under the document submittal categories for Instruction to Bidders, Form of Agreement, and Performance and Payment Bond. Upon closure of bid opening all vendors were excused with a copy of the Bid Tabulation in hand.

3. On December 5, 2019, after the bid opening, a representative of Canaveral Construction Company, Mike Harkcom, contacted the Purchasing Division to request a meeting with the Purchasing Manager Heath Hancher and Department Director Bryant Smith.

4. On December 6, 2019, Canaveral Construction Company representatives Mike Harkcom and David Nash met with Bryant Smith, Frank Mirabito, and Heath Hancher to discuss their concerns with the Bid Tabulation Sheet. Canaveral Construction Company also submitted a letter, expressing concerns that the Form of Agreement and Performance and Payment Bond were an after-award requirement and elected to omit these documents from their bid. Specifically, with respect to the Form of Agreement, Canaveral Construction Company representative stated that they did not include a signed Form of Agreement because they would not know the date of contract as required to be filled in on the first paragraph; would not know the contract value required based upon alternates to be decided by the City of Cocoa and the language in the Invitation to Bid stating that the City could choose to award on a per group or per item basis. Canaveral Construction Company also stated that the Bidders Certification of Paragraph 6 required a certification that they had carefully examined the Proposed Agreements and any other documents made a part of the Invitation and, therefore, were fully knowledgeable and acceptable to the terms of the Form of Agreement. With respect to the Performance and Payment Bond, Canaveral Construction Company noted that the Invitation to Bid, page 46, Paragraph 16.7, stated that the contractor would furnish the Performance and Payment Bond concurrently with the execution of the contract and further referred to the fact that the contract amount was not available to them at the time of the bid.

5. On December 6, 2019, the Bid Tabulation Sheet was updated to include a (Y) for "Yes" in the Instructions to Bidders column by Purchasing Staff.

6. On December 9, 2019, Purchasing Staff consulted with the City Attorney's Office to discuss the Canaveral Construction Company letter. Staff concluded that the concerns expressed were valid. At that time, the City Council short agenda had already been published with Rush Marine as the recommended awardee for the contract.

7. On December 10, 2019, the City Council agenda was republished recommending Canaveral Construction Company as the awardee. The City Council awarded the contract to Canaveral Construction Company during its regularly scheduled meeting. A representative of Rush Marine was present during the Council meeting and provided public comment prior to the award. The City Council discussed the bid responses and indicated that any missing

documents were a minor irregularity that could be waived. On December 12, 2019, a Notice of Award was signed and received from Canaveral Construction Company by the City.

8. On December 16, 2019, a timely Notice of Intent to Protest was received from Rush Marine. Canaveral Construction Company was notified of the Intent to Protest via email from Heath Hancher.

9. On December 17, 2019, the Form of Agreement was received from Canaveral Construction and signed by David Nash, President.

10. On December 18, 2019, a correction to the Notification of Award and Form of Agreement was sent to Canaveral Construction to review and sign. The original Notification of Award and Form of Agreement did not include the alternate pricing. Both base and alternate were still lowest bidder.

11. On December 19, 2019, Rush Marine filed its Formal Bid Protest via email and hard copy. The Formal Bid Protest argued that Canaveral Construction Company's bid was nonresponsive because it did not include the Instructions to Bidders, the Form of Agreement, or the Performance and Payment Bond. The Formal Bid Protest, as well as the arguments made by Rush Marine's legal counsel at the Bid Protest Review Committee meeting, focused on the Form of Agreement. According to Rush Marine, the failure to submit the Form of Agreement was a material omission because the Form addressed multiple protections for the City, including the scope of work, liability insurance requirements, attorney's fees provisions, federally-required procurement clauses, and a project completion date well in advance of the City's Fourth of July celebration. The Formal Bid Protest and arguments of legal counsel were that, upon award of the contract to Canaveral Construction, the contract that was created did not include the above-referenced clauses, which jeopardized the City's FEMA funding for the project. It was also argued that the failure to submit a Performance and Payment Bond resulted in the loss of guarantees protecting the City against defective, incomplete, delayed or substandard work and materials and loss of completion deadlines.

12. On December 20, 2019, a Corrected copy of the Notification of Award and Form of Agreement was received by the City and signed by David Nash, President.

### **Conclusions of Law**

13. The City's Bid Protest Policy is found in the Financial Operations Manual (FOM), revised August 2015, Section 15 para 15.2(A)13. The Bid Protest Policy establishes the procedure to review the protest. The City Manager and Assistant City Manager, as Acting City Manager, appointed the review committee members. The FOM provides that the Bid Protest Review Committee must formulate a final administrative response to a Formal Written Protest within 10 days after filing of such Formal Written Protest.

14. The FOM provides that the burden is on the Protestant to demonstrate by clear and convincing evidence that the Bid was procedurally or substantially flawed, arbitrary, fraudulent, unreasonable and capricious, dishonest, corrupt, or illegal. For all procurement decisions, a City acts improperly if the protested decision is contrary to the City's governing statutes, rules, or policies, or to the solicitation specifications, and the protester can show that the decision rose to the level of being clearly erroneous, contrary to competition, arbitrary, or capricious. The Invitation to Bid stated in multiple places that the City could waive any minor irregularities or technicalities. Accordingly, the Bid Protest Review Committee was required to determine



whether the three omissions from Canaveral Construction Company's bid response – the Instructions to Bidders pp. 12-16, the Form of Agreement, and the Performance and Payment Bond – were minor irregularities that can be waived.

15. Material variances are those that give one bidder a substantial advantage over other bidders and restrict competition. Nonmaterial variances are those that do not affect price, give one bidder an advantage or benefit not enjoyed by other bidders, or adversely affect the interests of the agency. *Tropabest Foods, Inc. v. State, Dept. of General Services*, 493 So.2d 50 (Fla. 1st DCA 1986).

16. The Bid Protest Review Committee unanimously voted to deny the Formal Bid Protest filed by Rush Marine, LLC, and concluded that each of the omissions from Canaveral Construction Company's bid response were immaterial omissions for the following reasons:

(a) *Instructions to Bidders.* The Bid Protest Review Committee concluded that the only portion of the Instructions to Bidders section (pages 12-17) requiring a signature or acknowledgement was page 17, which was to be submitted only where a local preference was sought for Brevard County, Florida contractors. Both Canaveral Construction Company and Rush Marine submitted a signed page 17 with their bid responses. Therefore, failure to submit pages 12 through 16, which required no signature or acknowledgement, was a minor irregularity.

(b) *Form of Agreement.* The Bid Protest Review Committee discussed with legal counsel representing the Committee that the protections contained in the Form of Agreement that was not signed by Canaveral Construction Company were not lost and would have been included in the contract created at the time of award. Canaveral Construction Company's bid response was to the Invitation to Bid, which specifically required responders to certify that they had reviewed and would comply with the contract documents and form of agreement. Therefore, any contract formed at the time of award would have included the federally-required contract clauses necessary to receive FEMA funding, the time for completion, and other protections. In addition, the Bid Protest Committee noted that the Form of Agreement could not be completed until after the award of the contract, where certain variables or unknowns exist, such as the date for beginning performance that is subject to change, etc.

(c) *Performance and Payment Bond.* The Bid Protest Review Committee discussed with legal counsel representing the Committee that the protections against incomplete, delayed or substandard work afforded by a Performance and Payment Bond were no more provided by the Rush Marine bid response than the Canaveral Construction Company bid response. Rush Marine's bid response contained a Performance and Payment Bond form that was signed by Rush Marine's President, but not a surety. Therefore, the assurance of a third party to step in and complete unfinished or substandard work was not afforded by either Canaveral Construction or Rush Marine. The Bid Protest Review Committee also noted that it would not be possible to submit a complete Performance and Payment Bond form at time of bid submittal.

**BASED UPON THE FOREGOING FACTS AND CONCLUSIONS, IT IS HEREBY ORDERED/RECOMMENDED:**

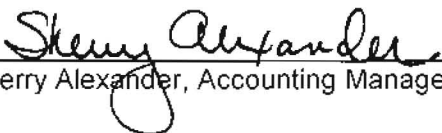
1. The City of Cocoa's Final Administrative Response to Rush Marine, LLC's Formal Bid Protest is denial of such Protest; and

2. The FOM provides that the Protestant shall have the opportunity to request to address the Review Committee. At this meeting, the Review Committee, Protestant and Awardee shall review the protest, evaluate its facts and merits and, if possible, reach a resolution acceptable to both parties or afford the protestant an opportunity to withdraw the protest. If the dispute cannot be resolved by mutual agreement, the Review Committee must forward the protest to the City Council with their recommendation for final resolution.

3. The Protestant shall have 10 days, excluding weekends and legal holidays, from the date of this Final Administrative Response to request a further opportunity to address the Bid Protest Review Committee. However, recognizing that all parties were afforded 10 minutes to speak at the Bid Protest Review Committee meeting on January 6, 2020, and that the Protestant may not feel it necessary to further address the Review Committee, the Protestant may alternatively request within the same time period that this Final Administrative Response be immediately forwarded as a recommendation to the City Council for its review.

DONE AND ORDERED at Cocoa, Florida, this 7th day of January, 2020.

BID PROTEST REVIEW COMMITTEE  
CITY OF COCOA, FLORIDA

  
Sherry Alexander, Accounting Manager, Chairwoman

APPROVED BY:

  
John Titkanich, City Manager

Copies furnished to:  
Abigail Morgan, Public Works Assistant City Engineer, Member of Bid Protest Review Committee;  
Katie Ennis, Deputy Utilities Director, Member of Bid Protest Review Committee;  
Matthew Fuhrer, Assistant City Manager