



Legislation Text

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CITY COUNCIL AGENDA ITEM

Memo Date: January 17, 2020
Agenda Date: January 22, 2020
Prepared By: Anthony Garganese, City Attorney and Health Hancher, Purchasing & Contracts Manager
Through: Rebecca Bowman, Finance Director
Requested Action:
Request review of the Bid Protest Review Committee's decision and recommendation to deny the bid protest received from Rush Marine, LLC on ITB Bid No. B-20-08-COC, Riverfront Promenade Overlook Improvement Project, which was previously awarded to Canaveral Construction Company, and final resolution of bid protest.

BACKGROUND:

Following the City Council's award of ITB # B-20-08-COC, Riverfront Promenade Overlook Improvement Project, to Canaveral Construction Company (hereinafter "Canaveral") at its December 11, 2019 regular meeting, the City received a timely notice of intent to protest the award and a formal bid protest from the second lowest bidder, Rush Marine, LLC (hereinafter "Rush"). In accordance with the City's Financial Operations Manual, containing the City's formal bid protest procedures ("FOM"), the City Manager and Assistant City Manager (as Acting City Manager) appointed a Bid Protest Review Committee, consisting of Accounting Manager Sherry Alexander, Public Works Assistant City Engineer Abigail Morgan, and Deputy Utilities Director Katie Ennis. The Bid Protest Review Committee held two public meetings and formulated a final, written administrative response to the bid protest, denying the protest. According to the FOM, if after addressing the Bid Protest Review Committee the protestant does not withdraw the protest or reach a resolution acceptable to both parties, the Bid Protest Review Committee must forward the protest to the City Council with their recommendation for final resolution. The Bid Protest Review Committee's final, written administrative response is attached to this agenda item, which also serves as its recommendation to the City Council. The Bid Protest Review Committee's recommendation was to deny Rush's bid protest. The City Council must now consider the Bid Protest Review Committee's recommendation and uphold or deny the bid protest.

In addition, if the protest is denied and the City Council finds the protest lacks merit, the City Council may further assess any costs, charges or damages associated with any delay of the award or any cost incurred with regard to the protest against the protest bond of \$5,000.00 that was submitted by Rush with its bid protest.

Underlying Facts Related to the Bid Protest:

The City of Cocoa's Purchasing Division published an invitation to bid on October 31, 2019, ITB # B-20-08-COC, Riverfront Promenade Overlook Improvement Project. 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.

The top three (3) respondents were:

1.	Canaveral Construction Company, Inc.:	\$952,909.00 (Alt. \$5,800.00)
2.	Rush Marine, LLC:	\$989,618.00 (Alt. \$5,940.00)
3.	C&D Construction Inc.:	\$993,000.00 (Alt. \$5,000.00)

The apparent lowest, responsive and responsible bidder was Canaveral Construction Company, Inc. However, during the review of proposal contents it was found that Canaveral omitted three documents within their proposal:

1. Instructions to Bidders (Pg. 12-17) - Canaveral 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.
2. Form of Agreement - Canaveral omitted and did not sign the Form of Agreement.
3. Performance and Payment Bond - Canaveral omitted and did not sign the Performance and Payment Bond.

By contrast, the Form of Agreement in Rush's bid submittal was returned signed. The Performance and Payment Bond in Rush's bid submittal was returned signed by Rush's President, Anthony Landry, but was not signed by a surety. The Bid Tabulation Sheet was filled out for Canaveral 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.

On December 6, 2019, Canaveral 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 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 representatives 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 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 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. 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.

On December 9, 2019, Purchasing Staff consulted with the City Attorney's Office to discuss the Canaveral 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. After careful examination of the bid documents, FOM and Canaveral's concerns, staff determined that Canaveral's proposal would be accepted as the apparent lowest, responsive, responsible bidder and recommended as the awardee.

On December 10, 2019, the City Council agenda was republished recommending Canaveral as the awardee. The City Council awarded the contract to Canaveral during its regularly scheduled meeting on December 11, 2019.

On December 16, 2019, a timely Notice of Intent to Protest was received from Rush. On December 17, 2019, the Form of Agreement was received from Canaveral, signed by David Nash, President.

Formal Bid Protest:

As stated above, the City Council must resolve Rush's formal bid protest, either upholding or denying the protest. Rush's Formal Bid Protest included certain legal arguments, explaining why, in Rush's view, the omissions from Canaveral's bid submittals were material deviations from the bid specifications that could not be waived by the City as minor irregularities. The arguments may be summarized as follows for each omission:

1. Form of Agreement. According to Rush, Canaveral's 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. Rush argues that upon award of the contract to Canaveral, the contract that was created did not include the above-referenced clauses, which jeopardized the City's FEMA funding for the project.

2. Performance and Payment Bond. Rush also argues that Canaveral's 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 the loss of completion deadlines.

3. Instructions to Bidders. Rush argues that Canaveral's failure to submit copies of pages 12 through 16 was material because the bid specifications require this submittal.

Legal Standards:

Public bids statutes “serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials and tend to secure fair competition upon equal terms to all bidders, [and] they remove temptation on the part of public officers to seek private gain at the taxpayers' expense, are of highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated.” *Liberty Cty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982). Florida law does not curtail the discretion of local authorities by demanding absolute compliance with public bidding guidelines. Rather, a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree. *Id.* Public agency decisions are deferred to absent illegality, fraud, oppression or misconduct. *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988). This standard is mirrored in the City's Bid Protest Policy from the FOM; the burden is on the Protester to demonstrate by clear and convincing evidence that the bid was procedurally or substantially flawed, arbitrary, fraudulent, unreasonable and capricious, dishonest, corrupt, or illegal.

ITB # B-20-08-COC issued by the City states very clearly that the City may waive any minor irregularity or technical errors or informalities. See, e.g., ITB, pp. 8, 10, 11, and 13. Therefore, the City Council must determine whether the three omissions from Canaveral's bid response were minor irregularities that could be waived.

Material variances or irregularities are those that give one bidder a substantial advantage over other bidders and restrict competition. Nonmaterial variances or irregularities 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). “There is a very strong public interest in favor of saving tax dollars in awarding public contracts. There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission.” *Intercontinental Properties, Inc. v. State Dep't of Health & Rehab. Servs.*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992).

The following tests may be used to measure an improper deviation:

- Is the deviation sufficiently material to destroy the competitive character of the bidding?
- Does the variation affect the price?
- Does the deviation give one bidder an advantage not enjoyed by the other bidders?
- Is the public entity able to make a fair and equal comparison of the bids?

The Florida Bar, *Florida Construction Law and Practice, BIDS, BID DISPUTES, AND COMPETITIVE NEGOTIATIONS INVOLVING PUBLIC ENTITIES*, CONSL FL-CLE 7-1 (9th ed. 2018) (citing *Wester v. Belote*, 103 Fla. 976, 138 So. 721 (1931); *Tropabest Foods, Inc. v. State, Dept. of General Services*, 493 So.2d 50 (Fla. 1st DCA 1986); *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 2nd DCA 1978)).

With respect to the Form of Agreement omission, the ITB repeatedly states that any person submitting a bid agreed to be bound by the terms of the ITB, including the Form of Agreement. Therefore, any contract that may have been formed at the time of award and communication of the

award to Canaveral would have contained the federally-required FEMA contract clauses and other protections contained therein, despite Canaveral's failure to sign the Form of Agreement. Specifically:

- The following statement appears on Page 11 of the ITB, which included the public advertisement of the ITB: "All work performed shall be in accordance with the specifications and contract documents pertaining thereto. . . ."
- On Page 1 of the ITB, the Bidder Acknowledgement Form cover page for all respondents: "I certify that I have carefully examined the instructions to Bidder/general Conditions, Invitation to Bid, Specification, and any other documents accompanying or made a part of this Invitation. . . . In compliance with this Invitation to Bid, and subject to all conditions herein, I hereby offer and agree to furnish the goods and/or services specified in the Invitation"
- On Page 24 of the Bidder's Certification: "I have carefully examined the Invitation to Bid, Instructions to Bidders, General and/or Special Conditions, Vendor Notes, Specification, proposed agreement and any other documents accompanying or made a part of this Invitation. I hereby propose to furnish the goods or services specified in the Invitation at the prices or rates quote in my bid... I agree to abide by all conditions of this bid and understand that a background investigation may be conducted."
- On Page 27, Bid Acknowledgment Form: "Proposal of _____ (Name) _____ (address) To furnish all materials, service, equipment, and labor required for the Cocoa Riverfront Park Promenade Improvements as specified in the bid documents. The undersigned Bidder has carefully examined the Contract Documents and is familiar with the nature and extent of the work and materials and labor required. The undersigned agrees to do all of the work called for by said specifications, in the manner prescribed therein, in accordance with the Contract Documents, for the prices stated in the spaces herein provided."
- On Page 16, Section 2.1.18(e) Terms: "No waiver, alterations, consent or modification of any of the provisions of this Agreement shall be binding unless in writing and signed by the Purchasing Manager."

In addition, the Bid Bond submitted by Canaveral provided security to the City in the event that Canaveral would have failed to enter into a written agreement for the work. It provides and warrants that the bidder cannot withdraw the bid for 90 days after opening, and shall within the period specified enter into a written contract with the Owner in accordance with the Bid as accepted. Nevertheless, it was not necessary to call the bid bond because an executed contract was received by the City from Canaveral.

With regard to FEMA funding, federal regulations provide that when procurement is accomplished via sealed bids, the contract must be awarded to the "responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest price." 2 CFR § 200.320(c). Accordingly, FEMA standards recognize that entities receiving funding have the authority to waive nonmaterial terms and conditions of the invitation for bid. See also 2 CFR § 200.320(c)(2)(v) ("Any or all bids may be rejected if there is a sound documented reason.") It would not be appropriate under FEMA regulations to reject a bid if there was not a sound, documented reason for doing so.

With respect to the Performance and Payment Bond, "a party protesting an award to the low bidder must be prepared to show not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency. To rule otherwise is to require the State to spend more money for a higher bid which suffers from the same deficiency as the lower bid."

Intercontinental Properties, Inc. v. State Dep't of Health & Rehab. Servs., 606 So. 2d 380, 384 (Fla. 3d DCA 1992). Rush's Performance and Payment Bond submittal was only executed by Rush and not a surety. This is likely because at the time of submittal, it would not have been possible to know the amount of the contract award, which is required for completion of the bond securing the work. Moreover, a Performance and Payment Bond constitutes a three-party agreement. The Florida Bar, Florida Construction Law and Practice, RIGHTS AND LIABILITIES OF SURETIES, CONSL FL-CLE 8 -1 (9th ed. 2018) ("Suretyship is a contractual tripartite relationship in which one party (the surety) guarantees to another party (the obligee) that a third party (the principal) will perform a contract in accordance with its terms and conditions. . . . The surety promises the obligee to answer the debt, default, or miscarriage of the principal."). Without the surety's signature, it is not valid and would not provide the City with any added security that the work would be completed in a timely and competent manner.

In addition, the Bid Bond submitted by Canaveral provided security to the City in the event that Canaveral would have failed to provide a completed Performance and Payment Bond. Canaveral's Bid Bond provides, in relevant part, that Canaveral warrants it cannot withdraw the bid for 90 days after opening and will provide a bond with good and sufficient surety or sureties for the faithful performance and proper fulfillment of the contract. In other words, the Bid Bond warrants that a fully executed Performance and Payment Bond will be submitted. Enter text here

STRATEGIC PLAN CONNECTION:

Extensive renovation to the existing Riverfront Promenade while adding upgrades to seawall safety, landscaping and added beautification to enhance the overall aesthetic experience for local citizens and visiting tourist.

BUDGETARY IMPACT:

Budgeted Yes

Amount: Base: \$952,709.00
 Alternate: \$5,800.00
 Total: \$958,709.00

PREVIOUS ACTION:

On December 11, 2019, City Council awarded the bid to Canaveral Construction Company

RECOMMENDED MOTION:

To deny the protest:

Move to deny the bid protest filed by Rush Marine, LLC; to reaffirm award of ITB B-20-08-COC, Riverfront Promenade Overlook Improvement, to Canaveral Construction Company Inc., Total base (\$952,909.00) plus alternate (\$5,800.00) in the amount of \$958,909.00; to direct staff to issue a Notice to Proceed to Canaveral

Construction Company in order to maintain the estimated project completion date; and to authorize the City Manager to assess costs, charges or damages associated with any delay of the award or any cost incurred with regard to the protest against the protest bond of \$5,000.00 that was submitted by Rush Marine, LLC with its bid protest.

Or,

To uphold the protest:

Move to uphold the bid protest filed by Rush Marine, LLC; to rescind the award of the contract ITB B-20-08-COC, Riverfront Promenade Overlook Improvement to Canaveral Construction Company; and to award the contract for ITB B-20-08-COC, Riverfront Promenade Overlook Improvement, to Rush Marine, LLC, Total Base (\$989,618.00) plus alternate (\$5,940.00) in the amount of \$995,558.00 and to direct staff to issue a Notice to Proceed to Rush Marine, LLC in order to maintain the estimated project completion date.