

Meeting Date: May 7, 2019

☐ Consent ☒ Regular
☐ Workshop ☐ Public Hearing

Department: Facilities Development & Operations

Motion and Title: Staff recommends motion to accept the recommendation of the Special Master denying the protest of Collage Design & Construction Group, Inc. concerning the solicitation for Construction Manager at Risk (CM) Services for the Canyon District Park Project Number 17204.

Summary: On 4/17/18, proposals were received to a Request For Proposals (RFP) for CM Services on the Canyon District Park Project (Project). On 5/17/18, the Shortlist Committee identified three (3) firms as finalists for the Selection Committee Meeting held on 6/15/18. Collage Design & Construction d/b/a The Collage Companies (Collage) was selected as the highest ranked proposer. Staff commenced negotiations, and at the conclusion of those negotiations, prepared a Board item recommending approval of those items at the 9/18/18 BCC meeting. In the week before the BCC meeting, Staff discovered that the Final Selection Committee had not scored the criteria category titled Small Business Utilization Plan (SBE Plan) according to the requirements of the RFP. As such, on 9/13/18 FDO staff recommended that the item be deleted from the agenda for further staff review. The Final Selection Committee met again on 10/9/18 to re-score only the criteria where the error occurred. The rescoring resulted in Kaufman Lynn Construction as the highest ranked proposer and Collage the second ranked proposer. On 10/16/18, Collage submitted a bid protest to the Director of Purchasing and subsequently the Director of Purchasing denied the protest. Collage then requested the protest be heard by a Special Master who also denied the protest on January 14, 2019. Collage also filed a public records lawsuit alleging failure to comply with public records requests and later requested a temporary injunction as expedited relief and also filed an emergency motion to preserve the status quo to prevent negotiations with Kaufman Lynn. Both requests for injunctive relief were denied on 4/2/19. Collage has made allegations regarding ethical violations but has not filed an ethics complaint to date. (FDO/Capital Improvements) Countywide/District 5 (MWJ).

Background and Policy Issues: The Final Selection Committee met on 9/13/18 to score the responses to the request for proposal but did not score the SBE Plan category according to the instructions. The instructions provided a total of ten points for the SBE Plan of respondents broken out into 7 possible points for SBE compliance and 3 points for a CM SBE Partnering Program. Originally all three scored Proposers were given 10 points although only Kaufmann Lynn Construction and Wharton Smith voluntarily participated in the CM SBE Partnering Program. Due to the unique and complex nature of these unique circumstances, FDO staff is bringing this item for acceptance of the Special Master's decision.

1. Committee Ranking and Scoring Sheets dated June 15, 2018
2. Email to BCC dated September 25, 2018
3. Committee Ranking and Scoring Sheets dated October 9, 2018
4. Collage Protest dated October 16, 2018
5. Purchasing Director's Response to Protest dated October 30, 2018
6. Proposal Protest of Project 17204 Decision by Special Master Robert D. Pritt, Esquire dated 1/14/19.

Recommended by: Army Wife 4/16/19
Department Director Date

Approved by: J. Burke 4/23/19
County Administrator Date

II. FISCAL IMPACT ANALYSIS

Fiscal Years	2019	2020	2021	2022	2023
Capital Expenditures					
Operating Costs					
External Revenues					
Program Income (County)					
In-Kind Match (County)					
NET FISCAL IMPACT	\$-0-	-0-	-0-	-0-	-0-
# ADDITIONAL FTE POSITIONS (Cumulative)					

Is Item Included in Current Budget: _____

Yes _____ No _____
Yes _____ No _____

Budget Account No: Fund __ Dept __ Unit __ Object __

B. Recommended Sources of Funds/Summary of Fiscal Impact:


There is no fiscal impact to this item.

C. Departmental Fiscal Review: Whit C. Mullikin

III. REVIEW COMMENTS:

A. OFMB Fiscal and/or Contract Development and Control Comments:

John R. Wholis
OFMB 11/4/18 g4/17


Contract Administrator

B. Legal Sufficiency:


Assistant County Attorney

C. Other Department Review:

Department Director

This summary is not to be used as a basis for payment.

0 SED OFFICE

CM @ RISK SERVICES FOR CANYON DISTRICT PARK			
Project # 17204			
FINAL SELECTION ORDINAL SCORE TALLY SHEET			
	The Collage Companies	Kaufman Lynn Construction	Wharton-Smith
Steve Carrier	1	2	3
Fernando Del Dago	1	2	3
Rosalyn Acosta	1	2	3
Faye Johnson	2	1	3
Angie Whitaker	2	3	1
Irwin Jacobowitz	2	1	2
Bob Hamilton	1	3	2
TOTALS	10	14	17
RANKED ORDER <u>1</u> <u>2</u> <u>3</u>			
<div>Recorded by</div> <div>Date</div>			

CM @ RISK SERVICES FOR CANYON DISTRICT PARK
FINAL SELECTION SCORE TALLY SHEET

June 15, 2018

	Max. Pts.	The College Companies	Kaufman Lynn Construction	Wharton-Smith
QUALIFICATIONS OF THE FIRM				
The firm's experience in similar projects utilizing the Construction Management process and other successful related CM projects will be scored. Recommendations from previous Owners and Architects will be evaluated. Litigation history will be considered.	25	20	25	25
PROPOSED PROJECT STAFF AND FUNCTIONS				
The Project Management team's experience with similar projects, with public projects, and overall Construction Management experience. Recommendations from previous Owners and Architects will be evaluated.	30	30	29	28
COMPREHENSIVE PROJECT MANAGEMENT SERVICES				
The ability and history of the firm and its staff to deliver projects using effective management tools and techniques will be evaluated. The firm's scheduling system and cost control system will be evaluated including methods for ensuring subcontractors' adherence to schedule. A comparison of the firm's project profile should indicate their ability to hold to original schedules and budgets. The firm's approach to establishing a Guaranteed Maximum Price along with methods of Cost Control and Reporting Systems used will be scored.	10	10	9	9
KNOWLEDGE OF LOCAL CONDITIONS				
The firm's knowledge of the local construction environment as an indication of their ability to deliver a quality product in an effective, economical, and timely manner with local subcontractors will be scored. The firm's location of its office which will manage the work will be considered.	15	15	15	13
SMALL BUSINESS UTILIZATION PLAN				
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored.	10	10	10	10
VOLUME OF PREVIOUS WORK				
The volume of the firm's previous work within the past 5 years with the County will be considered with the objective to share the available work with many firms.	10	10	10	10
TOTAL	100	95	98	95

RANKED ORDER (ORDINAL)

2 1 2

Committee Member:

Stacy J. [Signature]
A. G. [Signature]

Date:

6/15/18

CM @ RISK SERVICES FOR CANYON DISTRICT PARK
FINAL SELECTION SCORE TALLY SHEET

June 15, 2018

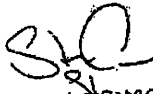
	Max. Pts.	The Cottage Companies	Kaufman Lynn Construction	Wharton-Smith
QUALIFICATIONS OF THE FIRM				
The firm's experience in similar projects utilizing the Construction Management process and other successful related CM projects will be scored. Recommendations from previous Owners and Architects will be evaluated. Litigation history will be considered.	25	25	21	21
PROPOSED PROJECT STAFF AND FUNCTIONS				
The Project Management team's experience with similar projects, with public projects, and overall Construction Management experience. Recommendations from previous Owners and Architects will be evaluated.	30	30	25 27 ^{SE}	25
COMPREHENSIVE PROJECT MANAGEMENT SERVICES				
The ability and history of the firm and its staff to deliver projects using effective management tools and techniques will be evaluated. The firm's scheduling system and cost control system will be evaluated including methods for ensuring subcontractors adherence to schedule. A comparison of the firm's project profile should indicate their ability to hold to original schedules and budgets. The firm's approach to establishing a Guaranteed Maximum Price along with methods of Cost Control and Reporting Systems used will be scored.	10	10	10	10
KNOWLEDGE OF LOCAL CONDITIONS				
The firm's knowledge of the local construction environment as an indication of their ability to deliver a quality product in an effective, economical, and timely manner with local subcontractors will be scored. The firm's location of its office which will manage the work will be considered.	15	10	15	50 15 14
SMALL BUSINESS UTILIZATION PLAN				
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored.	10	10	10	10
VOLUME OF PREVIOUS WORK				
The volume of the firm's previous work within the past 5 years with the County will be considered with the objective to share the available work with many firms.	30	10	10	10
TOTAL	100	95 ✓	93 ✓	90 ✓

RANKED ORDER (ORDINAL)

2

3

Committee Member:


Steven Carrier

Date: 6/15/18

CM @ RISK SERVICES FOR CANYON DISTRICT PARK
FINAL SELECTION SCORE TALLY SHEET

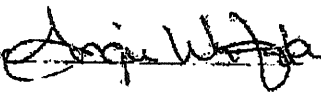
June 15, 2018

	Max. Pts.	The Collage Companies	Kaufman Lynn Construction	Wharton-Smith
QUALIFICATIONS OF THE FIRM				
The firm's experience in similar projects utilizing the Construction Management process and other successful related CM projects will be scored. Recommendations from previous Owners and Architects will be evaluated. Litigation history will be considered.	25	25	25	25
PROPOSED PROJECT STAFF AND FUNCTIONS				
The Project Management team's experience with similar projects, with public projects, and overall Construction Management experience. Recommendations from previous Owners and Architects will be evaluated.	30	30	25	30
COMPREHENSIVE PROJECT MANAGEMENT SERVICES				
The ability and history of the firm and its staff to deliver projects using effective management tools and techniques will be evaluated. The firm's scheduling system and cost control system will be evaluated including methods for assuring subcontractors adherence to schedule. A comparison of the firm's project profile should indicate their ability to hold to original schedule and budgets. The firm's approach to establishing a Guaranteed Maximum Price along with methods of Cost Control and Reporting Systems used will be scored.	10	10	10	10
KNOWLEDGE OF LOCAL CONDITIONS				
The firm's knowledge of the local construction environment as an indication of their ability to deliver a quality product in an effective, economical, and timely manner with local subcontractors will be scored. The firm's location of its office which will manage the work will be considered.	15	14	15	15
SMALL BUSINESS UTILIZATION PLAN				
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored.	10	10	10	10
VOLUME OF PREVIOUS WORK				
The volume of the firm's previous work within the past 8 years with the County will be considered with the objective to share the available work with many firms.	10	10	10	10
TOTAL	100	99	95	100

RANKED ORDER (ORDINAL)

2 3 1

Committee Member



Date

6/15/2018

CM @ RISK SERVICES FOR CANYON DISTRICT PARK

FINAL SELECTION SCORE TALLY SHEET


June 15, 2018

	Max. Pts.	The College Companies	Kaufman Lyriti Construction	Wharton-Smith
QUALIFICATIONS OF THE FIRM				
The firm's experience in similar projects utilizing the Construction Management process and other successful related CM projects will be scored. Recommendations from previous Owners and Architects will be evaluated. Litigation history will be considered.	25	24	22	20
PROPOSED PROJECT STAFF AND FUNCTIONS				
The Project Management team's experience with similar projects, with public projects, and overall Construction Management experience. Recommendations from previous Owners and Architects will be evaluated.	30	29	29	28
COMPREHENSIVE PROJECT MANAGEMENT SERVICES				
The ability and history of the firm and its staff to deliver projects using effective management tools and techniques will be evaluated. The firm's scheduling system and cost control system will be evaluated. Including methods for assuring subcontractors adherence to schedule. A comparison of the firm's project profile should indicate their ability to hold to original schedules and budgets. The firm's approach to establishing a Guaranteed Maximum Price along with methods of Cost Control and Reporting Systems used will be scored.	10	8	9	8
KNOWLEDGE OF LOCAL CONDITIONS				
The firm's knowledge of the local construction environment as an indication of their ability to deliver a quality product in an effective, economical, and timely manner with local subcontractors will be scored. The firm's location of its office which will manage the work will be considered.	15	14	13	12
SMALL BUSINESS UTILIZATION PLAN				
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored.	10	10	10	10
VOLUME OF PREVIOUS WORK				
The volume of the firm's previous work within the past 5 years with the County will be considered with the objective to share the available work with many firms.	10	10	10	10
TOTAL	100	95 ✓	93 ✓	88 ✓

RANKED ORDER (ORDINAL)

1 2 3

Committee Member:


FERNANDO DELGADO

Date: 6.15.18

CM @ RISK SERVICES FOR CANYON DISTRICT PARK
FINAL SELECTION SCORE TALLY SHEET

June 15, 2018

	Max. Pts.	The College Companies	Kaufman Lynn Construction	Wharton-Smith
QUALIFICATIONS OF THE FIRM				
The firm's experience in similar projects utilizing the Construction Management process and other successful related CM projects will be scored. Recommendations from previous Owners and Architects will be evaluated. Litigation history will be considered.	25	25	22	21
PROPOSED PROJECT STAFF AND FUNCTIONS				
The Project Management team's experience with similar projects, with public projects, and overall Construction Management experience. Recommendations from previous Owners and Architects will be evaluated.	30	30	22	28
COMPREHENSIVE PROJECT MANAGEMENT SERVICES				
The ability and history of the firm and its staff to deliver projects using effective management tools and techniques will be evaluated. The firm's scheduling system and cost control system will be evaluated including methods for ensuring subcontractors adherence to schedule. A comparison of the firm's project profile should indicate their ability to hold to original schedules and budgets. The firm's approach to establishing a Guaranteed Maximum Price along with methods of Cost Control and Reporting Systems used will be scored.	10	10	9	7
KNOWLEDGE OF LOCAL CONDITIONS				
The firm's knowledge of the local construction environment as an indication of their ability to deliver a quality product in an effective, economical, and timely manner with local subcontractors will be scored. The firm's location of its office which will manage the work will be considered.	15	10	8	8
SMALL BUSINESS UTILIZATION PLAN				
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored.	10	10	10	10
VOLUME OF PREVIOUS WORK				
The volume of the firm's previous work within the past 6 years with the County will be considered with the objective to share the available work with many firms.	10	10	10	10
TOTAL	100	100	81	80

RANKED ORDER (ORDINAL)

1 2 3

Committee Member:

Rodney Anstutz

Date:

6/15/18

CM @ RISK SERVICES FOR CANYON DISTRICT PARK
FINAL SELECTION SCORE TALLY SHEET

June 15, 2018

	Max. Pts.	The Collage Companies	Kaufman Lynn Construction	Wharton-Smith
QUALIFICATIONS OF THE FIRM				
The firm's experience in similar projects utilizing the Construction Management process and other successful related CM projects will be scored. Recommendations from previous Owners and Architects will be evaluated. Litigation history will be considered.	25	25	25	25
PROPOSED PROJECT STAFF AND FUNCTIONS				
The Project Management team's experience with similar projects, with public projects, and overall Construction Management experience. Recommendations from previous Owners and Architects will be evaluated.	30	25	30	20
COMPREHENSIVE PROJECT MANAGEMENT SERVICES				
The ability and history of the firm and its staff to deliver projects using effective management tools and techniques will be evaluated. The firm's scheduling system and cost control system will be evaluated including methods for assuring subcontractors adherence to schedule. A comparison of the firm's project profile should indicate their ability to hold to original schedules and budgets. The firm's approach to establishing a Guaranteed Maximum Price along with methods of Cost Control and Reporting Systems used will be scored.	10	10	10	10
KNOWLEDGE OF LOCAL CONDITIONS				
The firm's knowledge of the local construction environment as an indication of their ability to deliver a quality product in an effective, economical, and timely manner with local subcontractors will be scored. The firm's location of its office which will manage the work will be considered.	10	10	15	10
SMALL BUSINESS UTILIZATION PLAN				
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored.	10	10	10	10
VOLUME OF PREVIOUS WORK				
The volume of the firm's previous work within the past 5 years with the County will be considered with the objective to share the available work with many firms.	10	10	10	10
TOTAL	100	90	100	85

RANKED ORDER (ORDINAL)

2 1 3

Signature

Date: 6/15/18

CM @ RISK SERVICES FOR CANYON DISTRICT PARK
FINAL SELECTION SCORE TALLY SHEET

June 15, 2018

	Max. Pts.	The College Companies	Kaufman Lynn Construction	Wharton-Smith
QUALIFICATIONS OF THE FIRM				
The firm's experience in similar projects utilizing the Construction Management process and other successful related CM projects will be scored. Recommendations from previous Owners and Architects will be evaluated. Litigation history will be considered.	40	25	21	22
PROPOSED PROJECT STAFF AND FUNCTIONS				
The Project Management team's experience with similar projects, with public projects, and overall Construction Management experience. Recommendations from previous Owners and Architects will be evaluated.	30	25	22	25
COMPREHENSIVE PROJECT MANAGEMENT SERVICES				
The ability and history of the firm and its staff to deliver projects using effective management tools and techniques will be evaluated. The firm's scheduling system and cost control system will be evaluated including methods for assuring subcontractors adherence to schedule. A comparison of the firm's project profile should indicate their ability to hold to original schedule and budgets. The firm's approach to establishing a Guaranteed Maximum Price along with methods of Cost Control and Reporting Systems used will be scored.	30	10	10	10
KNOWLEDGE OF LOCAL CONDITIONS				
The firm's knowledge of the local construction environment as an indication of their ability to deliver a quality product in an effective, economical, and timely manner with local subcontractors will be scored. The firm's location of its office which will manage the work will be considered.	15	13	11	10
SMALL BUSINESS UTILIZATION PLAN				
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored.	10	10	10	10
VOLUME OF PREVIOUS WORK				
The volume of the firm's previous work within the past 6 years with the County will be considered with the objective to share the available work with many firms.	10	10	10	10
TOTAL	100	96	84	87

RANKED ORDER (ORDINAL)

1 3 2

Consultant Member:

B. Hamilton 7/11/18

Date:

6/15/18

Audrey Wolf

From: Audrey Wolf
Sent: Tuesday, September 25, 2018 8:40 AM
To: Melissa McKinlay; Mack Bernard; Hal Valeche; Paulette Burdick P.; Dave Kerner M.; Steven Abrams; MaryLou Berger
Cc: Verdenia Baker; Faye Johnson W.; Eric Call; Fernando DelDago; Brenda Znachko; Denise Coffman; Tonya Johnson D.
Subject: CM @ Risk Services for Canyons District Park, 9/18/18 3H-1 (Deleted)

Commissioners –

As you are aware, Item 3H-1 was deleted from the September 18th BCC agenda for further staff review. The result of that review was that the Final Selection Committee for the Construction Manager At-Risk Services for Canyon District Park (Project #17204), which was held on June 15, 2018 did not evaluate the “Small Business Utilization Plan” criteria consistent with the requirements of the Requests for Proposal (RFP). As a result the proposals of the three (3) finalists (Collage, Kaufman-Lynn and Wharton-Smith) are being returned to the Selection Committee for re-evaluation of this specific criteria only. The new scores for this criteria will be inserted in the original score sheets and re-ranked. Selection Committee meetings are public meetings and firms have been provided direct notice as to the time, date and location of the meeting so that the firm or its representative or any member of the public may attend. Pursuant to the RFP, the results will be posted for five (5) business days, during which time any firm may file a written protest through the Purchasing Department.

The firms have been reminded that the Cone of Silence extends from the deadline for submission of proposals and terminates at the time that the BCC awards or approves a contract, rejects all proposals or otherwise takes action which ends the solicitation process. Please call me directly if you have any questions.

Audrey

CM @ RISK SERVICES FOR CANYON DISTRICT PARK
Project # 17204
FINAL SELECTION ORDINAL SCORE TALLY SHEET

	The Collage Companies	Kaufman Lynn Construction	Wharton-Smith
Steve Carrier	2	1	3
Fernando Del Dago	2	1	3
Rosalyn Acosta	1	2	3
Faye Johnson	2	1	3
Angie Whitaker	2	3	1
Irwin Jacobowitz	3	1	2
Bob Hamilton	1	3	2
TOTALS	13	12	17

RANKED ORDER

2 1 3

Recorded by


Date

Canyon District Park

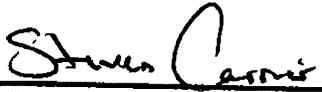
CM @ Risk Contract

Final Selection Committee Meeting October 9, 2018

Scoring Criteria	Maximum Points	Collage Companies Construction	Kaufman Lynn	Wharton-Smith Construction
SBE Program -Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.	10	7	10	8
Rank				


Signature

10/9/18
Date


Print Name

Canyon District Park

CM @ Risk Contract

Final Selection Committee Meeting October 9, 2018

Scoring Criteria	Maximum Points	Collage Companies Construction	Kaufman Lynn	Wharton-Smith Construction
SBE Program -Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.	10	7	10	8
Rank				



Signature

10/09/18
Date

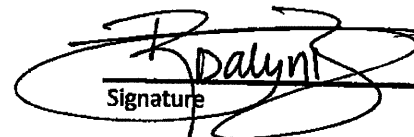
FERNANDO DEL DAGO
Print Name

Canyon District Park

CM @ Risk Contract

Final Selection Committee Meeting October 9, 2018

Scoring Criteria	Maximum Points	Collage Companies Construction	Kaufman Lynn	Wharton-Smith Construction
SBE Program -Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.	10	7	10	8
Rank				


Signature

10/9/18
Date


Rosalyn Arista
Print Name

Canyon District Park

CM @ Risk Contract

Final Selection Committee Meeting October 9, 2018

Scoring Criteria	Maximum Points	Collage Companies Construction	Kaufman Lynn	Wharton-Smith Construction
SBE Program -Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.	10	7	10	8
Rank				


 Signature

10/9/18
 Date

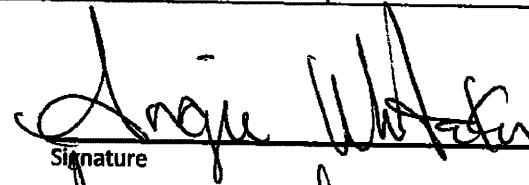
Faye M. Johnson
 Print Name

Canyon District Park

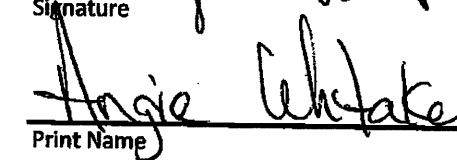
CM @ Risk Contract

Final Selection Committee Meeting October 9, 2018

Scoring Criteria	Maximum Points	Collage Companies Construction	Kaufman Lynn	Wharton-Smith Construction
SBE Program -Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.	10	7	10	8
Rank		3	1	2


 Signature

10/9/2018
 Date

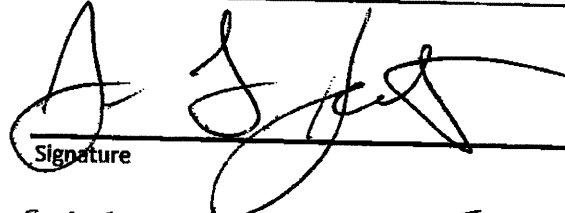

 Print Name

Canyon District Park

CM @ Risk Contract

Final Selection Committee Meeting October 9, 2018

Scoring Criteria	Maximum Points	Collage Companies Construction	Kaufman Lynn	Wharton-Smith Construction
SBE Program -Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.	10	7	10	8
Rank		3	1	2


 Signature _____ Date 10/9/18
 Thomas L. Isaac
 Print Name _____

Canyon District Park

CM @ Risk Contract

Final Selection Committee Meeting October 9, 2018

Scoring Criteria	Maximum Points	Collage Companies Construction	Kaufman Lynn	Wharton-Smith Construction
SBE Program -Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.	10	7	10	8
Rank				

Signature

Date

Print Name

PURCHASING DEPARTMENT
PALM BEACH COUNTY, FLORIDA

IN RE: CANYON DISTRICT PARK
PROJECT

BID PROTEST

COLLAGE DESIGN &
CONSTRUCTION GROUP, INC.,

Protestor

To: Kathleen Scarlett, Director of Purchasing
PALM BEACH COUNTY, FLORIDA
50 South Military Trail, Suite 110
West Palm Beach, FL 33415-3199
VIA EMAIL & FEDERAL EXPRESS DELIVERY

Collage Design & Construction, Inc. d/b/a The Collage Companies (Collage) respectfully protests the reranking and pending award of the Canyon District Park project contract. The contract previously negotiated and signed by Collage should be executed by the Palm Beach County (PBC) Mayor or her designee. Otherwise, the Request for Proposal (RFP) must be cancelled.

I.

**KAUFMAN-LYNN'S SBE PARTNER DOES NOT APPEAR TO MEET THE REQUIREMENTS OF
THE SBE ORDINANCE AND RFP MAKING THE RERANKING INVALID, ARBITRARY
AND THE AWARD ILLEGAL**

Collage promised to meet or exceed the 25% requirement with S/W/MBE subcontractors and furnished a detailed presentation of "the firm's SBE or minority participation history and the presentation of a viable plan to achieve

the County's SBE goal on this Project," meeting the exact criteria imposed on the proposers for the June 15, 2018, Selection Committee meeting.

Kaufman Lynn, the highest ranked proposer after the October 9 rescoring, does not commit to any SBE percentage for subcontractors or vendors. Kaufman Lynn relied on its Memorandum of Understanding (MOU) with its SBE Partner, MCO Construction & Services, Inc. (MCO).¹ However, MCO's qualification for S/W/MBE status is not in accordance with the PBC SBE Ordinance.

As set forth in more detail below, the SBE reranking was conducted by one Selection Committee member, terms of the RFP were rewritten, ignored, subjectively interpreted, and unpublished restrictions were added. At its core, however, the entire basis for unseating Collage –to add points for Kaufman Lynn's use of a MOU and thereby benefit Palm Beach County's S/W/MBEs, was arbitrary, capricious, and contrary to law.

The RFP states "SBE Ordinance. The successful respondent will be required to comply with Palm Beach County Code 2-80.21-2-80.35, which sets forth the County requirements for the SBE program."

SBE Ordinance:

Domiciled in the county means the business holds a valid Palm Beach County business tax receipt and has a permanent place of business in the county. [T]o establish a permanent place of business in the county, the business must:

- (1) Demonstrate that business has been conducted at the County location...
- (2) The county business tax receipt bears the county address, and the county location is in an area zoned for the conduct of such business;

¹ Kaufman Lynn used a nearly identical MOU with MCO in bidding for the Aquatic Center, the award of which to Kaufman Lynn was announced August 1, 2018.

- (3) The county location must be verifiable through documentation such as property tax bill or lease agreement; *and*
 (4) The county location should be identifiable through signage, telephone listing, and/or website or social media ...

Home business means a small business that operates from the business owner's home. Home businesses usually have a very small number of employees that are often members of the business owner's family. A home business is not affiliated with, nor a subsidiary of another company located outside of the home. Home businesses meeting this definition are eligible for certification as a small business, provided they meet all other certification criteria. Home offices of an employee working for a company located in another county do not establish domicile in Palm Beach County.

M/WBE means a minority-owned business enterprise or a women-owned business enterprise or a combination minority and women-owned business enterprise. A M/WBE is any small business concern which is organized to engage in commercial transactions, which is domiciled in Palm Beach County...

Small business means a business domiciled in Palm Beach County and certified by the county which is an independently owned and operated, for profit, business concern organized to engage in commercial transactions...

Eligibility standards. An eligible small business is an independent, for-profit business concern that performs a commercially useful business function, whose gross income is within the standards as defined in section 2-80.21... A small business must be domiciled in Palm Beach County in order to be eligible to participate.

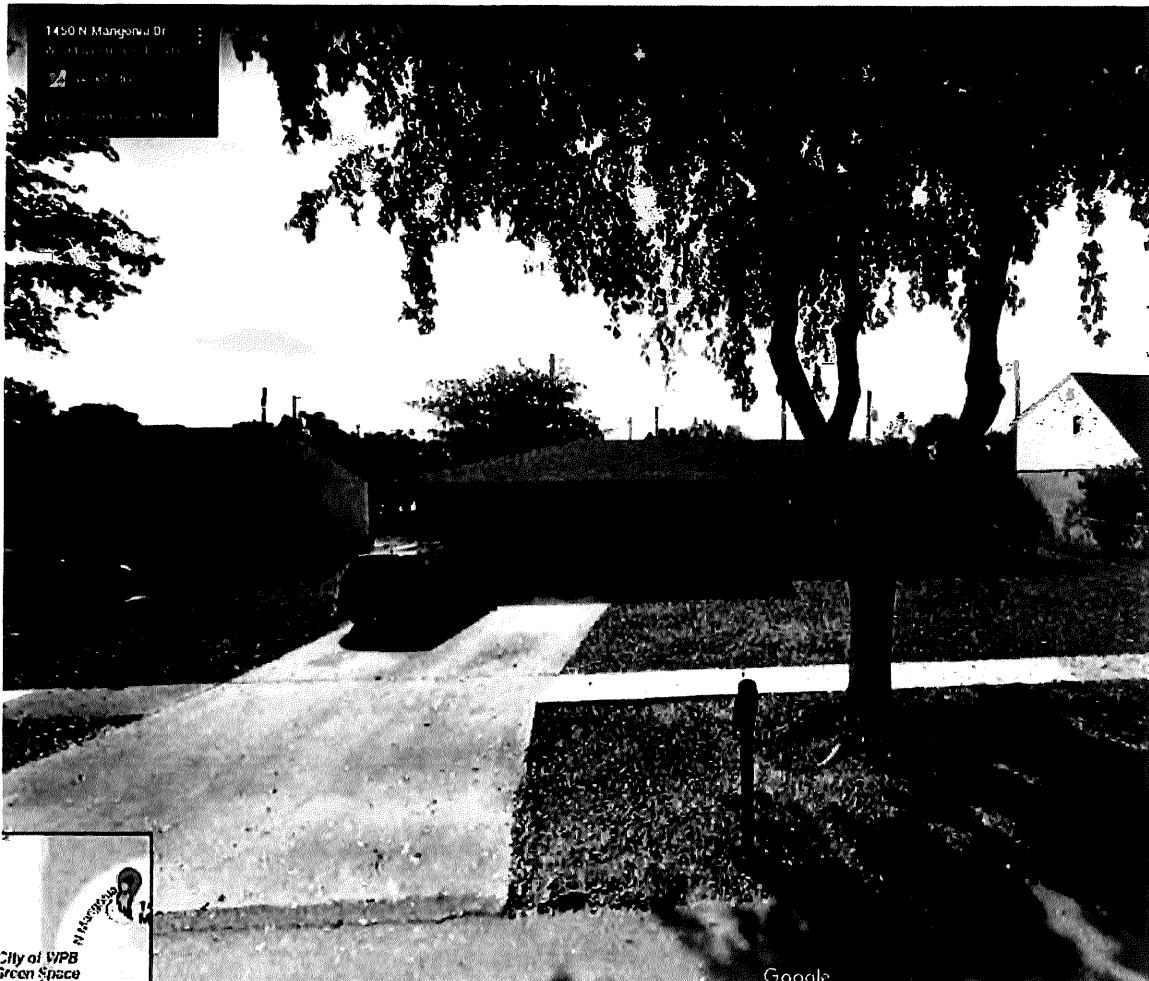
Eligibility standards. An eligible MBE or WBE is a small for profit business concern domiciled in the county... Further, the business must meet all other criteria of a small business as provided above.²

² The EBO Ordinance provides similarly, e.g.:

Domiciled in the county means the business holds a valid Palm Beach County business tax receipt and has a *Significant Business Presence* in the county. ... (2) The county business tax receipt bears the county address, and the county location is in an area zoned for the conduct of such business; (3) The county location must be verifiable through documentation such as property tax bill or lease agreement; and (4) The county location should be identifiable through signage, telephone listing, and/or website or social media...

...

MCO's SBE registration in PBC is 1450 N. Mangonia Drive, to wit:



The home is owned by Mr. Daniel McNeil; it has no signs, is zoned low density residential, and is homestead property. MCO's website office address is 6600 NW 27th Avenue in Miami-Dade. The address is a commercial building. The address is consistent with MCO's SBE registration with Miami-Dade County, its corporate filings at www.sunbiz.org and its FDOT W/MBE certification.

II.

**THERE IS NO PROCESS IN THE PBC CODE, PURCHASING MANUAL, OR THE RFP
AUTHORIZING PBC TO RETURN THE PROPOSAL TO THE SELECTION COMMITTEE AND
CANCEL COLLAGE'S EXECUTORY CONTRACT BASED ON AN OBJECTION PRIVATELY
COMMUNICATED BY A COMMISSIONER 2-MONTHS AFTER THE PROTEST PERIOD**

The RFP provided for Phase 1, short-listing and presentations by three proposers to the Selection Committee in Phase 2. There is no provision in the RFP, the Purchasing Manual or the County Code that permits PBC to cancel the executory contract the parties had negotiated and reconvene the Selection Committee months after the protest deadline of June 25, 2018.³ In lieu of raising any issue at the Board of County Commissioner's meeting on September 18, 2018, upon a privately stated concern by one Commissioner, Collage's contract was stricken from the Consent Agenda. PBC's acts and omissions were arbitrary and showed favoritism to the Kaufman Lynn team because Collage's proposal had been the highest ranked and met all requirements of the RFP, including the 25% SBE participation.

Here is a timeline of events:

- a. 02/02/2018 RFP
- b. 04/28/18: Commissioners advised of the proposers.
- c. 05/17/18: Commissioners advised of the short-list.
- d. 06/15/2018: Phase 2 presentations held, and Collage is ranked first.
- e. 06/18/2018: Staff sends email confirming Collage is successful proposer and advising Commissioners that

³ The RFP says, "Failure to file protest as outlined in the Palm Beach County Purchasing Code shall constitute a waiver of proceedings under the referenced County Code."

the contract will be negotiated unless someone objects within 5-business days.

- f. 06/18/2018: PBC letter stating Collage ranked No. 1.
- g. 06/21/2018: County sends Collage design documents (100% DDs), Collage begins design evaluation.
- h. 06/23/2018: County issues Collage invitation to bi-weekly project meetings to prepare to establish Guaranteed Maximum Price for construction.
- i. **06/25/2018: DEADLINE TO PROTEST**
- j. 07/10/2018: PBC issues draft contract to Collage.
- k. 07/12/2018: Collage attends Project Meeting #14.
- l. 07/12/2018: County confirms 100% DD Phase of project is concluded, A/E authorized to go to 50% Construction Drawings.
- m. 07/12/2018: PBC confirms Collage is to be part of FPL coordination and requests its participation at meetings.
- n. 07/16/2018: Collage notifies PBC of Collage representatives authorized as signatories.
- o. 07/17/2018: Collage attends Project Meeting #15.
- p. 07/31/2018: Email from A/E to PBC confirming Collage is P&R Rep. to witness, photo, direct test pit activities.
- q. 08/02/2018: Collage sends County SBE schedules 1 and 2 as requested.
- r. 08/08/2018: County requests Collage provide cost estimate for infrastructure to support fiber optic from Acme Dairy Road to park entrance.
- s. 08/09/2018: Collage provides the County with copies of aerial photos of the site.
- t. 08/10/2018: Collage coordinates underground locates for test pits.
- u. 08/10/2018: County advises that the contract has been submitted for Board of Commissioners review, and it added two clauses (Related to Scrutinized Companies and Non-Discrimination). PBC provides revised contract. Collage signs and returns it as requested.
- v. 08/14/2018: Collage attends Project Meeting #16.
- w. 08/15/2018: PBC coordinates FPL requirements with Collage.

- x. 08/15/2018: County approves verbiage of Collage's S/W/MBE subcontractor solicitation advertisement.
- y. 08/16/2018: OSBA advises that of email blast to 251 SBE firms regarding Canyon District Park for Collage.
- z. 08/21/2018: County sends final contract ("Task Order #1") to Collage for signature, advising that the contract is to go to the Board September 18.⁴ Collage emails signed contract to PBC. PBC Department Director signs the Executive Brief sent to the Commissioners with the Contract for the Consent Agenda.
- aa. 08/22/2018: Collage hand delivers hard copies of signed contracts to PBC and attends Project Meeting #17.
- bb. 08/26/2018: Collage SBE solicitation advertisement in Palm Beach Post.
- cc. 08/29/2018: PBC acknowledges Collage work on site evaluation and test pits.
- dd. 08/31/2018: PBC issues 50% Construction Documents review comments to A/E and includes comments from Collage.
- ee. 09/02/2018: Collage SBE solicitation advertisement in Palm Beach Post (2nd run).
- ff. 09/07/2018: Collage attends Project Meeting #18.
- gg. 09/09/2018: Collage's SBE solicitation advertisement in Palm Beach Post (3rd run).
- hh. 09/14/2018: Collage attends site meeting with FPL and project team.
- ii. 09/18/2018: PBC advises the September 19th project meeting is cancelled.
- jj. 09/18/2018: Letter from PBC advising proposals are being re-evaluated on SBE line item only because one proposer did not submit MOU.**

⁴ It must be noted the Task Order was for work by Collage on preconstruction. Since this project is a "GMP" or "Guaranteed Maximum Price" contract, preconstruction work includes establishing the GMP by signing up subcontractors and vendors to establish the cost of the work or "GMP," within which price Collage would meet or exceed the 25% SBE requirement. Therefore, the Task Order for preconstruction did not include SBE participation; however, this was irrelevant to meeting the goal as described in Collage's proposal and its SBE Plan.

- kk. 09/18/2018: Discussion with PBC reveals Commissioner raised SBE Partner issue and PBC decided to strike contract from Consent Agenda.
- ll. 09/18/2018: Public Records Request
- mm. 09/19/2018: Conference call with A/E to review test pits.
- nn. **09/20/18: PBC issues revised letter stating two proposers did not submit MOUs.**
- oo. 10/09/2018: PBC Selection Committee conducts re-scoring meeting; no presentations are allowed.⁵
- pp. 10/10/2018: PBC letter that Kaufman Lynn is highest ranked by one-point over Collage.

PBC's ordinance applicable to RFPs provides the "Board [of Commissioners] may reject any proposal prior to issuance of an award." Sec. 2-54(b)(7), Palm Beach County Code. Collage's proposal was not rejected, and the award was not protested.

There was no legitimate reason to remove the contract from the Consent Agenda. The Commissioner that communicated his concern could have raised it from the dais, at a public meeting. The point could have been discussed in the open forum and the Commissioners called to vote on the contract, in which case the contract would have been approved as recommended by staff or disapproved by majority vote of PBC's elected officials. Collage would have had an opportunity to be heard. To the extent a decision was in effect made by one Commissioner's

⁵ PBC had said 5-minute presentations would be permitted. Proposers were permitted to speak during the public comment section, but the Selection Committee declined to hear any additional presentations and Collage did not have the opportunity to discuss the shortcomings in the PBC process or competing proposal.

private communication, without compliance with the Sunshine Law, and outside of any process contemplated by applicable law, it is **VOID**.

Regrettably, Collage has been left to guess or is uninformed about events in public records that PBC has failed or refused to release. Collage has been prejudiced by the acts and omissions of PBC. Accordingly, Collage incorporates its Public Records Act suit by reference, and reserves all rights and claims.

III.

PBC's PROCESS WAS UNPREDICTABLE AND UNTRUSTWORTHY

- **USE OF THE WRONG SCORING CRITERIA IN RESCORING**

The worksheets from the October 9, 2018 reconvening of the Selection Committee instruct the members to apply the scoring criteria for the SBE Program from the RFP for Phase 1, for shortlisting of the proposers, not the applicable criteria, Phase 2, final selection.

PHASE I CRITERIA (ERRONEOUSLY APPLIED VIA 10/9/2018 SCORING INSTRUCTIONS):

CATEGORY 6 SBE Program - 10 Points Possible

Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such a partnering arrangement.

PHASE II CRITERIA (APPLIED BY FIRST SELECTION COMMITTEE 06/15/2018 AND SHOULD HAVE BEEN APPLIED PER THE RFP):

CATEGORY 5-Small Business Utilization Plan-10 Points Possible
The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored; up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a Partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such partnering arrangement.

PBC offered no reason for returning to the Phase 1 SBE scoring criteria which looked only at the bidder's proposal for its second round of Phase 2 scoring on October 9. PBC may have returned to Phase 1 considerations for Phase 2 reconsideration because PBC failed to preserve an intelligible record of the presentations that were ranked by the Selection Committee on June 15 for the original Phase 2 portion of the RFP. During the Phase 2 presentation, Collage supplied and discussed in detail its SBE Plan. Afterwards, Collage was the highest ranked bidder. PBC returned to Phase 1 on October 9, giving an unfair advantage and showing favoritism to the Kaufman Lynn team by eliminating from consideration Collage's SBE Plan and presentation of it in accordance with the Phase 2 SBE criteria in the RFP.

- EQUAL STANDING AT PHASE 2

The Scoring Criteria for Shortlisted Proposers – Phase 2 (Final Selection) as outlined in Section F of the RFP says that “all finalists will be considered in equal standing at the beginning of Phase 2.” This necessarily means that the scoring of the shortlisted proposers in Phase 1 is not relevant to the selection process. Still, OSBA, the sole scorer, revisited the Phase 1 submittals from the

proposers in their re-evaluation of the scoring for Phase 2 on October 9, using the original proposals considered in Phase 1 to determine how points would be awarded in Phase 2, an evaluation method that was arbitrary and capricious and without support in the RFP.

- ONE MEMBER RESCORING

PBC ignored the sequence of scoring, ranking and tabulation as described in the RFP. Section D(3) of the RFP explains the process for scoring, stating that each Category will be scored and when the scores awarded for all Categories are totaled, the scores will be tabulated and added to achieve the Total Points awarded to each firm. PBC deviated from this process by totaling the points on June 15, 2018 and then re-scoring only one category on October 9th.

The points awarded to the only category that was re-scored were not determined by each member of the Selection Committee, but by a single individual. The OSBA representative was the only scorer of the proposers on October 9. By using only one member to score the proposers, PBC again ignored the RFP, which states, “[t]he ranking of each firm will be tabulated from each Committee Member and combined with other Committee Members to determine the total score for the firm” (emphasis added).

- BASIS FOR SCORING

PBC ignored the RFP criteria providing that CM-proposers are to demonstrate their approach to obtaining small business participation during the presentation.

Kaufman Lynn relied exclusively on the MOU, providing no detail of a plan or percentage commitment to subcontract to S/W/MBEs; representing it would meet the 25% required with MCO. The RFP provided Kaufman Lynn was to describe “[t]he anticipated dollar value or percentage of the applicable portion of the CM firm’s contract, its basis and the anticipated scope of services that will be performed by the Partnering SBE.”

Kaufman Lynn’s MOU represents 25% of the budget of \$13 million would go to MCO, or \$3,250,000. How MCO would be paid this sum for “commercially useful” participation is not explained. The only clear undertaking described in the MOU is a “visit [to] the site” during “each month” of the project by MCO’s president. There is no basis to accept that MCO would receive the substantial sum of \$3,250,000 for three part-time (15%) participants and two full-time employees, i.e.:⁶

MCO CONSTRUCTION
Ann McNeill, Project Executive (15%)
Rodney Harrell, PE (100% Construction)
Carl Baptista, Field Engineer (100% Construction)
Lonnie McNeill, Compliance (15% Construction)
David Adler, Estimator (15% Pre-construction)

It was certainly worthy of debate whether placing a couple of full-time employees onsite like a staffing company and visiting once per month from the company office in Miami Dade serves a greater S/W/MBE good than hiring SBE

⁶ By way of example, if each of two full time employees was paid \$1,000 per week for 2 years to work continuously on the project, the total would only amount to \$208,000.00. Even assuming Mrs. McNeill was paid \$100,000 per year for 2 years to spend 15% of her time on it, the total received by MCO would be under half million dollars.

subcontractors that own and operate a business in Palm Beach County; however, there was no such discussion. The sole Selection Committee member voting appeared to rubber-stamp Kaufman Lynn's MOU. There is no evidence in the record of the member's consideration of the actual criteria in the RFP, Phase 2, the cogency of the MOU, the propriety of the proposed partner, or Kaufman Lynn's "gross income."⁷

The scoring Selection Committee member was unwilling to consider any of the actual criteria applicable to Phase 2. When one of the other Selection Committee members suggested Collage provided a better SBE Plan during the Phase 2 presentation on June 15 and was therefore deserving of more points than other firms, the OSBA Selection Committee member announced that information handed out during the presentation would not be considered. The RFP did not preclude Collage from submitting written materials in support of its oral presentation to "demonstrate its approach in obtaining participation of Palm Beach County Certified Small Business Enterprises" as required by the RFP. The written plan was discussed, and hard copies were distributed during Collage's Phase 2 presentation on June 15. On October 9, PBC unilaterally imposed another arbitrary limitation that was not in the RFP or brought up during the original presentation in June, refusing to consider Collage's SBE Plan.⁸

⁷ During the public comment section of the October 9 meeting Kaufman Lynn stated it earned gross income (profit) of \$9 million, apparently interpreting the RFP restriction in the same manner as Collage.

⁸ Even PBC's cone of silence exempts written communications and presentations from its orbit.

The arbitrariness of the PBC process and favoritism to the Kaufman Lynn team is clearly demonstrated in the Selection Committee's ranking under the SBE heading for another RFP at around the same time, the Aquatic Center. Using a nearly identical MOU with MCO, no commitment concerning the use of subcontractors, and identical criteria to that used at the June Selection Committee meeting on Canyon Park, Kaufman Lynn received 8-points in the SBE category for its proposal on the Aquatic Center, 2-points less than it received on June 15 and October 9 for Canyon District Park. If Kaufman Lynn's scoring was consistent with the Aquatic Center on Canyon District Park, Collage would have again been ranked highest by 1-point.⁹

- VOLUME OF WORK

The re-scoring ignores PBC's objective to share available work with many firms. Between the June and the October 2018 ranking, Kaufman Lynn and its SBE Partner—MCO, were awarded a project for more than \$13,000,000.¹⁰

The RFP includes categories for scoring volume of previous work in the Phase 1 (Category 4) and Phase 2 (Category 6) selection process. The points assigned in the scoring were based on the volume of a firm's prior PBC work. The volume of work for Kaufman Lynn changed; however, PBC's knowledge of this fact did

⁹ Taking PBC's rating based on volume of recent PBC work seriously, Collage did not submit an Aquatic Center proposal, having just been awarded Canyon District Park.

¹⁰ Indeed, MCO was awarded approximately \$7,000,000.00 in construction contracts on the two projects despite dubious compliance with the S/W/MBE ordinance requirements and RFP and based on unsupported amounts to be paid to it. The interests of Palm Beach County S/W/MBE firms are better served by Collage's plan to utilize S/W/MBE subcontractors for at least 25% of the Canyon District Park project work.

not lead it to revisit the points assigned to that category, producing an outcome that contravenes the objective stated in the RFP and again evidencing favoritism towards Kaufman Lynn.

- **ARBITRARY FORMAT AND NO DUE PROCESS**

PBC did not follow the published agenda for the October 9th Selection Committee meeting. On September 27, the PBC agenda included (1) a potential opportunity for CM's to take 5 minutes to re-present their SBE Plan and (2) Selection Committee re-scoring of the Small Business Utilization Plan (Category 6). However, during October 9th meeting, the committee varied from the agenda as follows: First, the Selection Committee said there was no new information that could be provided during a "re-presentation." Second, the committee did not re-score the entire 10 points of Category 6, SBE. Instead, the Selection Committee (OSBA member only) rescored just the 3-point CM/SBE Partner portion.

MEMORANDUM OF LAW

*a. The Rescoring and Award is Arbitrary, Capricious
and Based on Favoritism*

"A contract that contravenes an established interest of society can be found to be void as against public policy." Chandris, S.A. v. Yanakakis, 668 So. 2d 180, 185 (Fla.1995). Public policy concerns are "heightened" when a public entity is involved in the contract. See City of Hialeah Gardens v. John L. Adams & Co., 599 So. 2d 1322, 1324 (Fla. 3d DCA 1992), *rev. denied*, 613 So. 2d 5 (Fla.1992).

In Florida, competitive bid and qualifications-based competitive award statutes are designed to protect the public. See Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Cmm'rs, 955 So. 2d 647, 652 (Fla. 1st DCA 2007); City of Sweetwater v. Solo Constr. Corp., 823 So. 2d 798, 801 (Fla. 3d DCA 2002), *rev. denied*, 845 So. 2d 888 (Fla. 2003) (in the context of RFPs). The aim of Florida's public policy in the competitive award context is "to eliminate improper influence, or the temptation to exert improper influence." City of Hialeah Gardens, 599 So. 2d at 1325; Cnty. Mar. Park Assocs., Inc. v. Mar. Park Dev. Partners, LLC, 3:11CV60/MCR/CJK, 2014 WL 415955, at *12 (N.D. Fla. Feb. 4, 2014), *aff'd*, 606 Fed. Appx. 482 (11th Cir. 2015).

Because the law requires counties to competitively award contracts based on a fair review of the proposals, PBC "cannot be allowed to write out this competitive requirement by affording itself overly broad discretion to capriciously and arbitrarily award contracts without established criteria." Emerald Corr. Mgmt., 955 So. 2d at 653.

In Emerald Corr. Mgmt., the Court held that the prospective contractor's allegations of impermissible favoritism were sufficient to challenge Bay County's award of a contract to another contractor following a Request for Proposals (RFP) process. In rejecting the County's decision, the Court found the County was "statutorily required" to competitively award contracts based on a fair review of proposals and could not "write out" provisions in the RFP or rely on terms that were outside of it. Id. "A public body is not entitled to omit or alter **material**

provisions required by the RFP because in doing so the public body fails to ‘inspire public confidence in the fairness of the [RFP] process.’” Id. (quoting State, Dep't of Lottery v. Gtech Corp., 816 So. 2d 648 (Fla. 1st DCA 2001)).

b. The Rescoring and Award is Contrary to Law

Section 255.20, Florida Statutes (2014), provides a “county, municipality, special district, or other political subdivision may establish, by municipal or county ordinance or special district resolution, procedures for conducting the bidding process.” PBC has adopted ordinances that include SBE participation requirements that were incorporated in the Canyon District Park RFP. PBC’s ordinance states as follows:

Proposal award. Upon recommendation by the selection committee, award shall be made to the responsive, responsible proposer whose proposal is in the best interest of the County, and shall be effective upon issuance of a contract by the Director of Purchasing. Awards in which the County is contracting to expend, reimburse, or receive revenues in an amount equal to or greater than two hundred thousand dollars (\$200,000.00) per annum shall be effective upon Board approval. The Board may reject any proposal prior to issuance of an award. Recommended awards equal to or greater than the Mandatory Bid or Proposal Amount shall be posted at a designated location(s) for a period of five (5) business days.

Sec. 2-54(b)(7), Palm Beach County Code. The RFP incorporates the procedures and PBC’s SBE ordinance. PBC was not free to depart from the criteria or the process, “arbitrarily or capriciously discriminate between bidders, or make the bid based upon personal preference.” Solo Constr. Corp., 823 So. 2d at 801.

PBC's attempt to award the Canyon District Park contract to Kaufman Lynn is inconsistent with the requirements of the RFP, PBC Code for proposals and SBE, Florida Statute Section 255.20, and is contrary to law. Id. at 802-03.

A public entity must follow its own laws for a contract with the entity to be valid. See City of Hollywood v. Witt, 789 So. 2d 1130, 1131-32 (Fla. 4th DCA 2001) ("In order for a contract with a city to be valid, it must comply with the city charter or ordinances."); Palm Beach Cnty. Health Care Dist. v. Everglades Mem'l Hosp., Inc., 658 So. 2d 577, 581 (Fla. 4th DCA 1995) (holding that "[a]greements entered into by public bodies which fail to comply with statutory requirements are void"); Martin Cnty. v. Yusem, 690 So. 2d 1288, 1295 (Fla.1997) (noting that, in the context of the deferential "fairly debatable" standard applicable to a local government's legislative action, the action "still must be in accord with ... local ordinances").

(c) The Rescoring is a Product of Illegal Decision-Making

Public records have been wrongly withheld from Collage as more fully set forth in the Public Records suit, incorporated herein by reference. In addition to the facts and law recited there, section 286.011, Florida Statutes (2012) provides that the decision-making of Palm Beach County's Board of Commissioners must be public. This obligation is of constitutional significance. See Art. I, § 24, Fla. Const.

All meetings of any board or commission of any state agency or authority or of any agency or authority of any

county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, including meetings with or attended by any person elected to such board or commission, but who has not yet taken office, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.

§ 286.011, Fla. Stat.

In this instance, the striking of the Canyon District Park contract from the Consent Agenda was a belated rejection of Collage's proposal and decision that ONLY a proposer that attempted to comply with the ill-explained CM/SBE Partner requirement could be successful. The apparent objection of one Commissioner ceded all authority for a decision to the OSBA member of the Selection Committee, and the scoring was without regard for any of the applicable requirements in the ordinance or RFP.

It is a matter of settled law that the Sunshine Law "should be construed so as to frustrate all evasive devices." Wood v. Marston, 442 So. 2d 934 (Fla. 1983). Any matter on which "foreseeable action" may be taken in the future is subject to the Sunshine Law and it was applicable to PBC's rejection of Collage's executory contract outside of PBC's RFP and laws, without notice or opportunity to be heard. Id. at 939-40.

CONCLUSION

The award to Kaufman Lynn was a nullity and illegal. It cannot proceed. The Canyon District Park contract should be awarded to Collage.

In addition, Collage is entitled to recover its attorney's fees and costs in pursuing this protest. Solo Constr. Corp., 823 So. 2d at 803.

CERTIFICATE OF SERVICE

I CERTIFY the foregoing was delivered by email to an FTP site to the Palm Beach County Attorney with Appendix on October 16, 2018 and faxed without appendix and sent by FedEx to the above-addressee for delivery by 10:30 a.m. on October 16, 2018.

/s/ Rosemary Hayes
Rosemary Hanna Hayes
Florida Bar No. 549509
Carly M. Newman
Florida Bar No. 99419
HAYES LAW, PL
830 Lucerne Terrace
Orlando, FL 32801
rhayes@const-law.com
cnewman@const-law.com
cstone@const-law.com (paralegal)
Tel. 407-649-9974
Fax 407-649-9379
Counsel for Protestor



Purchasing Department
50 South Military Trail, Suite 110
West Palm Beach, FL 33415-3199
(561) 616-6800
FAX: (561) 616-6811
www.pbcgov.com/purchasing

**Palm Beach County
Board of County
Commissioners**

Melissa McKinlay, Mayor

Mack Bernard, Vice Mayor

Hal R. Valeche

Paulette Burdick

Dave Kerner

Steven L. Abrams

Mary Lou Berger

County Administrator

Verdenia C. Baker

October 30, 2018

VIA Email: rhayes@const-law.com
VIA FedEx: (407) 649-9974

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
830 Lucerne Terrace
Orlando, FL 32801

**RE: Notice of Protest
Project No. 17204
Construction Manager (CM) At Risk Services for
Canyon District Park**

Dear Ms. Hayes:

This is in response to your Protest ("Protest") dated October 16, 2018 submitted on behalf of your client, Collage Design & Construction, Inc. d/b/a The Collage Companies ("Collage"), regarding Palm Beach County ("County") Request for Proposals Project No. 17204 ("RFP"), Construction Manager ("CM") At Risk Services for Canyon District Park ("Project"). I have fully reviewed and taken into consideration your Protest; the RFP; the proposals submitted by both Collage and Kaufman Lynn Construction, Inc. Florida ("Kaufman Lynn"); the Selection Committee score sheets dated June 15, 2018; the Selection Committee revised score sheets dated October 9, 2018; and Sections 2-51 through 2-58 of the County Code. For the reasons set forth below, it is my determination that your protest be denied.

For ease, I will address the allegations raised in your Protest in the order received:

I.

Kaufman Lynn's SBE partner does not appear to meet the requirements of the SBE Ordinance and RFP making the re-ranking invalid, arbitrary and the award illegal.

The RFP, in **Section B Terms and Conditions** ("Section B") and **Exhibit B Palm Beach County CM/SBE Partnering Guidelines** ("Exhibit B"), which was referenced and attached thereto, set forth specific pertinent requirements for proposers. RFP **Section B.14.b., Small Business**

"An Equal Opportunity
Affirmative Action Employer"

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Two
October 30, 2018

Enterprise (SBE) Program ("SBE") - **SBE Goal**, establishes a minimum goal of 25% SBE participation for the Project. **RFP Section B.14.c., Small Business Enterprise (SBE) Program - CM/SBE Partner Program**, encourages Proposers to establish and include a CM/SBE Partnering arrangement in its SBE Plan. **RFP Exhibit B** provides relevant information and requirements for partnering with an SBE, and advises proposers that the County's evaluation of proposals received in response to the RFP shall include review of their CM partnering approach in meeting the County's SBE requirements and goals established for this Project. For example, **Exhibit B, Section 6. Eligibility of Partnering SBE Firms**, requires the Partnering SBE to be: A certified general or building contractor; a County certified SBE; willing and able to meet all requirements of a Memorandum of Understanding ("MOU") between the CM and the Partnering SBE; and, willing and able to meet any and all requirements established in a sub-consulting agreement as it relates to the CM's contract with the County.

In its proposal, Kaufman Lynn included a CM/SBE Partnering arrangement in the form of a MOU with MCO Construction & Services, Inc. ("MCO"). MCO is an SBE firm certified for Construction Management Services and is licensed as a General Contractor with the State of Florida. MCO's headquarters and domicile is in Palm Beach County and it also has an office in Miami, Florida. MCO is a "home business" in accordance with the County's SBE Ordinance. The MOU, which was entered into between Kaufman Lynn and MCO on April 25, 2018, clearly establishes Kaufman Lynn's commitment to utilize MCO, its partnering SBE, for 25% of the construction management services associated with this Project. Your allegation that MCO does not "appear" to meet the requirements of the SBE Ordinance and the RFP is unfounded and unsubstantiated.

Further, your statements that "...the SBE reranking was conducted by one Selection Committee member, terms of the RFP were rewritten, ignored, subjectively interpreted, and unpublished restrictions were added..." are neither true nor evidenced by any facts. The reason that the County "unseated Collage" is because the Selection Committee, on October 9th, *correctly* followed the selection criteria set forth for evaluating a proposer's

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Three
October 30, 2018

Small Business Utilization Plan. The Selection Committee, at the same meeting, clearly did not "add points" for Kaufman Lynn's "use of a MOU". The points awarded to Kaufman Lynn by the Selection Committee at its June 15th Selection Committee Meeting ("Meeting") were correctly awarded in accordance with the RFP. Therefore, there was no need for the Selection Committee to add or deduct points to Kaufman Lynn's score at the October 9th Meeting. Also, it is irrelevant that Kaufman Lynn submitted a MOU with its proposal in response to an RFP for a separate County Project at Lake Lytal Park ("Lake Lytal Project"). In fact, Kaufman Lynn's MOU for the Lake Lytal Project was submitted *subsequent* to the MOU and proposal submitted by them in response to this RFP.

The most important facts that have any bearing in this matter are that: Collage did not submit a CM/SBE Partnering arrangement with its proposal for the Project; when evaluating the Small Business Utilization Plans submitted by the short listed proposers at the June 15th Meeting, the Selection Committee failed to follow the scoring criteria/points allocation as set forth in the RFP; and, the Selection Committee erroneously awarded the maximum total of three (3) points to Collage for having a CM/SBE Partnering arrangement that was clearly not included in Collage's proposal either by reference or evidenced by inclusion of a MOU. In sum, MCO clearly met the requirements of the SBE Ordinance and the RFP, and the re-ranking of the proposals by the Selection Committee at the October 9th Meeting was valid, reasonable and lawful.

II.

There is no process in the PBC Code, Purchasing Manual, or the RFP authorizing PBC to return the proposal to the Selection Committee and cancel Collage's executory contract based on an objection privately communicated by a commissioner 2-months after the protest period.

Per RFP Section B.2., Cancellation of Award the County has the authority to cancel an award of any contract prior to its execution by the

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Four
October 30, 2018

Board. Per law, the County's actions must be reasonable; and, in this instance, cancelling an erroneous award to a contractor and re-convening the Selection Committee for the purpose of re-scoring the selection criteria giving rise to the error is entirely reasonable.

In addition, maintaining the integrity of the procurement process and being ethical in our dealings with the Board and with all proposers is essential. When an error occurs during the competitive procurement process and is discovered either during or after the selection process, the County has a duty and a responsibility to correct that error, when possible. To do otherwise or to dismiss the error, as you are suggesting, would serve to impede the integrity of the County's procurement process and cause mistrust by the Board and by existing and future proposers. Further, the County's waiver of the Selection Committee's mistaken award to Collage would not only be arbitrary and capricious, it would violate the tenets of fair and open competition by providing Collage with the ultimate competitive advantage. The remedy to re-convene the Selection Committee for the purpose of correcting their mistake is both fair and reasonable. I will never knowingly place, or recommend placing, a contract on the Board's Agenda that is in violation of the corresponding RFP, the County's procurement rules, policies or procedures, or procurement law.

I cannot concur that the timeline provided in your Protest is accurate, and I do not find it relevant to the Protest. Your assertions in Paragraphs "u" and "jj" of the timeline are mischaracterizations of the facts. Further, your dramatic assertion that "There was no legitimate reason to remove the contract from the Consent Agenda..." and "a decision was in effect made by one Commissioner's private communication, without compliance with the Sunshine Law, and outside of any process contemplated by applicable law is VOID." is clearly incorrect. First of all, the Sunshine Law is not applicable in this instance. As you should realize, the Sunshine Law was put into place to prohibit two (2) or more persons from discussing any issues in private that may come before them for a vote. It's applicable to Board Members,

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Five
October 30, 2018

Selection Committee Members, etc. It is *not* applicable when a Commissioner's Assistant asks a question of County staff.

Also, for your information, County Department Heads, with contracts to be considered by the Board, frequently receive questions from County Administration or Commissioner's Assistants up to the day of the Board Meeting when the contract is to be considered. This is absolutely and completely normal. In this particular instance, Michael Carter, Assistant to Vice Mayor Mack Bernard, called Ms. Audrey Wolf, Director of FDO, to ask why there was no SBE participation on Task Order #1 for pre-construction services for the Project. With the Board's commitment to the County's SBE Program, this question is routinely asked by both County Administration and Commissioners Assistants. In researching a response for Mr. Carter, Ms. Wolf reviewed the Selection Committee scores for the Small Business Utilization Plan, which are contained in the June 15th Selection Committee score sheets. She also reviewed the corresponding selection criteria for the Small Business Utilization Plan included in **RFP Section F., Scoring Criteria for Short Listed Proposers – Phase 2, Category 5 - Small Business Utilization Plan**. During her review, Ms. Wolf noticed an error in the Selection Committee's scoring because the full available ten (10) points allocated for the SBE Business Utilization Plan were awarded to all three (3) short listed proposers even though MOUs were *not* included in all proposals. It was determined that the scoring criteria set forth in the RFP for the Small Business Utilization Plan was not correctly followed by the Selection Committee at the June 15th Meeting.

RFP Section F., Scoring Criteria for Short Listed Proposers – Phase 2, Category 5 - Small Business Utilization Plan, provides that proposals can be awarded up to 7 of the 10 total points for the SBE Plan, and can be awarded up to 3 of the 10 total points for having a CM/SBE Partnering arrangement. In her review, Ms. Wolf noted that Collage received the maximum total of 3 points even though Collage's proposal did not include a CM/SBE Partnering arrangement; Kaufman Lynn included an executed MOU with MCO in its proposal and received the maximum total of 3 points for its CM/SBE Partnering arrangement; and Wharton Smith, also received the maximum total of 3 points even though its proposal did not

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Six
October 30, 2018

include a signed MOU though its proposal did include a CM/SBE Partnering arrangement with Messam Construction. Due to the scoring errors made by the Selection Committee, Ms. Wolf had no choice but to delete Collage's contract from the Board's Agenda. She could not, in good faith or conscious, bring a contract to the Board when the basis for award of the contract was made in error. That being said, it is clearly the responsibility of the Selection Committee to perform their duties correctly and in a well-informed manner. It is *not* the responsibility of the Board to take the place of the Selection Committee and correct errors made by same.

Per Section V.(4) of PPM # CW-L-008 Purchasing Policy and Procedures, the Office of Small Business Assistance ("OSBA") is "responsible for evaluating all IFB and RFP responses as to compliance with SBE requirements." Ms. Wolf personally spoke with Ms. Tonya D. Johnson, Director of OSBA, and verified that an error had, in fact, been made in the Selection Committee's scoring of the Small Business Utilization Plan selection criteria. **RFP Section F., Scoring Criteria for Short Listed Proposers – Phase 2, Category 5 - Small Business Utilization Plan**, sets forth the precise scoring criteria and is very clear. Ms. Wolf then spoke with the County Attorney's Office and with me personally, and determined that it was necessary to re-convene the Selection Committee so as to re-score the Small Business Utilization Plans of the three (3) shortlisted proposers in accordance with the RFP. This was the correct decision, both ethically and legally.

Footnote 5 of your Protest states that "PBC had said 5-minute presentations would be permitted. Proposers were permitted to speak during the public comment section, but the Selection Committee declined to hear any additional presentations and Collage did not have the opportunity to discuss the shortcomings in the PBC process or competing proposal". Again, your statement is misleading and inaccurate. The Final Selection Committee Meeting Agenda reads "1:35 p.m. to 1:40 p.m. Selection Committee determines if Finalists are to re-present its proposal on the SBE Utilization Plan. *If so, 5 minutes per Finalist will be permitted. Finalist will not be allowed to introduce any new material and only speak about the Small Business Utilization Plan – Category 6 as set forth in its original submittal.*"

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Seven
October 30, 2018

(Emphasis added). Although the Final Selection Committee Meeting Agenda inadvertently refers to "Category 6" instead of "Category 5", there is little distinction between the two (2) provisions. Most importantly, it is noted that a five (5) minute presentation was *never* represented as being "permitted" by the Selection Committee.

The Selection Committee was well within their authority to vote not to re-hear oral presentations. That being said, each proposer was afforded two (2) minutes in which to comment publicly at the October 9th Meeting. In addition, questions were asked by the Selection Committee Members and addressed by the proposers. Collage certainly could have utilized those two (2) minutes to make a presentation or "discuss the shortcomings in the PBC process or competing proposal." The entire selection process, including the re-convening of the Selection Committee, was fair and reasonable with regard to *all* proposers, and the deletion of the contract with Collage from the Board's Agenda was necessary and lawful.

Lastly, I cannot opine as to Collage being "prejudiced by the acts and omissions of PBC" due to its lawsuit re: public records because I am not knowledgeable of the lawsuit. I do know that the County is very accustomed to public records requests and truly understands the importance of retaining and producing all public documents as requested in a timely manner.

III.

PBC's process was unpredictable and untrustworthy

• **USE OF THE WRONG SCORING CRITERIA IN RESCORING**

No proposer was harmed by the Selection Committee's use of the scoring criteria included in RFP Section E., **Scoring Criteria for Submittals – Phase I, Category 6 - SBE Program** instead of the scoring criteria found in RFP Section F., **Scoring Criteria for Short Listed Proposers – Phase 2, Category 5 - Small Business Utilization Plan**. As seen in bold below, the language in both Phase I and Phase II, which is the *sole* purpose for the re-scoring by the Selection Committee, is identical.

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Eight
October 30, 2018

The scoring criteria used by the Selection Committee on October 9th is identical to RFP Section E., Scoring Criteria for Submittals – Phase I, Category 6 - SBE Program:

SBE Program – Firms will be awarded points for the firm's SBE or minority participation history and the presentation of a viable plan to achieve the County's SBE goal on this Project, up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a Partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such partnering arrangement.

The language used in Mr. DelDago's above-mentioned letter dated September 18th, which was addressed to all short listed proposers, is identical to RFP Section F., Scoring Criteria for Short Listed Proposers – Phase 2, Category 5 - Small Business Utilization Plan:

Small Business Utilization Plan -The firm's history, approach, and commitment to meet or exceed the SBE participation requirement will be scored; up to 7 of the 10 possible points may be awarded for this part of the SBE plan. Proposers are encouraged to participate in the County's CM/SBE Partner Program as described in the Guidelines attached hereto as Exhibit B. Proposers that include a Partnering arrangement in their SBE plan may receive up to 3 of the 10 possible points for such partnering arrangement.

The literal reading of the above bolded scoring criteria is very clear. Proposals that did NOT include a CM/SBE Partnering arrangement in their SBE Plan may receive a maximum of up to 7 of the total 10 points for their SBE Plan. Proposals including a CM/SBE Partnering arrangement in their SBE Plan are able to receive a maximum of up to 3 of the total of 10 points for such partnering arrangement. I found these instructions to be quite

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Nine
October 30, 2018

simple. In looking at Collage's scores from the June 15th and October 9th Meetings, it is clear that the Selection Committee fully considered and appreciated Collage's SBE Plan. Collage scored seven (7) points, which is the maximum number of points possible for a proposal *without* a CM/SBE Partnering arrangement. The only way Collage could have scored higher on October 9th would have been to have a Partnering arrangement included in its proposal. It did not; and, even if presentations were permitted and Collage provided a CM/SBE Partnering arrangement, it could not have been accepted or considered by the Selection Committee because the said arrangement would be "new" information.

Lastly on this point, the Selection Committee did not "return to Phase 1 on October 9th, giving an unfair advantage and showing favoritism to the Kaufman Lynn team by eliminating from consideration Collage's SBE Plan and presentation of it in accordance with the Phase 2 SBE criteria in the RFP." Again, the Selection Committee corrected a previously made scoring error and followed the appropriate scoring criteria for the scoring of the CM/SBE Partnering arrangement. The specific scoring criteria, as stated above, is *identical* in both RFP Section E., Scoring Criteria for Submittals – Phase 1, Category 6 - SBE Program and RFP Section F., Scoring Criteria for Short Listed Proposers – Phase 2, Category 5 - Small Business Utilization Plan. With regard to favoritism towards Kaufman Lynn, I have seen no documented proof supporting this allegation. In fact, the County has no previous relationship with Kaufman Lynn and Kaufman Lynn has never performed previous work for the County. Collage is the only short listed proposer with whom the County has a previous relationship and who has performed previous work for the County.

- **EQUAL STANDING AT PHASE 2**

Your argument that OSBA "...revisited the Phase 1 submittals from the proposers in their re-evaluation of the scoring for Phase 2 on October 9, using the original proposals considered in Phase 1 to determine how points would be awarded Phase 2..." does not make sense. Again, the Selection Committee, at their October 9th Meeting, merely corrected their previous error of providing the maximum ten (10) points to *all* short listed proposers,

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Ten
October 30, 2018

even to those proposers that did *not* meet the requirements of the scoring criteria set forth in the RFP. Collage should have never received the allotted three (3) points for a CM/SBE Partnering arrangement because Collage didn't include any such arrangement in its proposal for the Project. Quite bluntly, Collage received three (3) points from each Selection Committee Member that it was not entitled to receive. Equal Standing in this instance means that all short listed proposers have equal standing going into the Phase II scoring. Accordingly, the Selection Committee recognized no order or hierarchy of the short listed proposers at its June 15th Meeting. All short listed proposers had equal standing.

- ONE MEMBER RESCORING

Your allegation that "The points awarded to the only category that was re-scored were not determined by each member of the Selection Committee, but by a single individual." is incorrect. OSBA is recognized in the SBE Ordinance and in PPM # CW-L-008 as the subject matter expert of the County's SBE Program. In fact, OSBA is required to review all RFP responses for compliance with the County's SBE Program, as well as all SBE requirements set forth in every County RFP. A staff person from OSBA attends and sits on every County Selection Committee and shares his/her opinion as to whether or not each proposal has met the necessary SBE requirements. That being said, although subject matter experts certainly add value to the Selection Committee's discussion when they share their opinions, each Selection Committee Member fills out his/her own score sheet and awards points in accordance with his/her own judgment. The consideration of proposals by Selection Committee Members typically includes the information contained within the RFP and the proposals along with the knowledge, experience, and expertise of each Selection Committee Member as it relates to the subject matter. To assume that one (1) person can dictate a selection criteria score for all Selection Committee Members is naïve and not based on any facts presented in your protest.

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Eleven
October 30, 2018

- BASIS FOR SCORING

Your allegation that "PBC ignored the RFP criteria providing that CM-proposers are to demonstrate their approach to obtaining small business participation during the presentation." is flawed. Although I cannot read the minds of the Selection Committee Members, I have no doubt that they considered this very information when they awarded Collage a total of ten (10) points at their June 15th Meeting and a maximum total of seven (7) points at their October 9th Meeting. The County did not ignore any evaluation criteria set forth in the RFP. The only thing that was ignored was the scoring criteria requirements for the Small Business Utilization Plan by the Selection Committee at its June 15th Meeting.

I could find no documented support for your arguments pertaining to Kaufman Lynn's lack of "cogency of the MOU, the propriety of the proposed partner, or Kaufman Lynn's 'gross income'." I also found no evidence that "the sole selection committee member voting appeared to rubber-stamp Kaufman Lynn's MOU." In looking at Kaufman Lynn's MOU with MCO, it provides the purpose; roles and responsibilities with regard to developmental assistance to be provided by Kaufman Lynn to MCO; monthly meetings; and the names of individuals who are part of the Kaufman Lynn Mentor-protégé program along with the duration of their involvement in the Project. It is virtually impossible to determine what a Selection Committee Member considered or did not consider when scoring proposals. It is certainly not unusual to not discuss every single opinion of each Selection Committee Member on every single item presented within a proposal.

The SBE plan in Collage's proposal and the SBE material that Collage distributed for clarity at the June 15th Meeting was sent to each Selection Committee Member *prior* to the October 9th Meeting. Thus, it was available for review and consideration by each Selection Committee Member. Although the OSBA staff person may not have considered materials handed out at the June 15th Meeting, other Selection Committee Members considered the clarifying materials distributed by Collage. Although documents or materials are allowed for clarification, it is a best practice in procurement to not allow *new* information to be introduced by a

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Twelve
October 30, 2018

proposer subsequent to the submittal of their proposal. To do so would create an unlevel playing field and provide a definite advantage to the proposer submitting new and late information in order to supplement its proposal.

After much discussion at the October 9th Meeting regarding the proposed SBE Plans, and after allowing public comment from each proposer, the Selection Committee voted not to re-consider the scoring of the up to 7 possible points for the SBE Plan. Instead, the Selection Committee focused their consideration and discussion on the up to 3 points allocated for the CM/SBE Partner Program. I fail to see how Collage was disadvantaged in any way by the decision of the Selection Committee since Collage received the maximum 7 points for its SBE Plan. Since Collage did not submit a CM/SBE Partnering arrangement at the time it submitted its proposal, Collage could not receive the 3 points allocated for the CM/SBE Partner Program.

The selection process conducted by the County was not arbitrary, and no favoritism was evidenced on the County's part in favor of Kaufman Lynn. Again, Kaufman Lynn fully met the selection criteria of the RFP and received the highest score for its SBE Business Utilization Plan accordingly. As stated previously, Kaufman Lynn's involvement in the Lake Lytal Park Project is irrelevant because it occurred subsequent to the Selection Committee Meeting for this Project. Further, your reference to the Cone of Silence is completely misstated and incorrect. Since the Board has final approval of the Contract resulting from this RFP, the Cone of Silence applies to Commissioners as well as Commissioners Assistants. Exceptions to the Cone of Silence include written communication to the Commissioners and Commissioners Assistants, and presentations to the Board when the contract is being considered for approval.

- VOLUME OF WORK

Collage asserts that since the County's objective is to share available work between a number of firms, that the Selection Committee, at its October 9th Meeting, should have re-scored the points awarded under the

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Thirteen
October 30, 2018

"Volume of Work" selection criteria because the County was aware of the Lake Lytal Project award to Kaufman Lynn and its SBE Partner, MCO. I disagree. The Volume of Work for all proposers was scored by the Selection Committee at the June 15th Meeting. At that time, only Collage had performed previous work for the County. The points scored for this selection criteria were not made in error by the Selection Committee at its June 15th Selection Committee Meeting; and, as such, there is no reason to re-score same.

- ARBITRARY FORMAT AND NO DUE PROCESS

The County most certainly followed the published agenda for the October 9th Meeting. As stated previously, I have neither allowed nor heard of a procurement policy or procedure that allows *new* information to be introduced during an oral presentation. This is certainly not a best practice, and it provides an unfair advantage to the proposer introducing the new material. Further, the Selection Committee did not have to re-score the *entire* 10 points of the proposers SBE Program/Small Business Utilization Plan. Collage received the maximum 7 points for same; however, since Collage's proposal did not include an SBE Partnering arrangement, the most points Collage could have possibly received was 7. Lastly, Collage's due process to the RFP and to the selection process of the RFP is the County's protest process, which Collage is currently utilizing.

Based upon the information herein, it is my determination that the recommended award for RFP Project No. 17204 proceed as posted. I have received input on your protest from Ms. Tonya D. Johnson, Director, Office of Small Business Assistance, and she has knowledge of and concurs with my determination. This determination will be final as to the County unless you request a hearing before a Special Master pursuant to Section 2-55 of the Purchasing Code (extract attached). This request must be made in writing and received in my office no later than 5:00 p.m., November 6, 2018. Your written request to convene the hearing must be accompanied by a protest bond in the amount of \$1,500.00 remitted by money order, certified, cashier's or bank check payable to Palm Beach County. You are advised to familiarize yourself with the Purchasing Code, which provides that your

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
Page Fourteen
October 30, 2018

protest bond shall be forfeited if your protest is not upheld by the Special Master. Please note that the hearing before the Special Master is limited to those issues related to this determination and the issues raised in your protest letter referenced hereinabove. Lastly, it is your obligation to ensure that a verbatim record of the hearing is made, in case you decide to appeal the decision of the Special Master to the Circuit Court.

Sincerely,



Kathleen M. Scarlett, Esquire
Director of Purchasing

Attachment

cc: Samara Cooper, Assistant Director, Purchasing Department
Michael W. Jones, Senior Assistant County Attorney
Tonya D. Johnson, Director, OSBA
Audrey Wolf, Director, FDO
Fernando DelDago, Director, FDO CID
Brenda Znachko, Esq., Director, FDO Business Operations
Bob Hamilton, Director, Planning, Research & Development, Parks

ment Project, and the corresponding change order required to implement those purchases, may be approved by the Director of Purchasing or by the Director of the appropriate Construction Department in accordance with the County's sales tax recovery program.

(g) *Informal competitive solicitation process.* Solicitations for goods or services valued at less than the Mandatory Bid or Proposal Amount shall be made in accordance with policies and procedures established by the Purchasing Department for Requests for Quotes and Requests for Submittals.

(h) *Waiver of requirements for competitive selection for professional and consultant services.* The Board may waive the requirements for competitive selection and approve professional or consulting services upon recommendation of the Administrator.

(Ord. No. 2015-004, § 5, 1-13-15)

Sec. 2-55. Protested awards.

(a) *Right to protest.* After posting of the recommended awardee, any bidder or proposer who is aggrieved in connection with the recommended award may protest in writing to the Director of Purchasing. The right to protest is limited to those procurements of goods or services solicited through an Invitation for Bid or a Request for Proposal. Recommended awards less than the Mandatory Bid or Proposal Amount cannot be protested. Notwithstanding the above, the Director of Purchasing may, in his or her sole discretion, include the right to protest in any solicitation process if in the best interests of the County.

(b) *Notice of protest.* The protest shall be submitted within five (5) business days after posting of the award recommendation. The protest shall be in writing and shall identify the protestor and the solicitation, and shall include a factual summary of the basis of the protest. Such protest is considered filed when it is received and date/time stamped by the Department of Purchasing. Neither the Director of Purchasing nor a special master shall consider any issue not submitted in writing within the time frame specified for the notice of protest.

(c) *Authority to resolve.* Protests filed in accordance with Section 2-55(b) hereinabove shall be resolved under the provisions of this Section.

(1) The Director of Purchasing shall have the authority to:

- a. Uphold the Protest. The protest may be upheld based upon a violation of the provisions of this Purchasing Code or of any other County Ordinance, resolution, policy, or procedure, or upon discovery of an irregularity or procedural flaw that is so severe as to render the process invalid. If the upholding of the protest will result in a change of the recommended awardee, a new recommended award shall be posted in accordance with Section 2-54(c)(8) and 2-54(d)(7) hereinabove. If the upholding of the protest will result in a cancellation of the protested solicitation, a recommendation to uphold the protest and cancel the solicitation will be made to the Administrator, who may then direct the cancellation of the solicitation.
- b. Deny the Protest. If the protest is denied, the protestor has the right to request that the protest be referred to a special master in accordance with Section 2-55(c)(4) hereinbelow.
- c. Refer the protest directly to a special master with no determination made by the Director of Purchasing, in accordance with Section 2-55(c)(4) hereinbelow.

(2) When a protest is filed by a certified SBE contractor or where the protest involves a small business issue, the Director of the Office of Small Business Assistance will act in conjunction with, and with authority equal to, the Director of Purchasing in arriving at the determination to be made in this step of the process. After reviewing the facts surrounding the issues raised in the written protest, the Director of Pur-

chasing, and the Director of the Office of Small Business Assistance may make the determination to:

- a. Uphold the protest in accordance with Section 2-55(c)(1) b. hereinabove.
- b. Deny the protest in accordance with Section 2-55(c)(1) b. hereinabove.
- c. Refer the protest to a special master in accordance with Section 2-55(c)(4) hereinbelow, in those instances when a determination is not unanimous between the Director of Purchasing and the Director of the Office of Small Business Assistance. In this specific instance, the protestor will be exempt from posting a protest bond.

In the event that the County adopts an M/WBE Ordinance, any protest process shall be set forth by adopted Board policy.

- (3) The Director of Purchasing shall issue a written statement of the determination within a reasonable period of time. The written statement shall provide the general rationale for said determination and shall be provided to the protestor and to any other party to the protest.
- (4) Upon receipt of a denial of the protest, the protestor may request a hearing before a special master. The request for a hearing shall be in writing to the Director of Purchasing and shall be made within five (5) business days of issuance of the Director of Purchasing's determination. The request for a hearing shall be accompanied by a protest bond of fifteen hundred dollars (\$1,500.00) which shall be remitted in the form of a money order, a certified check, a cashier's check, or a bank check payable to Palm Beach County.
- (5) At no time shall a protestor, party, or any other person, contact a special master regarding any issue pertaining to or involving the protest. Contact between the County and the special master shall be limited to scheduling and other adminis-

trative issues, including the provision and copying of public records pertinent to protest.

(d) *Establishment of rules.* The Purchasing Department shall establish rules and regulations by separate policy and procedure detailing the selection of special masters, the protest process, and the conduct governing protest hearings.

(e) *Authority of special masters.* Special masters shall have the jurisdiction and authority to hear and decide protests.

- (1) The special master shall make a recommendation as to whether the protest should be upheld or denied.
- (2) If the special master upholds the protest, the special master shall either make a recommendation to cancel the solicitation, or to cancel the award recommendation and post a new award recommendation after re-evaluation based on the special master's determination of the facts in the case. In these instances, the Purchasing Department shall return the protestor's bond to the protestor.
- (3) If the special master denies the protest, the special master shall recommend that the Director of Purchasing proceed with the posted award recommendation. In these instances, the protestor's bond shall be forfeited.
- (4) In making contract awards for procurements in an amount equal to or greater than two hundred thousand dollars (\$200,000.00) per annum, the Board, upon recommendation of the Director of Purchasing, may accept or reject the recommendation of the special master.
- (5) In making contract awards for procurements of less than two hundred thousand dollars (\$200,000.00) per annum, the Director of Purchasing may accept the special master's recommendation or, if the Director of Purchasing determines the special master's recommendation is not in the County's best interest, the original award recommendation may be referred

to the Board for approval. At that time, the Board may accept or reject the recommendation of the special master.

- (6) Nothing contained herein shall limit or divest the Board of its authority pursuant to F.S. Ch. 125, Pt. IV, as referenced in Section 2-51 of the Purchasing Code.

(f) *Stay of procurement during protests.* Notwithstanding anything contained herein to the contrary, in the event of a timely protest, the Director of Purchasing shall stay the award of the contract unless the Director of Purchasing, with the advice of the County Attorney and after consultation with the County Department, makes a determination that the award of the contract without delay is necessary to protect substantial interests of the County.

(Ord. No. 2015-004, § 6, 1-13-15)

Sec. 2-56. Suspension and debarment.

(a) *Authority.* The Director of Purchasing may suspend or debar for cause the right of a vendor, contractor or subcontractor to be included in the renewal of an existing contract or any solicitation process; and any bid, proposal, submittal, or quote received from that vendor, contractor or subcontractor shall be rejected. The Board shall have the power to waive or lift such suspension or debarment.

(b) *Suspension and debarment.* A vendor, contractor or subcontractor may be suspended for a period not to exceed two (2) years as determined by the Director of Purchasing, or may be permanently debarred. However, any suspension imposed pursuant to the provisions of subsections (b)(3) and (4) below shall be in effect during the pendency of the applicable proceeding, regardless of duration. A suspended or debarred vendor or contractor shall not bid or propose as a subcontractor during their suspension or debarment; and, a suspended or debarred subcontractor shall not bid or propose as a vendor or contractor during their suspension or debarment. A suspension or debarment may be based upon the following:

- (1) Failure to fully comply with the conditions, specifications or terms of a contract with the County, including but not limited

to the unilateral withdraw of a bid, quote, submittal, or proposal that has been received from the recommended awardee.

- (2) Any misrepresentation in connection with a solicitation or any misrepresentation of fact upon which the County has based a decision, including but not limited to a misrepresentation by a vendor, contractor or subcontractor on a small business application, or a local preference affidavit.

- (3) Charged or convicted with the commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract. If charges are dismissed or the vendor, contractor or subcontractor is found not guilty, the suspension or debarment shall be lifted automatically upon written notification and proof of final court disposition. However, nothing herein shall preclude the Director of Purchasing from imposing an additional suspension or debarment following said dismissal or finding of not guilty where the Director of Purchasing determines that the additional suspension or debarment is otherwise supported by the Purchasing Code. In such case, the suspended or debarred vendor, contractor, or subcontractor may avail themselves of the protest procedure set forth in subsection (d) below.

- (4) Charged or convicted for embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or business honesty which currently, seriously, and directly affects responsibility as a County government contractor. If charges are dismissed or the vendor, contractor or subcontractor is found not guilty, the suspension or debarment shall be lifted automatically upon written notification and proof of final court disposition. However, nothing herein shall preclude the Director of Purchasing from imposing an additional suspension or debarment following said dismissal or finding of not guilty where the

PALM BEACH COUNTY, FLORIDA
SPECIAL MASTER FOR PROCUREMENT ACTIVITIES

IN THE MATTER OF:

COLLAGE DESIGN & CONSTRUCTION, INC.
d/b/a THE COLLAGE COMPANIES
CANYON DISTRICT PARK
CID PROJECT NO. 17204

DENIAL OF PROTEST
&
RECOMMENDATION TO DIRECTOR OF PURCHASING

Summary

The Protest is DENIED and it is RECOMMENDED that the Director of Purchasing proceed with the posted award recommendation.

This determination is based upon the arguments, the testimony and the documentary evidence adduced at a hearing conducted on January 8, 2019, as will be explained further below:

1. The original ranking of COLLAGE as the top-ranked Proposer was erroneous.
2. The re-ranking of the Proposals, resulting in selection of another Proposer, was a proper remedy for correction of the error in ranking and did correct the original error.
3. The evidence of improper influence and ethical conflicts did not support a claim that is within the subject matter jurisdiction of this Special Master such that it would support upholding the Protest.

Background

This is a Protest of a Notice of Award of a Construction Management at Risk (CMAR) Contract for Canyon District Park Improvements, Project No. 17204. It is a result of an error in ranking of Proposals, discovery of the error, and the COUNTY administrative staff's method of correcting the error.

In performing the re-ranking, the staff recommendation for the construction phase of the work changed from COLLAGE to another firm (Kaufman Lynn). The Protest was considered by the Director of Purchasing and it was determined that the Contract proceed to award to the other proposer. COLLAGE timely filed a Protest. The matter was referred to this Special Master pursuant to Sec. 2-55 (e) of the Palm Beach County Code (Code).

The Hearing

The Special Master conducted a hearing on January 8, 2019 of nearly seven hours in length. He considered sworn testimony and documentary evidence and the arguments of counsel for both parties that day. He allowed and considered further submittals concerning subject matter jurisdiction on the ethics charge that were received by January 11, 2019.

Appearances:

For Protestor : Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
830 Lucerne Terrace
Orlando, FL 32801

Witness: (Ms. Hayes provided the testimony and documentary evidence for Protestor)*

*Note: In informal local administrative proceedings such as this, it is common for attorneys to present argument and evidence together. Formal rules of evidence do not apply so long as fundamental due process is observed. Therefore, statements for the attorneys of both parties were considered.

For COUNTY: Michael W. Jones, Esq.
Senior Assistant County Attorney
Palm Beach County

Witnesses: Tonya D. Johnson—Director, Office of Equal Business Opportunity
Audrey Wolf— Director- Facilities Development & Operations

For Kaufman Lynn, Inc.: Jeffrey Zalkin, Vice President

Preservation of testimony and evidence:

The hearing was recorded by the COUNTY. Protestor provided a court reporter. Exhibits were transmitted to the Administrative Secretary for the Palm Beach County Purchasing Department.

Exhibits: An Exhibit List is enclosed as Attachment A. Included in Exhibits is a Power Point presentation from Protestor's attorney.

Attorney Hayes also submitted a post-hearing memo on January 11, which was considered.

Hearing Procedures

Upon request of Protestor's attorney and due to the nature of the allegations, the Special Master opted to have witnesses sworn by the Court Reporter. All evidence was admitted, with the understanding that it would be given such weight, if any, that the Special Master determines to be relevant. Thus, it was not necessary to interpose objections in order to preserve them.

The Evidence & Analysis

Protestor's contentions:

- I. There is no authority for the procedure or outcome.**
- II. There is no clear standards [sic] applied and the reconvened Selection Committee's SBE¹ ranking was arbitrary.**
- III. The proposed SBE is disqualified under PBC Ethics Code and an award including it is void.**
- IV. The proposed SBE participant is not a "Home Business" as defined by the SBE ordinance.**

Taking the contentions in order:

- I. There is no authority for the procedure or outcome.**
- II. There is no clear standards [sic] applied and the reconvened Selection Committee's SBE ranking was arbitrary.**

These two contentions are interrelated so they will be discussed together. The first contention is in essence that while there are a number of procedures for procurement by way of Requests for Proposals, and safeguards to ensure fairness in the process, there is no authority for re-ranking after the first tentative award. Specifically, once the rankings were completed, notice of proposed award published with no protests filed by the deadline, and the matter was set for final Board action, it could not be undone, and the award must be made regardless of error.

From COLLAGE's point of view: It was the top-ranked and apparently successful proposer for the work as of June 15, 2018. A notice of proposed award was issued, with COLLAGE receiving the highest ranking, and nobody filed a protest by the June 25, deadline. COLLAGE began preliminary work under a Task Order that was subsequently approved. The CMAR construction contract was not yet finalized since it would come back later with a Guaranteed Maximum Price (GMP).² It was on the Board of County Commissioners (BCC) September 18, 2018 Consent Agenda for approval of the CMAR Contract and of a Task Order for the preliminary phase work.

Then a question emanating from the office of the Vice Mayor arose as to the ranking. The CMAR Contract approval was removed from the BCC Agenda. The Selection Committee was reconvened, a re-ranking was done and the result was a recommendation for selection of another company. The other company had a relationship with an SBE partner that appeared to have connections with the COUNTY and was on one or more COUNTY advisory committees. COLLAGE was determined not to be qualified.

¹ Small Business Enterprise-Defined in Palm Beach County Code Sec. 2-80.20, part of the Equal Business Ordinance (EBO) S. 2-80.20—2-80.30.

² CMAR contracts and GMPs are specifically provided for in Florida Statutes. See, e.g., Sec. 255.103 & Sec. 287.055 Fla. Stats.

One of the contentions made is that once the initial notice of proposed award and deadline to protest passed (June 25), the then second-ranked firm waived its protest and the award must go to COLLAGE. I disagree with the conclusion that a waiver of protest by an interested party prohibits the COUNTY on its own from correcting its mistake.

It appears from the testimony of COUNTY staff members, Audrey Wolf and Tonya D. Johnson, the exhibits and the ordinance criteria, that the original ranking of COLLAGE was not consistent with the COUNTY's ranking criteria and that the ranking criteria used in the reconvened Selection Committee meeting was correct.

A governmental entity is given substantial leeway in creation of its procurement methods and in seeking competitive procurement of goods and services. However, it is required to follow its own regulations and processes. In *City of Sweetwater v. Solo Construction Corp.*,³ a case similarly involving selection committee scoring sheets, the Third District Court of Appeal held that the use of selection criteria not in the Invitation to Bid was improper.

In *American Engineering and Development Corporation v. Town of Highland Beach*⁴ the Fourth District Court of Appeal distinguished *Solo Construction* and determined that the Town's decision to award the contract to the second-lowest bidder was permissible pursuant to section 255.20(1)(d) 1., Florida Statutes, which states that the competitive bidding requirement "is not intended to restrict the rights of any local government to reject the low bid of a nonqualified or nonresponsive bidder and to award the contract to any other qualified and responsive bidder."

This contract appears to be under (1)(d)3. which requires RFPs to be awarded "in accordance with the applicable local ordinances."

Similar to the *Highland Beach* case, if the top-ranked proposer did not meet the stated local ordinance, the County has a right and even a duty to reject the proposal and award the contract to the highest ranked proposer that does meet the criteria.

This is not a case where a new and unfair shot at a bid or proposal is given. The COUNTY staff merely re-reviewed the existing proposals. The testimony suggests that the error occurred due to interpretation and application of newly-adopted standards (that nevertheless applied to this RFP and Project), not to improper influence or corruption.

The COUNTY provided substantial credible evidence explaining that what turned out to be the error, was discovered by the Vice Mayor's office, relayed to the County Administrator's office, referred for departmental review, referred to the Selection Committee and again reviewed. It was certainly not easy to admit to an error but staff did so.

It is neither unusual nor illegal to vet qualifications of bidders or proposers before issuance of a notice of proposed award or indeed any time prior to final Board action. Such is the nature of

³ 823 So.2d 798 (3d DCA 2002).

⁴ 20 So.3d 1000 (4th DCA 2009).

dealing with governmental contracting (See e.g., *Morgran Company, Inc. v. Orange County*, 818 So. 2d 640 (5th DCA 2002)). That case is in the context of contract zoning, but has similar facts; i.e., an edict from a county chairman. Here, there is no evidence of any edict, but only of a request to see if the ranking procedure was correct—only to find that it was not.

III. The proposed SBE is disqualified under PBC Ethics Code and an award including it is void.

Protestor contends that the SBE is disqualified under the COUNTY Ethics Code, which makes an award void or voidable. The undisputed testimony is that the SBE partner (MCO Construction Services, Inc.) is a corporation owned by a person (Ann McNeill) who is also on one or more COUNTY advisory committees including the Office of Small Business Assistance (OSBA) Advisory Committee. She is the qualifier for the company for SBE status. Protestor's theory is that this disqualifies her company from participating as an SBE partner with a result that the formerly second-ranked (and now top-ranked) proposer cannot receive points for SBE participation. The further contention is that the result is that the proposed award to that firm would be void.

A second contention is that she or others on her behalf may have violated the "Cone of Silence" to get the award of the contract shifted to the formerly second-ranked firm, with whom she is the SBE partner. The Cone of Silence prohibits proposers and decision-makers from attempting to influence the outcome during the process.

A third contention is that the formerly second-ranked and now top-ranked firm used its influence by way of participation and donation to a related non-profit Matchmakers organization. It is COLLAGE's contention that this is an unlawful "gift" under the COUNTY Ethics Code.

Taking these contentions together, a threshold and dispositive issue (that was actually raised by this Special Master at the hearing) is whether an alleged violation of the COUNTY Ethics Code is within the subject matter jurisdiction of this tribunal. The scope of inquiry of a Bid Protest Special Master does not necessarily extend to Ethics ordinance matters. It is understood that Palm Beach County has a specific charter-created independent Ethics Commission and an Inspector General's office, to which are assigned investigation, prosecution and enforcement of local ethics violations. The State of Florida, through the Florida Ethics commission has exclusive jurisdiction over investigation and enforcement of the State ethics laws.⁵

While an Ethics violation may result in nullity or voidability of a contract, such investigations and determinations would seem to be the result of the Ethics process, not this one. I conclude that I do not have subject matter jurisdiction to determine the existence or non-existence of COUNTY ethics violations. If the Board or a court were to determine otherwise, it could remand it back for further evidence concerning that issue. The Board does appear to have authority to declare a proposed award void for improprieties in the process.

⁵ Ch 112, Part III, Florida Statutes.

This is not to intimate in any way that the evidence supports or does not support a determination of an ethics violation.

IV. The proposed SBE participant is not a “Home Business” as defined by the SBE ordinance.

Protestor contends that the SBE participant business is not domiciled in Palm Beach County.

The SBE ordinance requires participants to be “domiciled” in Palm Beach County. “Domicile” is defined as:

Domiciled in the County means the business holds a valid Palm Beach County business tax receipt and has a Significant Business Presence in the County. In order to establish a Significant Business Presence in the County, the business must: 1) Demonstrate that the business has been conducted at the county location, and sufficient full-time employees are maintained in the County to perform the contracted work; (2) The County business tax receipt bears the county address, and the county location is in an area zoned for the conduct of such business; (3) The county location must be verifiable through documentation such as property tax bill or lease agreement; and (4) The county location should be identifiable through signage, telephone listing, and/or website or social media. On-site visits may be conducted at any time to determine continued adherence to requirements and additional documentation may be requested on a case-by-case basis. A county telephone number or post office box in the County shall not be sufficient without further documentation, to establish the domicile requirements and other requirements of the code. (Code S. 2-80.21)

Testimony showed that the Palm Beach County address is that of the owner of the SBE partner business and was qualified through confirmation of a business tax receipt, other information and previous site visits. The business is considered a Home Business, which is defined in the same section:

Home business means a small business that operates from the business owner's home. Home businesses usually have a very small number of employees that are often members of the business owner's family. A home business is not affiliated with, nor a subsidiary of another company located outside of the home. Home businesses meeting this definition are eligible for certification as a small business, provided they meet all other certification criteria. Home offices of an employee working for a company located in another county do not establish domicile in Palm Beach County.

Protestor produced documents showing that the SBE partner's business was in Miami Dade County. The home address in Palm Beach County is that of a person named Ann McNeill. She is not just an employee of the SBE partner but also the owner. The Business Tax receipt indicates that she operates out of the Palm Beach County address as well as the Miami Dade County address. Under Chapter 205, Fla. Stats., governing local business taxes and receipts, both permanent business locations and branch offices are subject to taxation.

I find that the weight of the evidence supports the COUNTY's determination that this is a bona fide home business domiciled in Palm Beach County. While the usual definition of "domicile", such as for homestead and qualification to vote or run for office, requires a residence coupled with intent for that to be a one and only domicile, the County Code definition for SBE does not purport to limit domicile to a single, exclusive location. Nor does the Local Business Tax Act.

Lastly, it is doubtful that disqualifying the newly top-ranked firm will result in an award to COLLAGE. Since it did not qualify under the re-ranking, if Kaufman Lynn were disqualified, the proposal would not default to COLLAGE. That gets into a lot of speculation, though.

Comment on Other Evidence

Evidence concerning other projects such as Lytal Lake is given little weight. Potential errors in another project's analysis are collateral and of little relevance to the analysis of this Protest.

Evidence that the design portion of the Project was approved by Purchase or Task Order and that the work was begun is given little weight. There is no unjust enrichment or quasi-contract cause of action against a Florida local government (see *Morgran* and its antecedents).

To the extent that Protestor contends that staff members cannot communicate with members of County boards under the Florida Government in the Sunshine Law, it is mistaken. That law does apply to the Selection Committee,⁶ but it only applies to communications between and among members of the same board, commission or committee.⁷ Communications between staff members, between staff members and county commissioners or board members, or between members of one board to members of another board are not the "same" board communications.

Only when the staff members are actually serving on a committee (such as a Selection Committee) are their communications with each other prohibited under that Law. This applies to communications between members of different committees and a staff member and a member of another committee, such as the one alleged between Tonya Johnson and Angie Whitaker. Thus, as long as they were not both serving as members of the Selection Committee or the Revised Selection Committee at the same time, the Sunshine Law does not apply. By necessity, staff Selection Committees are ad hoc. The membership varies depending upon the nature of the bid or proposal.

An exception is where the staff is being used as a liaison to carry messages between Selection Committee members themselves. There was no evidence of this occurring.

Jeffrey Zalkin, Vice President of Kaufman Lynn, the now-apparent top-ranked proposer, testified in objection to the suggestion that his firm improperly influenced the ranking process. He testified that the gift of \$5,000 was to a private non-profit, not to the COUNTY or any COUNTY

⁶ See, *Silver Express Co. v. Dist. Bd. of Lower Tribunal Trustees*, 691 So. 2d 1099 (Fla. 3d DCA 1997) (committee established by agency purchasing director).

⁷ See generally, Article I Sec. 24 Fla. Constitution and S. 286.011 Fla. Stats.

employee and that his firm was selected as a corporate citizen of the year. He is offended by the testimony of Protestor suggesting otherwise. It appears that the donation was not to the COUNTY or a staff member.

Legal Analysis of Due Process

Protestor cites *Optiplan, Inc. v. School Board of Broward County*, 710 So. 2d 569 (Fourth Dist. 1998). However, in that case a Hearing Officer erroneously refused to allow an amendment of the protest. This Special Master has allowed all evidence desired by Protestor to be placed into evidence and to be considered. This includes even some evidence that the COUNTY objected to at the beginning of the hearing. So, that case is inapposite.

Conclusions


A possible maxim relevant to this case might be a variation of Occam's Razor which holds that one should not make more assumptions than the minimum needed. Instead, it might say as follows: "Do not attribute to malice that which can be explained by error, even in dealing with government." The COUNTY discovered an error and corrected it prior to Board of County Commissioner approval. The procedures used to effectuate the correction were reasonable. The suggestions of the "smoke" of improper influence are not supported by the "fire" of proof. The ethics violation contentions are beyond the scope of this proceeding.

This Protest was conducted very capably by both attorneys. Both represented their clients zealously, but with professionalism and civility.

Denial of Protest & Recommendation

Based upon the foregoing, the Protest is DENIED. It is the RECOMMENDATION that the Purchasing Director proceed to post the award notification.

Date: January 14, 2019



Robert D. Pritt, Esq.
Special Master for Procurement Activities-Palm
Beach County
Fla. Bar No. 0196571
Board Certified City, County, Local Government
Law
Roetzel & Andress, L.P.A.
850 Park Shore Drive
Third Floor
Naples, FL 34103

This document is filed with Kathleen Scarlett, Purchasing Director via e-mail at Brenda D'Agostino BDAgosti@pbcgov.org and sent via Regular Mail to:

Brenda J. D'Agostino,
Administrative Secretary
Palm Beach County
Purchasing Department
50 South Military Trail, Suite 110
West Palm Beach, FL 33415-3199

With request to transmit copies to:

Ms. Rosemary Hanna Hayes, Esquire
HAYES LAW, PL
830 Lucerne Terrace
Orlando, FL 32801
and
Michael W. Jones, Esquire
Senior Assistant County Attorney
Palm Beach County
301 N. Olive Ave. Suite 601
West Palm Beach, FL 33401

ATTACHMENT A
EXHIBIT LIST

Protestor Exhibits

- Exhibit 1-Whitaker e-mail to Tonya Johnson (with attachments)
- Exhibit 2-Protestor's Power Point (50 slides with links)
- Exhibit 3-Ann McNeill e-mail to Tonya Johnson September 24, 2018
- Exhibit 4-Summary 12/31/18
- Exhibit 5-Lake Lytal Score Sheet with annotation
- Exhibit 6-Wolf e-mail to McKinlay, et al April 28, 2018
- Exhibit 7-Draft BCC Agenda Item Summary recommendation--8/21/18 by Audrey Wolf
- Exhibit 8-Wolf e-mail to Carter—September 13, 2018
- Exhibit 9-Excerpts Code of Ethics Sec. 2-441—2-448 County Code
- Exhibit 10-Division 2.-Purchasing—County Code
- Exhibit 11-*Optiplan Inc v. School Board of Broward County*

Also submitted was a Flash Drive with Power Point and Exhibits and a post-hearing memo.

COUNTY Exhibits

- Exhibit 1. Request for Proposals (RFP) (Project No. 17204)
- Exhibit 2. Bid Proposal from Kaufman Lynn Construction
- Exhibit 3. Bid Proposal ,from Collage Design & Construction, Inc. d/b/a The Collage Companies
- Exhibit 4. Notice of Protest
- Exhibit 5. Notice of Protest w/attachments
- Exhibit 6. Ms. Scarlett's Response Letter
- Exhibit 7. Copy of Code Section on Protest Procedures
- Exhibit 8. Protestor's Request and Bond for Special Master Hearing
- Exhibit 9. Selection Committee's Score Sheets (June 15, 2018)
- Exhibit 10. Selection Committee's Score Sheets (October 9, 2018)
- Exhibit 11. Protest Hearing Confirmation Letter