



Finance and Administrative Services Department
PURCHASING DIVISION

115 S. Andrews Avenue, Room 212 • Fort Lauderdale, Florida 33301 • 954-357-6066 • FAX 954-357-8535

Certified Mail No. 7005 3110 0002 8833 8957

December 20, 2019

Mark J. Stempler, Esq.
Becker & Poliakoff
625 N. Flagler Drive, 7th Floor
West Palm Beach, Florida 33401

Re: Protest - Solicitation No. PNC2117911C1, Segment II Nearshore Hardbottom Mitigation

Dear Mr. Stempler:

Broward County Purchasing Division is in receipt of Resolve Marine Group, Inc.'s timely protest letter of the Recommendation for Award of Bid No. PNC2117911C1, Segment II Nearshore Hardbottom Mitigation, dated October 7, 2019, which included the required \$5,000 protest filing fee.

After considerable due diligence in reviewing the protest and the solicitation requirements, I have decided to reject all bids. In accordance with the solicitation document and Section 21.31.i of the Broward County Procurement Code, the County reserves and has the right to reject any or all responses when it is in the best interests of the County. The rejection of all bids will allow for the bid specifications to be reviewed and revised to accurately reflect County requirements; a new solicitation will be promptly issued for this project.

A response to your letter dated October 7, 2019 is not being considered. We therefore will be returning the \$5,000 protest filing fee on behalf of your firm, Resolve Marine Group, Inc., under separate cover.

Sincerely,

*Glenn Marcos ON BEHALF OF
BRENDA J. BILLINGSLEY*

Brenda J. Billingsley, Director
Purchasing Division

Attachment

BJB/gm/dce/lg

- c: Jennifer Jurado, Director, Environmental Planning and Community Resilience Division
- Kenneth Banks, Natural Resources Section Manager, Environmental Planning & Community Resilience Division
- Glenn Marcos, Assistant Director, Purchasing Division
- Connie Mangan, Purchasing Manager, Purchasing Division
- Danea Cohen-Ebanks, Purchasing Agent Senior, Purchasing Division
- Fernando Amuchastegui, Assistant County Attorney, Office of the County Attorney
- Neil Sharma, Assistant County Attorney, Office of the County Attorney

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October 7, 2019

***VIA HAND DELIVERY and
Email: bbillingsley@broward.org***

Brenda J. Billingsley, Director
Broward County Purchasing Division
115 S. Andrews Avenue, Room 212
Fort Lauderdale, FL 33301

***Re: Bid Protest - Bid No. PNC2117911C1 – Segment II Nearshore Hardbottom
Mitigation***

Dear Ms. Billingsley:

This law firm represents Resolve Marine Group, Inc. (“Resolve”), an international, but **locally-headquartered business within Broward County**, with regard to Bid No. PNC2117911C1 – Segment II Nearshore Hardbottom Mitigation (the “Bid”). Pursuant to Section 21.118(a)(2) of Broward County’s Code of Ordinances (“Code”), Resolve files this protest in response to the Purchasing Division’s (“Purchasing”) Rescission of its Recommendation for Award to Resolve (“Recission”), and regarding the new Recommendation for Award to Earth Tech Enterprises, Inc. (“Earth Tech”) both of which were posted on September 27, 2019. Enclosed is a check for the Protest filing fee in the amount of \$5,000.00.

Purchasing’s Recommendation of Earth Tech, and the Rescission of the award to Resolve, blatantly run afoul of the Bid specifications, the County’s own Procurement Code, and decades of established Florida law. At the time of this initial award, Purchasing had correctly rejected Earth Tech’s “hard” bid for failing to meet the bid requirements. Purchasing then impermissibly rehabilitated Earth Tech’s “hard” bid **based solely on purported newly gained experience that did not exist at the time its bid was submitted seven (7) months earlier.** Further, the purported new experience was gained on a project that is a fraction of the scope, size and cost of Broward County’s current project, and is non-responsive to the Bid requirements. Purchasing’s reliance on Earth Tech’s experience gained seven months after bids were submitted, and a month after the Recommendation of Award to Resolve, is arbitrary,

Brenda J. Billingsley, Director
October 7, 2019
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capricious, contrary to the bid specifications, contrary to the County's Code and in violation of Florida Law.

Therefore, the Rescission and the second Recommendation of Award must be rejected. As the lowest-priced responsive and responsible bidder, the award to Resolve must be reinstated. An award to Earth Tech would undermine the sanctity of the public procurement process and undermine the established and respected policies of Broward County.

The filing of this protest shall not be construed as a waiver or prejudice of any other right or remedy afforded by Section 21.118 of the Code or applicable Florida law. On September 10, 2019, the undersigned submitted a Public Records Request to Broward County which sought all records relating the Bid from July 29, 2019 through the present. To date, the majority of records responsive to that request have not been furnished. Therefore, Resolve reserves the right to supplement and/or amend its Protest if needed based on the information yet to be provided by Broward County.

I. BACKGROUND

A. The Bid

Broward County (the "County") issued the Bid on November 21, 2018. The Bid is about the protection of Broward's shoreline and beaches. The Bid essentially sought a vendor to perform the fabrication and installation of 6.8 acres of mitigation reef units across approximately 10 acres of nearshore seafloor. The mitigation reef units were to be placed in the nearshore area offshore of Southern Lauderdale-By-the-Sea and Northern Fort Lauderdale in approximately 18 to 22 feet of water. The Bid required specific marine experience as outlined in the specifications. Such experience was sought due to the complex and unique nature of this project and the services requested.

Section F of the Bid's Special Instructions for Vendors ("Section F") states:

F. Relevant Specialized Required Experience:

Prime **shall demonstrate** at least one successfully completed project which included free-standing crane or excavator deployment from a barge or similar vessel of concrete, rock, or similar reef-replicating structures to the seabed, detached from shore, in offshore/open waters of the Atlantic Ocean and/or the Gulf of Mexico, with precise placement locations/layout of the structures.

Prime and/or Subcontractors **shall** also collectively demonstrate relevant project experience that includes successfully completed experience in the fabrication, transport, and controlled placement of structures, similar in size, scope and nature specified for the project work. Demonstrated experience is required in the

following areas:

- a) Installation from a barge or artificial reefs constructed of concrete, rock, or similar reef-replicating structures to the seabed, detached from shore, in offshore/open waters of the Atlantic Ocean and/or the Gulf of Mexico, with precise placement location/layout of the structures to or upon the seabed.
- b) Transport and handling of heavy structural materials for marine installation in offshore/open waters of the Atlantic Ocean and/or the Gulf of Mexico.
- c) Diving services for control and inspection of the structural installations to or upon the seabed in offshore/open waters of the Atlantic Ocean and/or the Gulf of Mexico.

(Emphasis added). The Vendor Questionnaire in the Bid sought at least three projects within the last three years.

In addition, Section 12 of the Standard Instructions for Bidders requires that this Bid only be awarded to a bidder that has the requisite experience in the type of work specified for this project:

Qualifications of Vendors: The County will only consider solicitation responses from firms normally engaged in performing the type of work specified within the Contract Documents. (Emphasis added)

Further, the Bid states that this Project is to be awarded to the “responsible Vendor who has submitted either the lowest responsive bid” or the lowest responsive bid based on the base bid with alternative/options terms.

B. The Evaluation for Responsiveness and Responsibility

The Bids were opened on January 28, 2019. Purchasing then reviewed the bids received for responsiveness and responsibility. Six months later, on July 29, 2019, Purchasing finally issued its Recommendation for Award to Resolve. A copy of the Recommendation is attached as Exhibit “1.” Purchasing determined three other bidders, Earth Tech, Pac Comm, Inc. (“Pac Comm”) and Underwater Engineering Services, Inc. were **rejected**. Upon information and belief, Underwater Engineering Services, Inc. was rejected due to the submission of an incorrect and unreasonably low bid, and Pac Comm was rejected due to its lack of experience required in the Bid.

Earth Tech was specifically rejected for failing to meet the experience requirements in Section F of the Special Instructions in the Bid, as well as the specifications in the corresponding Vendor Questionnaire. Again, the Bid required vendors to list references from three projects completed in the last three years which met the experience requirements described in Section F.

According to limited documents received from Purchasing, on or about March 18, 2019, Jennifer Jurado, Director and Chief Resilience Officer of the Environmental Protection and Growth Management Department sent a “concurrence form” to Purchasing following its review of Earth Tech’s bid. That concurrence form is attached as Exhibit “2.” Ms. Jurado evaluated the three prior projects listed by Earth Tech in its Bid in response to the Section F requirements. Ms. Jurado determined that Earth Tech failed to meet one of the requirements of Section F (which required successful completion experience in the fabrication, transport and control placement of structures, similar in size, scope and nature specified for the project work) because the “Naples Oyster Reef Renovation” project (“Oyster Reef”) listed in its bid had not been completed. In fact, she determined, **“the deployment phase of this contract has not begun yet, therefore ETE (Earth Tech) is deemed disqualified per Section F.”** Ms. Jurado further stated that she contacted Earth Tech to see if there were other references that would meet the experience required by the Bid, but Earth Tech could not provide further support. Ms. Jurado’s investigation and conclusions were adopted by Purchasing, based on its subsequent rejection of Earth Tech’s bid.

C. Events After the Recommendation for Award to Resolve

Following the July 29th Recommendation for Award to Resolve, Pac Comm filed a protest regarding the rejection of its bid only. Earth Tech did not file a protest, and there was no challenge to Purchasing’s rejection of Earth Tech’s bid. To date, we are not aware of Purchasing issuing a response to Pac Comm’s protest, despite a pending public records request. But for Pac Comm’s protest which stayed the procurement, the contract would have already been awarded to Resolve.

Despite the Recommendation for Award to Resolve, the lack of any protest by Earth Tech, and the passage of time of more than seven months since bids were submitted, on September 25, 2019, the experience of Earth Tech was inexplicitly revisited. Kenneth Banks, a Natural Resources Section Manager, sent another concurrence form to Purchasing, now supporting Earth Tech as the recommended vendor for this award. The September 25, 2019 form is attached as Exhibit “3.” The form references the Oyster Reef project originally cited by Ms. Jurado as not being completed, but now found that services were “provided” from January, 2019 through August, 2019. The form lists August 27, 2019 as the date of verification by Mr. Banks. **It does not state that the project was completed, but based on the dates, it is undisputed that the project was not completed at the time Earth Tech’s bid was submitted for this Bid in January, 2019. See e.g.,** Email from Glenn Marcos, attached to Exhibit “3.”

On September 27, 2019 Purchasing rescinded the award to Resolve, and recommended Earth Tech for the award of this Project. The notice of recession and the new Recommendation of Award is attached as Exhibit “4.”

III. LEGAL STANDARD

Public authorities have wide discretion in awarding public contracts through the competitive bid process. That discretion, however, “must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously.” Liberty County v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982); Emerald Correctional Management v. Bay County Bd. Of County Commissioners, 955 So. 2d 647 (Fla. 1st DCA 2007). Public authorities cannot exercise that discretion in a manner that is illegal, dishonest, fraudulent, unreasonable, arbitrary, capricious, or in any other way that would subvert or undermine the purpose and object of competitive bidding. D.O.T. v. Groves-Watkins Constructors, 530 So.2d 912, 913-14 (Fla. 1988); Caber Systems v. Department of General Services, 530 So.2d 325, 336 (Fla. 1st DCA 1988); *see also* William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So. 2d 550, 551 (Fla. 2d DCA 1960) (an agency’s wide discretion in evaluating bids will not be interfered with unless, “exercised arbitrarily or capriciously, or unless based upon a misconception of law, or upon ignorance through lack of inquiry, or in violation of the law, or was the result of improper influence.”).

The object of competitive procurement is:

“to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids’....

From the above quote, it is apparent that the entire scheme of bidding on public projects is to insure the sanctity of the competitive atmosphere prior to and after the actual letting of the contract. In order to insured this desired competitiveness, a bidder cannot be permitted to change his bid after the bids have been opened, except to cure minor irregularities.” (Emphasis added).

Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1190); *quoting, in part*, Wester v. Belote, 138 So. 721, 723-23 (Fla. 1931).

“A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic.” Agrico Chem. Co. v. Dep’t of Envir. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Arbitrary and capricious has also been defined the include acts taken with improper motive, without reason, or for a reason which is merely pretextual. City of Sweetwater v. Solo Const. Corp., 823 So. 2d at 798, 802 (Fla. 3d DCA 2002); *citing* Decarion v. Monroe County, 853 F.Supp. 1415 (S.D. Fla. 1994).

An agency acts arbitrarily when it fails to follow its own evaluation procedures. Moore v. HRS, 596 So. 2d 759 (Fla. 1st DCA 1992). **If an agency fails to observe pre-established specifications, or its code or written guidelines, “that action will render meaningless the basis upon which bids were initially sought, and so must be deemed arbitrary, illegal, fraudulent, or dishonest.”** MCI Telecommunications Corp. v. Dept. of Corrections, 1995 WL 1053092 (Fla.Div.Admin.Hrgs.); *citing* Proccaci v. HRS, 603 So. 2d 1299 (Fla. 1st DCA 1992); Courtenay v. HRS, 581 So. 2d 621 (Fla. 5th DCA 1991); Spiliotis v. Department of Education, 2005 WL 2484798 (Fla. Div. Admin. Hrgs); NEC Business Communication Systems, Inc. v. Seminole County School Board, 1995 WL 1053245 (Fla. Div. Admin. Hrgs).

IV. PROTEST ARGUMENT

A. Earth Tech’s Bid was Non-Responsive, and the County Violated Its Own Bid, Code, and Florida Law By Considering Material Information That Did Not Exist at the Time of Earth Tech’s Bid

Broward County impermissibly used information obtained seven months after the bid to improperly rehabilitate Earth Tech’s rejected bid. At the time Earth Tech submitted its bid in January, 2019, it had not completed the Oyster Reef project listed in its bid to meet the Section F requirements. In fact, based on the County’s records, that project had only just begun when the bid was submitted, and the deployment phase of that contract had not even begun as of March, 2019. **For this reason alone, Earth Tech failed to meet the criteria of the bid specifications, and was neither responsive, nor responsible, under the Bid specification.** Therefore, Purchasing rightfully rejected Earth Tech’s bid.

Seven months later, and about a month after Purchasing recommended Resolve for the award, the County revisited Earth Tech’s performance of the Oyster Reef project. By that time, in late August, 2019, Earth Tech may have completed the project, however that is not clear from the County’s records received to date.

Section 21.8(65) of the Purchasing Code defines a “responsive bidder” as one which has:

“submitted a bid which **conforms in all material respects** to a solicitation. A bid or proposal of a Responsive Bidder must be submitted on the required forms, which contain all required information, signatures, notarizations, insurance, bonding, security, **or other mandated requirements required by the bid documents to be submitted at the time of bid opening.**”

Under Florida law, a responsive bidder is one ‘that has submitted a bid, proposal, or reply that conforms in all material respects to the solicitation.’” Am. Eng’g & Dev. Corp. v. Town of Highland Beach, 20 So. 3d 1000 (Fla. 4th DCA 2009); *citing* § 255.248(5), Fla. Stat. (2009) and § 255.248(7), Fla. Stat. (2009), respectively.

Clearly, Subsection F of the Special Instructions to Bidders sets forth requirements for demonstrated experience **at the time the bid was submitted**. Therefore, the submission of such information is clearly a matter of responsiveness, and is not a minor irregularity that can be waived. Failure to meet the criteria set forth in the bid, must render a nonconforming bid non-responsive. This was a hard bid, and the fundamental underpinnings of the bid could not be changed months after the submission date.

Based on its bid as submitted, Earth Tech was clearly non-responsive, as Purchasing originally determined when it rejected Earth Tech's bid. Earth Tech did not demonstrate "successfully completed experience in the fabrication, transport, and controlled placement of structures, similar in size, scope and nature specified in the project work." It is undisputed that the Oyster Reef project was not complete at the time of Earth Tech's bid submittal. Therefore, Earth Tech's bid did not conform in at least one material respect to the Bid.

Purchasing then violated the Bid, the Code and Florida law by considering information prohibited by the Bid, and information which only came into existence seven months after bids were submitted. Section 21.30 of Broward County's Administrative Code pertains to "Competitive Sealed Bidding." Section 21.30(e) addresses bid acceptance and evaluation, and states "bids shall be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine suitability for a particular purpose." Further, "no criteria may be used in bid evaluation that are not set forth in the Invitation for Bids."

The information actually submitted in a bid is the only information upon which the bidder shall be evaluated. Section 21.30(f)(1)(c) of the Code states:

Information shall not be considered after the bid opening if it has been specifically requested to be provided with the bid and becomes a matter of responsiveness. The bid shall be considered responsive only if it substantially conforms to the requirements of the Invitation for Bids as it relates to pricing, surety, insurance, specifications, and any other matter unequivocally stated in the Invitation for Bids as a deterrent of responsiveness. (Emphasis added).

That clear rule is subject only to limited exceptions as stated in the Code, none of which apply to Purchasing's mishandling of Earth Tech's new information. Section 21.30(f)(1)(a), states that bidders "shall be permitted the opportunity to furnish other information called for by the Invitation for Bids and not supplied due to oversight, so long as it does not affect responsiveness." There was no missing information from Earth Tech due to oversight. In its bid Earth Tech identified a project that was not complete, and failed to satisfy the requirements in Section F for experience. Information about its purported completion of that project, only achieved seven months after its bid was submitted, is not missing information due to oversight, and it does directly affect responsiveness.

Further, Section 21.30(f)(2) pertains to the “Correction of Bids.” The ability of a bidder to correct a bid only includes mathematical errors, correction of nonjudgmental errors and voluntary reduction of price. The new information Purchasing relied on in re-evaluating Earth Tech was not due to a mathematical error, it was not a correction of a nonjudgmental error nor was it a voluntary reduction of price. Therefore, its bid could not be “corrected” though a supplementation of information.

Earth Tech’s non-responsiveness goes beyond the Oyster Reef project, however. Earth Tech had listed another project that does not satisfy the Bid’s experience requirements. That project known as the “Venice Artificial Reef Renovation,” is listed as a 2008 project. **Broward County specifically requested project references from the last three years. This experience is from over 10 years ago.** Specifically, Section 31 of the Vendor Questionnaire (where these references/projects were listed) required vendors to:

“Provide at least three (3) individuals, corporations, agencies, or institutions for which your firm has completed work of a similar nature or in which your firm sold similar commodities in the past three (3) years.”

Therefore, the Venice Artificial Reef Renovation project does not meet the three year requirement, and Earth Tech further failed to provide three projects in the last three years.

Earth Tech’s non-responsiveness at the time of bid submission cannot be fixed because of the passage of time after submission and after a recommendation of award. Further, Earth Tech’s bid cannot become responsive, due to the passage of time, especially when it is caused by the delay of Purchasing itself. The County is not permitted to evaluate bids in perpetuity in order to allow one bidder time to gain the requisite experience sought in the Bid. Doing so is arbitrary, capricious, and specifically not permitted by the terms of the Bid and by Broward County’s Procurement Code or Florida law. **By doing so, however, Purchasing gave Earth Tech an unfair competitive advantage not enjoyed by the other bidders. That unfair competitive advantage, which clearly violates the Bid specifications, the Code and Florida law, is the only reason that Earth Tech’s rejected bid could be rehabilitated.**

Earth Tech did not just fail to submit information to satisfy the experience requirements; it also did not possess the experience required by the Bid specification. Again, this is measured and evaluated at the time its bid was submitted.

If Purchasing’s decision is upheld, it will set a dangerous precedent in Broward County. Procurements will be permitted to be manipulated by allowing bidders to achieve project desired experience after bids or proposals are submitted, despite a requirement in a bid or proposal that the experience must exist at the time of submission.

B. Earth Tech's Lack of Experience Renders it Non-Responsible

A "responsible bidder" is defined in Section 21.8(64) of the Purchasing Code as a bidder which "has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance."

Section 21.30(f)(1)(b) of the Code permits the Director of Purchasing to ask bidders to provide "additional information" to determine responsibility. However, first, that information can only be sought for clarification of existing factual information only. Additional information is not new information that only comes into existence due to a change in circumstances achieved only through the passage of time. New experience is not a clarification. Second, the Code does not permit Purchasing to allow an otherwise non-responsible bidder to become responsible through the passage of time resulting in a change of circumstances. Third, the Code does not permit that information to be sought, or utilized, after a Recommendation of Award has been issued, especially in a circumstance when a bidder such as Earth Tech did not protest the Recommendation.

Even if Earth Tech had timely completed the Oyster Reef project (which it did not), its lack of experience still renders it non-responsible. First, the bid specifications, in Section 12 of the Standard Instructions for Bidders, not only requires the County to award this project to a vendor with the requisite experience, but also that only firms normally engaged in performing the type of work specified could be considered. Earth Tech is not normally engaged in performing the type of work in this Bid. As evidenced by its own website, Earth Tech is a geotechnical construction services group from West Florida. Its focus is soil stabilization projects. It has no significant offshore experience. While it claims to have performed a few small projects near the water, none of its past projects involve the type of offshore work which would be required of Broward County for this current project.

Second, the Oyster Reef project that Purchasing improperly relied on in reversing its Recommendation of Award is completely distinguishable from the present project. The Oyster Reef project was not offshore but inside a protected waters area. That project involved deploying oyster shells in shallow water depths within a bay. Most deployments would be in less than two feet of water. The deeper reef sites are in approximately four feet of water. This shallow water depth eliminates the challenges of working with a crane load below the water surface. The sea state and the proposed project site for Broward's project will far surpass those inside a bay or those caused by passing boats. In Broward's project, the crane loads will need to be adjusted below the water surface where communication to the rigger, visual line of sight for the operator and dynamics of the load "now submerged in water" are all more difficult. That is in stark contrast to Earth Tech's Oyster Reef project.

In addition, the City of Naples had installed marking stakes to outline the area that Earth Tech had to dump the oyster shells into. Since Earth Tech was given visual markings, it did not allow it an opportunity to demonstrate the precision placement monitor ring and recording abilities requested as part of the Broward County Project.

Significantly, the Oyster Reef project is valued at \$699,000. The present Broward project is valued at well over \$12-million. The Oyster Reef project is not similar in size, scope and nature, as required by Section F.

Third, the other two projects listed in Earth Tech's bid further render it non-responsible. As set forth above, the project known as the "Venice Artificial Reef Renovation," is listed as a 2008 project. **Broward County specifically requested project references from the last three years. This project is from more than 10 years ago.** Therefore this project does not meet the three year requirement, and Earth Tech further failed to provide three completed projects in the last three years. Based on that alone, Earth Tech is a non-responsible bidder.

Purchasing also failed to realize that Earth Tech's third project listed is also distinguishable from Broward's project. The "Doctors Pass Erosion Control Structure" ("Doctors Pass") project required the placement of base stones and then further adding of rocks and boulders to repair an existing jetty at Doctors Pass in Naples, Florida. The work was done from a barge, but largely used a long reach excavator in a nearshore environment.

A main difference between Doctors Pass and Broward's project is that Earth Tech used a long reach excavator on the barge, not a crane. A long reach excavator would not be capable of the weight for each Hard Bottom Mitigation unit in Broward. The operation of these two machines is vastly different and the experience is largely non-transferable. The majority of the excavator loads were deposited above the water surface as the jetty was being repaired, not newly built. Further, despite Collier County considering this to be an "offshore" project, all work was completed either in-shore, in the channel, or in immediate vicinity of the shallow channel and breakwater jetties in protected waters. The furthest point offshore for the work completed was approximately 60 yards and the work was completed in water depths of 5-7 feet.

The work noted as "offshore" is understood to be the work at the "offshore" end of the jetty. While this could be technically defined as offshore, it is not how the general marine industry defines "offshore." The term "offshore" means in an open or exposed environment, some distance away from the shoreline, without the ability for immediate return to protected waters. The Broward County project will require operations over five miles from the nearest channel/port entrance, in depths over twenty feet of water, and will require an offshore approach through a narrow access channel in the live coral reef.

The crane deployment and precision placement of subsea modules including with the assistance of divers is also substantially more challenging in the offshore waves, swell and current expected off Broward County as compared to Collier County. Thus, the equipment and skill sets required to work offshore are substantially different and this jetty project does not demonstrate such offshore capability for performing the project of concern off Broward County.

Significantly, Doctors Pass was worth less than \$2.5-million. This project is 5-6 times the value. The Doctors Pass project is not similar in size, scope and nature, as required by Section F.

In sum, even if the Oyster Reef project could be considered a completed project, a review of the Venice Artificial Reef Renovation and Doctors Pass projects must render Earth Tech as a non-responsible, and non-responsive, bidder. Purchasing's finding to the contrary is arbitrary, capricious, and violates the Bid, the Code and Florida law.

Like with the responsiveness issue, Earth Tech's non-responsibility at the time of bid submission cannot be fixed because of the passage of time after submission and after a recommendation of award. Further, Earth Tech's bid cannot become responsible, or responsive, due to the passage of time, especially when it is caused by the delay of Purchasing itself. The County is not permitted to evaluate bids in perpetuity in order to allow one bidder time to gain the requisite experience sought in the Bid. Doing so is arbitrary, capricious, and specifically not permitted by the terms of the Bid and by Broward County's Procurement Code or Florida law. **By doing so, however, Purchasing gave Earth Tech an unfair competitive advantage not enjoyed by the other bidders. That unfair competitive advantage, which clearly violates the Bid specifications, the Code and Florida law, is the only reason that Earth Tech's rejected bid could be rehabilitated.**

V. CONCLUSION

This project was originally awarded to Resolve based on its demonstrated experience, responsiveness to all of the bid specifications and its responsibility and ability to adequately complete this important project for the County. Purchasing's determination to rescind the award to Resolve and award it to Earth Tech based on information:

- That did not exist at the time of bid submission, that only came into existence seven months after bids were submitted
- That Purchasing was not permitted to consider based on the Bid, the Code and Florida Law; and
- That is irrelevant to the determination of responsiveness and responsibility.

Purchasing's reliance on Earth Tech's experience gained seven months after bids were submitted, and a month after its Recommendation of Award to Resolve, is arbitrary, capricious, contrary to the bid specifications, contrary to the County's Code and in violation of Florida Law. Further, Purchasing's actions undermine the sanctity of the competitive bidding process and would send a deeply disturbing signal to any business which to compete in the future for Broward County public projects. In addition, Purchasing considered an Earth Tech project from 2008 which was

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time-barred from consideration. Further, Purchasing considered a Collier County project which did not meet the experience requirements for the Bid.

For the reasons set forth above, Broward County must reinstate the award to Resolve Marine, and reinstate its determination that Earth Tech is a rejected bidder. Thank you for your time and attention to the foregoing. Resolve continues to stand ready, willing and able to perform this important project for the County.

Sincerely,



Mark J. Stempler, Esq.
For the Firm

MJS/mrw
Enclosures

cc: Fernando Amchastegui, Esq., via email: FA@broward.org
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