AGENDA

SOLID WASTE & RECYCLING COLLECTION BID AND RFP
PROTEST HEARINGS
BID: 19-402/SLB and RFP: 19-203/SLB

Wednesday, January 23, 2019
9:00 AM

LOCATION:
Solid Waste Authority of PBC
7501 North Jog Road, Auditorium
West Palm Beach, FL 33412
www.swa.org

I. Call to Order / Roll Call

   Vice Mayor Dave Kerner, Chair
   Commissioner Robert S. Weinroth, Vice Chair
   Commissioner Gregg Weiss, Secretary
   Commissioner Hal Valeche
   Commissioner Mary Lou Berger
   Commissioner Melissa McKinlay
   Mayor Mack Bernard

II. Proof of Publication of Meeting

III. Opening Presentation by General Counsel

IV. Protest by Waste Management of Florida, Inc. [Bid 19-402/SLB]:
   a. Presentation by petitioner Waste Management of Florida, Inc. [30 minutes]
   b. Comments by Richard's Disposal, Inc. [15 minutes]
   c. Presentation by SWA
   d. Petitioner's response [5 minutes]
   e. Governing Board deliberations
V. Protest by Richard’s Disposal, Inc. [Bid 19-402/SLB]:

   a. Presentation by petitioner Richard’s Disposal, Inc. [30 minutes]

   b. Presentation by other bidders
      • Advanced Disposal [15 minutes]
      • Goode Companies [15 minutes]
      • Republic Services [15 minutes]
      • Waste Management [15 minutes]
      • Waste Pro [15 minutes]

   c. Presentation by SWA

   d. Petitioner’s response [5 minutes]

   e. Governing Board deliberations

VI. Protest by Richard’s Disposal, Inc. [RFP 19-203/SLB]:

   a. Presentation by petitioner Richard’s Disposal, Inc. [30 minutes]

   b. Presentation by other bidders
      • Florida Cuttings [15 minutes]
      • Goode Companies [15 minutes]

   c. Presentation by SWA

   d. Petitioner’s response [5 minutes]

   e. Governing Board deliberations

VII. Adjournment
NOTICE OF PUBLIC MEETING

The Solid Waste Authority of Palm Beach County announces Bid and RFP Protest Hearings to which all persons are invited.

DATE & TIME: JANUARY 23, 2019 at 3:00 PM
PLACE: Solid Waste Authority of Palm Beach County
7501 North Jog Road, Auditorium
West Palm Beach, FL 33412

PURPOSE: To hear the protests of bidders Richard’s Disposal, Inc., and Waste Management Inc. of Florida regarding the Solid Waste and Recycling Collection Bid for Service Areas 1-4 and RFP for Service Area 6.

A copy of the agenda may be obtained by writing or calling the Solid Waste Authority of Palm Beach County, 7501 North Jog Road, West Palm Beach, FL 33412 (561) 640-4000 ext. 4210.

PLEASE TAKE NOTICE AND BE ADVISED that if a person desires to appeal any decision made by the Solid Waste Authority of Palm Beach County with respect to any matter considered at subject meeting, (s)he will need a record of the proceedings and, for such purpose, will need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based (F.S.285.0105).

Published by order of Dan Fellows, Executive Director of the Solid Waste Authority of Palm Beach County.

Sandra J. Vassafoti
Clerk to the Authority
1-15-2019

0000947347-01
MEMORANDUM

TO:  Vice Mayor Dave Kerner, Chair
     and Solid Waste Authority Board Members

THRU: Howard J. Falcon, III
       SWA General Counsel
       Dan Pellowitz
       Executive Director

FROM: Michael W. Jones
      Senior Assistant County Attorney

RE:  Bid Protest #1: SWA Response to Waste Management Inc. of Florida’s
     Protest to Pre-Qualification Phase of Bid 19-402/SLB

Waste Management's Pre-Qualification Challenge

A. INTRODUCTION

The Solid Waste Authority found Waste Management, Inc. (WM) to be nonresponsive to Bid 19-402/SLB based on the failure to establish that two WM M/WBE vendors proposed under its Subcontractor/Supplier Utilization Plan had a Significant Business Presence in the County as of the date the bid was due, which was a requirement of the Invitation to Bid (ITB). WM protests this determination based on the following: (a) The two M/WBE vendors were responsive to the ITB; (b) the procurement was conducted in an arbitrary and capricious manner; and (c) the protest filed by Richard's Disposal, Inc. was untimely filed.

B. FACTUAL BACKGROUND

As a member of the Prequalification Committee, Ms. Colleen Robbs, Coordinator of the Equal Business Opportunity Office (EBO), indicated that WM's Subcontractor/Supplier Utilization Plan was "acceptable with reservations." The reservations related, in part, to the inability to substantiate the existence of a place of business in the County for two (2) of
WM's M/WBE vendors, Tiger Natural Gas, Inc. and TV Guy Orlando, LLC, dba MDB Services.

Subsequent to the posting of the prequalification recommendation, the EBO office exercised its authority under Section 6.4 F ii, Paragraph j. of the Purchasing Manual, to “determine Prime Contractor compliance with EBO Policy requirements prior to contract award presentation to the SWA and prior to Originating Department release of final retainage” (emphasis supplied). Section 6 of the Authority Purchasing Manual was expressly incorporated into the Bid documents by reference. See Section 27, Terms and Conditions, p. 5, Invitation to Bid. The initial documentation submitted by WM was insufficient to establish that its two listed subcontractors at issue in this protest had an established business presence in Palm Beach County as required by the Bid due date. Therefore, the EBO Office initiated a site visit of the two office locations in an effort to alleviate concerns about the legitimacy of the local offices¹. After the site visit by EBO, in accordance with its authority under Section 6 of the Authority Purchasing Manual, EBO determined that the two M/WBE firms did not meet the ITB requirements related to Significant Business Presence and therefore WM did not satisfy the M/WBE requirements of the ITB, and was declared non-responsive.

C. APPLICABLE LEGAL STANDARDS AND DISCRETION OF SWA BOARD

1. Materiality Standard

In this case, the bid documents expressly reserved the right to the Authority “to waive any minor irregularity in the Bids received”. (Invitation to Bid, General Terms and Conditions No. 12). This is consistent with Florida law.

In Tropabest Foods, Inc. v. State of Florida Department of General Services, 493 So.2d. 50 (Fla. 1st DCA 1986), the court held:

Although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over other bidders and thereby restricts or stifles competition.

Tropabest Foods, 493 So.2d. 52 (other citations omitted)

Further, the court of Tropabest expressly recognized that “the purpose of competitive bidding is to secure the lowest responsible offer and minor irregularities can be waived in effectuating that purpose.” Tropabest, 493 So.2d. 52, citing Robinson Electrical Co, Inc. v. Dade County, 417 So.2d. 1032, 1034 (Fla. 3rd DCA 1982).

¹ The site visits also included visits to other offices proposed by other bidders/subcontractors.
2. **Discretion of SWA Board**

In Liberty County v. Baxter’s Asphalt & Concrete, Inc., 421 So.2d. 505 (Fla. 1982), the Florida Supreme Court held:

A public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.

Liberty County, 421 So.2d 507; see also Sutron Corp. v. Lake County Water Auth., 870 So.2d 930, 932 (Fla. 5th DCA 2004) (explaining that discretion of a public entity to solicit, accept or reject contract bids should not be interfered with by courts absent a showing of dishonesty, illegality, fraud, oppression or misconduct).

**D. BURDEN OF PROOF**

In this case, the burden of proof is on the Protester, WM, to prove to the SWA Board by “clear and convincing” evidence that it is entitled to the relief it is requesting: that the determination that WM is non-responsive be set aside and that it remains a pre-qualified bidder.

To meet this high threshold, the evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

*Slomowitz v. E. O. Walker, 429 So 2d. 797, 800 (Fla. 4th DCA 1983)*

(emphasis supplied)

**E. THE M/WBEs AT ISSUE**

In the case of Tiger Natural Gas, Inc., WM provided a Palm Beach County Business Tax Receipt identifying their location as Tulsa, Oklahoma. In addition, they provided a letter from Tiger Gas stating that they had an office in Palm Beach County. A representative of the EBO office, after attempting to notify the company of his intent, visited the site and confirmed it to be a single family home in the Acreage that is the registered homestead of an attorney for WM, but with no other indication of a Tiger Natural Gas, Inc., office.

In the case of TV Guy Orlando, LLC, dba MDB Services, WM provided a Palm Beach County Business Tax Receipt identifying their location as Orlando, Florida. In addition, they provided a letter from MDB stating that they had an office in Palm Beach County. A representative of the EBO office, after notifying the company of his intent, visited the site and found it to be occupied by First Transit. This same representative spoke to the principal of MDB, Mr. Boyd, who stated that MDB’s local partner was First Transit, and MDB would
be operating out of the same space. The EBO representative told Mr. Boyd that situation might require clarification.

**F. WM's SBE and M/WBE UTILIZATION PLAN**

WM submitted an E3O plan for both Service Areas 3 and 4. WM's plan committed to a 21.29% participation rate in Service Area 3, and a 25.59% participation rate in Service Area 4.\(^2\) Without the aforementioned firms, WM's participation is affected as follows:

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<thead>
<tr>
<th></th>
<th>Service Area 3</th>
<th>Service Area 4</th>
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<tr>
<td>Submitted MWBE</td>
<td>11.29%</td>
<td>14.88%</td>
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<tr>
<td>Submitted SBE</td>
<td>10.00%</td>
<td>10.71%</td>
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<td>Submitted Total</td>
<td>21.29%</td>
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<td>Adjusted MWBE</td>
<td>8.07%</td>
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<td>Adjusted SBE</td>
<td>9.36%</td>
<td>10.71%</td>
</tr>
<tr>
<td>Adjusted Total</td>
<td>17.43%</td>
<td>20.10%</td>
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The ITB contained the following provision related to the local requirement of S/M/WBE firms:

The goal is to encourage doing business with certified local S/M/WBE firms with certifications from any certifying organization within the State of Florida approved by the AUTHORITY. For the purpose of this requirement, an eligible local S/M/WBE firm included in the Contractor's plan must have had a valid certification prior to the due date for responses to this Bid solicitation. Certified local S/M/WBE firms added after contract award must have a valid certification prior to the date upon which they are added. **Furthermore, such firms shall be domiciled in Palm Beach County as defined in the AUTHORITY'S Purchasing Manual, Section 6, is incorporated herein, as of the aforementioned dates required for certification.** See ITB, Page 22, REQUIREMENT D – EQUAL BUSINESS OPPORTUNITY (EBO) Program, Section 1.03(2) (emphasis added).

In addition, the Authority made clear on multiple occasions that a documented office in Palm Beach County must be in existence as of the date the bid was due. During the question and answer period, **WM** submitted the following question in writing\(^3\):

Does the possession of a Palm Beach County Business Tax Receipt and office in Palm Beach County by the time of bid submission meet the definition of domiciled in PBC? Please clarify what constitutes local business in Palm Beach County as a qualifier for the bid.

\(^3\) Addendum No. 2, October 31, 2018.
The Authority provided the following written response:

Yes. The local business office and Palm Beach County Business Tax Receipt must be in place at the time of submission and will meet the definition of "domiciled" for purposes of this bid. This is not intended to be a legal declaration of domicile for any other purpose.

WM did appear to be confused about the local requirement as it relates to the EBO Program, and asked the following question in writing:

Sect. 42. EBO program, does not appear to have a local requirement. Sect. 43, Local Business Participation, the bid itself appears to separate WMBE and local business participation into two separate categories, Sect. 43 states "contractor shall prioritize the satisfaction of the SWWBE goals established in Sect. 42 of the agreement. Upon satisfaction of the requirements in Sect. 42, contractor shall prioritize the utilization of local businesses." Where is the local requirement in the bid or purchasing manual that requires MWBEs to be local?

The Authority provided the following written response:

Certified firms must meet the certification eligibility requirements, including having a significant business presence within Palm Beach County. Please refer to the definition of significant business presence in the Definition section of the Purchasing Manual.

In response to this question, the Authority directed WM and all of the other participants to the definitions section of the Purchasing Manual. The definition of Significant Business Presence in the Purchasing Manual is as follows:

**Significant Business Presence** – to qualify for participation as an S/M/WBE firm in the EBO Program, the initial designated street address of the S/M/WBE firm's principal office as stated in its filings with the Florida Department of State must be located within Palm Beach County, or the firm must have a significant business presence for at least one year within Palm Beach County, defined as: an established place of business in Palm Beach County, from which at least 50% of its total full-time, part-time and contract employees are domiciled and regularly based in Palm Beach County, and from which a substantial role in the S/M/WBE's performance of a Commercially Useful Function on the Authority contract is conducted. A location utilized solely as a post office box, mail drop or telephone message center or any combination thereof, with no other substantial work function, shall not be construed to constitute a significant business presence.4

The key phrase from the above is "established place of business." For this solicitation, in the interest of inclusiveness and competition, the SWA relaxed the above requirement to provide for an office (established place of business) in the County as of the due date for the

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4 Authority Purchasing Manual Definitions, p. xii
bid (not for a full year before), but an established place of business was still required. WM knew or should have known that this was a requirement of this solicitation. The express terms of the Bid documents at p. 1, General Terms and Conditions, state that "[b]y submitting a Bid the BIDDER agrees to be subject to all terms and conditions specified herein." The requirement for an established place of business was set forth in the Bid, Addenda, and incorporated Purchasing Manual, and WM, by submitting its bid, agreed to be subject to those terms.

Furthermore, in referring to the definition of M/WBE in the Authority Purchasing Manual, the definition includes the phrase, "and meets the Significant Business Presence requirements as defined herein" (emphasis supplied). Clearly, WM should have had no confusion that a local presence was required, and the evidence, particularly the letters from the two vendors identifying local "satellite offices," suggests that WM knew this to be a fact and made an effort to comply with the requirement. The failure to meet this requirement to the satisfaction of the Authority's EBO Office after personal inspection caused WM to be deemed non-responsive.

In its protest on this basis, WM basically asserts that it was confused on this matter as evidenced by the multiple questions asked on this topic and that the Invitation to Bid was not sufficiently clear, again, as evidenced by the multiple questions on this topic. WM's argument is without merit.

More specifically, it was WM that asked the question on this topic and received an answer. Further, the Authority's answer to this question specifically referred WM to the Authority Purchasing Manual where again, WM itself recognizes that the Purchasing Manual is incorporated into the Bid documents where expressly stated, as in this exact instance.

Next, WM asserts that the decision to declare WM nonresponsive was improper, as that determination is solely within the discretion of the Pre-Qualification Committee, or in the alternative, that if the Pre-Qualification Committee did meet again to determine its responsiveness to the Bid, that a Sunshine violation occurred and the EBO's determination of its non-responsiveness must be set aside. As set forth above, Section 6.4 F ii, Paragraph j. of the Purchasing Manual, specifically authorizes the EBO Office to "determine Prime Contractor compliance with EBO Policy requirements prior to contract award presentation to the SWA." The EBO Office acted within its authority in conducting the site visits "prior to contract award presentation to the SWA." No subsequent Pre-Qualification Committee meeting occurred, nor was necessary, so no sunshine violation occurred.

Finally, WM asserts that certain bidders were given an "advantage" or "preferential" treatment by having an opportunity to review public records related to the bid, while WM was somehow prevented from doing so. This is a non-issue in its entirety.

First, every bidder had an opportunity to review any public records related to the Bid. Second, and more importantly, no public records in the possession of the Authority would assist WM in showing that its two (2) sub-contractors at issue (Tiger Natural Gas, Inc., and MDB Services) had the required business presence in Palm Beach County at the time of

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5 Authority Purchasing Manual Definitions, p. ix
the Bid due date. Only WM itself, not any documents in the possession of the Authority, can establish that its two (2) subcontractors had the local office presence in Palm Beach County as required. Absent WM providing supplemental evidence to support its position that its subcontractors in fact had an office in Palm Beach County at the time of the Bid due date, it is within the SWA Board’s discretion to deny WM’s protest on this ground.

Therefore, the cumulative grounds that WM asserts as “evidencing” the arbitrary and capricious action of the Authority in declaring WM non-responsive are wholly unfounded. WM’s protest on all grounds must be denied.

G. **WM CLAIMS RICHARD’S PROTEST IS UNTIMELY**

There is no basis to WM’s protest on this ground. The Authority acknowledges that Richard’s protest is timely as the original due date fell on Christmas Day, December 25, 2018, which due date, as a result of the holiday, carried over to the next business day, December 26, 2018. The Authority specifically stated that bid protests were due on December 26, 2018 in Addendum #3. There is simply no basis for WM’s protest on this ground.

H. **SPECIFIC QUESTION PRESENTED**

The primary question for the Board is whether or not, for the two firms in question, the letters from the firms and any supplemental information provided by WM at this hearing are sufficient to demonstrate an established place of business in the County as of the bid due date.

The Board could conclude any of the following:

1) The Board could conclude that WM, by virtue of not meeting the API requirement, and in the absence of the granting of a Waiver is non-responsive; or

2) The Board could, based upon the information provided in its submittal, the supplemental information provided in its protest, and on the information provided at the hearing, uphold the protest and conclude that WM sufficiently satisfied the requirement of the ITB as of the Bid due date, and is therefore responsive; or

3) The Board could conclude that despite the failure of WM to document the existence of a local office as of the Bid Due Date for these two firms that it demonstrated a good faith effort to achieve the goal and that the failure to achieve the local requirement was a minor irregularity that may be waived.

**CONCLUSION/STAFF RECOMMENDATION**

In the event the Board decides to uphold the protest, staff recommends that the Board hold WM to its committed participation percentages, and in the event that either of the two firms fails to establish a bona fide local office or site, to obtain a suitable substitution. To do
otherwise could be construed to provide a competitive advantage to WM that would not be consistent with Florida law. If the Authority prevails, the bond shall be forfeited, and the Authority shall be entitled to recover the costs and charges, excluding attorney fees, of such proceeding. In addition, if the SWA Board determines that the protest was filed for frivolous or improper purposes, including, but not limited to, the purpose of harassing, causing unnecessary delay, or causing needless cost for the SWA or other parties, the entire amount of the $10,000 protest bond shall be forfeited as required by Section 10.4.B of the Authority’s Purchasing Manual.
January 18, 2019

MEMORANDUM

TO: Vice Mayor Dave Kerner, Chair
   and Solid Waste Authority Board Members

THRU: Howard J. Falcon, III
       SWA General Counsel
       Dan Pellowitz
       Executive Director

FROM: Michael W. Jones
      Senior Assistant County Attorney

RE: Bid Protest #2 SWA Response to Richard's Disposal, Inc., Protest to Pre-Qualification Phase of Bid 19-402/SLB

Richard’s Disposal’s Pre-Qualification Challenge

A. INTRODUCTION

Richard’s Disposal, Inc., (hereinafter “Richard’s”) filed a formal protest regarding the qualifications of multiple sub-contractors being used by the prime contractors in Bid No. 19-402/SLB (the “Bid”). With the exception of Waste Management, Inc., who the SWA found nonresponsive due to issues with two of its M/WBE subcontractors (and whose protest on that issue is being heard separately), all prime contractors, including Richard’s, were pre-qualified by the selection committee to participate in the Invitation to Bid for Solid Waste and Recycling Collection Services for Service Areas 1-4.

Richard’s challenge to the pre-qualification phase of the Bid falls into four (4) categories: a) SWA Permits; b) Business Tax Receipts; c) SBE Certification; and d) Bond Irregularities or Insufficient Bonds.

The matrix attached hereto as Exhibit “A” shows each pre-qualified prime contractor along the top and each challenged sub-contractor listed on the side. The “X” marks the spot of
each area being challenged by Richard's and the corresponding prime contractor to which the sub-contractor challenge relates.

In short, Richard's is making technical challenges to the qualifications of multiple sub-contractors in an effort to have the corresponding prime contractor disqualified, thus leaving Richard's as the only qualified prime contractor.

B. SUMMARY

Richard's is attempting to challenge the technical qualifications of multiple sub-contractors in an effort to disqualify the prime contractors using those sub-contractors, thus eliminating all other competition. This is contrary to SWA Board policy to maximize competition to obtain the best prices and value for the public, absent emergency circumstances.

Further, each challenge put forth by Richard's is an immaterial, minor irregularity that is completely within the SWA Board's discretion to waive and dismiss this protest in its entirety.

C. APPLICABLE LEGAL STANDARDS AND DISCRETION OF SWA BOARD

1. Materiality Standard

In this case, the bid documents expressly reserved the right to the Authority "to waive any minor irregularity in the Bids received". (Invitation to Bid, General Terms and Conditions No. 12). This is consistent with Florida law.

In Tropabest Foods, Inc. v. State of Florida Department of General Services, 493 So.2d. 50 (Fla. 1st DCA 1986), the court held:

Although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over other bidders and thereby restricts or stifles competition.

Tropabest Foods, 493 So.2d. 52 (other citations omitted)

Further, the court of Tropabest expressly recognized that "the purpose of competitive bidding is to secure the lowest responsible offer and minor irregularities can be waived in effectuating that purpose." Tropabest, 493 So.2d. 52, citing, Robinson Electrical Co, Inc. v. Dade County, 417 So.2d. 1032, 1034 (Fla. 3rd DCA 1982).

2. Discretion of the SWA Board

In Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d. 505 (Fla. 1982), the Florida Supreme Court held:
A public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree.

Liberty County, 421 So.2d 507; see also Sutron Corp. v. Lake County Water Auth., 870 So.2d 930, 932 ( Fla. 5th DCA 2004) (explaining that discretion of a public entity to solicit, accept or reject contract bids should not be interfered with by courts absent a showing of dishonesty, illegality, fraud, oppression or misconduct).

D. **BURDEN OF PROOF**

In this case, the burden of proof is on the Protester, Richard's, to prove to the SWA Board by "clear and convincing" evidence that it is entitled to the relief it is requesting: that multiple other pre-qualified bidders must be disqualified.

To meet this high threshold, the evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. E. O. Walker, 429 So 2d. 797, 800 (Fla. 4th DCA 1983) (emphasis supplied)

Therefore, Richard's must leave the SWA Board with the unequivocal conviction that the challenges in this protest to the prime and sub-contractors qualifications are material in nature and not the type of immaterial, minor irregularities, that are wholly within the SWA Board's discretion to waive.

E. **Richard's Protest Challenges by Group**
   (Please refer to MATRIX as Exhibit "A")

1. **SWA Permits**

Any challenge by Richard's that the specified sub-contractors do not presently have the required SWA permit(s) to perform work under the Solid Waste and Recycling Collection Franchise Agreement for Service Areas 1-4 to be awarded under this Bid is completely baseless.

As stated at the pre-proposal conferences on October 2, 2018 and October 17, 2018, which Richard's representative attended, and in Addendum #3 dated November 30, 2018, any permits required by the SWA to perform work required under the Franchise Agreement must be obtained, at the prime contractor's sole expense, on or before the start date of October 1, 2019. **Nothing** in the Bid documents requires these permits to be currently in the hands of any contractor.
Therefore, Richard’s challenge on this basis is without merit and its protest on these grounds should be dismissed.

2. Business Tax Receipts

Richard’s is also challenging the technical sufficiency of multiple sub-contractor’s Business Tax Receipts issued by the Constitutional Tax Collector of Palm Beach County. The challenges include that the various sub-contractor’s Business Tax Receipts, although currently valid, do not include current information as to address, a complete description of business types, or other very minor technical discrepancies. Richard’s challenges on these grounds also lack merit.

By act of the Florida Legislature, Occupational Licenses are now called Business Tax Receipts. By definition in the Palm Beach County Code of Ordinances, Ch. 17, Article II – Business Taxes, a "Receipt" means:

The document that is issued by the local governing authority which bears the words “Business Tax Receipt” and evidences that the person in whose name the document is issued has complied with the provisions of this chapter relating to the business tax.

PBC Code of Ordinances, Ch. 17, Sec. 17-16, Definitions

Further, the Palm Beach County Code of Ordinances states:

No receipt shall be issued until all applicable county and state laws are complied with, including, but not limited to, building, zoning, construction industry licensing, fire control, and health. Compliance with the applicable laws shall be evidenced by the verification of the respective county and/or state official on a form prescribed by the [TAX] collector.

PBC Code of Ordinances, Ch. 17, Sec. 17-19(a)

Therefore, having supplanted the Occupational License, the Business Tax Receipt is used by the Solid Waste Authority (“Authority”) to verify a business location in Palm Beach County. The Authority is not required, nor does it have the legal authority to question whether or not a Business Tax Receipt was properly issued by the Constitutional Tax Collector of Palm Beach County.

The Authority is entitled to rely on the facial sufficiency of the Business Tax Receipt issued by the Constitutional Tax Collector of Palm Beach County. Any irregularities, inconsistencies, or inaccuracies in the issuance of a Business Tax Receipt is a matter to be addressed by the issuing entity or agency and not in this pre-qualification challenge before the SWA Board.

Therefore, Richard’s protest on this ground has no merit and must be dismissed.
3. **SBE Certification**

Richard's challenge to the SBE Certification of a sub-contractor based on a minor technicality is nearly identical in form and substance to its challenge of the Business Tax Receipts and equally without merit. The subcontractor in question, Jet Hauling, is certified for Garbage/Trash Removal, which is entirely appropriate for the service that they conduct. Richard's argument that the certificate should specifically state "hauling" is without merit. Even if this could be construed as an irregularity, it is of such a minor nature that it should be waived.

Therefore, Richard's challenge on this basis similarly has no merit and its protest on these grounds should be dismissed.

4. **Insufficiency of Bid Bonds**

Richard's final challenge to the pre-qualifications of the multiple sub-contractors and prime contractor(s) relates to the insufficiency of the bid bonds of three (3) prime contractors: Waste Management, The Goode Companies, and Republic Services. Again, this challenge, like all others posed by Richard's, is without merit.

The appropriate Authority staff has reviewed the bid bonds submitted by the challenged prime contractors. After complete review, Authority staff has concluded that the bid bonds submitted by Waste Management, The Goode Companies, and Republic Services are valid and in accordance with the Bid requirements.

Therefore, Richard's challenge on this basis has no merit and should be dismissed.

F. **ISSUES BEFORE THE BOARD**

The Board is to determine whether Richard's has met its burden of proof by providing clear and convincing evidence that its bid protest should be upheld. The Board may take the following actions:

1. Deny the bid protest in its entirety, which would result in all bidders\(^1\) remaining prequalified in the bid process;
2. Uphold the bid protest in its entirety, which would result in the disqualification of Advanced Disposal, Waste Management, Goode Companies, Republic Services, and Waste Pro from the bidding process; or
3. Partially deny and partially uphold the bid protest.

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\(^1\) While the SWA's determination to find Waste Management non-responsive based on failure to establish a local business presence of two of its M/WBE subcontractors is the subject of a separate protest filed by Waste Management, Richard's protest also includes an allegation that Waste Management's bid bond was insufficient.
CONCLUSION/STAFF RECOMMENDATION

Each and every protest challenge submitted by Richard's is without merit and should be rejected. Therefore, the SWA Board should reject Richard's protest(s) of the pre-qualification phase of Bid No. 402/SLB in its entirety. If the Authority prevails, the bond shall be forfeited, and the Authority shall be entitled to recover the costs and charges, excluding attorney fees, of such proceeding. In addition, if the SWA Board determines that the protest was filed for frivolous or improper purposes, including, but not limited to, the purpose of harassing, causing unnecessary delay, or causing needless cost for the SWA or other parties, the entire amount of the $10,000 protest bond shall be forfeited as required by Section 10.4.B of the Authority's Purchasing Manual.
# Richard's Disposal Protest of Bid No. 19-402

## Protest Matrix

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<thead>
<tr>
<th>Nature of Protest</th>
<th>Advanced Disposal</th>
<th>Waste Management</th>
<th>Goode Companies</th>
<th>Republic Services</th>
<th>Waste Pro</th>
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<tbody>
<tr>
<td>SWA Permits</td>
<td></td>
<td></td>
<td>Also Using</td>
<td>Also Using</td>
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</tbody>
</table>

*SWA Permits are not required until the commencement of service on October 1, 2019 as stated at Pre-Proposal Conference No. 1 and reflected in the minutes.*

<table>
<thead>
<tr>
<th>Business Tax Receipts</th>
<th>Tiger Gas</th>
<th>Florida Cuttings</th>
<th>Coastal</th>
<th>Jet Hauling</th>
<th>Superior Wash</th>
</tr>
</thead>
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</table>

| Inadequate Bond       |           |                 |         |             |               |
|                       | x         | x               |         |             |               |

*All respondents have provided a good and sufficient bond as required by the SWA and the bid documents and that is consistent with established SWA practices.*

<table>
<thead>
<tr>
<th>SBE Certification</th>
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<tbody>
<tr>
<td>Jet Hauling</td>
<td></td>
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<td>x</td>
</tr>
</tbody>
</table>

*The claimant states that the certification does not reflect hauling services. The certification includes Garbage/Trash Removal, which is entirely appropriate for the service they conduct.*
January 18, 2019

MEMORANDUM

TO: Vice Mayor Dave Kerner, Chair
    and Solid Waste Authority Board Members

THRU: Howard J. Falcon, III
       SWA General Counsel

       Dan Pellowitz
       Executive Director

FROM: Michael W. Jones
      Senior Assistant County Attorney

RE: Bid Protest #3 SWA Response to Richard's Disposal, Inc., Protest to RFP
    No. 19-203

SWA Response to Richard's Disposal, Inc.'s Protest
to RFP No. 19-203

A. INTRODUCTION

Richard's Disposal, Inc. (hereinafter "Richard's") filed a formal protest to RFP No. 19-203 (the "RFP") regarding the qualifications of the two other proposers to the RFP, Florida Cuttings, Inc. and The Goode Companies, Inc. SWA Joint Venture, as well as certain of their subcontractors.

B. SUMMARY

Richard's is attempting to challenge the technical qualifications of the other proposers and certain sub-contractors in an effort to disqualify all other proposers, thus eliminating all other competition. This is contrary to SWA Board policy to maximize competition to obtain the best prices and value for the public.

Further, each challenge put forth by Richard's is an immaterial, minor irregularity that is completely within the SWA Board's discretion to waive and dismiss this protest in its entirety.
C. **APPLICABLE LEGAL STANDARDS AND DISCRETION OF SWA BOARD**

1. **Materiality Standard**

   In this case, the bid documents expressly reserved the right to the Authority "to waive any minor irregularity in the Bids received". (Invitation to Bid, General Terms and Conditions No. 12). This is consistent with Florida law.

   In Tropabest Foods, Inc. v. State of Florida Department of General Services, 493 So.2d. 50 (Fla. 1st DCA 1986), the court held:

   "Although a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over other bidders and thereby restricts or stifles competition."

   Tropabest Foods, 493 So.2d. 52 (other citations omitted)

   Further, the court of Tropabest expressly recognized that "the purpose of competitive bidding is to secure the lowest responsible offer and minor irregularities can be waived in effectuating that purpose." Tropabest, 493 So.2d. 52, citing, Robinson Electrical Co, Inc. v. Dade County, 417 So.2d. 1032, 1034 (Fla. 3rd DCA 1982).

2. **Discretion of the SWA Board**

   In Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So.2d. 505 (Fla. 1982), the Florida Supreme Court held:

   "A public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree."

   Liberty County, 421 So.2d 507; see also Sutron Corp. v. Lake County Water Auth., 870 So.2d 930, 932 (Fla. 5th DCA 2004) (explaining that discretion of a public entity to solicit, accept or reject contract bids should not be interfered with by courts absent a showing of dishonesty, illegality, fraud, oppression or misconduct).

D. **BURDEN OF PROOF**

   In this case, the burden of proof is on the Protester, Richard's, to prove to the SWA Board by "clear and convincing" evidence that it is entitled to the relief it is requesting: that multiple other pre-qualified bidders must be disqualified.
To meet this high threshold, the evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. E. O. Walker, 429 So 2d. 797, 800 (Fla. 4th DCA 1983) (emphasis supplied)

Therefore, Richard’s must leave the SWA Board with the unequivocal conviction that the challenges in this protest to the prime and sub-contractors qualifications are material in nature and not the type of immaterial, minor irregularities that are wholly within the SWA Board’s discretion to waive.

E. RICHARD’S GENERAL PROTEST CHALLENGES BOTH FLORIDA CUTTINGS AND GOODE COMPANIES¹

1. Bias of the Selection Committee

Richard’s presents absolutely no evidence whatsoever as to a single factual instance of bias of the selection committee. The selection committee was formed in accordance with paragraph 7 of Section 2.18 of the Authority Purchasing Manual. A cursory review of the scoring does not give rise to even an inference of bias against any responding party.

Therefore, without a single factual instance of objective bias, it is impossible for Richard’s to meet its burden of proving bias by clear and convincing evidence. It’s protest on this basis is without merit and must be dismissed. There is simply nothing for the Authority to refute.

2. Small Business Administration (SBA) Size Limits and State of Florida Office of Supplier Diversity

Richard’s is protesting that the SWA Board never authorized the use of the SBA size standards or the acceptance of certifications from State of Florida Office of Supplier Diversity. Richard’s protest on this ground is baseless. Further, it is not even an appropriate basis for a protest and must be dismissed since it is what amounts to nothing more than an “objection” to previously adopted SWA Board policy.

In accordance with the Equal Business Opportunity Office (EBO) Policy that was adopted by the SWA Board, the responsibility for the establishment of appropriate size standards and which governmental agencies’ certification standards to accept as part of the Authority EBO program was delegated to the Authority’s EBO office in consultation with the Executive Director. All bidders/proposers, including Richard’s, were fully aware that the Authority would be using SBA size standards and that State of Florida Office of Supplier Diversity certifications would be acceptable for this program.

¹ Please refer to the MATRIX attached as Exhibit “A” for a Summary of Richard’s Protest.
Therefore, Richard's is merely "objecting" or protesting SWA Board policy. This is not an appropriate topic for a "protest" and Richard's protest on this basis must be dismissed.

3. Insufficient/Unclear Instructions to Committee

Richard's protest on this ground asserts that the Evaluation Committee was given insufficient/unclear instructions. Again, to the extent that this is even an appropriate basis for a protest, which it is not, Richard's points to no factual evidence, let alone clear and convincing evidence, that the Evaluation Committee was unclear or confused in its evaluation function. Again, there is nothing for the Authority to refute.

Therefore, Richard's protest on this basis is without merit and must be dismissed.

4. Business Tax Receipts/SWA Permits

Similar to their bid protest, Richard's is also challenging the technical sufficiency of various business tax receipts and/or SWA Permits of the proposer's and/or their subcontractors. As set forth in the response to Richard's bid protest, the Authority is entitled to rely on the facial sufficiency of the Business Tax Receipt issued by the Constitutional Tax Collector of Palm Beach County. Any irregularities, inconsistencies, or inaccuracies in the issuance of a Business Tax Receipt is a matter to be addressed by the issuing entity or agency and not in this protest before the SWA Board. In addition, any challenge related to the SWA permits held by any other proposer or subcontractor is premature. Any permits required by the SWA to perform work required under the Franchise Agreement must be obtained, at the prime contractor's sole expense, on or before the start date of October 1, 2019, and not prior to the RFP submission. Therefore, Richard's protest on this basis is without merit and must be dismissed.

F. RICHARD'S MULTIPLE PROTESTS AGAINST FLORIDA CUTTINGS

Richard's makes six (6) protest challenges directed to Florida Cuttings alone. They are as follows: 1) insufficient documented experience and insufficient documented experience as to a principal, Camille Vitiello; 2) insufficient references; 3) invalidity of M/WBE certification; 4) improper documentation of current contracts; 5) inadequate financial capability and statements; 6) Aquarius Development as proposer and use of financial material.

Each ground is baseless and constitutes a minor, immaterial irregularity (if at all), that is well within the SWA Board's discretion to waive, thus requiring the dismissal of Richard's protest on these grounds.

1. Insufficient Documented Experience and Insufficient Documented Experience as to a Principal – Camille Vitiello

Florida Cuttings satisfied the experience requirements of the RFP as stated in Section 2.4, Minimum Requirements. Further, the requirements for this RFP
solicitation were established to allow small startup companies to compete based on the collective experience of the company/team members and not of any individual member. The Evaluation Committee reviewed the collective experience of the company/team members and has concluded that Florida Cuttings is qualified. Richard's cannot point to any evidence, let alone clear and convincing evidence, that Florida Cuttings is not qualified to perform the work required by this contract award. It is impossible for Richard's to meet its burden in this protest by simply making the conclusory statement that they disagree with Florida Cuttings' qualifications.

Therefore, Richard's protest must be dismissed on these grounds too. The terms of the RFP, specifically Section 2.4, have been met. There is no legitimate basis for this protest. It too is baseless and must be dismissed.

2. Insufficient References

Florida Cuttings has provided Waste Pro of Florida, Advanced Disposal, Republic Services, and a grapple truck and yard waste disposal company as references. These references meet the requirements set forth in Section 2.5(d) of the RFP.

Therefore, Richard's protest on this ground must be dismissed.

3. Invalidity of Florida Cuttings' M/WBE Certification

Richard's asserts that Florida Cuttings' M/WBE certification is invalid because the majority shareholder transferred/sold a controlling (51%) interest to Morgen Greenwood Neely in November, 2018. Richard's has presented documentation confirming this stock transfer.

However, Richard's further asserts that Authority staff possessed a document evidencing this stock transfer prior to the pre-qualification committee meeting. Richard's claims that if true, this would somehow invalidate Florida Cuttings' M/WBE certification. As an initial matter, Authority staff disputes having such documentation in its possession.

Further, even if it is true that the Authority did have in its possession this documentation, Morgan Greenwood Neely is female. The Authority did not have, nor does it have, any evidence or information that Florida Cuttings' M/WBE certificate lapsed or is currently invalid. nor has Richard's produced any in this regard. In addition, Authority staff has confirmed that Florida Cuttings' certification with the State of Florida Office of Supplier Diversity remains valid. Absent any decertification by said office, it is not in the Authority's jurisdiction to find Florida Cuttings' certification invalid.

Therefore, Richard's allegations have no merit whatsoever, and its protest must be denied on this basis.
4. **Improper Documentation of Current Contracts**

Richard's again asserts that Florida Cuttings did not provide sufficient documentation of its current contractual obligations and therefore must be deemed non-responsive. This allegation is also baseless.

The purpose of this specific requirement in the RFP documents is to provide a reasonable level of assurance that a company can assume the responsibility to properly carry out the required scope of work.

Florida Cuttings, in the eyes of the Evaluation Committee, has provided sufficient documentation of its ability to perform the scope of work required under this contract. Richard's provides *no evidence at all* to the contrary except for the local representative's opinion. There is no factual basis for this protest on these grounds and it must be dismissed.

5. **Florida Cuttings Failed to Demonstrate Adequate Financial Capability**

Florida Cuttings met the requirements of Section 2.6 (Financial Capability) and Section 2.7 (Performance Bond). Florida Cuttings provided a statement of financial stability that included a letter from RBC Wealth Management documenting $2.5 million of liquid assets, a statement indicating no prior bankruptcies, financial statements for 2018 (the only year available), multiple letters of reference and/or creditworthiness and an $800,000 cash bond. Richard's provided *no evidence* of Florida Cuttings' financial instability, lack of creditworthiness or financial inability to perform this contract due to insufficient financial ability, except for its own self-serving opinion.

Specifically, as to only one year (2018) of financial statements being provided, RFP Section 2.6 specifically states, "Proposers that have less than three (3) years of experience must provide applicable statements . . . for each year of operation." Florida Cuttings has done this and the Evaluation Committee deemed them financially able to perform this contract and gave them a passing score.

Therefore, without any evidence to the contrary, Richard's is completely unable to meet its burden in this protest and it must be dismissed.
6. **Aquarius Development as Proposer and Use of Financial Material**

Aquarius Development is *not* a proposer to this RFP. Aquarius Development was owned by Mr. Vitiello, a current principal of Florida Cuttings. Aquarius Development was sold to Coastal, a Florida Cuttings' SBE subcontractor. Aquarius Development was a successful company in which Mr. Vitiello was involved. As such, the financial stability of Aquarius Development is probative of the competence of Florida Cuttings to perform this contract. Furthermore, there is nothing in the RFP that precludes a proposer from providing information referencing prior businesses and operations of the proposer or its principals. To the contrary, Paragraph c. of Section 2.10 (Other) of the RFP provides for the proposer to provide "Additional Data – Any additional information, which the PROPOSER considers pertinent for consideration". Therefore, Richard’s protest on this issue is without merit and should be dismissed.

G. **RICHARD’S MULTIPLE PROTESTS AGAINST GOODE COMPANIES, INC.**

Richard’s makes three (3) protest challenges directed to Goode Companies alone. They are as follows: 1) Non-compliance with Fictitious Name Statute; 2) Legitimacy of Goode Companies as an S/M/WBE; and 3) Goode Companies use of Audited Financial Statements from a Maryland Corporation.

Each ground is baseless and constitutes a minor, immaterial irregularity (if at all), that is well within the SWA Board’s discretion to waive, thus requiring the dismissal of Richard’s protest on these grounds.

1. **Goode Companies Non-Compliance with Fictitious Name Statute**

The Authority does not enforce state reporting requirements unrelated to solid waste functions. It is an understatement to say that this is a minor irregularity, wholly immaterial, and well within the SWA Board’s authority to waive. Therefore, again, Richard’s protest on this ground is completely baseless and must be dismissed.

2. **Goode Companies is not a Legitimate SBE/M/WBE**

Richard’s is protesting or “objecting” to the stated requirements of the RFP established pursuant to the SWA Board’s established policy and it is not the appropriate topic of a bid protest and should likewise be dismissed. Goode meets the requirements established for inclusion in this program and is fully responsive to the RFP. The Authority has no basis upon which to declare Goode Companies, Inc. nonresponsive.

3. **Goode Companies’ State of Maryland Audited Financial Statements**

Goode Companies is a Maryland corporation. Richard’s asserts that because Goode Companies used its State of Maryland audited financial statements to demonstrate
its financial stability and ability to perform this contract, that it should be declared non-responsive and disqualified. This is incorrect.

Nothing in the RFP prohibits a foreign corporation from using its audited financial statements to document financial capability. The Goode Companies’ response reflects the proposing entity as a joint venture between The Goode Companies, Inc., D/B/A The Goode Companies of Florida, Inc. and A & Associates Staffing/AA Staffing Firm. The members of the joint venture provided audited financial statements. It is irrelevant that a fictitious name has been established, as the joint venture partner remains the Goode Companies, Inc., which provided its audited financial statements.

In accordance with both Florida law and the Authority’s well-established business practices, the qualifications and experience of the parent company flow to its wholly owned subsidiary. AT&T Corp. v. State Dept. of Management Services, et al., 201 So.3d 852 (Fla. 1st DCA 2016) (Dept. of Management Services could rely on the qualifications of bidder’s parent corporation rather than relying solely on qualifications of the bidder to meet experience and bonding requirements).

Therefore, Richard’s protest on this basis must be dismissed.

F. ISSUES BEFORE THE BOARD

The Board is to determine whether Richard’s has met its burden of proof by providing clear and convincing evidence that its protest should be upheld. The Board may take the following actions:

1. Deny the protest in its entirety, which would result in upholding the Evaluation Committee’s recommendation of award to Florida Cuttings, Inc.;

2. Uphold the bid protest in its entirety, which would result in the disqualification of Florida Cuttings, Inc. and The Goode Companies, Inc. SWA Joint Venture; or

3. Partially deny and partially uphold the protest.

CONCLUSION/STAFF RECOMMENDATION

Each and every protest challenge submitted by Richard’s is completely without merit and should be rejected. Therefore, the SWA Board should reject Richard’s protest(s) of RFP No. 19-203 in its entirety. If the Authority prevails, the bond shall be forfeited, and the Authority shall be entitled to recover the costs and charges, excluding attorney fees, of such proceeding. In addition, if the SWA Board determines that the protest was filed for frivolous or improper purposes, including, but not limited to, the purpose of harassing, causing unnecessary delay, or causing needless cost for the SWA or other parties, the entire amount of the $10,000 protest bond shall be forfeited as required by Section 10.4.B of the Authority’s Purchasing Manual.
## Richard's Disposal Protest of RFP No. 19-203  EXHIBIT “A”

### Protest Matrix

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<tr>
<th>Nature of Protest</th>
<th>Goode</th>
<th>Richards</th>
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<td>Business Tax Receipts</td>
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<td>Financial Documents</td>
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<td>Insufficient Experience, References, Contracts</td>
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