IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CITY OF MIAMI,

Appellant,

vs.

VIRGINIA KEY, LLC,

Appellee.
_____/

CASE NOS. 3D23-0422, 3D23-0436 (consolidated)

L.T. NO. 21-22931

APPELLEE VIRGINIA KEY, LLC'S MOTION TO EXPEDITE APPEAL

Appellee Virginia Key, LLC ("VKLLC"), by and through undersigned counsel and pursuant to Florida Rule of Appellate Procedure 9.300, hereby moves to expedite the appeal filed by Appellant City of Miami ("the City") in Case No. 3D23-0436.[1]

[1] This motion was originally inadvertently filed in Case No. 3D23-0422 on April 14, 2023. By Order dated April 18, Appellant was ordered to file a response. The motion is being re-filed in Case No. 3D23-0436 to clarify that is the appeal for which expedited treatment primarily is being sought. On April 6, VKLLC moved to dismiss the consolidated appeal of Non-Party Rickenbacker Marina, Inc. ("Rickenbacker") in Case No. 3D23-0422, which motion to dismiss is pending. Should that appeal not be dismissed, then VKLLC would request the same expedited treatment for Case No. 3D23-0422.

BACKGROUND

As reflected in the 42-page Final Judgment (attached hereto as Exhibit 1) entered by the trial court (the Honorable Alan Fine) on February 10, 2023 after a three-day bench trial and being appealed by the City here, this matter concerns the arbitrary and capricious actions of the City that defied the state procurement law by refusing to award a proposed marina redevelopment project to VKLLC. The dispute dates back **eight years**.

On two occasions, in 2015 and 2017, the City issued Requests for Proposal ("RFPs") to redevelop a City marina at 3301 Rickenbacker Causeway on Key Biscayne (the "Virginia Key Property"), and on both occasions VKLLC's bids were selected over those of affiliates of Rickenbacker, the longtime tenant at the Virginia Key Property who enjoys the City Commission's favor. *See* Ex. 1 at 6-9. After VKLLC successfully bid the second RFP, Rickenbacker's affiliate, Biscayne Marine Partners, LLC ("Biscayne Marine"), submitted a formal bid protest, which was rejected by a hearing officer and subsequently in appeals to the Miami-Dade Circuit Court and this Court. *Id.* at 10. However, instead of awarding the contract to VKLLC, the City delayed the contract award more than a dozen

times for nearly two years, allowing Rickenbacker to remain on the property as a holdover tenant. *Id.* at 10, 12. Rejecting the recommendation of a third different City Manager to award the project to VKLLC, the City Commission voted to reject all bids on November 16, 2020. *Id.* at 16-18. The trial court found the City Commission's actions, and its purported bases for doing so, to be arbitrary, capricious and pretextual. *Id.* at 20-30.

The trial court found that the City went even further in its efforts to favor Rickenbacker. After rejecting all bids on pretextual grounds, the City, at Rickenbacker's request, proposed an amendment to the City Charter to allow the City to award the project to Biscayne Marine – again, the ***losing bidder*** – without competitive bidding. *Id.* at 18-19. The City placed this proposed Charter amendment on the ballot for voter approval in an election in November 2021, where it failed. Since that time, the City has not advanced any planned improvements to the Virginia Key Property, leaving Rickenbacker in place as the holdover tenant. *Id.* at 19-20.

The trial court determined that "VKLLC is entitled to a writ of mandamus requiring the City to execute the marina lease with it," *id.* at 35, and it "enter[ed] a declaratory judgment directing the City to

award the marina contract to VKLLC and put the proposal before the voters by referendum." *Id.* at 38. *See also id.* at 39. The City appealed and has declined to award the marina contract or schedule the referendum required by the RFPs that it flouted.

ARGUMENT

After eight years of delays in improvement to the City's valuable waterfront due to a brazen and impermissible scheme to rig the public bidding process, this Court should forestall further attempts to postpone a final resolution. The Court, of course, has broad discretion to expedite appeals. *See, e.g., Muniz v. Muniz*, 789 So. 2d 370, 373 n. 2 (Fla. 3d DCA 2001) ("[t]his Court is always willing to expedite appeals where the justice of the cause requires it") (Sorondo, J. concurring). Expediting of the appeal is warranted in these circumstances.

The issues to be determined on appeal are no different than those presented to the trial court in post-trial submissions by the parties. Accordingly, preparation of briefs should be a straightforward matter not requiring extensions of time. Indeed, it has already been over two months since the Final Judgment was entered. Although the court clerk has not yet transmitted the record

on appeal, the parties can easily prepare their own record on appeal and file it with the Court.

VKLLC proposes that the City be directed to file its Initial Brief within 21 days of entry of an Order on this motion, with VKLLC's Answer Brief due 21 days following the Initial Brief and the City's Reply Brief due 21 days after the Answer Brief. Should this Court grant oral argument, VKLLC would also ask that the scheduling of argument be expedited as well.[2]

VKLLC has conferred with counsel for the City, which opposes the requested relief.

WHEREFORE, for these reasons, Appellee Virginia Key, LLC, respectfully requests that this Court enter an order expediting the appeal in the manner set forth herein, and for such other relief as the Court deems just and proper.

[2] As stated in footnote 1 above, to the extent that Rickenbacker's appeal is not dismissed, the proposed briefing schedule should apply to Rickenbacker as well.

Respectfully submitted,

COFFEY BURLINGTON, P.L.
Counsel for Virginia Key, LLC
2601 South Bayshore Drive, PH1
Miami, Florida 33133
Telephone: (305) 858-2900
Facsimile: (305) 858-5261

By: */s/ Daniel F. Blonsky*
Kendall B. Coffey, FBN 259861
kcoffey@coffeyburlington.com
Daniel F. Blonsky, FBN 972169
dblonsky@coffeyburlington.com
groque@coffeyburlington.com
Scott A. Hiaasen, FBN 103318
shiaasen@coffeyburlington.com
lperez@coffeyburlington.com
service@coffeyburlington.com

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished by the Florida Courts e-filing Portal pursuant to Fla. R. Jud. Admin. 2.516(b)(1), this 18th day of April 2023, to the following:

SERVICE LIST	
John K. Shubin, Esq. **Katherine R. Maxwell, Esq.** **Jamie L. Katz, Esq.** **Ian E. DeMello, Esq.** **K. Denise Haire, Esq.** SHUBIN & BASS, P.A. 150 West Flagler Street Suite 1420 Miami, FL 33130 Telephone: (305) 381-6060 Facsimile: (305) 381-9457 jshubin@shubinbass.com kmaxwell@shubinbass.com jkatz@shubinbass.com idemello@shubinbass.com dhaire@shubinbass.com eservice@shubinbass.com *Counsel for Rickenbacker Marina, Inc.*	**Victoria Mendez, City Attorney** **Eric J. Eves, Assistant City Attorney** 444 S.W. 2nd Avenue Suite 945 Miami, FL 33130-1910 Telephone: (305) 416-1800 Facsimile: (305) 400-5071 EEves@miamigov.com CSantos@miamigov.com *Counsel for City of Miami*

By: */s/ Daniel F. Blonsky*
Daniel F. Blonsky

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO: 2021-022931-CA-01
SECTION: CA44
JUDGE: Alan Fine

Virginia Key LLC et al

Plaintiff(s)

vs.

City of Miami et al

Defendant(s)

_____/

FINAL JUDGMENT

THIS CAUSE came on to be heard for a bench trial between November 18-20, 2022, and the Court having considered all the evidence , the arguments of counsel and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED:

Final judgment is entered for Plaintiff Virginia Key, LLC and against Defendant City of Miami. The Court makes the following findings of fact and conclusions of law:

Background

This case arises from a procurement process in which the City of Miami sought to enter into a lease agreement with a business entity to redevelop Virginia Key's marina. Before delving into the facts of this case, some background on procurement law will be useful.

Section 255.20, Florida Statutes, provides, in relevant part:

> A county, municipality, special district as defined in chapter 189, or other political subdivision of the state seeking to construct or improve a public building, structure, or other public construction works must competitively award to an appropriately

EXHIBIT 1

> licensed contractor each project that is estimated to cost more than $300,000. . . . As used in this section, the term "competitively award" means to award contracts based on the submission of sealed bids, proposals submitted in response to a request for proposal, proposals submitted in response to a request for qualifications, or proposals submitted for competitive negotiation. This subsection expressly allows contracts for construction management services, design/build contracts, continuation contracts based on unit prices, and any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution, or by state law. For purposes of this section, cost includes employee compensation and benefits, except inmate labor, the cost of equipment and maintenance, insurance costs, and the cost of direct materials to be used in the construction of the project, including materials purchased by the local government, and other direct costs, plus a factor of 20 percent for management, overhead, and other indirect costs. Subject to the provisions of subsection (3), the 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.

§ 255.20(1), Fla. Stat. (emphasis added).

As the plain language of this statute establishes, the Legislature authorized municipalities to adopt ordinances establishing the procedures for the proposal process. See Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Com'rs, 955 So. 2d 647, 652 (Fla. 1st DCA 2007) (recognizing that section 255.20 "affords counties discretion in adopting express procedures for conducting the proposal process through the use of their county or municipal ordinances"). The City of Miami exercised its direction to adopt such ordinances.

Under section 18-86 of the City of Miami Code, the City has established procedures for competitive negotiations/competitive sealed proposals. It begins by explaining the following:

> Competitive negotiations/competitive sealed proposals shall be used in those circumstances in which it is both practicable and advantageous for the city to consider a range of competing plans, specifications, standards, terms and conditions so that adequate competition will result and award be made not principally on the basis of price, but to the respondent whose proposal contains the most advantageous combination of price, quality or other features. All contracts shall be signed by the city manager.

§ 18-86(a)(1), Miami, Fla., Code (attached hereto as Ex. A).

When the contract will exceed $50,000.00, the City Code authorizes the City to use request for proposals ("RFP") "setting forth the terms and conditions of the professional or personal services sought, including but not limited to, scope of work and evaluation factors . . . ." § 18-86(c)(1), Miami, Fla., Code. The City will then receive proposals from prospective proposers. § 18-86(c)(5), Miami, Fla., Code.

An evaluation committee, appointed by the City Manager, will evaluate the proposals based on the criteria in the RFP. § 18-86(c)(6), Miami, Fla., Code. It will then provide a recommendation. Id. After reviewing the evaluation committee's recommendation, the City Manager has the discretion to accept or reject it. § 18-86(c)(6)a., Miami, Fla., Code. If the City Manager accepts the evaluation committee's recommendation, he or she must make a recommendation to the City Commission. Id.

The City Commission retains the ultimate discretion to accept or reject the City Manager's recommendation. The City Code provides:

> After reviewing the city manager's recommendation, the city commission may:
>
> 1. Approve the city manager's award recommendation and negotiated contract(s);
> 2. Approve the city manager's recommendation and authorize contract negotiations;
> 3. Reject all proposals;
> 4. Reject all proposals and instruct the city manager to reissue a solicitation; or
> 5. Reject all proposals and instruct the city manager to enter into competitive negotiations with at least three individuals or firms possessing the ability to perform such services and obtain information from said individuals or firms relating to experience, qualifications and the proposed cost or fee for said services, and make a recommendation to the city commission.

§ 18-86(c)(6)b., Miami, Fla., Code (emphasis added).

As noted above, this procedure is an RFP. "[An] RFP is used when the public authority is incapable of completely defining the scope of work required, when the service may be provided in

several different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity." Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Com'rs, 955 So. 2d 647, 651 (Fla. 1st DCA 2007).

The First District cogently explained the distinctions between an RFP and to an invitation to bid ("ITB") or invitation for bid ("IFB"):

> Implicit in the definition of an RFP is the underlying rationale that, in some types of competitive procurement, the agency may desire an ultimate goal but cannot specifically tell the offerors how to perform toward achieving that goal; thus, a ready distinction arises between an RFP and an IFB. Typically, an IFB is rigid and identifies the solution to the problem. By definition, the invitation specifically defines the scope of the work required by soliciting bids responsive to the detailed plans and specifications set forth. On the contrary, an RFP is flexible, identifies the problem, and requests a solution. Consideration of a response to an IFB is controlled by cost, that is, the lowest and best bid, whereas consideration of an offer to an RFP is controlled by technical excellence as well as cost.

Sys. Dev. Corp. v. Dep't of Health & Rehab. Services, 423 So. 2d 433, 434 (Fla. 1st DCA 1982) (internal citation omitted).

"Further, at the conclusion of the RFP process, the procurement officer will seek authorization from the governing body to begin negotiating the terms of the contract with the highest-ranking bidder. The contract is, thus, not formed until after the negotiation process." Emerald, 955 So. 2d at 651. See also City of Cocoa v. Villas of Cocoa Vill., LLC, 343 So. 3d 122, 124 (Fla. 5th DCA 2022).

Findings of Fact

Introduction

This case comes down to a decision on whether the City Commission's rejection of all bids on November 16, 2020, was a proper exercise of the discretion afforded to the City Commission or whether the stated reasons for rejecting all bids were arbitrary and capricious, i.e. pretextual. In order to place the decision in proper context it is important o review the history of proposal process, specifically the first RFP as well as the events taking place after the second rejection of all bids which it's the decision under review in this case.

1. Through its parent company, RCI Group, VKLLC is a national marina operator that has developed and managed large-scale marinas all around the United States. (Nov. 9 Trial Tr. at 75:20-21; Nov. 10 Trial Tr. at 35:4-24, 37:21-38:13.) During the time period relevant to this action, the principals of VKLLC owned or operated more than 40 marinas nationwide, including several in South Florida. (Nov. 10 Trial Tr. at 37:21-38:13.). An affiliate of VKLLC operated the marina at Monty's in the Grove owned by Defendant CITY OF MIAMI (the "City"), with the approval of the City of Miami Commission, from 2004 to 2015, an operation that was mutually beneficial. (Nov. 10 Trial Tr. at 35:25-36:24, 56:2-5.)

2. The City owns a marina at 3301 Rickenbacker Causeway on Virginia Key (the "Virginia Key Property") that has been operated by the current tenant, Rickenbacker Marina, Inc. ("Rickenbacker"), since 1983. (Nov. 9 Trial Tr. at 17:7-9.)

3. Since 2015, Rickenbacker has been a holdover tenant at the Virginia Key Property pursuant to a settlement agreement with the City arising from prior litigation. (Plaintiff's Trial Exhibit ("PTX") 45; PTX 53, Ex. A.) Under the settlement agreement, Rickenbacker became a "holdover tenant at will" on a "month to month basis" whose tenancy "shall continue until the successful bidder/new tenant takes possession of the Subject Property, after any and all objections to the Bid and award, including appeals, have been fully and finally resolved." (PTX 53, Ex. A at 2-3.)

B. The City's First Request for Proposal

4. In 2015, the City first conducted a public procurement process for the lease, redevelopment, expansion and operation of the Virginia Key Property (the "First RFP"). (PTX 65 at 22-23.)

5. VKLLC prepared and submitted a bid in response to the City's First RFP. (Nov. 10 Trial Tr. at 39:19-41:15.) To avoid any suggestion that it would control an excessive amount of waterfront property in Miami, VKLLC's affiliate gave up the operation of the marina at Monty's in the Grove as a result of its bid proposal. (Nov. 10 Trial Tr. at 36:25-37:6.)

6. Rickenbacker (through an affiliate, New Rickenbacker Marina) also submitted a bid in response to the First RFP. (PTX 39.)

7. The City employed a five-person selection committee to review the bids submitted in response to the First RFP. (PTX 39.)

8. The City's selection committee ranked VKLLC as the top ranked bidder that responded to the First RFP. (Nov. 8 Trial Tr. at 44:23-45:2; PTX 39.)

9. Rickenbacker was ranked third out of the three bidders that responded to the First RFP. (Nov. 8 Trial Tr. at 45:6-8; Nov. 9 Trial Tr. at 39:12-19; PTX 39.)

10. The City Manager at the time, Daniel Alfonso, subsequently recommended to the City Commission that the project be awarded to VKLLC as the top-ranked bidder. (PTX 39.)

11. Rickenbacker then submitted a bid protest challenging the recommendation of VKLLC. (Nov. 9 Trial Tr. at 39:20-40:4; PTX 40.) The bid protest on the First RFP was heard by the Miami City Commission. (Nov. 8 Trial Tr. at 46:2-5; Nov. 9 Trial Tr. at 40:17-41:11; Nov. 10 Trial Tr. at 200:12-20.)

12. In the presentations to the City Commission regarding the bid protest, one of the issues discussed was the involvement of Marin and Marin, a subcontractor to a subcontractor of a VKLLC affiliate, in a sewage spill in Biscayne Bay near the Miami Beach Marina in 2000. (Nov. 8 Trial Tr. at 89:1-20; Nov. 9 Trial Tr. at 95:22-96:3; Nov. 10 Trial Tr. at 57:9-12;

76:13-22.)

13. VKLLC presented undisputed evidence to the City Commission showing that the spill in 2000 occurred when the sub-subcontractor struck an underwater sewage pipe that was not marked on any map or chart or recorded in a public easement. (Nov. 8 Trial Tr. at 90:14-91:21; Nov. 10 Trial Tr. at 76:13-22; PTX 4 at 38-39; PTX 9.)

14. City staff investigated and confirmed with the National Oceanic and Atmospheric Administration (NOAA) that the underwater sewage pipe was not identified on any maps or charts. (Nov. 9 Trial Tr. at 96:4-97:14.)

15. Neither VKLLC nor its principals or affiliates was found to be at fault for the spill by any government agency. (Nov. 8 Trial Tr. at 91:11-21; Nov. 10 Trial Tr. at 76:6-77:3; PTX 4; PTX 9.)

16. On July 20, 2016, the City Commission voted to reject all bids submitted in response to the First RFP. (Nov. 8 Trial Tr. at 46:20-47:3; Nov. 9 Trial Tr. at 41:16-22, 43:20-24; PTX 4.)

17. During the City Commission discussion on that date, Commissioner Ken Russell said he believed that the First RFP "could have been written better" and that "the way the RFP was worded, [VKLLC] may not have even had to disclose that [the 2000 sewage spill] happened, and I think that's the fault of the RFP, not [VKLLC]." (PTX 4 at 21.)

C. The City's Second Request for Proposal

18. The City subsequently issued a second Request for Proposal for the Virginia Key Property (the "Second RFP") in February 2017. (PTX 61.)

19. Pursuant to the City Charter, any lease agreement approved by the City Commission in response to the Second RFP must be subsequently approved by a public vote through a referendum in order to be valid. (PTX 61 at 6.)

20. The Second RFP included a 59-page draft lease agreement that was to form the basis of the final agreement with the proposer selected by the City for the Virginia Key project. (PTX 61, Ex. C.) The lease agreement incorporated in the Second RFP included terms that were originally negotiated with the City by VKLLC when it was attempting to finalize an agreement after it was recommended to receive the bid award following the First RFP. (Nov. 8 Trial Tr. at 53:8-15.)

21. The City Commission took an active role in formulating the Second RFP, and voted to approve the Second RFP before it was published. (Nov. 8 Trial Tr. at 46:20-47:19; 49:17-50:11; 89:22-90:3; Nov. 9 Trial Tr. at 44:9-45:1; Nov. 10 Trial Tr. at 223:4-224:6; PTX 6.)

22. The City Commission incorporated criteria in the Second RFP designed to address the environmental record of the applicants. (Nov. 8 Trial Tr. at 90:4-13; 121:14-23; Nov. 10 Trial Tr. at 223:21-224:6.) The Second RFP adopted a 100-point scoring system to rank applicants and devoted 15 of those points to the category of "Resiliency & Environmental Considerations." (PTX 61 at 32.) This included a subcategory ranking the applicants' "[c]ommitment to protection of environmental assets and history of environmental stewardship," which accounted for 5 points on the 100-point evaluation scale contained in the Second RFP. (PTX 61 at 32; Nov. 8 Trial Tr. at 90:4-13*;* Nov. 10 Trial Tr. at 44:5-17, 224:8-12.)

23. In its proposal in response to the Second RFP, VKLLC disclosed the facts related to the 2000 spill. (PTX 59, App. 10; Nov. 10 Trial Tr. at 44:18-23.)

24. Also included in the Second RFP were criteria for determining whether an applicant is a responsible bidder. Most germane to this action, the Second RFP states that the City may deem a proposal to be non-responsive, and a proposer to be not responsible, based on the conduct of the "Proposer or any of its members" or the Proposer's "principals." (PTX 61 at 12-13; Nov. 8 Trial Tr. at 57:11-21.) The Second RFP does not permit the City to deem a

bidder not responsible based on the conduct of its current or former subcontractors or sub-subcontractors. (PTX 61 at 12-13.)

25. VKLLC submitted a proposal to the City in response to the Second RFP. (PTX 59.) For the Second RFP, VKLLC's principals partnered with Suntex, another experienced marina developer which had submitted the second-ranked bid to the First RFP. (Nov. 8 Trial Tr. at 40:13-41:4; Nov. 10 Trial Tr. at 37:21-38:5.)

26. Rickenbacker also submitted a proposal to the Second RFP through a new affiliate, Biscayne Marine Partners, LLC ("Biscayne Marine"). (PTX 30.)

27. Unlike VKLLC's plan, Rickenbacker's proposal included plans to dredge the bay bottom at the marina, endangering sensitive sea grasses. (Nov. 9 Trial Tr. at 25:7-19; Nov. 10 Trial Tr. at 49:6-50:9; PTX 30.)

28. The City employed a new seven-person selection committee to review the bids submitted in response to the Second RFP. (PTX 31.) Rickenbacker has no reason to believe that any of the selection committee members were biased against it. (Nov. 9 Trial Tr. at 19:17-25.)

29. The City's selection committee again ranked VKLLC as the top-ranked bidder on the project. (Nov. 9 Trial Tr. at 46:3-23; PTX 31.) Rickenbacker was ranked as the second of the three bidders. *Id.*

30. An independent financial analysis conducted by CBRE on behalf of the City found that VKLLC's proposal would have provided the City with about $93 million more revenue than it would have received under Rickenbacker's proposal. (Nov. 10 Trial Tr. at 47:24-49:3; PTX 3.)

31. The City Manager, Daniel Alfonso, agreed with the selection committee and again recommended that the City Commission award the lease to VKLLC on or about June 15, 2017. (PTX 31.)

32. Rickenbacker then filed another bid protest that was heard this time by an administrative hearing officer, who rejected the bid protest. (Nov. 8 Trial Tr. at 61:13-63:5; Nov. 10 Trial Tr. at 72:4-9, 204:8-13.)

33. Rickenbacker appealed the administrative hearing officer's decision to an appellate panel of the Eleventh Judicial Circuit, which unanimously denied the appeal. (Nov. 8 Trial Tr. at 65:10-66:9; Nov. 10 Trial Tr. at 204:17-23, 231:21-232:2; PTX 34.)

34. Rickenbacker then filed a petition for writ of certiorari with the Third District Court of Appeal, which affirmed the lower court and unanimously rejected the bid protest in 2019. (Nov. 8 Trial Tr. at 66:10-67:1; Nov. 10 Trial Tr. at 204:17-23, 231:21-232:2; PTX 34; PTX 6.)

35. While these appeals were pending for nearly two years, the City Commission repeatedly deferred any action on the Second RFP, allowing Rickenbacker to remain at the property as a holdover tenant. (Nov. 8 Trial Tr. at 63:9-69:1, 100:8-12; Nov. 9 Trial Tr. at 53:6-56:20; Nov. 10 Trial Tr. at 11:7-12:21, 125:9-18; PTX 6.) VKLLC's attorney, Albert Dotson, testified that in his experience in procurement before the City and Miami-Dade County, the government never defers ruling while a losing bidder pursued a bid protest through the courts. (Nov. 8 Trial Tr. at 63:19-64:22.) This testimony was undisputed at trial.[1] Similarly, current City Manager Art Noriega testified that the number of deferrals was uncommon for a Request for Proposal. (Nov. 10 Trial Tr. at 130:12-20.)

D. Additional Rent

36. The City ultimately demanded that Rickenbacker pay an additional $100,000 in supplemental monthly rent, to compensate the City for the lost income it would have received if the Second

RFP had not been delayed while Rickenbacker's litigation was pending. (Nov. 9 Trial Tr. at 55:10-18; 57:6-60:1.)

37. After Rickenbacker failed to make all of its payments, the City Staff issued a 15-Day Notice to Vacate the Premises to Rickenbacker on September 14, 2018. (PTX 42; PTX 45; Nov. 9 Trial Tr. at 60:10-61:13.)

38. After receiving additional payments from Rickenbacker, the City Commission then stayed the Notice to Vacate until December 2018. (PTX 45.) At that time, the City Commission passed another resolution in which it "indefinitely defers action regarding the fifteen (15) day 'Notice to Vacate' sent by the City to [Rickenbacker] dated September 14, 2018, as long as [Rickenbacker] is timely paying an amount equal to one hundred thousand ($100,000.00) each month in addition to [Rickenbacker's] monthly rent and is not otherwise in violation of the Settlement Agreement." (PTX 45.)

39. On May 1, 2019, after Rickenbacker again failed to make these payments, Daniel Rotenberg, then-director of the City's Department of Real Estate & Asset Management ("DREAM") sent a demand letter threatening eviction if payment was not made. (PTX 47; Nov. 9 Trial Tr. at 67:10-69:8.) Although Rotenberg recommended that the City terminate Rickenbacker's holdover tenancy at the Virginia Key Property, his recommendation was not accepted by the City Administration. (Nov. 9 Trial Tr. at 69:1-8.)

40. On May 20, 2019, Rickenbacker filed a lawsuit against the City claiming that it was not legally obligated to pay the $100,000 in additional monthly rent pursuant to the resolution passed by the City Commission in December 2018, and asserting that the payments were voluntary. (PTX 53.) Although the City suggested that it never received service of Rickenbacker's complaint, the evidence on this point is unclear. (Nov. 10 Trial Tr. at 252:24-254:2.) The lawsuit was not dismissed until July 16, 2020. (Nov. 10 Trial Tr. at 258:5-7.)

E. The City's Deferrals and Responsibility Reviews

41. After Rickenbacker's court appeals were exhausted, the City Commission continued to defer any decision on the Second RFP eight more times over 20 months between February 2019 and November 2020. (PTX 6; Nov. 8 Trial Tr. at 68:3-69:1; Nov. 9 Trial Tr. at 70:21-72:2.) During these deferrals, Rickenbacker continued to remain on the property as a holdover tenant. (Nov. 8 Trial Tr. at 100:8-15; Nov. 10 Trial Tr. at 125:9-18.)

42. During that time period, VKLLC continued to work with City staff to finalize the draft lease agreement to conform to VKLLC's proposal and the terms and conditions of the Second RFP. (Nov. 8 Trial Tr. at 55:7-56:7; Nov. 10 Trial Tr. at 51:11-21; 53:23-54:11.)

43. After its bid protest and appeals failed, Rickenbacker raised new allegations with the City challenging VKLLC's responsibility as a bidder. (Nov. 8 Trial Tr. at 69:16-20; 72:14-25; 74:24-76:2; Nov. 9 Trial Tr. at 77:22-78:6; Nov. 10 Trial Tr. at 16:19-19:17, 118:3-8, 134:12-135:13, 235:21-25; PTX 34.) These allegations were first investigated by the City's DREAM as part of a "responsibility review" requested by then-City Manager Emilio Gonzalez. (Nov. 9 Trial Tr. at 77:22-78:6; Nov. 10 Trial Tr. at 16:19-17:7.)

44. One of these allegations concerned Shoreline Foundation, Inc. ("Shoreline"), a potential subcontractor identified in VKLLC's proposal. After VKLLC submitted its proposal to the City in 2017, and after VKLLC was recommended for the project by the City Manager, Shoreline pleaded guilty to defrauding the Coast Guard in an unrelated matter. (PTX 34; Defendant's Trial Exhibit ("DTX") B; Nov. 8 Trial Tr. at 92:1-93:1; 130:5-7; Nov. 10 Trial Tr. at 74:10-21, 173:20-24, 235:16-25.)

45. It is undisputed that Shoreline's misconduct, and its 2018 guilty plea, were unknown at the time that VKLLC submitted its proposal to the City in 2017. (Nov. 8 Trial Tr. at 92:1-11; Nov. 10 Trial Tr. at 74:10-21; 79:3-12, 178:2-24; PTX 37.)

46. After investigating the allegations made against VKLLC related to Shoreline, the City staff determined that the allegations were "unfounded" and not a basis to disqualify VKLLC. (Nov. 9 Trial Tr. at 78:7-23; Nov. 10 Trial Tr. at 17:13-18:2; PTX 34.) City Manager Gonzalez also concluded that "it would be unreasonable to reject Proposer as non-responsible for the subsequent actions of a potential subcontractor." (PTX 34.) Gonzalez further noted that, under the terms of the Second RFP, a proposer could be deemed not responsible based on the conduct of the proposer's members or principals, but not based on the conduct of its proposed subcontractors. (PTX 34; Nov. 10 Trial Tr. at 17:13-18:6.)

47. As part of the responsibility review, VKLLC informed the City staff that it did not intend to hire Shoreline as a subcontractor and that it would either hire a new subcontractor or self-perform the work, which City Manager Gonzalez approved. (PTX 34; Nov. 8 Trial Tr. at 71:6-10; 93:6-9; 93:17-24; 130:5-15; Nov. 10 Trial Tr. at 79:13-16.) As Mr. Gonzalez's May 15, 2019, memo stated: "A proposer must have some form of flexibility in selecting its subcontractors in a project such as this, which is not a simple construction bid, but rather a project involving planning, design, permitting, construction, operation, a leasehold interest, and numerous other factors that will result in a project that will occur in multiple phases over many years." (PTX 34.)

48. Rickenbacker also accused VKLLC's representatives of making a misstatement before the selection committee in 2017 about the use of its proposed Aero Docks automated dry storage technology at Port Marina in Fort Lauderdale. (PTX 34; Nov. 10 Trial Tr. at 180:18-181:16.) Rickenbacker did not raise this issue in its bid protest to the Second RFP. (PTX 41.)

49. Gonzalez and the City staff also reviewed this allegation as part of the responsibility review and found that VKLLC's counsel had merely made contradictory statements about the use of Aero Docks dry storage technology at Port Marina, which the staff determined to be a "statement of innocent confusion of a technical matter on the part of counsel." (PTX 34;

Nov. 9 Trial Tr. at 79:17-80:5; Nov. 10 Trial Tr. at 18:11-20.)

50. There is no evidence that the alleged misstatement benefited VKLLC during the selection committee evaluation process; in fact, the City staff concluded that the misstatement "actually may have impacted [VKLLC's] scores negatively." (PTX 34; Nov. 10 Trial Tr. at 18:11-20.) The City staff ultimately found that VKLLC "should not be deemed non-responsible for a statement that was not intentionally meant to mislead, and which ultimately had either no effect or a potential negative effect on their score." (PTX 34.)

51. It is undisputed that Aero Docks has the necessary patents for the automated dry storage system proposed by VKLLC, and that VKLLC had the right to use that technology. (PTX 34; Nov. 10 Trial Tr. at 18:11-20.) In fact, VKLLC's team presented the City with copies of the patents for the automated dry stacks technology. (PTX 34; Nov. 10 Trial Tr. at 18:11-19:2). City staff concluded that VKLLC did, in fact, have the capacity and the necessary patents to design, construct and operate the automated dry storage facilities. (PTX 34.)

52. Gonzalez later resigned as City Manager, and was replaced in February 2020 by Art Noriega, who performed his own analysis of the Second RFP and its responses, and later examined Rickenbacker's allegations against VKLLC as part of his own responsibility review with the assistance of the City's DREAM staff and the Procurement Department. (PTX 37; Nov. 10 Trial Tr. at 117:21-118:13, 133:14-24.)

53. As part of this additional responsibility review, City staff asked VKLLC to provide further information to address when it first learned of Shoreline's guilty plea. (PTX 36.) VKLLC informed the City that it learned of Shoreline's guilty plea from the City during the responsibility review process (PTX 37), a fact confirmed by the testimony at trial. (Nov. 8 Trial Tr. at 92:1-5; Nov. 10 Trial Tr. at 79:3-12, 178:2-24.)

54. At the request of City staff, VKLLC also provided additional information about its experience with Aero Docks and automated dry storage facilities. (PTX 36; PTX 37.)

55. After this additional review, Noriega agreed with Gonzalez's conclusions. Noriega testified that the allegations related to Shoreline were "immaterial" because they concerned a subcontractor, not a principal of VKLLC. (Nov. 10 Trial Tr. at 137:6-138:5.) Noriega also stated that he and the City staff found no basis to question VKLLC's integrity or its capacity to perform. (Nov. 10 Trial Tr. at 140:11-14.)

56. Jacqueline Lorenzo of DREAM, who helped investigate Rickenbacker's claims, testified that she found no evidence that VKLLC concealed any information about Shoreline's guilty plea. (Nov. 10 Trial Tr. at 178:2-24; PTX 37.) Lorenzo also testified that there was no evidence that VKLLC intentionally misled the selection committee regarding the Aero-Docks technology. (Nov. 10 Trial Tr. at 183:15-24, 239:10-22; 240:14-20; PTX 37.)

57. The environmental spill in 2000 was not considered as part of the City's responsibility reviews in 2019 and 2020, and it was not raised in Rickenbacker's bid protest in 2017. (PTX 37; PTX 37; PTX 41; Nov. 10 Trial Tr. at 228:14-229:12.) Indeed, Rickenbacker took the position during the bid protest that it was inappropriate to consider the 2000 spill because it had been previously disclosed and had been factored into the Second RFP in creating the scoring criteria. (Nov. 10 Trial Tr. at 229:16-231:20.)

58. City staff also considered issues regarding Rickenbacker's qualifications as a responsible bidder that were raised by VKLLC. (Nov. 8 Trial Tr. at 76:3-25.) Specifically, the City examined allegations of criminal fraud and bounced checks in Argentina implicating Damien Calebrese, a principal in Biscayne Marine, Rickenbacker's bidding entity. (PTX 37.) The City staff also examined whether Rickenbacker had initiated litigation against the City (which is a basis to deem a bidder not responsible under the Second RFP). (PTX 37; PTX 61.) Rickenbacker first told City staff that it did not have ongoing litigation with the City, only to later admit that there was a pending lawsuit, stating that the initial misstatement was "inadvertent." (PTX 37.)

59. According to an October 16, 2020 memo to Mr. Noriega from Ms. Lorenzo and Annie Perez, the Director of Procurement, the City made no determination at that time as to whether Rickenbacker had the "integrity and capacity" to be deemed a responsible bidder. (PTX 37.) As stated in the memo: "If there is a determination that the top-ranked Proposer [VKLLC] is not responsible, then the City will determine whether the second-ranked Proposer [Rickenbacker] has such integrity and capacity." (PTX 37.)

F. The City Commission Vote

60. The City Commission considered the Virginia Key Property proposals at a meeting on November 16, 2020 and heard presentations from representatives of both VKLLC and Rickenbacker. (PTX 65.)

61. At the meeting, Noriega informed the City Commission that he recommended that the project be awarded to VKLLC as the top-ranked bidder. (PTX 65 at 8.)

62. Commissioner Russell then advanced a proposal to have VKLLC deemed a non-responsible bidder because, more than two decades earlier, "contractors" working for VKLLC were responsible for the spill at the Miami Beach Marina. (PTX 65 at 42-44.)

63. Commissioner Russell asserted that VKLLC did not disclose the role of its affiliate's sub-subcontractor in the 2000 spill in its response to the First RFP, and this "spoke volumes to not only to the responsibility, but their character and forthrightness in responding." (PTX 65 at 42.) This contradicted Commissioner Russell's July 20, 2016 statement (noted above) in which he acknowledged that the failure to disclose this information was a result of how the First RFP was written. (PTX 4 at 21.)

64. Commissioner Russell persisted with this motion even after the City Attorney, Victoria Mendez, advised that the City Commission could not disqualify the winning bidder and award the lease to another bidder. (PTX 65 at 81-82.)

65. The City Attorney further advised that the City Commission did have the option to reject all bids, in which case it must "give reasons for the rejection of all bids." (PTX 65 at 68-69.) Ms. Mendez then suggested that one of those reasons could be the "environmental issue" regarding the 2000 spill, even though it was not examined by City staff in its responsibility reviews, and the issue of environmental stewardship constituted no more than 5 percent of a proposer's score under the criteria of the Second RFP approved by the City Commission. (PTX 65 at 68-69; PTX 61 at 32.)

66. Commissioner Joe Carollo then made a motion to reject all bids on the Second RFP. (PTX at 93.) Carollo identified "three direct reasons" for his motion:[2] (1) "the environmental" (referring to the 2000 spill attributed to a sub-subcontractor of a VKLLC affiliate, which was not a subject of the City's responsibility reviews or Rickenbacker's bid protest); (2) "defrauding of the U.S. Coast Guard" (a reference to the felony conviction of Shoreline, the dropped proposed subcontractor); and (3) "the misrepresentation of the Aero-Docks technology" (referring to the alleged misstatements made by VKLLC's counsel before the City's selection committee in 2017 regarding the use of Aero Docks technology at Port Marina in Fort Lauderdale). (PTX 65 at 69, 93, 95-96.)

67. There is no evidence that the City Commission had any additional evidence or information regarding these three issues other than the information provided by City staff. (Nov. 8 Trial Tr. at 96:23-97:5; Nov. 10 Trial Tr. at 241:13-16.)

68. However, Commissioner Carollo suggested that he did not necessarily believe that there were any factual bases for these allegations, but, following the advice of the City Attorney, he nevertheless relied on them as purported grounds to reject the bids: "Now, what I believe or not believe, well, that could be a reason. It still doesn't matter. We gave three sound reasons why we can reject this, and if they want to sue, let them sue." (PTX 65 at 69). Commissioner Carollo also signaled that he sought to reject all bids based on some undisclosed rationale that he would reveal only if compelled to do so in a lawsuit: "[I]f at any

time in the future anybody wants to sue and like to put any of us under deposition, I'll be happy then to answer some of the other things I haven't talked about here." (PTX 65 at 55).[3]

69. Without further debate, the City Commission then voted in favor of Commissioner Carollo's motion to reject all bids submitted in response to the Second RFP. (PTX 65 at 96-98.)

G. The Referendum and Charter Amendment

70. After the City Commission rejected all bids in November 2020, Rickenbacker's principal, Aabad Melwani, approached Commissioner Russell with a proposal for the City to circumvent the bidding process and instead advance a ballot initiative to amend the City Charter to allow voters to unilaterally award the lease of the Virginia Key Property directly to Biscayne Marine – Rickenbacker's bidding affiliate – with no competitive bidding whatsoever. (Nov. 8 Trial Tr. at 141:4-23.)

71. Commissioner Russell's staff then proposed the charter amendment to City staff, and Commissioner Russell sponsored the legislation to put forward a ballot initiative to amend the City Charter to provide the lease to Rickenbacker without competitive bidding. (Nov. 10 Trial Tr. at 189:20-190:10; 243:22-245:4; PTX 2 at 2.) Both Commissioner Russell's staff and a Rickenbacker lobbyist participated in the drafting the proposed charter amendment. (Nov. 8 Trial Tr. at 142:2-10; Nov. 10 Trial Tr. at 244:12-245:4.)

72. The proposal presented to voters under the proposed charter amendment was "substantially similar" to the proposal contained in the Second RFP. (Nov. 10 Trial Tr. at 248:13-18, 251:15-20.)

73. When the City Commission considered the charter amendment proposal in July 2021, Suntex then offered an unsolicited bid for the Virginia Key Property lease. (PTX 2 at 10-12.) Suntex's proposal included financial terms more favorable to the City than those in the

proposed referendum requested by Rickenbacker. (PTX 5 at 36-47.) However, the City Commission declined to consider the Suntex bid or issue a new Request for Proposal for the Virginia Key project. (PTX 2 & 5.)

74. Instead, the City Commission used the Suntex bid to negotiate directly with Rickenbacker to improve the terms of its charter amendment proposal. (PTX 5 at 36-42, 57.) Still, Rickenbacker's new, revised proposal provided less revenue to the City than other proposals from the RFP process. (Nov. 10 Trial Tr. at 248:19-250:1).

75. During the City Commission discussion of the proposed charter amendment, Commissioner Alex Diaz de la Portilla described the proposal as an attempt to "hoodwink our voters by giving them one option" and avoiding the competitive bidding process. (Ex. 2 at 29:13-31:3.)

76. Ultimately, Miami's voters rejected the proposal to award the Virginia Key Property lease to Rickenbacker. (Nov. 8 Trial Tr. at 99:20-100:3; Nov. 10 Trial Tr. at 251:21-24.)

77. From the time of the second responsibility review in October 2020 to July 2021, when the City voted to put the proposed charter amendment on the ballot, the City staff did not make a determination regarding Rickenbacker's "integrity and capacity" or further investigate the fraud and bad-check allegations regarding Rickenbacker's principal in Argentina before agreeing to put the proposed charter amendment before the voters. (Nov. 10 Trial Tr. at 145:23-146:19; PTX 37.)

78. Since the referendum failed in 2021, the City has not offered a new Request for Proposal or otherwise advanced the planned improvements to the Virginia Key Property. (Nov. 10 Trial Tr. at 148:20-149:11.)

79. Rickenbacker ceased making additional rent payments after the City Commission rejected all bids. (Nov. 10 Trial Tr. at 126:18-127:5.) The matter of whether Rickenbacker was responsible for the additional $100,000 per month is in legal limbo.

80. Rickenbacker remains a "holdover tenant at will … on a month to month basis" at the unimproved property today. (PTX 53, Ex. A at 2; Nov. 8 Trial Tr. at 100:8-15; Nov. 9 Trial Tr. at 7:9-8:8.)

H. In Rejecting All Bids in Response to the Second RFP, the City Commission Acted Arbitrarily and Capriciously

81. Under controlling Florida law, a governmental body's decision to accept or reject bid proposals may be found to be arbitrary or capricious if the governmental body (1) showed favoritism to a particular bidder; (2) made an award based on personal preference; (3) acted without reason, or for a reason that was merely pretextual; (4) made its decision based upon criteria that were neither included in the bid documents nor clearly defined; or (5) the decision was not based on facts reasonably tending to support the conclusions reached by the agency. *Marriott*, 383 So. 2d at 668; *Emerald Corr. Mgmt. v. Bay County Bd. of Cty. Comm'rs*, 955 So. 2d 647 (Fla. 1st DCA 2007); *Wester v. Belote*, 138 So. 721 (Fla. 1931); *City of Sweetwater v. Solo Constr. Corp.*, 823 So. 2d 798 (Fla. 3d DCA 2002).

82. A governmental body also acts arbitrarily and capriciously if it circumvents the competitive bidding process by rejecting all bidders to allow a favored bidder another chance to submit an improved bid. *See Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc.*, 354 So. 2d 446 (Fla. 1st DCA 1978).

83. Based on the Findings of Facts discussed herein, the Court finds that in rejecting all bids and refusing to approve the award of the Second RFP to VKLLC, the City Commission acted arbitrarily and capriciously in the following ways:

1. The City's Decision Lacked Factual Support

84. As discussed above, in approving Commissioner Carollo's motion, the City Commission

provided three specific grounds to reject all bids: (1) concerns regarding the 2000 spill off Miami Beach; (2) the Shoreline guilty plea; and (3) alleged misstatements regarding the Aero Docks technology. After reviewing all of the evidence introduced at trial, the Court finds that there was insufficient factual support for any of these stated grounds to be a valid basis to reject all bids.

85. The Shoreline guilty plea could not rationally provide any basis for the City Commission's actions. The undisputed evidence conclusively establishes that Shoreline's guilty plea arose from an entirely unrelated matter, and, significantly, it did not come to light until **after** VKLLC had submitted its proposal to the City. Moreover, the undisputed testimony established that VKLLC terminated Shoreline as a potential subcontractor once it learned of the prosecution of Shoreline and offered to perform the same services itself. The unrelated, independent misconduct of a potential subcontractor, occurring long after the proposal was submitted to the City, with no material effect on the proposal, is plainly insufficient to support the City Commission's decision to reject all bids and avoid awarding the bid to VKLLC as recommended by the City Manager.

86. The "misstatement" regarding the Aero Docks technology also cannot support the City's decision. The precise nature of the alleged "misstatement" is not clear from this record, since the "misstatement" itself was not introduced into evidence. It appears the issue arises from a statement made by VKLLC's representatives before the City's selection committee in 2017 regarding whether Port Marina in Fort Lauderdale also used Aero Docks' dry dock technology. Notably, Rickenbacker did not allege in its original bid protest that VKLLC made any misstatements during the evaluation process, and only raised this issue for the first time in 2019. In any event, the City staff reviewed VKLLC's 2017 statements in 2019 and again in 2020 and concluded that VKLLC's statement about Port Marina was a "statement of innocent confusion of a technical matter on the part of counsel" that was not material and not intended to mislead the selection committee. The City staff further concluded that the

misstatement "actually may have impacted [VKLLC's] scores negatively," because VKLLC's counsel characterized Port Marina's technology as "inferior and subject to failure." (PTX 34.) City staff also concluded that VKLLC did, in fact, have the capacity and the necessary patents to design, construct and operate the automated dry storage facilities. (PTX 34.)

87. The City Commission did not identify any additional or contrary evidence on this issue at the November 16, 2020, meeting, or offer any explanation as to how the misstatement regarding Aero Docks could be sufficiently material to merit the rejection of all bids. On this record, the Court finds that the mysterious misstatement regarding the use of the Aero Docks technology at Port Marina in Fort Lauderdale – a misstatement that is not itself in the record – cannot reasonably support the City Commission's decision to reject all bids.

88. Finally, there is the issue of the sewage spill. The undisputed evidence shows that, in 2000 – more than 20 years before the City Commission vote – a subcontractor of a subcontractor of an affiliate of VKLLC was performing underwater work when it struck a sewage pipe that was unmarked on any chart or map and not recorded in any county easement, resulting in a significant sewage spill in Biscayne Bay.

89. The undisputed evidence further shows that this issue first arose in 2016, as part of a bid protest lodged in opposition to VKLLC's bid on the First RFP. Commissioner Russell stated at that time that the First RFP did not require VKLLC to disclose its role in the 2000 spill, and for this reason he wanted the Second RFP to include more robust disclosure requirements.

90. The City Commission took an active role in drafting the Second RFP and in establishing the scoring requirements to be used in evaluating the responsive proposals, including the scoring requirements related to environmental issues. The scoring criteria for the Second RFP includes a subcategory assessing proposers' "Commitment to protection of environmental

assets and history of environmental stewardship," which accounted for 5 points on the 100-point evaluation scale. (PTX 61 at 32; Nov. 8 Trial Tr. at 90:4-13). However, at the November 16, 2020, meeting, the City Commission essentially made VKLLC's "history of environmental stewardship" a dispositive issue, though, under the terms of the Second RFP, it accounted for no more than 5 percent of a proposer's score in the evaluation process.

91. More significantly, the undisputed facts regarding the spill in 2000 do not reasonably tend to support the City's decision to reject all bids. The undisputed evidence shows that the spill occurred when Marin and Marin, a subcontractor of a subcontractor of an affiliate of VKLLC, struck a hidden sewage pipe that was not marked on any chart or map and not recorded in an easement. Such an attenuated relationship between the proposer (whose affiliate had been subsequently approved by the City Commission to operate another City-owned marina, which it did successfully for over a decade (Nov. 10 Trial Tr. at 35:20-36:24)) and an unforeseeable accident that occurred over 20 years earlier cannot reasonably form the basis of the City's decision to reject all bids. Moreover, even Rickenbacker recognized that the spill was addressed in the Second RFP, and therefore not a basis for its bid protest. (Nov. 10 Trial Tr. at 229:16-231:20; PTX 41.)

92. To the extent that Commissioner Russell concluded that VKLLC had not properly disclosed the facts related to the 2000 spill, this is not supported by the facts in the record. In considering the First RFP in 2016, Russell recognized that VKLLC was not required to disclose information regarding the spill under the terms of the First RFP. And the undisputed evidence shows that VKLLC disclosed the facts related to the spill in its proposal on the Second RFP. (PTX 59, App.10.)

2. **The City's Decision Was Based Upon Criteria Not Included in the Bid Documents**

93. In basing its decision on the Shoreline guilty plea and the 2000 spill, the City essentially held VKLLC responsible for the conduct of a future potential subcontractor, and the conduct of a

past subcontractor of another subcontractor to an affiliate. This was arbitrary and capricious, as the Second RFP does not include any evaluation criteria based on the conduct of subcontractors of subcontractors of the proposer's affiliates. *See Solo*, 823 So. 2d at 802 (government award is arbitrary or capricious if "based upon criteria that were neither included in bid documents nor clearly defined"); *Marriott*, 383 So. 2d at 668 (county acted arbitrarily and capriciously by failing to award RFP to "the best bidder within the standards set by the Board when it elected to solicit competitive bids"); *Academy Express, LLC v. Broward County*, 53 So. 3d 1188, 1190 (Fla. 4th DCA 2011) ("In the contract procurement context, whether an action was arbitrary or capricious depends on whether the awarding committee complied with its own proposal criteria"); *Emerald Corr.*, 955 So. 2d at 653 (same).

94. To the contrary, the Second RFP states that the City "shall have reasonable discretion to deem any proposal non-responsive, and/or any proposer non-responsible, based on the conduct of the **proposer or its members**" if they "have been found liable by any legal or administrative entity via any proceedings for environmental damage, contamination or any other environmental liability," or "have been debarred by any public agency or been placed in the convicted vendors list pursuant to Florida Statute Section 287.133 or a similar law, rule, or regulation." (PTX 61 at 12.) The express standards of the Second RFP were not met and it was therefore not a reasonable exercise of discretion for the City to throw out all bids on this basis.

95. The evidence further shows that the City Commission played an active role in preparing the Second RFP and formulating the scoring criteria to be used in ranking the bidders and determining the responsibility of the proposers. In preparing and approving the Second RFP, the Commission could have developed criteria that deemed proposers not responsible based on the past or future conduct of a proposer's subcontractors (or a proposer's affiliate's sub-subcontractors). Or the Commission could have otherwise disqualified a proposer for

environmental damage caused by subcontractors or sub-subcontractors. (Nov. 8 Trial Tr. at 89:22-90:3.) But the Commission did not do so. Thus, it was arbitrary and capricious for the Commission to rely on the conduct of VKLLC's subcontractor and an affiliate's sub-subcontractor as the bases to reject all bids and decline to award the contract to VKLLC.

96. The Second RFP further states that it is "subject to City of Miami Code Section[] 18-95." (PTX 61 at 12.) However, Section 18-95, like the Second RFP itself, identifies factors to be considered in determining the responsibility of "**prospective contracting parties**," including whether the prospective contracting party has a "satisfactory record of performance" or a "satisfactory record of integrity." Notably, Section 18-95 states that the determination of a contracting party's responsibility shall be made by the City's "chief procurement officer or individual purchasing agent," and does not reference the City Commission. Nothing in this section of the City Code or the Second RFP suggests that a prospective contracting party may be deemed not responsible by the City Commission based on the conduct of a potential future subcontractor or the conduct of a subcontractor of a subcontractor of an affiliate.

97. Nevertheless, the City's counsel argued that the City Commission could consider the conduct of subcontractors in determining the "integrity" of VKLLC. Putting aside the fact that neither the Second RFP nor the City Code supports this argument, the City fails to explain how either the Shoreline guilty plea or the 2000 spill speaks to VKLLC's integrity. Shoreline's misconduct cannot be attributed to VKLLC: The undisputed evidence is that Shoreline's misconduct was in a wholly different matter, and VKLLC was not even aware of it until after Shoreline pleaded guilty. Once VKLLC learned of the prosecution, it terminated Shoreline as a potential subcontractor – which it was allowed to do. Similarly, the undisputed evidence shows that the 2000 spill occurred because an **unknown** and unmarked pipe was hit by a subcontractor to a subcontractor to an affiliate. Neither of these incidents are probative of VKLLC's integrity as a proposer.

98. The City has also argued that the City Commission could consider the conduct of

subcontractors in determining VKLLC's "record of performance" under Section 18-95(c)(2). As discussed above, this section of the City Code refers only to the record of performance of the "prospective contractual party," and makes no reference to the record of performance of a prospective contractual party's subcontractors (or subcontractors of subcontractors of affiliates). The 20-year-old spill resulting from an undocumented underwater pipe and attributed to Marin and Marin, and the guilty plea of Shoreline after VKLLC submitted its bid proposal, are not conceivably probative of VKLLC's record of performance.

99. To the extent that Commissioner Russell concluded that VKLLC was not "forthright" about the 2000 spill, this conclusion is not supported by the record. The undisputed evidence shows that VKLLC disclosed the facts related to the spill in its proposal in response to the Second RFP. (PTX 59, App. 10.) If Commissioner Russell was referring to VKLLC's response to the First RFP, then this would be yet another instance in which the Commission applied a criterion not included in the Second RFP, and thus acted arbitrarily or capriciously.

100. By attributing to VKLLC the conduct of a potential subcontractor and a past sub-subcontractor of an affiliate, the City Commission impermissibly applied criteria not included in the Second RFP. This is arbitrary and capricious under Florida law.

3. **The City Commission's Decision Was Pretextual**

101. The evidence also compels a finding that the City Commission's actions were pretextual.

102. As discussed above, all three grounds stated by the Commission as bases for its motion to reject all bids and decline to award the contract to VKLLC lacked factual support, and they concerned issues outside the evaluation criteria contained in the Second RFP.

103. The City Commission's reliance on the 2000 spill as a basis to reject all bids when the City Commission had previously approved VKLLC's affiliate's lease of the marina at Monty's in the Grove only four years after the spill, further shows that the City's decision was

pretextual. (Nov. 10 Trial Tr. at 35:25-36:24.)

104. Moreover, the movant, Commissioner Carollo, specifically stated at the November 16, 2020 commission meeting that he there were other reasons to refuse to award the bid to VKLLC which he would not disclose unless compelled to do so in a deposition. (PTX 65 at 55.) Commissioner Carollo further stated that "what I believe or not believe … could be a reason," without stating what exactly he "believed," and whether that was in fact a reason for his motion to reject all bids. (PTX at 69.) These statements are direct evidence that Commissioner Carollo had other, unstated reasons to advance his motion to reject all bids, making the stated grounds for the motion pretextual.

105. The City Commission's subsequent efforts to award the contract directly to Rickenbacker, the two-time losing bidder, without competitive bidding, further show that the Commission's vote to reject all bids was pretextual.

106. At its November 16, 2020 meeting, the City Commission heard presentations from both VKLLC and Rickenbacker, even though Rickenbacker was the second-ranked bidder and had not been recommended by the City Manager. (PTX 65 at 9-21.) However, the City Attorney advised the commissioners that they could not "carve out" VKLLC and award the contract to Rickenbacker; rather, the Commission could only approve the City Manager's recommendation to award the bid to VKLLC or reject all bids, and then address "next steps" later in a "bifurcated process." (PTX 65 at 57, 68-70, 82-83.) The Commission then voted to reject all bids, based on the three factually unsupported grounds discussed above.

107. Subsequently, at the request of Rickenbacker, the City Commission approved a ballot referendum to amend the City Charter and award the Virginia Key project directly to Rickenbacker's affiliate without competitive bidding, though it was not the top-ranked bidder for the project. Absent an amendment to the City Charter it would have been illegal to simply have a referendum on approval of a lease that was not subject to the RFP process and

had , in fact, been consistently lower ranked in the RFP process. (Nov. 10 Trial Tr. at 247:1-11.)

108. Notably, Rickenbacker's proposal for the project included plans to dredge the bay bottom, which would have a substantial environmental impact. This further supports the finding that the City Commission's stated concern over environmental issues (based on incident that occurred more than 20 years ago) was pretextual.

4. **The City Commission's Decision Was Based on Favoritism and Personal Preference**

109. This same evidence also shows that the City Commission showed favoritism to the second-ranked bidder, Rickenbacker, in rejecting all bids and attempting, at Rickenbacker's request, to award the Virginia Key project directly to Rickenbacker without competitive bidding. In effect, the City made a *de facto* bid award to the lower bidder in an arbitrary and capricious manner.

110. When the City Commission was considering the charter amendment to award the project directly to Rickenbacker, it received an unsolicited offer from Suntex – a bidder on the First RFP that scored higher than Rickenbacker and a partner in VKLLC on the Second RFP – offering more favorable financial terms to the City than Rickenbacker's proposal. However, the City did not consider this proposal, or open the project again to competitive bidding. Instead, the City Commission used the Suntex bid to obtain more favorable terms from Rickenbacker before approving the resolution to put the Charter amendment on the ballot. Through these actions, the City clearly showed favoritism and preference to Rickenbacker.

111. The City's repeated delays in considering VKLLC's proposal while Rickenbacker futilely pursued its legal challenges and for an additional 20 months after those unsuccessful challenges ended also shows the City's favoritism to Rickenbacker. Mr. Dotson testified that

in his experience governments do not delay action on requests for proposal merely because a losing bidder has brought a lawsuit (which a losing bidder can always do).

112. Further evidence of the City's favoritism is the fact that the City did not undertake a separate responsibility review of Rickenbacker or further investigate the allegations of criminal and financial misconduct in Argentina by one of Rickenbacker's principals before approving the proposed charter amendment to award the project to Rickenbacker. This is in stark contrast to the City's repeated investigations of the allegations that Rickenbacker raised against VKLLC even after Rickenbacker's bid protest and multiple appeals had failed.

113. The evidence also shows that the City excused the fact that Rickenbacker had filed multiple lawsuits against the City, which is deemed disqualifying under the Second RFP. (PTX 61 at 12.) This likewise shows that the City exhibited improper favoritism to Rickenbacker.

5. **The City Circumvented the Competitive Bidding Process Arbitrarily and Capriciously**

114. The evidence further demonstrates that the City Commission improperly circumvented the competitive bidding process by rejecting all bidders and proposing a charter amendment to award the project directly to the two-time losing bidder, Rickenbacker.

115. The City also improperly circumvented the competitive bidding process by allowing Rickenbacker to improve its proposal without providing any other bidders a similar opportunity.

116. The City issued two RFPs for the Virginia Key project, and in both instances Rickenbacker was ranked as one of the low bidders, and was not recommended for the project by any of the three City Managers to consider the matter.

117. In the case of both RFPs, the City voted to reject all bids in lieu of awarding the contract to the top ranked bidder, VKLLC.

118. After rejecting all bids in response to the Second RFP, the City then took steps to circumvent the competitive bidding process to award the project to Rickenbacker. At Rickenbacker's request, the City approved a ballot referendum for a charter amendment to allow the City to award the project directly to Rickenbacker without competitive bidding.

119. When the City received an unsolicited offer from Suntex offering more favorable financial terms to the City than Rickenbacker's proposal, the City Commission used this offer to negotiate more favorable terms from Rickenbacker before approving the resolution to put the charter amendment on the ballot – without providing a similar opportunity to Suntex or to VKLLC. These facts support a finding that the City acted arbitrarily and capriciously.

I. CONCLUSIONS OF LAW

1. The critical issue presented in this case is whether the City has complied with Florida law concerning competitive bidding of public projects. The City, like all municipalities, is subject to Florida Statute § 255.20, which states that all local governments "seeking to construct or improve a public building, structure or other public construction works **must competitively award**" any such projects in excess of $300,000. Fla. Stat. § 255.20(1) (emphasis added). Notably, Fla. Stat. § 255.20 applies to "sealed bids, proposals submitted in response to a request for proposal, proposals submitted in response to a request for qualifications, or proposals submitted for competitive negotiation." *Id.*

2. As the Third District has noted, "[t]here is a great public interest in ensuring that contracts be awarded to effectuate the intent of the competitive bid laws." *Solo Constr.*, 823 So. 2d at 801.

3. "While a public authority has wide discretion in award of contracts for public works on competitive bids, such discretion must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously." *Id.* at 802.

4. Thus, under Florida law, VKLLC may be entitled to the relief requested upon a showing that the City acted arbitrarily or capriciously when it rejected all bids submitted in response to the Second RFP and sought voter approval of a charter amendment to award the marina lease to Rickenbacker, a lower-ranked bidder.

A. **The City's Motion for Involuntary Dismissal**

5. At the close of VKLLC's case, the City moved for involuntary dismissal under Fla. R. Civ. P. 1.420(b). In making this motion, the City's counsel argued that, in reviewing the City Commission's decision to reject all bids, the Court cannot find that the Commission acted arbitrarily and capriciously if the Commission identified any facts that may support its conclusions. (Nov. 10 Trial Tr. at 88:18-90:6.) As stated by the City's counsel, judicial deference "means you defer to the final decision maker as to how they construe those facts." (Nov. 10 Trial Tr. at 92:9-11.)

6. The applicable standard of review has been confirmed repeatedly by the Florida Supreme Court: "[W]here discretion is vested in a public agency with respect to letting public contracts on a competitive basis, the discretion may not be exercised arbitrarily or capriciously but **must be based upon facts reasonably tending to support the conclusions reached by such agency**." *City of Pensacola v. Kirby*, 47 So. 2d 533, 535-36 (Fla. 1950) (emphasis added) (citing *Culpepper v. Moore*, 40 So. 2d 366 (Fla. 1949), and *Willis v. Hathaway*, 117 So. 89 (Fla. 1928)). *See also Marriott*, 383 So. 2d at 668 (same).

7. As discussed above (Findings of Fact ¶¶ 84-92), the facts here do not support the conclusions purportedly reached by the City Commission regarding VKLLC. The guilty plea of a potential subcontractor of VKLLC that only became known well after VKLLC's proposal was submitted, and a sewage spill that occurred in 2000 and was attributed to a subcontractor of a subcontractor of an affiliate who unwittingly pierced an unmarked and unknown underwater sewer pipe, cannot reasonably support the conclusion that VKLLC lacks the

competence or integrity to be deemed a responsible bidder. And the record contains no facts at all to support any of the other reasons or potential reasons for the Commission's decision discussed at the November 16, 2020 meeting. Applying the standard articulated in *Kirby*, the Court finds that the City acted arbitrarily and capriciously in rejecting all bids.

8. The City further argued that if the City Commission reached an "erroneous" conclusion in rejecting all bids, the Court cannot find that the Commission acted arbitrarily or capriciously absent a finding of fraud, bad faith or illegality, citing *Department of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912 (Fla. 1988). (Nov. 10 Trial Tr. at 96:7-97:19.)

9. In *Groves-Watkins*, the Department of Transportation rejected all bids after finding that the bids exceeded the department's "prebid estimate" for the cost of the project – an estimate that a hearing officer later determined to have been miscalculated. *Groves-Watkins*, 530 So. 2d at 912-13. The Florida Supreme Court noted that the department's decision could not be overturned "absent a finding of illegality, fraud, oppression or misconduct." *Id.* at 913 (quoting *Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982)). Elaborating further, the Court recognized that "the system of competitive bidding protects against collusion, favoritism, and fraud in the award of public contracts," and therefore judicial intervention to prevent the rejection of a bid is appropriate "when the purpose or effect of the rejection is to defeat the object and integrity of competitive bidding." *Id. See also id.* at 914 ("if municipality, in connection with competitive bidding, is empowered to do so, it may reject any and all bids in the absence of fraud, collusion, bad faith or arbitrary action") (citation omitted). Thus, the standard in *Groves-Watkins* is fully consistent with the standard in *Kirby*, and both cases prohibit arbitrary conduct, including favoritism.

10. Here, the Court has found that the City Commission showed improper favoritism to Rickenbacker and defeated the object and integrity of competitive bidding by rejecting all bids and agreeing, at the request of Rickenbacker, the low bidder, to advance a charter

amendment to circumvent competitive bidding and award the marina project directly to Rickenbacker. (Findings of Fact ¶¶ 114-119.) Accordingly, the relief provided by the Court here is consistent with *Groves-Watkins*.

11. Under the applicable Florida law, the Court has found that the City acted arbitrarily and capriciously, for the reasons stated above. Accordingly, the motion for involuntary dismissal is denied.

B. **VKLLC's Claims**

12. In its Complaint, VKLLC has asserted claims for a writ of mandamus (Count II), promissory estoppel (Count III), and declaratory relief (Count IV). In Count II, VKLLC has requested a writ of mandamus directing the City to award the Virginia Key project to it, subject to the applicable referendum requirements, and, in Count IV, VKLLC has requested a declaration that it is the winning bidder of the Virginia Key project with the right to have its proposal placed on the ballot for a public vote. VKLLC also asserted a claim for specific performance and injunctive relief (Count I) on which the Court previously granted summary judgment in favor of the City. The City has argued that VKLLC is not entitled to the remedies it is seeking. The Court will address VKLLC's claims, and the appropriate remedies in turn below.

C. **Count II: Writ of Mandamus**

13. To be entitled to a writ of mandamus, (1) the petitioner must have a clear legal right to the requested relief, (2) the respondent must have an indisputable legal duty to perform the requested action, and (3) the petitioner must have no other adequate remedy. *Point Conversions, LLC v. Pfeffer & Marin Holdings, LLC*, 305 So. 3d 609, 610 (Fla. 3d DCA 2020). Florida courts have held that "mandamus is the proper vehicle for seeking to compel an agency to follow its rules." *Waters v. Inch*, 266 So. 3d 1216, 1218 (Fla. 1st DCA 2019).

14. The City argues that a writ of mandamus is not an available remedy because the City retained the right to reject all proposals, and therefore retained sufficient discretion so that the award of the marina contract was not ministerial. However, under governing Florida law, the fact that the City retained the discretion to reject all bids does not mean that a writ of mandamus is not an available remedy.

15. In *Wood-Hopkins*, the Court rejected the same argument advanced by the City and held that, "as with all other discretionary functions," the agency's decision to reject all bids "is subject to the requirement that its exercise be not arbitrary, unreasonable or capricious. Without these limitations, the purpose of competitive bidding is circumvented." *Wood-Hopkins*, 354 So. 2d at 450. "Even where the right to reject any and all bids is properly reserved, the bidding law may not be evaded under the color of rejection." *Id.* After finding that the public agency acted arbitrarily and capriciously in rejecting all bids, the trial court entered a final judgment of mandamus requiring the agency to award the contract to the plaintiff – a judgment affirmed by the appeals court. *Id.* at 448.

16. Similarly, in *Solo*, the Third District affirmed a trial court's issuance of a writ of mandamus requiring the municipality to award a stormwater improvements contract to the plaintiff upon a showing that the municipality acted arbitrarily and capriciously in making the award to a lower-ranked bidder. *Solo*, 823 So. 2d at 803. In that case, as well, the City reserved the right to reject any and all proposals. *Id.* at 804. The Third District recognized the municipality's discretion in making the bid award but held that "such discretion must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously." *Id.* at 802. Pursuant to *Solo* and *Wood-Hopkins*, a court may enter a writ of mandamus directing a government agency to award a public contract upon a finding that the government's failure to do so was arbitrary and capricious.

17. In this case, the City had a clear legal duty to apply the criteria contained in the Second RFP when evaluating the bids, and the City breached that duty by rejecting all bids based on

criteria not contained in the RFP. As discussed above, a writ of mandamus "is the proper vehicle for seeking to compel an agency to follow its rules." *Waters*, 266 So. 3d at 1218. Thus, VKLLC is entitled to a writ of mandamus requiring the City to execute the marina lease with it.

18. Moreover, the Court finds that the execution of the fully negotiated marina lease is sufficiently ministerial to merit mandamus relief. The undisputed evidence shows that a comprehensive draft of the lease agreement had already been completed and provided to bidders as an attachment to the Second RFP (PTX 61, Ex. C), and at the time that the City Commission voted to reject all bids the lease was in its final form for approval. (Nov. 8 Trial Tr. at 98:25-99:5; Nov. 10 Trial Tr. at 53:23-54:11.) In this way, this case is clearly distinguishable from *PCA Life Ins. Co. v. Metropolitan-Dade Cnty.*, 682 So. 2d 1102 (Fla. 3d DCA 1995), cited by the City. In *PCA Life*, the Court found that a writ of mandamus was not available because the bidder still had to negotiate with the county. *Id.* at 1103. Here, the evidence presented shows that there were no material terms left to negotiate, and the contract only needed to be executed. On these facts, VKLLC is entitled to a writ of mandamus. *Solo*, 823 So. 2d at 803; *Wood-Hopkins*, 354 So. 2d at 450.

19. Moreover, not to grant mandamus relief would be to leave the unsupportable decision to reject all bids in place.

D. **Count IV: Declaratory Relief**

20. In Count IV, VKLLC seeks a declaratory judgment that it is "entitled to an award of the Project, subject to any applicable referendum requirements," Compl. ¶ 98, and that, as the prevailing bidder, it "has the right to have its bid presented to the public for approval."

21. It is undisputed that a claim for declaratory relief is an appropriate vehicle to challenge a government's arbitrary or capricious actions related to competitive bidding. However, the parties disagree about the scope of the declaratory relief the Court may grant.

22. The City has argued that, even if the Court were to find that the City's actions were arbitrary and capricious, it cannot award VKLLC any relief other than remanding the matter back to the City for another round of competitive bidding through the RFP process, relying on *State, Dep't of Lottery v. Gtech Corp.*, 816 So. 2d 648, 653 (Fla. 1st DCA 2001). In the City's view, a court only has the authority to direct a government agency to award a contract to a party where the government had issued an invitation to bid, not a request for proposal. (Nov. 10 Trial Tr. at 100:5-13; 102:18-103:9.)

23. The Court finds *Gtech* distinguishable and inapplicable. *Gtech* concerned a government authority's attempt to change the proposal itself *after* the bid had been awarded; that is, the contract that was ultimately awarded was "materially different" from the terms provided to all bidders in the original RFP. *Gtech*, 816 So. 2d at 652-53. As the Court said: "[T]he pivotal issue before the trial court and in this appeal is whether the Lottery can treat the RFP process as little more than a ranking tool to determine a preferred provider and then negotiate a contract with that provider with little or no concern for the original proposal of that preferred provider." Under those circumstances – plainly distinguishable from this case – the Court found that the appropriate remedy was an order requiring the public body to issue a new RFP reflecting the new proposal, to allow for a competitive bidding process on the revised proposal. *Id.* *Gtech* does **not** say that a court may not order the award of a contract to an aggrieved bidder to an RFP under the circumstances here, where the City tossed out all bids and then proceeded to negotiate the **same** proposal with the losing bidder. For those reasons, *Gtech* is inapposite and inapplicable.

24. The Court has not been provided with any authority holding that a court cannot direct a contract or bid award when a government authority has acted arbitrarily or capriciously in deciding on a request for proposal. To the contrary, in at least two cases courts have approved or directed a contract award in cases arising from requests for proposal or similar procurement solicitations.

25. *Marriott* concerned an "invitation for proposals" to enter into an "Operational and Management Services Agreement" with Miami-Dade County to sell alcoholic beverages at Miami International Airport. *Marriott*, 383 So. 2d at 663-64. Under the terms of the proposal, bidders were to be evaluated not only on the basis of the proposed revenues to the county but also on depth of management, other experience serving international travelers, marketing and consumer research programs, prior track record in other markets and "other factors which will best serve the highest public interest." *Id.* at 664. This clearly has the character of a request for proposal, not an invitation to bid where the bid goes to the bidder offering the lowest price for goods.

26. Marriott brought an action for declaratory judgment and other relief, asserting that the county acted arbitrarily and capriciously in awarding the proposal to another bidder based on grounds for which there was no factual support. *Id.* at 665, 668. The trial court held that the County Commission had acted within its discretion, but the Third District reversed and held that the award to the other bidder was arbitrary and capricious and constituted an abuse of discretion. *Id.* at 668. Accordingly, the Third District directed that the contracted be awarded to Marriott. *Id.*

27. Similarly, *Wood-Hopkins* concerned competitive bidding to perform construction of a thermal discharge unit for the Jacksonville Electric Authority. *Wood-Hopkins*, 354 So. 2d at 447. After finding that the JEA acted arbitrarily and capriciously in rejecting all bids, the trial court granted a writ of mandamus directing the contract to the objecting bidder – and this relief was affirmed by the appeals court. *Id.* at 450.

28. It is well established that "courts of equity have wide discretion in fashioning remedies to satisfy the exigencies of the circumstances." *Demorizi v. Demorizi*, 851 So. 2d 245, 245 (Fla. 3d DCA 2003) (internal citation omitted). Moreover, "[e]quity will not do a useless or vain thing." *Mitchell v. Chambers Const. Co.*, 214 F.2d 515, 517 (10th Cir. 1954). Indeed, in an analogous context – an election contest rather than a bid protest – the Third District found

that a new election was an improper remedy to cure an election tainted by fraud, because allowing another vote would appear to "encourage such fraud" rather than deter it. *See Matter of Protest Election Returns and Absentee Ballots in November 4, 1997 Election for City of Miami*, *Fla.*, 707 So. 2d 1170, 1174 (Fla. 3d DCA 1998). Here, an order requiring the City to issue yet another request for proposal for the Virginia Key project, after its prior arbitrary and capricious conduct, would be similarly inadequate. More fundamentally, neither Florida law nor the principles of equity requires the Court to order the City to engage in the RFP process for a third time, and the Court declines to do so.

29. Based on *Marriott* and *Wood-Hopkins*, the Court finds that it may and should enter a declaratory judgment directing the City to award the marina contract to VKLLC and put the proposal before the voters by referendum. *See also* Fla. Stat. § 86.061 ("Further relief based on a declaratory judgment may be granted when necessary and proper").

E. **Count III: Promissory Estoppel**

"Promissory estoppel requires proof that: (1) the promisor made a representation as to a material fact that is contrary to a later-asserted position; (2) the promisee reasonably relied on the representation; and (3) the promisee changed his or her position to his or her detriment based on the representation." JN Auto Collection, Corp. v. U.S. Sec. Ins. Co., 59 So. 3d 256, 258 (Fla. 3d DCA 2011). Plaintiff failed to establish all these elements.

Plaintiff alleges that the City promised to award the project to the top-ranked bidder, Compl. ¶ 92, but no such thing occurred. Everything in the City Code and RFP established that the City Commission retained the right to reject all proposals. See City of Cocoa v. Villas of Cocoa Vill., LLC, 343 So. 3d 122, 124 (Fla. 5th DCA 2022) (reversing injunctive relief in a lawsuit for promissory estoppel and concluding that there was no likelihood of success on the merits, where "[t]he RFP contains no language guaranteeing the Villas a successful negotiation").

[4]

Plaintiff also alleges that the City promised not to consider the environmental spill when evaluating the RFP, Compl. ⁋ 91, but Plaintiff failed to establish at trial when and where this promise was made. And nothing in the City Code or RFP expressly precluded the consideration of the environmental spill. It should also be noted that given the language in the City Code and RFP (analyzed in detail above), no rogue City employee could bind the City Commission from considering the environmental spill. In other words, even if a City employee promised not to consider the environmental spill, Plaintiff could not reasonably rely on such a promise given the language of the City Code and RFP on the City Commission's ultimate decision-making authority.

For these reasons, promissory estoppel is not available to Plaintiff and the Court grants the City's motion for involuntary dismissal on Count III.

II. **CONCLUSION**

For the reasons set forth above, it is hereby ORDERED AND ADJUDGED that:

1. The Court finds that the City acted arbitrarily and capriciously in rejecting all bids responsive to the Second RFP for the Virginia Key project and agreeing to put forward a charter amendment to award the project to Rickenbacker's affiliate, a lower bidder, without competitive bidding.

2. Accordingly, the Court declares that VKLLC, as the prevailing bidder, has the right to have its proposal presented to the public for approval by referendum.

3. The Court further declares that the City must award the contract for the Virginia Key project to the prevailing bidder, VKLLC, pending approval by the public.

4. The Court therefore enters a writ of mandamus directing the City to enter into the lease

agreement with VKLLC for the Virginia Key project, pending approval by the public.

5. The City's Motion for Involuntary Dismissal is GRANTED as to the Promissory Estoppel Count and DENIED as to the remaining arguments.

---

[1] During cross-examination of Mr. Dotson, the City's counsel argued that it "makes sense" that the City deferred ruling while the appeals were pending because the settlement agreement with Rickenbacker stated that Rickenbacker could remain a holdover tenant until all appeals were exhausted. (Nov. 8 Trial Tr. at 112:5-22). However, the City presented no evidence that this was in fact the reason that the City deferred action on the RFP; indeed, Emilio Gonzalez, the former City Manager, testified that he was never provided a reason why the Commission continued to delay the matter. (Nov. 10 Trial. Tr. at 12:7-21.) Moreover, Mr. Dotson testified that VKLLC offered to indemnify the City in connection with any lawsuits filed by Rickenbacker, and also that approval of the bid award did not require Rickenbacker to immediately vacate the premises, because the bid award required subsequent approval from voters in a referendum. (Nov. 8 Trial Tr. at 112:23-113:15.)

[2] At trial, the City's counsel took the position that the City Commission "speaks with one voice," citing *Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598 (Fla. 3d DCA 1995). (Nov. 8 Trial Tr. at 32:18-24.) However, the City also argued, somewhat inconsistently, that the Court should consider other issues raised by the commissioners during the November 2020 meeting. (*See* Nov. 8 Trial Tr. at 21:21-29:15.)

The record shows that only the three grounds offered by Commissioner Carollo were discussed at the November 2020 meeting as a basis for the motion to reject all bids. If the Commission "speaks with one voice," then these are the only applicable grounds for the Commission's decision. Moreover, if the Commission's decision was, in fact, based on other grounds, such as perceived conflicts of interest or inadequacies of the selection committee members, there are no facts in the record to support those conclusions – making the City Commission's decision arbitrary and capricious. *See, e.g., Marriott Corp. v. Metro. Dade Cnty.*, 383 So. 2d 662, 668 (Fla. 3d DCA 1980) (public agency's decision "must be based upon facts reasonably tending to support the conclusions reached by such agency").

[3] The Court is reminded of the old adage from Aesop's fables – "Be careful what you wish for, lest it come true!"

[4] City of Cocoa is the only case provided by either party that addresses promissory estoppel in the RFP context.

DONE and **ORDERED** in Chambers at Miami-Dade County, Florida on this 10th day of February, 2023.

2021-022931-CA-01 02-10-2023 1:30 PM
Hon. Alan Fine

CIRCUIT COURT JUDGE
Electronically Signed

Final Order as to All Parties SRS #: **3** (Non-Jury Trial)

THE COURT DISMISSES THIS CASE AGAINST ANY PARTY NOT LISTED IN THIS FINAL ORDER OR PREVIOUS ORDER(S). THIS CASE IS CLOSED AS TO ALL PARTIES.

Electronically Served:
Daniel F. Blonsky, dblonsky@coffeyburlington.com
Daniel F. Blonsky, groque@coffeyburlington.com
Daniel F. Blonsky, service@coffeyburlington.com
Daniel Patrick Hanlon, daniel.hanlon@hklaw.com
Daniel Patrick Hanlon, marilynn.shrater@hklaw.com
David A. Freedman, dfreedman@coffeyburlington.com
David A. Freedman, mpalmero@coffeyburlington.com
Dorothy C. Kafka, dkafka@coffeyburlington.com
Elizabeth M. Hernandez, elhernandez@miamigov.com
Elizabeth M. Hernandez, dbailey@miamigov.com
Elizabeth M. Hernandez, gcarby@miamigov.com
Eric John Eves, eeves@miamigov.com
Eric John Eves, CSantos@miamigov.com
Ian E. DeMello, idemello@shubinbass.com
Jamie Katz, jkatz@shubinbass.com
John A. Greco, jagreco@miamigov.com
John A. Greco, kjones@miamigov.com
John A. Greco, gcarby@miamigov.com
John K. Shubin, jshubin@shubinbass.com
Kendall Coffey, kcoffey@coffeyburlington.com
Kendall Coffey, Jcaballero@coffeyburlington.com
Kendall Coffey, service@coffeyburlington.com
Miguel A. De Grandy, miguel.degrandy@hklaw.com
Oren Rosenthal, orosent@miamidade.gov
Oren Rosenthal, dmh@miamidade.gov
Scott Andrew Hiaasen, shiaasen@coffeyburlington.com

Scott Andrew Hiaasen, lperez@coffeyburlington.com
Scott Andrew Hiaasen, service@coffeyburlington.com
Shubin Bass, eservice@shubinbass.com

Physically Served: