

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA**

Case No. 3D23-436

L.T. Case No. 2021-022931 CA 44
(Hon. Alan Fine)

CITY OF MIAMI,
APPELLANT,

v.

VIRGINIA KEY, LLC
APPELLEE.

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INTRODUCTION

This case arises from the relentless and unlawful efforts of Appellant, City of Miami (the “City”), to undermine its own competitive bidding process and Florida procurement law and wrongfully deprive Appellee, Virginia Key, LLC (“VKLLC”), of its right to be awarded the lease of the City marina located at 3301 Rickenbacker Causeway on Key Biscayne (“Virginia Key Property”).

On two occasions, in 2015 and 2017, the City issued Requests for Proposal (“RFPs”) to redevelop the Virginia Key Property, and on both occasions VKLLC’s bids were recommended – by a total of two different expert evaluation committees and three different City Managers – over those of all other bidders, including affiliates of Rickenbacker Marina, Inc. (“Rickenbacker”), the Virginia Key Property’s longtime tenant which enjoys the City’s favor. *See, e.g.,* R.1261-62. After Rickenbacker’s formal bid protests and numerous appeals failed in court, the City Commission continued to stall the award to VKLLC for *years*.

Then, in November 2020, the Commission formally declined to award the negotiated contract to VKLLC and voted to reject all bids – for a second time. Pressed by the City Attorney, the commissioners

cited for the record three grounds to refuse to award the project to VKLLC. But these grounds were pretextual, a thin cover story to conceal the *real* reason the City rejected the bids.

City Commissioner Joe Carollo admitted the pretextual nature of the City's vote during the November 2020 commission meeting, all but daring any challengers to sue the City: "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. I know where the ducks are at." R.2364. Commissioner Carollo also signaled that he sought to reject all bids *not* for the reasons stated at the meeting, but 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."¹ R.2353.

The true intent behind the City's actions was revealed soon enough: At the explicit request of Rickenbacker, the City attempted

¹ Understandably, Commissioner Carollo was never listed as a deposition or trial witness by the City.

to re-write *its own Charter* to *avoid* competitive bidding on the Virginia Key Property and award the project on a no-bid basis to Rickenbacker – the twice-losing bidder. The terms offered by Rickenbacker were far less beneficial to the City than those offered in VKLLC’s proposals, and the City Commission expressly *rebuffed* a request to allow alternative bids. Ultimately, the voters of Miami saw through the City’s (and Rickenbacker’s) anti-competitive subterfuge and voted down the proposed Charter amendment.

Through these actions, the City distorted its own competitive bidding process, which is designed to avoid precisely the type of naked favoritism displayed by the City Commission toward Rickenbacker at VKLLC’s expense and to the continuing financial detriment of the City. For these reasons, VKLLC sued the City seeking a writ of mandamus and declaratory and injunctive relief to remedy the City’s arbitrary and capricious misconduct.

After a three-day nonjury trial, the trial court (the Honorable Alan Fine) issued a 42-page order containing detailed findings of fact and conclusions of law, entered final judgment on VKLLC’s claims, and ordered the City to award the negotiated contract to VKLLC and place the issue on the ballot for voter approval pursuant to the City

Charter. In its order, the trial court identified **five** distinct grounds to find that the City acted arbitrarily and capriciously in violation of Florida law, and made specific factual findings as to each of these grounds. Notably, the City seriously challenges **only one** of these five grounds in this appeal. For this reason alone, the trial court's judgment should be affirmed.

Indeed, rather than challenge the lower court's findings at trial, the City primarily argues on appeal that the trial court should have granted *summary judgment* in its favor. The detailed factual findings contained in the trial court's 42-page order are proof enough of the factual issues present in this case.

The City further argues that the trial court lacked the authority to enter declaratory and injunctive relief awarding the negotiated contract to VKLLC and enter a writ of mandamus. In other words, the City argues that, despite its rampant misconduct, VKLLC's only recourse is to engage in yet another expensive and time-consuming "competitive" bidding process with the City and presumably be subjected to a third round of arbitrary and capricious conduct. This is not the law, and the trial court correctly declined to require such an absurd result.

The City declines to seriously contest the trial court’s most significant factual findings and rests its appeal on narrow legal grounds that have no legal support. At bottom, the City asks this Court to create a new, bright-line rule that a trial court may *never* direct the award of a contract when a government body acts arbitrarily and capriciously in considering responses to a request for proposal (in contrast with an invitation to bid). Such a ruling would be not only unprecedented, but also contrary to the prior holdings of this Court. *See Marriott Corp. v. Metro. Dade Cty.*, 383 So. 2d 662 (Fla. 3d DCA 1980) (awarding contract to aggrieved proposer); *accord Emerald Corr. Mgmt. v. Bay Cty. Bd. of Cty. Comm’rs*, 955 So. 2d 647 (Fla. 1st DCA 2007) (holding that governments cannot engage in favoritism in the RFP context). The City’s proposed, and brazenly self-serving, rule would let the government act as arbitrarily and capriciously as it wishes so long as the procurement is for “proposals” instead of “bids.” That cannot be, and fortunately is not, the law.

The Court should decline the City’s novel invitation and affirm the trial court’s judgment in all respects.

STATEMENT OF THE CASE AND FACTS

The relevant facts are described in the 42-page Final Judgment entered in favor of Appellee Virginia Key (R.3409-3450) following a three-day trial:

The City’s First Request for Proposal

In 2015, the City conducted a public procurement process seeking requests for proposals (the “First RFP”) for the lease, redevelopment, expansion and operation of a City-owned marina located at the Virginia Key Property. R.3413. The Virginia Key Property was operated at the time by Rickenbacker, which has been the tenant on the Property since 1983. *Id.* Rickenbacker is currently a “holdover tenant at will” on the Property “on a month to month basis” pursuant to a legal settlement with the City. *Id.*

Among the respondents to the First RFP was VKLLC, an affiliate of RCI Group, a national marina operator that has developed and managed large-scale marinas across the United States. *Id.* During the relevant time period, VKLLC’s principals owned or operated more than 40 marinas nationwide, including several in South Florida. *Id.* An affiliate of VKLLC operated the Monty’s in the Grove marina owned by the City, with the approval of the City of Miami Commission, from

2004 to 2015, an operation that was mutually beneficial. *Id.* 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 Monty's in the Grove marina as a result of its bid proposal. R.3414. Rickenbacker also submitted a bid in response to the First RFP through an affiliate named New Rickenbacker Marina. *Id.*

The City employed a five-person selection committee to review all bids submitted in response to the First RFP. *Id.* The selection committee ranked VKLLC's proposal first out of the three proposals submitted; Rickenbacker's proposal was ranked last. *Id.* 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. *Id.*

Rickenbacker then submitted a bid protest challenging the recommendation of VKLLC for the First RFP, which was heard by the City Commission. *Id.* Among the issues discussed by the Commission in reviewing Rickenbacker's bid protest was a sewage spill in Biscayne Bay near the Miami Beach Marina in 2000 (15 years before the First RFP) involving Marin and Marin, a subcontractor to a subcontractor of a VKLLC affiliate. *Id.* The undisputed evidence

presented to the Commission showed that the spill 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. *Id.* City staff investigated and confirmed with the National Oceanic and Atmospheric Administration that the pipe was not identified on any maps or charts. R.3415. Neither VKLLC nor its principals or affiliates was found to be at fault for the spill by any government agency. *Id.*

During the City Commission discussion of the matter on July 20, 2016, 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 spill] happened, and I think that’s the fault of the RFP, not [VKLLC].” *Id.*; *see also* SR.759. Nonetheless, the Commission voted to reject all bids submitted in response to the First RFP and start over, leaving Rickenbacker in place as the holdover tenant. R.3415.

The City’s Second Request for Proposal

The City then issued a second Request for Proposals for the Virginia Key Property (the “Second RFP”) in February 2017. *Id.* 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 project. R.3416; SR.1772-1830. The lease agreement 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. R.3416. Pursuant to the City Charter, any lease agreement approved by the City Commission in response to the Second RFP would require subsequent approval by a public referendum vote. R.3415.

The trial testimony confirmed that the City Commission took an active role in formulating the Second RFP, and voted to approve it prior to publication. R.3416. Of particular note, the City Commission incorporated criteria in the Second RFP to address the applicants' environmental records. *Id.* Specifically, the Second RFP adopted a 100-point scoring system to rank applicants, devoting 15 of those points to the category of "Resiliency & Environmental Considerations." *Id.* This included a subcategory ranking the applicants' "[c]ommitment to protection of environmental assets and history of environmental stewardship," which accounted for 5 points. *Id.*

The Second RFP also included criteria for determining whether an applicant is a responsible bidder. *Id.* Most relevant to this action, the Second RFP stated that the City shall have *reasonable* – not unfettered – discretion to deem a proposal non-responsive or a proposer not responsible “with due consideration of *all* relevant extenuating circumstances, including, without limitation, the *Proposer’s* culpability, overall record of performance, etc.” SR.1400 (emphasis added). Significantly, any such finding must be based on the conduct of the “Proposer or any of its members” or the Proposer’s “principals.” R.3416. The Second RFP *did not* permit the City to deem a bidder not responsible based on the conduct of its current or former subcontractors, let alone its affiliate’s sub-subcontractors. R.3416-17.

VKLLC submitted a development proposal for the Virginia Key Property in response to the Second RFP. R.3417. For this proposal, VKLLC’s principals partnered with Suntex, another experienced marina developer which had submitted the second-ranked bid to the First RFP. *Id.* As part of its proposal, VKLLC disclosed the facts related to the 2000 spill. *Id.*

Rickenbacker also submitted a proposal through a new affiliate, Biscayne Marine Partners, LLC (“Biscayne Marine”). *Id.* Unlike VKLLC’s plan, Rickenbacker’s proposal included plans to dredge the bay bottom at the marina, endangering sensitive sea grasses. *Id.*

This time, the City employed a new seven-person selection committee to review the bids submitted in response to the Second RFP. *Id.* Once again, the City’s selection committee ranked VKLLC as the top-ranked bidder on the project. *Id.* This time, Rickenbacker was ranked second of three bidders. *Id.* An independent financial analysis conducted for the City found that VKLLC’s proposal would have provided the City with about **\$93 million more revenue** than Rickenbacker’s proposal. *Id.* Mr. Alfonso agreed with the selection committee and again recommended that the City Commission award the lease to VKLLC on or about June 15, 2017. *Id.*

Rickenbacker then lodged another bid protest, which was rejected. R.3418. Rickenbacker appealed the administrative hearing officer’s decision to an appellate panel of the Eleventh Judicial Circuit, which unanimously denied the appeal. *Id.* Rickenbacker then filed a petition for writ of certiorari with this Court, which

affirmed the lower court and unanimously rejected the bid protest in 2019. *Id.*

During the *two years* that Rickenbacker's appeals were pending, the City Commission repeatedly deferred any action on the Second RFP, allowing Rickenbacker to continue to remain at the Property as a holdover tenant. *Id.* VKLLC's attorney, Albert Dotson, testified that in his procurement experience before the City and Miami-Dade County, the government never defers ruling while a losing bidder pursues a bid protest through the courts. *Id.* This testimony was un rebutted. *Id.* The current City Manager, Art Noriega, also testified that the number of deferrals was uncommon for a request for proposal. *Id.*

The City's Repeated Deferrals and Responsibility Reviews

Even after Rickenbacker's unsuccessful 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. R.3420. During these deferrals, Rickenbacker continued to remain on the property as a holdover tenant. *Id.* Meanwhile, VKLLC worked with City staff during that

time to finalize the draft lease agreement to conform to VKLLC's proposal and the terms and conditions of the Second RFP. *Id.*

After its bid protest and appeals failed, Rickenbacker raised new allegations with the City challenging VKLLC's responsibility as a bidder. *Id.* Then-City Manager Emilio Gonzalez requested that Rickenbacker's allegations be investigated by the City's DREAM department as part of a "responsibility review." *Id.*

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. *Id.* The undisputed evidence at trial confirmed that Shoreline's misconduct, and its 2018 guilty plea, were unknown at the time that VKLLC submitted its proposal to the City in 2017. *Id.*

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. R.3421. City Manager Gonzalez also concluded that "it would be unreasonable to

reject Proposer as non-responsible for the subsequent actions of a potential subcontractor.” *Id.* Moreover, as Mr. Gonzalez correctly noted, 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. *Id.*

VKLLC also 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. *Id.* As he stated in a May 15, 2019, recommendation memo: “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.” *Id.*

Rickenbacker also alleged that VKLLC’s counsel had made misstatements before the selection committee in 2017 regarding the automated dry dock technology used at a *different* facility – Port Marina in Fort Lauderdale. *Id.* Significantly, Rickenbacker did *not*

raise this issue in its bid protest to the Second RFP. *Id.* More importantly, as the trial court found, the City did not introduce at trial any direct evidence of this purported “misstatement” to the selection committee. R.3429.

The evidence at trial showed that Mr. Gonzalez and the City staff investigated this issue as part of the responsibility review and found that VKLLC’s counsel had inadvertently 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.” R.3421-22. The trial court found that there was no evidence that the alleged misstatement benefited VKLLC in the bid evaluation process; to the contrary, the City staff concluded that the misstatement “actually may have impacted [VKLLC’s] scores negatively.” R.3422. The City staff 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.” *Id.*

It was undisputed at trial that Aero Docks had the necessary patents for the automated dry storage system proposed by VKLLC,

and that VKLLC had the right to use that technology. *Id.* In fact, VKLLC’s team presented the City with copies of the patents for the automated dry stacks technology. *Id.* City staff concluded that VKLLC had the capacity and the necessary patents to design, construct and operate the automated dry storage facilities – as the trial court also concluded in the Final Judgment. *Id.*

The City reviewed these issues a second time after Mr. Noriega was named City Manager in February 2020. *Id.* 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. *Id.* VKLLC responded that it learned of it from the City during the responsibility review process – a fact confirmed by the testimony at trial. *Id.* VKLLC also provided additional information about its experience with Aero Docks and automated dry storage facilities at the City’s request. *Id.*

After this additional review, Mr. Noriega agreed with Mr. Gonzalez’s conclusions. Mr. Noriega testified that the allegations related to Shoreline were “immaterial” because they concerned a subcontractor, not a principal of VKLLC. R.3423. Mr. Noriega also

testified that he and the City staff found no basis to question VKLLC's integrity or its capacity to perform. *Id.*

Moreover, 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.² *Id.* Ms. Lorenzo also testified that there was no evidence that VKLLC intentionally misled the selection committee regarding the Aero Docks technology. *Id.*

The environmental spill in 2000 involving Marin and Marin 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. *Id.* Indeed, *Rickenbacker itself* 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. *Id.*

² Indeed, Shoreline remains an approved vendor of the City despite its guilty plea. SR.512.

The City Commission Vote

Nearly four years after the Second RFP was issued, the City Commission finally considered the Virginia Key Property proposals at a meeting on November 16, 2020, and heard presentations from representatives of both VKLLC and Rickenbacker. R.3424.

At the meeting, Mr. Noriega informed the City Commission that his recommendation, like those of prior City Managers Alfonso and Gonzalez, was that the negotiated contract be awarded to VKLLC as the top-ranked bidder. *Id.* Commissioner Russell then advanced a proposal to deem VKLLC a non-responsible bidder and award the lease to two-time losing bidder Rickenbacker because “contractors” working for VKLLC were responsible for the Miami Beach spill more than two decades earlier – the same debunked issue Mr. Russell raised when rejecting all bids for the *First* RFP four years earlier. *Id.*

At the November 16, 2020, commission meeting, 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 said this “spoke volumes to not only to the responsibility, but their character and forthrightness in responding.” *Id.* As the trial court noted, this flatly contradicted Mr. Russell’s July 20, 2016,

statement when he acknowledged that the failure to disclose this information was a result of how the First RFP was written – not any wrongdoing by VKLLC. *Id.*; *see also* SR.759. Mr. Russell persisted with this motion even after the City Attorney, Victoria Mendez, advised that the Commission could not disqualify the recommended bidder and award the lease to another bidder. R.3424.

The City Attorney further advised that the City Commission had the option to reject all bids, in which case it must “give reasons for the rejection of all bids.” R.3425. Ms. Mendez then mistakenly suggested that one of those reasons could be the “environmental issue” regarding the 2000 spill, even though this issue was *not* examined by City staff in its responsibility reviews, and the issue of environmental stewardship constituted no more than 5% of a proposer’s score under the criteria of the Second RFP approved by the Commission. *Id.*

Commissioner Joe Carollo then made a motion to reject all bids on the Second RFP. *Id.* Mr. Carollo identified “three direct reasons” for his motion: (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 subsequent, unrelated guilty plea of Shoreline, the dropped proposed subcontractor); and (3) “the misrepresentation of the Aero-Docks technology” (referring to the statements 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). *Id.*

Significantly, there was no evidence presented at trial indicating that the City Commission relied at the November 16, 2020, Commission meeting on any additional evidence or information regarding these three issues other than the information provided by City staff. *Id.* As discussed above, none of the information provided by City staff supported a rejection of VKLLC’s proposal.

During that meeting, Mr. Carollo indicated that he did not believe that there were any factual bases for these three allegations, but, following the advice of the City Attorney, he nevertheless raised them as cover 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.” *Id.* 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.” R.3425-26. Without further debate, and based on the three pretextual and discredited reasons identified by Commissioner Carollo, the City Commission then voted in favor of his motion to reject all bids submitted in response to the Second RFP. R.3426.

The City’s Referendum and Charter Amendment

After the City Commission rejected all bids in November 2020, Rickenbacker’s principal, Aabad Melwani, realizing he could not win the award fair and square through competition, approached Commissioner Russell with a plan for the City to circumvent the bidding process. *Id.* Mr. Melwani proposed amending 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. *Id.*

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**. *Id.* Both Commissioner Russell’s staff and a Rickenbacker lobbyist participated in drafting the proposed charter amendment. *Id.* The trial evidence showed that the proposal ultimately presented to voters under the proposed charter amendment was “substantially similar” to the proposal contained in the Second RFP. *Id.*

When the City Commission considered the charter amendment proposal in July 2021, Suntex then offered an unsolicited bid for the Virginia Key Property lease. *Id.* Suntex’s proposal included financial terms more favorable to the City than those in the referendum requested by Rickenbacker. R.3426-27. However, the City Commission ***declined to consider*** the Suntex bid or issue a new Request for Proposals for the Virginia Key project. R.3427. Instead, the City Commission used the Suntex bid to negotiate ***directly*** with Rickenbacker to improve the terms of its charter amendment proposal. *Id.* Even then, Rickenbacker’s revised proposal still provided less revenue to the City than did VKLLC’s proposal. *Id.* Miami’s voters ultimately rejected the proposal to award the Virginia Key Property lease to Rickenbacker. *Id.*

During the City’s second responsibility review of VKLLC, around October 2020, VKLLC provided City staff with information impacting Rickenbacker’s qualifications as a responsible bidder under the Second RFP – including information indicating that one of Rickenbacker’s partners had been accused of criminal fraud and bouncing checks in Argentina. R.3423. However, from the time of the second responsibility review in October 2020 through July 2021, when the City Commission voted to put the proposed charter amendment favoring Rickenbacker on the ballot, the City staff made no determination regarding Rickenbacker’s “integrity and capacity” or further investigate the fraud and bad-check allegations regarding Rickenbacker’s principal in Argentina. R.3427.

Since the referendum failed in 2021, the City has not offered a new request for proposals or otherwise advanced the planned improvements to the Virginia Key Property. *Id.* Rickenbacker ceased making increased rent payments that had been mandated after the City Commission rejected all bids. *Id.* Rickenbacker remains a “holdover tenant at will ... on a month to month basis” at the unimproved property today. R.3428.

The Proceedings Below

On October 8, 2021, VKLLC filed this action against the City, alleging that the rejection of VKLLC’s Second RFP bid proposal and the negotiated lease contract was pretextual and that the City had demonstrated impermissible favoritism towards Rickenbacker. R.27-67. VKLLC’s Complaint asserted four causes of action against the City: (1) for specific performance (R.42-45); (2) for issuance of a writ of mandamus (R.45-46); (3) for promissory estoppel (R.46-47); and (4) for declaratory relief (R.47-48).

On July 5, 2022, the City moved for summary judgment on all of VKLLC’s claims. R.958-1143. VKLLC opposed the motion. R.1240-2622. On September 14, 2022, the trial court granted summary judgment in favor of the City on Count I (VKLLC’s specific performance claim) on purely legal grounds and reserved ruling on the motion as to the remaining claims. R.2645-47. After allowing for supplemental briefing on certain legal issues, the trial court entered an order denying the balance of the City’s motion, finding that “the evidence submitted demonstrates the existence of genuine issues of material facts that preclude summary judgment on Counts II, III and IV.” R.3399-3400.

The Trial Court's Findings of Fact and Conclusions of Law

Following a three-day trial in November 2022, the trial court entered a Final Judgment in favor of VKLLC on its claim for a writ of mandamus (Count II) and its claim for declaratory and injunctive relief (Count IV) in a 42-page Order including detailed findings of fact and conclusions of law. R.3409-50. In its Order, the court identified five distinct grounds supporting its conclusion that the City acted arbitrarily and capriciously. Specifically, the court held that: (1) the City's decision rejecting all bids (including VKLLC's) in the Second RFP lacked factual support; (2) the City's decision was based upon criteria not included in the bid documents; (3) the City's decision was pretextual; (4) the City's decision was based on favoritism and personal preference; and (5) the City circumvented the competitive bidding process arbitrarily and capriciously. R.3428-38. Significantly, the court made specific and detailed factual findings to support each ground. *Id.*

Based on these factual findings, the court concluded that the City acted arbitrarily and capriciously in violation of Florida's competitive bidding laws. R.3438-39. Accordingly, the court denied the City's Motion for Involuntary Dismissal and entered judgment in

favor of VKLLC on Count II (for writ of mandamus) and Count IV (for declaratory judgment).³ R.3439-46. Specifically, the court entered a declaratory judgment directing the City to award the already negotiated marina contract to VKLLC and put the proposal before the voters by referendum. R.3446. It also entered 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. R.3447-48. The City's appeal followed.

STANDARD OF REVIEW

In reviewing a final judgment following a nonjury trial, “the appellate court reviews the record for substantial, competent evidence to support the trial court’s findings of fact.” *Bailey v. Covington*, 317 So. 3d 1223, 1227 (Fla. 3d DCA 2021). Where the trial court’s findings are supported by substantial, competent evidence, they cannot be disturbed on appeal. “It is not the function of [the appeals] court to re-weigh the evidence or substitute its

³ The court entered judgment in favor of the City on Count III for promissory estoppel. R.3446-47. That ruling has not been appealed.

judgment for that of the trial court, but rather to determine whether there was competent substantial evidence to support the trial court's factual determinations.” *Robles-Martinez v. Diaz, Reus & Targ, LLP*, 88 So. 3d 177, 182 (Fla. 3d DCA 2011) (citing *Shaw v. Shaw*, 334 So. 2d 13 (Fla. 1976)). Following a bench trial, “the standard of review for the trial court’s conclusions of law is de novo.” *Bailey*, 317 So. 3d at 1227.

“The standard of review for orders denying summary judgment is de novo.” *Tiger Point Golf & Country Club v. Hipple*, 977 So. 2d 608, 610 (Fla. 1st DCA 2007). Summary judgment may only be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fla. R. Civ. P. 1.510(a). “The test for the existence of a genuine factual dispute is whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party, and whether the evidence presents a sufficient disagreement to require submission to a jury.” *Benitez v. Lawson Indus., Inc.*, 367 So. 3d 600, 602-03 (Fla. 3d DCA 2023). “Because summary judgment tests the sufficiency of the evidence to justify a trial, it is proper only if, taking the evidence and inferences in the light most favorable to the non-moving party,

and assuming the jury would resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law.” *Shands v. City of Marathon*, 261 So. 3d 750, 752 (Fla. 3d DCA 2019) (internal quotation omitted). Thus, “at both the trial and appellate level, all evidence and inferences from the evidence must be taken in the light most favorable to the non-moving party.” *Universal Prop. & Cas. Ins. Co. v. Horne*, 314 So. 3d 688, 692 (Fla. 3d DCA 2021).

A trial court’s order granting a petition for writ of mandamus is reviewed for an abuse of discretion. *McDonough v. City of Homestead*, 350 So. 3d 169, 169-70 (Fla. 3d DCA 2022).

SUMMARY OF THE ARGUMENT

The Final Judgment should be affirmed in all respects. The City was not entitled to summary judgment on VKLLC’s claims for declaratory relief and a writ of mandamus. The evidence presented in opposition to the City’s summary judgment motion (R.1259-2622) plainly demonstrated that the City showed favoritism toward Rickenbacker, that its decision to reject all bids was pretextual, that the ostensible grounds for the City’s decision lacked any reasonable factual basis, and that the City itself improperly attempted to evade

competitive bidding laws to award the project to Rickenbacker. VKLLC's summary judgment evidence was more than enough to establish a genuine issue of material fact to defeat summary judgment, just as this evidence was more than sufficient to establish the City's arbitrary and capricious misconduct at trial. The trial court properly denied the City's motion for involuntary dismissal for the same reasons.

Nor did the trial court err in directing the City to award the fully negotiated marina contract to VKLLC and put the proposal before the voters by referendum. R.3446. Such relief has been consistently provided by Florida courts where it has been shown that a government agency undermined the competitive bidding process through its arbitrary and capricious misconduct.

Contrary to the City's argument, VKLLC is entitled to a writ of mandamus under Florida law; moreover, given that the City does not challenge on appeal the trial court's factual finding that the execution of the lease was "sufficiently ministerial" under these circumstances to merit mandamus relief, the City's argument should be rejected.

ARGUMENT

I. The Trial Court’s Factual Findings and Conclusions of Law Were Correct and Supported by Competent, Substantial Evidence.

In its Initial Brief, the City makes the astonishing argument that, despite three days of trial featuring numerous witnesses and thousands of pages of exhibits, there are *no disputed issues of material fact* in this case and therefore the City was entitled to summary judgment on all claims. In pursuing this through-the-looking-glass argument, the City continues to advance its fundamentally flawed misunderstanding of the law governing bid procurements such as the Second RFP. More significantly, the City largely ignores the trial court’s factual findings that the City’s decision to reject VKLLC’s proposal was *pretextual* and influenced by *favoritism*, and therefore arbitrary and capricious as a matter of law. The court’s findings at trial of pretext and favoritism are *not challenged* on appeal – which is a determinative reason alone to affirm the Final Judgment.

The overwhelming – and largely undisputed – evidence presented at summary judgment and at trial demonstrates that the City showed improper and illegal favoritism to Rickenbacker,

VKLLC’s rival bidder, throughout the RFP process and after. Indeed, in its desperation to steer the project to Rickenbacker, the City attempted to *rewrite its own Charter* – at Rickenbacker’s request and with its direct participation – to *avoid* the application of the very procurement laws the City now cites with reverence in its appeal.

The trial court’s legal conclusions were entirely correct, and its findings of fact were fully supported by the evidence in the record. The Final Judgment in favor of VKLLC should be affirmed.

A. The Trial Court Correctly Denied the City’s Motion for Summary Judgment.

In arguing that the trial court should have granted summary judgment in its favor (Initial Br. at 35-43), the City must necessarily show that the court could not have found the City’s conduct arbitrary and capricious under *any* set of facts – even when viewed in the light most favorable to VKLLC – and the case should not have proceeded to trial at all. *Benitez*, 367 So. 3d at 603 (summary judgment unavailable where “the evidence presents a sufficient disagreement to require submission to a jury”); *Shands*, 261 So. 3d at 752 (“[b]ecause summary judgment tests the sufficiency of the evidence to justify a trial, it is proper only if, taking the evidence and inferences

in the light most favorable to the non-moving party, and assuming the jury would resolve all such factual disputes and inferences favorably to the non-moving party, the non-moving party still could not prevail at trial as a matter of law”). The City fails to meet this standard, which it ignores throughout its Brief.

It is ***undisputed*** that, 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 proposer or 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, as the trial court correctly held. R.3400 (citing *Marriott*, 383 So. 2d at 662; *Emerald Corr.*, 955 So. 2d at 647; *Wester v. Belote*, 138 So. 721 (Fla. 1931); and *City of Sweetwater v. Solo Constr. Corp.*, 823 So. 2d 798 (Fla. 3d DCA 2002)). In addition, the trial court found that “[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.” R.3400 (citing *Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc.*, 354 So. 2d 446 (Fla. 1st DCA 1978)). Again, this legal conclusion is **not challenged** by the City on appeal.

It is axiomatic, then, that if there were a genuine dispute as to *any* material fact relating to *any* of these grounds for finding the City’s conduct arbitrary and capricious, the trial court was *required* to deny the City’s summary judgment motion. *See, e.g., Morales v. Citizens Prop. Ins. Corp.*, 338 So. 3d 320, 322 (Fla. 3d DCA 2022) (summary judgment is improper if the record “reveals the merest possibility of genuine issues of material fact”). Here, the summary judgment evidence presented by VKLLC (R.1259-2622) was more than adequate to establish a genuine dispute as to the City’s arbitrary and capricious misconduct.

In denying the City’s motion, the Court found that there was sufficient evidence to support the following material facts: “(1) VKLLC was ranked as the highest bidder to the City’s Second RFP for the marina lease by the City’s Selection Committee; (2) bid protests lodged by the losing bidder, Biscayne Marine ... were rejected by an administrative hearing officer, the Eleventh Judicial Circuit Court

Appellate Division and the Third District Court of Appeal; (3) VKLLC's bid was recommended for approval by three different City Managers; (4) the City Commission delayed voting on the proposal over a dozen times over several years without explanation, leaving an affiliate of Biscayne Marine in place as the holdover tenant at the marina; (5) the City Commission ultimately voted to reject all bids based on grounds that the City staff and City Managers found to be incorrect or immaterial; and (6) at the request of Biscayne Marine, the losing bidder, the City attempted to amend its own Charter to award the marina project directly to Biscayne Marine without having to abide by the City's own competitive bidding process." R.3400-01. "On this record," the trial court held, "a factfinder could reasonably conclude that the City showed favoritism to a particular bidder or applied criteria not included in the Second RFP." R.3401.

The City claims that this ruling was erroneous, arguing that the facts cited by the trial court are not material – a meritless position. Initial Br. at 40-43. The City also appears to assert that, in government procurement cases, the public statements of government officials are somehow afforded heightened deference at summary judgment. *Id.* at 36-43. This too is a meritless argument.

The facts cited by the trial court in its order denying summary judgment overwhelmingly established a genuine factual dispute as to whether the City showed favoritism or acted pretextually in steering the Virginia Key project to Rickenbacker, the twice-losing bidder. The evidence before the court at summary judgment showed that VKLLC was the highest bidder for the Second RFP, the City staff repeatedly recommended that VKLLC be awarded the project, and Rickenbacker's bid protests repeatedly failed. R.3400-01. Yet, after years of unprecedented deferrals aiding Rickenbacker, the City Commission rejected its own staff's recommendations and invoked factually unsupported findings expressly rejected by the City staff as a basis to reject all bids, and subsequently sought to *amend its own City Charter at Rickenbacker's urging* to get around the City's procurement law and do what the City otherwise could not legally do: hand a *de facto* no-bid award to Rickenbacker, a losing bidder in the Second (and First) RFP. *Id.*

These facts are more than sufficient to allow a reasonable factfinder to conclude that the City showed improper favoritism to Rickenbacker or applied criteria not included in the RFP, as the trial court correctly held. This was the *sole* issue before the trial court on

summary judgment, and it did not err in finding that these facts presented a triable issue.

Remarkably, the City concedes *in its appeal* that “reasonable people can disagree” about the City Commission’s decision-making based on the evidence presented at summary judgment. Initial Br. at 38-40. This utterly undermines the City’s argument: Where the facts “permit different reasonable inferences,” denial of summary judgment is required. *Del Rio v. Russell Eng'g, Inc.*, 351 So. 3d 1180, 1182-83 (Fla. 3d DCA 2022) (summary judgment should be denied “if the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues”); *Morales*, 338 So. 3d at 322 (the “merest possibility of genuine issues of material fact” precludes summary judgment). The trial court did not err in denying the City’s summary judgment motion.

On appeal, the City asks this Court to examine the facts cited by the trial court *in isolation* and deem them “immaterial” one at a

time. Initial Br. at 41-43. This is nonsense.⁴ Under Florida law, a “material fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case.” *Trelles v. Le Basque Holdings, LLC*, 274 So. 3d 503, 503 (Fla. 3d DCA 2019). *See also Del Rio*, 351 So. 3d at 1182 (“an issue of fact is ‘material’ if it could have **any bearing** on the outcome of the case under the applicable law”) (emphasis added). All of the facts cited in the trial court’s summary judgment order are essential to determining whether the City showed improper and illegal favoritism

⁴ This argument is also waived. At the summary judgment hearing, the City argued *only* that the Court should not give any weight to the statements of the City managers who recommended that VKLCC receive the award, or to the statements of a city commissioner who opposed the rejection of all bids. Sept. 9, 2022, Hr’g Tr. at 24:10-25:17. The City did *not* specifically challenge the materiality or relevance of any other evidence advanced by VKLCC in opposing the City’s motion, or the *five* other fact issues cited in the trial court’s order denying summary judgment. *See* R.958-73. The City cannot now challenge the lower court’s ruling on the materiality of those other fact issues *for the first time* on appeal. *See, e.g., H.R. v. State*, 298 So. 3d 1217, 1221 (Fla. 3d DCA 2020) (“[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the **specific legal argument or ground to be argued on appeal or review must be part of that presentation** if it is to be considered preserved”) (emphasis added) (internal citation omitted).

to Rickenbacker or applied criteria not included in the Second RFP, as the trial court held.

Again, it is *undisputed* that favoritism in the procurement process is forbidden under Florida law, and provides grounds to overturn a government bidding decision. *See, e.g., Department of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988) (“the system of competitive bidding protects against collusion, ***favoritism***, and fraud in the award of public contracts”) (emphasis added); *Liberty Cty. v. Baxter’s Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982) (“public bids statutes serve the object of protecting the public against collusive contracts and prevent ***favoritism*** toward contractors”) (emphasis added). Taken together, the facts showing that the City Commission delayed voting on the bid award *for years*, ignored the recommendations of City staff and three different City Managers, cited dubious grounds for rejecting all bids, and then went so far as to *re-write its own laws at the losing bidder’s urging* in an effort to give a *no-bid award* to that losing bidder, certainly suffice to create a genuine issue of material fact regarding the City’s illegal favoritism to Rickenbacker, as well as to support the ultimate Final Judgment. The City cannot credibly argue that these

facts do not “have any bearing on the outcome of the case under the applicable law.” *Del Rio*, 351 So. 3d at 1182. This argument fails.

The City erroneously asserts that the trial court “reweighed” the evidence (Initial Br. at 39) and “ignored” other facts that the City advanced to rebut VKLLC’s claims.⁵ *Id.* at 37. This betrays a fundamental misunderstanding of the issues presented at summary judgment. The only issue before the court at summary judgment was whether there existed a “genuine factual dispute” – that is, “whether the evidence presents a sufficient disagreement to require submission to a jury.” *Benitez*, 367 So. 3d at 603. The City’s references to other evidence in the record that, in its view, supported its position (Initial Br. at 36-40) only serve to confirm the existence of a genuine factual dispute *precluding* summary judgment.

Throughout its argument, the City insists that the trial court was required to afford near-total deference to the City Commission’s

⁵ Rickenbacker, meanwhile, complains in its Amicus Brief that the proposal it submitted in response to the Second RFP was not placed in evidence at trial. (Amicus Br. at 11.) The fact that the City chose not to introduce this material for strategic reasons obviously does not mean that the trial court’s ruling was in error.

ostensible grounds for rejecting all bids – an argument based on a misreading of *Groves-Watkins*. Initial Br. at 36-40, 43. 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. On those facts, the Supreme Court found that the department’s decision could not be overturned “**absent a finding of illegality, fraud, oppression or misconduct.**” *Id.* at 913 (quoting *Liberty County*, 421 So. 2d at 507) (emphasis added).

Groves-Watkins expressly 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 (in competitive bidding, a municipality may only “reject any and all bids in the absence of fraud, collusion, bad faith or arbitrary action”) (citation omitted).

In *Groves-Watkins*, unlike this case, there were no allegations that the department rejected the bids as a result of fraud or collusion

or as “a means to avoid competition.” *Id.* Rather, the department rejected the bids to correct an “honest mistake.” *Id.* Under *those* circumstances – where a public body’s decision is “based on an *honest* exercise of [its] discretion,” without any suggestion of fraud or avoiding competition – the agency’s decision should be accorded “judicial deference,” the court held. *Id.* at 913 (quoting *Liberty County*, 421 So. 2d at 507) (emphasis included).

That is not the case here. VKLLC alleged and proved that the City’s decision was *not* based on an “honest exercise of discretion,” but was pretextual and motivated by improper favoritism to Rickenbacker, the twice-losing bidder, and was intended to *avoid* competition. In short, this is the case that *Groves-Watkins* warned about.

It bears noting that *Groves-Watkins* concerned an appeal of an order of an administrative hearing officer in a bid protest. *Id.* at 912-13. Contrary to the implications of the City’s Brief (Initial Br. at 42), *Groves-Watkins* does not hold that a court must show deference to the “official” version of events put forward by government officials when considering summary judgment on claims alleging favoritism and pretextual grounds for its decision. To the contrary, at summary

judgment all facts must be viewed in the light most favorable to the non-moving party – here, VKLLC.⁶ *Shands*, 261 So. 3d at 752.

The trial court did not err in denying the City’s motion for summary judgment. Its ruling (R.3399-3403) should be affirmed.

B. The Final Judgment is Supported by Competent, Substantial Evidence and Should Be Affirmed.

The City also appears to challenge on appeal the trial court’s findings of facts based on the evidence presented at trial.⁷ Initial Br.

⁶ Again, the standards of review applicable here to a bench trial and denials of summary judgment do not allow – let alone require – “deference” to the losing party. The City cannot fabricate new facts simply because it is the government.

⁷ In appealing the Final Judgment, the City avers that “the reasons for reversing the final judgment on Counts II and IV are essentially the same as the reasons for reversing the denial of summary judgment,” and therefore the City “adopts and incorporates” its arguments on the summary judgment issue in its argument for reversal of the Final Judgment. Initial Br. at 50-51. Frankly, this makes no sense. As discussed above, an order denying a motion for summary judgment may be reversed only upon showing that, viewing all evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact. By contrast, the trial court’s findings of fact following a bench trial can only be reversed upon a showing that its factual determinations were not supported by competent substantial evidence. *Robles-Martinez*, 88 So. 3d at 182. To the extent that the City claims to be challenging the trial court’s denial of its motion for involuntary dismissal, see Initial Br. at 50-51, it does not even argue that the evidence presented *at trial* failed

at 50-54. However, after loudly, and in conclusory fashion, declaring that the trial court’s “FACTUAL FINDINGS ARE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE,” *id.* at 50, the City does not identify a single factual finding in the court’s 42-page Final Judgment (all of which cites to record evidence) that is unsupported by competent, substantial evidence. *Id.* Instead, the City makes the conclusory assertion that that the court’s findings were “based on false premises,” not insufficient evidence. *Id.* at 53.

In the Final Judgment, the trial court identified **five distinct grounds** for finding that the City’s actions arbitrary and capricious, and identified the record evidence supporting each of these findings. R.3428-3438. To succeed in reversing the Final Judgment on appeal, the City must show that *none* of these five grounds is supported by competent, substantial evidence. However, the City squarely addresses only *one* of these findings on appeal – namely, that the City’s decision was based upon criteria not included in the bid

to establish a *prima facie* case. Therefore, any such argument should be rejected out of hand.

documents and therefore arbitrary and capricious. Initial Br. at 53-54.

As discussed above, the City Commission cited as bases for its decision (1) the guilty plea of Shoreline, a proposed subcontractor, which only came to light *after* the bid was submitted, and (2) a 20-year-old sewage spill attributed solely to Marin and Marin, a subcontractor of a subcontractor of a VKLLC affiliate.⁸ R.3429-32. The trial court held that the City’s reliance on these factors was arbitrary and capricious because neither the Second RFP nor the City’s procurement ordinance allowed the City to deem a responder non-responsive based on the actions of a subcontractor. R.3432.

As the court explained, the Second RFP states that the City “shall have reasonable discretion to deem any proposal non-

⁸ While the City Commission also purported to find that VKLLC had made “misstatements” through counsel regarding the use of Aero Docks technology, the trial court found that this conclusion by the City lacked sufficient factual support, as the nature of the supposed “misstatement” was never made clear, and the City failed to demonstrate that this issue was sufficiently material to merit the rejection of all bids to the Second RFP. R.3429-30. Because the City does not challenge the trial court’s factual findings on the Aero Docks issue, VKLLC does not address it further.

responsive, and/or any proposer non-responsive, 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.” R.3432 (emphasis included). Moreover, Section 18-95 of the City Code (on which the City relies on appeal) 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.” R.3433 (emphasis included). As the court stated: “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.” *Id.*

On appeal, the City now claims that the trial court’s ruling was based on a “false premise[],” arguing that the plain language of the

Second RFP and the City Code allows the City to consider “how a proposer vets its team members and the past conduct of team members” when considering bids. Initial Br. at 53 (emphasis added). There are two obvious problems with this newly conceived argument.

First, the City does not cite any language in either Second RFP or the City Code regarding an applicant’s “vetting” of its subcontractors as a criterion for being deemed responsible to bid – because there is none. This is nothing more than a *post hoc* rationale that was never discussed by the City Commission when it rejected all bids in 2020, and never raised by the City at trial. It is improper to raise this issue now. *H.R.*, 298 So. 3d at 1221 (“specific legal argument or ground” must be raised before trial court to be preserved for appeal).

Indeed, before the trial court, the City argued that these two issues were relevant to determining VKLLC’s “integrity” – not the quality of VKLLC’s “vetting” of subcontractors. However, as the trial court recognized, neither Shoreline’s guilty plea (which arose from an entirely separate project not involving, and unknown to, VKLLC) nor the 20-year-old spill (which occurred when a subcontractor of a subcontractor accidentally struck an unknown and uncharted

underwater pipe) is relevant to VKLLC’s “integrity.” R.3433; Nov. 10 Trial Tr. at 94:15-20 (Court: “But what is the rational connection between an inference that this company does not have the integrity that the City wants to have in its contracting parties if the guilty plea wasn’t known at the time of the RFP? How does that rationally implicate the integrity of the bidder?”).

Second, the City cites no record evidence even suggesting that the City Commission considered these issues relevant to the quality of VKLLC’s “vetting.” There is no discussion of “vetting” anywhere in the record. Thus, there was no factual basis to support such a finding even if the City had made this argument below, which it did not.

Ultimately, the trial court held, based on the evidence presented, that by relying on these two issues as the basis for its decision, the City applied “criteria that were neither included in bid documents nor clearly defined,” making its decision arbitrary and capricious under Florida law. R.3432 (citing *Solo*, 823 So. 2d at 802). This finding was supported by competent, substantial evidence. R.3432-34. The City does not argue otherwise in this appeal. Its position thus must be rejected.

In any case, the City does *not* challenge the other bases for finding the City’s decision arbitrary and capricious: the findings that the City’s decision was not based on facts reasonably tending to support its conclusions; that the City’s decision was pretextual; that the City’s decision was based on favoritism and personal preference; and that the City improperly circumvented the competitive bidding process to favor Rickenbacker. R.3428-38. At a minimum, the Final Judgment should be affirmed based on these ***unchallenged*** findings of the trial court.

Finally, the City also claims that the trial court erred by denying its motion for involuntary dismissal of Count II under Fla. R. Civ. P. 1.420(b). Initial Br. at 51-52. “[I]n a bench trial, an involuntary dismissal is appropriate where the plaintiff fails to establish a prima facie case.” *Deutsche Bank Nat. Tr. Co. v. Altos Del Mar (7701 Collins Ave) LLC*, 187 So. 3d 930, 931 (Fla. 3d DCA 2016) (internal quotation omitted). “When a party raises a motion for involuntary dismissal in a nonjury trial the movant admits the truth of all facts in evidence and every reasonable conclusion or inference based thereon favorable to the non-moving party.” *Naples Motorcoach Resort Homeowners Ass’n, Inc. v. JG&M Props., LLC*, 363 So. 3d 1184, 1189 (Fla. 6th DCA

2023) (internal citations omitted). The trial court correctly applied this standard when denying the City’s motion.

In the Final Judgment, the trial court held that, based on the evidence presented, “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 ... and at the time that the City Commission voted to reject all bids the lease was in its final form for approval.” R.3443 (emphasis added). The court specifically identified the record evidence supporting these factual findings. *Id.* (citing SR.1772-1830; Nov. 8 Trial Tr. at 98:25-99:5; Nov. 10 Trial Tr. at 53:23-54:11.) Importantly, **the City did not rebut this evidence in any way at trial.**

The Initial Brief strangely asserts that the trial court’s finding that execution of the marina lease is “sufficiently ministerial” to merit mandamus relief is somehow “precluded” by the court’s previous interlocutory order granting summary judgment on VKLLC’s specific performance claim, in which the court found specific performance was not available relief “because no contract was formed between the

parties.” Initial Br. at 51-52 (citing R.2645). Legally and factually, the issues are distinct: Whether the parties had an enforceable contract for which specific performance could be awarded is wholly separate from the issue of whether the negotiations had reached the point where execution of an agreement was “sufficiently ministerial to merit mandamus relief,” as the trial court held based on the undisputed evidence. R.3443. Beyond that, the summary judgment ruling on the specific performance claim was not a final order with preclusive effect. *Libman v. Florida Wellness & Rehab. Ctr., Inc.*, 260 So. 3d 515, 517 (Fla. 3d DCA 2018). This argument fails under any analysis.

Taking all inferences in the light most favorable to VKLLC, the evidence at trial far exceeded what is required to establish a *prima facie* case for a writ of mandamus. *Deutsche Bank*, 187 So. 3d at 931. To the extent that the City asserts that the court erred in finding a sufficient factual basis to deny its motion for involuntary dismissal as to Count II, this argument is meritless, and the judgment should be affirmed.

II. The Declaratory Relief Awarded Was Appropriate Under Florida Law.

After finding that the City acted arbitrarily and capriciously – based on evidence and factual findings largely uncontested on appeal – the trial court entered a declaratory judgment directing the City to award the marina contract to VKLLC and put the proposal before the City’s voters by referendum, as required by the City Code. R.3446. On appeal, the City argues that such relief was prohibited as a matter of law, and therefore it was entitled to summary judgment on this issue.⁹ In advancing this argument, the City mischaracterizes the trial court’s findings and asserts, with no supporting authority, that Florida law forbids this type of relief simply because this dispute arises from a request for proposal (“RFP”) instead of an invitation to bid (“ITB”).¹⁰ The City even goes so far to assert that the “differences between an RFP and an ITB is [sic] dispositive.” Initial Br. at 44. In

⁹ The City also argues that the Court should have entered involuntary dismissal in its favor on Count IV on the same grounds. Initial Br. at 52.

¹⁰ In its Amicus Brief, Rickenbacker unhelpfully parrots the same argument, and similarly fails to cite any supporting precedent.

short, the City insists that, as a matter of (non-existent) law, a trial court can only order a government body to award a winning bidder to an ITB, but not to a bidder to an RFP. Initial Br. at 44-46. This is wrong.

None of the authority cited by the City stands for, let alone expressly articulates, any such bright-line rule. Nor did the City cite any such authority in the court below, as the trial court noted. See R.3444 (“[t]he 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, Florida courts have expressly held that a government body cannot engage in favoritism or act arbitrarily in the competitive bidding process for an RFP any more than for an ITB. *Emerald Corr.*, 955 So. 2d at 654. The City repeatedly quotes *Emerald* in its Brief, but tellingly fails to cite to its holding that favoritism is banned in the RFP context (no less than in the ITB context).

Moreover, binding precedent from this District holds that a contract should be awarded when the government abuses its

discretion in the RFP context. In *Marriott*, a bidder responding to “invitation for proposals” for an “Operational and Management Services Agreement” with Miami-Dade County to sell alcoholic beverages at Miami International Airport sued to challenge an award made to a lower-ranked proposer. *Marriott*, 383 So. 2d at 663-64. “Instructions to proposers ... provided that the parties would be evaluated with respect to” not only revenues but also on several other criteria, including 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.

Thus, the solicitation clearly had the character of an RFP, not an ITB where the bid goes to the bidder offering the lowest price for goods, as the trial court found. R.3445. The City itself defines an RFP as having “[m]ultiple factors [that] need to be weighed,” whereas “cost is determinative” for an ITB. Initial Br. at 5. Because the “invitation for proposals” in *Marriott* required evaluations on **seven** different criteria – with only one of them being price, and the last

criterion itself being an open-ended catch-all for even more factors – *Marriott* was an RFP case by the City’s own definition.¹¹

Marriott sought a 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. *Marriott*, 383 So. 2d at 665, 668. This Court reversed the trial court and held that the award to another bidder was arbitrary and capricious and constituted an abuse of discretion. *Id.* at 668. Accordingly, this Court directed that the contracted **be awarded to Marriott**. *Id.*

Similarly, *Wood-Hopkins* concerned competitive bidding to perform construction of a thermal discharge unit for the Jacksonville

¹¹ Disregarding these factors, the City insists that the proposal at issue in *Marriott* was an ITB because the county resolution requiring competitive bidding included the word “shall.” Initial Br. at 46. At the least, *Marriott* confirms that the distinction between ITBs and RFPs is not so clear-cut in practice as the City argues – and the distinction has no bearing on the potential remedies available to correct a government body’s arbitrary and capricious misconduct. It was certainly not error for the trial court to deny *summary judgment* on this purported ITB/RFP distinction, as the City argues. *Id.* at 50.

Electric Authority.¹² *Wood-Hopkins*, 354 So. 2d at 447. After finding that the authority 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 appellate court. *Id.* at 450. As *Marriott* and *Wood-Hopkins* confirm, a declaration directing a government body to enter into an agreement with the highest bidder is indeed a proper remedy – even if the agreement arose from an RFP.

In its Brief, the City relies primarily on *PCA Life Ins. Co. v. Metropolitan-Dade Cnty.*, 682 So. 2d 1102 (Fla. 3d DCA 1995), which is plainly distinguishable. In *PCA Life*, the trial court declined to enter an order requiring the government to contract with the plaintiff after finding, as a factual matter, that the terms of any agreement between the parties were still to be negotiated. *Id.* at 1102-03.

¹² While the City insists that the procurement in *Wood-Hopkins* has the “mandatory language” of an ITB, the court nevertheless recognized that a government agency is not required to select the lowest bidder “to the exclusion of all other pertinent factors that may be taken into consideration.” *Wood-Hopkins*, 354 So. 2d at 449 (quoting *City of Pensacola v. Kirby*, 47 So. 2d 533 (Fla. 1950)). This further confirms that the purported ITB/RFP distinction has no legal significance.

Indeed, the *PCA Life* opinion notes that the “request for proposal did not contain a form of contract.” *Id.*

The facts in this case are the *opposite* of those in *PCA Life*. Here, the Second RFP *did* include a 59-page draft contract – based in large part on the terms that VKLLC negotiated with the City in the First RFP process – as the trial court observed. R.3416; SR.1772-1830. And – critically – the **undisputed evidence** at trial established that, at the time the City Commission rejected all bids, the lease was in its final form and there was nothing left to negotiate. R.3443. *See also* Nov. 8 Trial Tr. at 98:25-99:5 (“the lease was in a form that it needed to be in order for the item to go to referendum”); Nov. 10 Trial Tr. at 53:23-54:11 (“It was in the final form to be approved. We had worked with the City for months to finalize”).¹³

Based on this evidence – again, unrebutted at trial – the trial court held that “the evidence presented shows that there were no

¹³ The City mischaracterizes the record by contending that “the trial court essentially required the City to negotiate with Virginia Key and award the project to it.” Initial Br. at 20. The trial court did not require any further negotiations, and adding the word “essentially” to the sentence does not make it true.

material terms left to negotiate, and the contract only needed to be executed.” R.3443. Significantly, the City **does not challenge this factual finding on appeal**. These undisputed facts make this case distinguishable from *PCA Life*.¹⁴

The City’s reliance on *State, Dep’t of Lottery v. Gtech Corp.*, 816 So. 2d 648 (Fla. 1st DCA 2001), is also misplaced. *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. *Id.* at 652-53. As the court said, “the 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.” *Id.* at 653. Under those circumstances – plainly distinguishable from this case – the court found that the appropriate

¹⁴ *City of Cocoa v. Villas of Cocoa Village, LLC*, 343 So. 3d 122 (Fla. 5th DCA 2022), and *Tropical Soup Corp. v. City of Key West*, 2021 WL 611351, at *1 (S.D. Fla. Feb. 9, 2021), are distinguishable for the same reasons, as negotiations were ongoing in both cases.

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 these circumstances, where the City tossed out all bids and then proceeded to negotiate the **same** proposal with the losing bidder. The trial court correctly found *Gtech* distinguishable.¹⁵ R.3444.

Finally, the City argues that the trial court’s declaratory judgment somehow “implicate[s] sovereign immunity and separation of powers.” Initial Br. at 47. This argument is as inconsistent as it is baseless: The City’s own brief cites multiple cases in which courts entered orders enforcing the state’s procurement laws against government bodies. Indeed, the City *concedes* in its brief that a court may order a government body to contract with a bidder responding to an ITB – and therefore the City is not immune from suit in such

¹⁵ *State, Dept. of Corr. v. C & W Food Serv., Inc.*, 765 So. 2d 728 (Fla. 1st DCA 2000), also cited by the City, concerned a renewal of an *existing* contract, and does not even discuss the available remedies for a government’s arbitrary and capricious misconduct in the competitive bidding process. *Id.* at 729.

instances. The City has no coherent explanation why sovereign immunity would *only* apply to an order concerning an RFP but would *not* bar such an order relating to an ITB, as their argument necessarily suggests. The numerous cases cited by both parties affirming declaratory and injunctive relief against government bodies for violating procurement laws themselves confirm that claims such as this are not barred by sovereign immunity.

Indeed, under Florida law, sovereign immunity “does not bar claims for nonmonetary relief.” *State Dep’t of Highway Safety & Motor Vehicles v. Rendon*, 957 So. 2d 647, 652 (Fla. 3d DCA 2007). *See also Bull v. City of Atlantic Beach*, 450 So. 2d 570, 572 (Fla. 1st DCA 1984) (same). Moreover, as the City acknowledges, the state procurement law unambiguously states that “[a]ny qualified contractor or vendor who could have been awarded the project had the project been competitively bid has standing to challenge a local government’s actions to determine if the local government has

complied with this section.” Fla. Stat. § 255.20(4).¹⁶ Because the statute clearly authorizes an action against the City in these circumstances, sovereign immunity does not bar this claim. *City of Miami Gardens v. City of North Miami Beach*, 346 So. 3d 648, 654 (Fla. 3d DCA 2022).

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). On these **undisputed** facts, the trial court was well within its authority in directing the City to award the fully negotiated contract to VKLLC and place the issue on the ballot for voters to consider. *See Miami Dade Cnty. Sch. Bd. v. J. Ruiz Sch. Bus Serv., Inc.*, 874 So. 2d 59, 65 (Fla. 3d DCA 2004) (directing that “appellees be awarded equitable relief in the form of *future* comparable contracts” based on school board’s arbitrary and capricious conduct). It would be Kafkaesque to conclude that the

¹⁶ The City repeatedly emphasizes its ability to establish its own procurement procedures under Fla. Stat. § 255.20, but that discretion cannot be exercised arbitrarily and capriciously.

only remedy for the City's blatant misconduct is yet *another* request for proposal analysis with the City – this after VKLLC already prevailed twice in the RFP process, only to see the City twice reject all bids and then embark on a scheme to rewrite its own Charter to *avoid* competitive bidding altogether on this project and hand the award to a twice-losing bidder.¹⁷ The City's argument that such relief is never available to remedy an arbitrary and capricious RFP process has no basis in law and should be rejected, with the trial court's order affirmed.

III. VKLLC Is Entitled to a Writ of Mandamus.

Relatedly, the City argues that a writ of mandamus was not an available remedy. As discussed below, the City is wrong on the law

¹⁷ There is a cruel hypocrisy to Rickenbacker's complaint in its Amicus Brief that the remedy provided by the trial court "divested all future proposers of the right to have their proposals considered." Amicus Br. at 2. That is exactly the result that Rickenbacker wanted *for itself* when it schemed with the City to amend the City Charter to avoid the RFP process and enter into a no-bid deal for the Property. The fact that Miami voters and the trial court thwarted Rickenbacker's anti-competitive scheme is hardly reason to find error here.

and on the facts. The trial court did not abuse its discretion in entering a writ of mandamus.

The City’s position hinges almost exclusively on the argument that a writ of mandamus is inappropriate to address discretionary decisions of government bodies. *See, e.g.*, Initial Br. at 23-28. While writs of mandamus are generally limited to “ministerial” government acts, this general rule has “limitations,” as this Court has recognized.

Specifically, this Court has held that, whether performing a discretionary *or* ministerial function, “an official may not act ***arbitrarily and unwarrantably*** or in disregard of evidence clearly and unmistakably pointing to a contrary result and thereafter question the right to resort to mandamus to compel proper action on his part.” *City of Miami Beach v. 3098 Alton Rd., LLC*, 307 So. 3d 86, 87 n.1 (Fla. 3d DCA 2020) (declining to address whether city’s actions were discretionary or ministerial in affirming writ of mandamus because “the result would be the same regardless” based on its arbitrary conduct) (emphasis added). “If, in the attempted performance of ***discretionary*** acts, the official abuses the discretion so as to amount to a failure to do the act as the law requires, there has been in fact no actual exercise in good faith of the judgment or

discretion vested in the officer and mandamus is a proper remedy.” *City of Hialeah v. State ex rel. Danels*, 97 So. 2d 198, 199 (Fla. 3d DCA 1957) (emphasis added). *See also Dade Cnty. Sch. Bd. v. Miami Herald Pub. Co., a Div. of Knight-Ridder Newspaper, Inc.*, 443 So. 2d 268, 272 (Fla. 3d DCA 1983) (affirming writ of mandamus against school board based on an “arbitrary exercise of its discretion”) (citing *State ex rel. Roberts v. Knox*, 14 So. 2d 262 (Fla. 1943) (“an officer exercising administrative discretion should not act in an arbitrary or capricious manner”)).

Indeed, the Florida Supreme Court has repeatedly recognized that “[o]fficial action by Boards ... in arbitrarily and erroneously exercising or abusing discretion given by law is reviewable on mandamus where no other adequate legal remedy exists.”¹⁸ *State ex rel. Kinsella v. Florida State Racing Comm’n*, 20 So. 2d 258, 261 (Fla. 1944). *See also State ex rel. Pinellas Kennel Club v. State Racing Comm’n*, 156 So. 317, 317 (Fla. 1934) (“[w]hen discretion is given by

¹⁸ Contrary to the City’s suggestion, declaratory relief is not an “adequate legal remedy” that precludes mandamus. *Fisher v. Dade Cty.*, 127 So. 2d 132, 134 (Fla. 3d DCA 1961).

law, but is arbitrarily or clearly erroneously exercised or abused by the official action of a board ... such official action is subject to judicial review on mandamus, and redress may be had on such writ”). Crucially, this rule has been applied specifically in the procurement context: In *Wood-Hopkins*, the court affirmed the trial court’s entry of a final judgment of mandamus to award a contract to the aggrieved party. 354 So. 2d at 447.

Here, the trial court found that the City acted arbitrarily and capriciously in five distinct ways. R.3428-38. The City unavailingly challenges only *one* of these findings on appeal. Thus, the trial court’s findings the City acted arbitrarily and capriciously by showing favoritism to Rickenbacker, rejecting all bids pretextually and without supporting facts, and circumventing the bidding process to steer a no-bid deal to Rickenbacker are *uncontested*. Under Florida law, these uncontested findings of arbitrary and capricious misconduct are sufficient to support a writ of mandamus, regardless of whether the City’s actions were discretionary or ministerial. 3098 *Alton Rd.*, 307 So. 3d at 87 n.1; *Danels*, 97 So. 2d at 199; *Kinsella*, 20 So. 2d at 261; *Pinellas Kennel Club*, 156 So. at 317. The City’s argument to the contrary is incorrect.

The City also ignores the trial court’s finding that “the execution of the fully negotiated marina lease is sufficiently ministerial to merit mandamus relief.” R.3443. On appeal, the City does not contest the court’s factual finding that the lease was “fully negotiated,” which the Court noted in the Final Judgment was based on “undisputed” evidence. *Id.* Given the undisputed facts that the marina lease was “fully negotiated” and its execution was “ministerial,” the writ of mandamus was appropriate even under the City’s rigid (and incorrect) understanding of mandamus relief.

The trial court did not abuse its discretion in entering the writ of mandamus. The City’s appeal of the writ should be denied.

CONCLUSION

For all of the reasons stated herein, the City’s appeal should be denied, and the trial court’s Final Judgment should be affirmed in all respects so that the upgraded marina lease long delayed by the City can be fully implemented, to the City’s great financial betterment.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by the Florida Courts e-filing Portal pursuant to Fla. R. Jud. Admin. 2.516(b)(1), this 26th day of September 2023, upon the following:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Bookman Old Style, 14-point font, and contains 12,987 words, in compliance with the Florida Rules of Appellate Procedure.

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