

# VERNIS & BOWLING

OF The FLORIDA KEYS, P.A.

ATTORNEYS AT LAW

Islamorada Professional Center  
81990 Overseas Highway, 3<sup>rd</sup> Floor  
ISLAMORADA, FLORIDA 33036

TELEPHONE (305) 664-4675

FACSIMILE (305) 664-5414

WEB SITE: [www.Florida-Law.com](http://www.Florida-Law.com)

EMAIL: [DSmits@Florida-Law.com](mailto:DSmits@Florida-Law.com)

**COPY**

February 5, 2014

**VIA HAND DELIVERY AND EMAIL TO [Legal@CityofPensacola.Com](mailto:Legal@CityofPensacola.Com)**

James M. Messer, Esq.  
City Attorney's Office  
222 W. Main St.  
Seventh Floor  
Pensacola, FL 32502

***RE: Airport Concession - Pensacola***

Dear Mr. Messer:

Our firm represents OHM Group. From reviewing the bid process and potential lease extension I we would offer the following:

1. The City council refused to award the contract to OHM in favor of 'the local guy'.
2. The Florida Supreme Court, as far back as 1928, found that a City Commission awarded a contract to 'the local firm, because "he is a local man, will use local contracts and local labor, and will patronize local supply houses." The Court held that awarding a contract based upon advantages that would accrue to particular members of the community and which would accrue to them as individuals had the practical result of unnecessarily depleting public funds for the personal benefit of those individuals, substantially affecting the rights of all other taxpayers. A copy of the case is attached for your review as Exhibit "A".
3. Having rejected the award to OHM, based upon concerns of a few local individuals to the detriment of all other taxpayers, the City is now contemplating granting a lease extension to the existing vendor.
4. Without the required language from 287.058(1)(g) requiring the contract to specify renewal periods, the effect of granting an extension will be to defeat the object and integrity of the competitive bidding process. A City Council may not do indirectly, through a lease extension not incorporated into the original contract, what it could not do directly; a contract with the 'local group'.
5. While we do not question the ability to give vendors a local preference, Creative Groups does not qualify as such under the City Ordinances and without proper legislative authority, such preference results in an arbitrary and capricious selection process that is contrary to the principles upon which an open, fair and competitive process is founded.
6. We encourage you to adequately inform the City Council of their obligations under the law. I understand that ultimately they may ignore your advice, however, should the result be an extension of the existing lease, to avoid the competitive process, my firm will be

recommending that OHM challenge the decision. While they may choose to do otherwise it will be contrary to our strong advice to the contrary.

Finally, as detailed in Exhibit "B", attached, OHM was the clear winner of the bid. Awarding, extending or any other circuitous efforts subjects the city to substantial liability.

Sincerely,

*Dirk M. Smits*

Dirk M. Smits, B.C.S.  
*For the Firm*



DMS:le

Attachments: As noted

cc: Mayor (via hand delivery and e-mail with enclosures)  
City Council (via e-mail with enclosures)  
Greg Donovan, Airport Director (via e-mail with enclosures)



95 Fla. 603  
Supreme Court of Florida, Division B.

ADOLPHUS  
v.  
BASKIN et al.

March 28, 1928.

Suit by G. Adolphus against H. H. Baskin and others, constituting the City Commission of Clearwater, for an injunction. From an order sustaining a demurrer and dissolving a temporary restraining order and dismissing the bill, the complainant appeals.

Reversed.

*Syllabus by the Court*

Reasonable exercise of power by municipal governmental authorities is always required. The reasonable exercise of power by municipal governmental authorities is always required as a matter of public policy and fidelity to public trust.

Unreasonable action under color of authority by municipal authorities that materially affects substantial rights of persons and taxpayers is illegal; municipality's letting contract for public building to higher bidder, although lower bidder was responsible party, ready, willing, and able to construct building properly should be enjoined in taxpayer's suit. Unreasonable action taken under color of authority that materially affects substantial rights of persons and of taxpayers is contrary to the principles upon which our system of government is founded.

**\*\*225 \*603** Appeal from Circuit Court, Pinellas County; O. L. Dayton, judge.

**Attorneys and Law Firms**

J. C. Davant, of Clearwater, for appellant.

M. H. Jones, McMullen & McMullen and Kelly & Casler, all of Clearwater, for appellees.

**Opinion**

BUFORD, J.

The city commission of the city of Clearwater, proposing to let a contract for the erection of a certain municipal building and jail addition at a designated place, procured competent architects to prepare plans and specifications for such building, and, acting through the \*604 city manager, published a notice calling for bids for the construction of said building to conform to the plans and specifications so prepared and on file. The notice required certain conditions to be met and certain things to be done as incident to the filing of bids to erect the building. Some eight different persons, firms, and corporations presented bids for the construction of the building according to the plans and specifications referred to.

It is alleged: 'That B. F. Walker & Son were able, efficient, and responsible contractors, and that they met all conditions required to be met by contractors in and about presenting their bid, and that they bid and offered to construct the building in accordance with the plans and specifications for the sum of \$45,960. That among others bidding to construct the building in accordance with plans and specifications, as required, was one George F. Gillespie who bid and offered to construct the building according to the plans and specifications for the sum of \$53,221. That although the bid of Gillespie was \$7,261, or more than 15 per cent. above the bid submitted by B. F. Walker & Son, the city commission awarded the contract to Gillespie and entered upon the official minutes of the commission that the contract was awarded to Gillespie because 'he is a local man, will use local contractors and local labor, and will patronize local supply houses.'

A taxpayer, feeling aggrieved at this action by the city commission, filed a bill to enjoin the city commission from making and entering into and from signing and executing a contract with Gillespie for the doing and performing of the work contemplated in the notice, and for which the bid was made, and from permitting him entering upon the property and undertaking to build the said building under his said bid.

A temporary restraining order was granted. Later, on \*605 coming in of demurrer and motion to dissolve the restraining order, an order was made sustaining the demurrer, dissolving the restraining order, and dismissing the bill.

The demurrer admits the allegations of the bill which are well pleaded.



It is therefore admitted that Walker & Son were responsible bidders, that they were ready, willing, and able to construct the building in accordance with the plans and specifications which had been adopted, and that the only reason or cause which actuated the commission in its attempt to award the contract to Gillespie was that as stated in the face of the minutes heretofore quoted.

[1] Section 10 of chapter 9710, Sp. Laws of Fla. (1923), being the Charter Act of the city of Clearwater, provides for the appointment of a city manager; section 29, among other things, provides that the city manager shall be purchasing agent of the city, and further provides:

'But in any case, if an amount in excess of \$200 be involved, opportunity for competition shall be given.'

There appears to be nothing in the city charter which requires the city commission to let contracts for public work to the lowest responsible bidder, but the *reasonable* exercise of power by municipal governmental authorities is always required as a matter of public policy and fidelity to the public trust. The allegations of the bill of complaint, which are admitted to be true, show that the proposed awarding of the contract to Gillespie was solely because of advantages \*\*226 which would accrue to particular members of the community and which would accrue to them as individuals, and the practical result of such awarding of the contract was

to unnecessarily deplete the public fund in the sum of \$7,261 for the personal benefit of those individuals who would be benefited by the contract being let to that particular bidder.

\*606 The substantial rights of taxpayers would be materially affected by this exercise of authority.

[2] Unreasonable action taken under color of authority that materially affects substantial rights of persons and of taxpayers is contrary to the principles upon which our system of government is founded. See Willis v. Special Road & Bridge District, 73 Fla. 446, 74 So. 495; Antuono v. City of Tampa, 87 Fla. 82, 99 So. 324.

The order dissolving the temporary injunction sustaining the demurrer and dismissing the bill of complaint should be reversed and the cause remanded for further procedure not inconsistent with this opinion, and it is so ordered.

Reversed.

WHITFIELD, P. J., and TERRELL, J., concur.

ELLIS, C. J., and STRUM and BROWN, JJ., concur in the opinion and judgment.

**Parallel Citations**

116 So. 225

**I. The City failed to adhere to the rules of the Procurement Process as published in the RFP:**

- City Council Members made public statements “supporting the Local Vendors” despite the fact that the locals in question did not propose.
- Creative did not protest and therefore automatically took themselves out of process.
- Creative response is non-compliant with the RFP since they proposed several “Exceptions”
- Creative MAG, Percentage Rent and Investment are all lower than OHM
- OHM Is a 100% Airport Concessions Disadvantage Business Enterprise (ACDBE)
  - The Airport published a Goal of 30% ACDBE Participation
  - Creative is not ACDBE
  - Robert Verona is not an ACDBE
  - Therefore Creative proposal does not adhere to the 30% ACDBE Goal
- Creative proposed a pre-security unit that is well below the requirement of the RFP
  - Required 2,500 sq. ft – Creative proposed an 800 sq. ft unit
- A sub-lease as proposed by Creative Foods to Varona’s is not contemplated in the RFP instructions and not allowed. Therefore Creative response is non-compliant
- If a sub-lease is allowed then Robert Varona should have submitted Financials, and a complete set of required Forms required by the RFP – he did not therefore the Creative response is non-compliant
- Creative lists Robert de Varona as a Pensacola ACDBE in several areas of their response – this is incorrect – he is not an ACDBE in the State of Florida, therefore, also non-compliant
- The ability for Creative to Sub-lease to anyone is not contemplated in this RFP
  - There are no Financials for the sub-tenant
- There is no Sub-tenant Agreement between Creative and Varona’s
- Creative is NOT A LOCAL and therefore cannot be given any preference
- They disqualified themselves by not filing a protest.

**II. PAGE 20 of the PUBLISHED RFP:  
ERRORS AND OMISSIONS IN RFP**

*Proposers are responsible for reviewing all portions of this RFP. Proposers are to promptly notify the Airport, in writing, if the proposer discovers any ambiguity, discrepancy, omission, or other error in the RFP. Any such notification should be directed to the Airport’s Revenue Development and Management Office promptly after discovery, but in no event later than five (5) working days prior to the date of receipt of proposals. Modifications and clarifications will be made by addenda as provided below.*

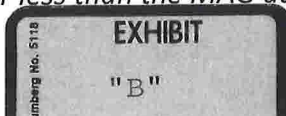
- Creative’s claim that they made a TYPO is non-compliant given the above rules as published in the RFP

**III. MAG Proposed Overview**

**Request for Proposal Minimum Annual Guarantee Instructions as published by the City of Pensacola Florida:**

**A. Page 12 of the RFP**

- **MAG Definition.** *The MAG for the first year of the Primary Term of the Contract is determined as the successful proposer’s MAG Offer (Submittal 5) for the first Lease Year and is adjusted annually. In the second and later years of the Primary Term, the MAG is 85% of the prior year’s total Percentage Fee, but never less than the MAG during the first year of the Primary Term.*





**B. Page 17 of the RFP**

- **Evaluation Criteria, Minimum Annual Guarantee Offer, and Financial Pro Forma** - Proposer must propose a Minimum Annual Guarantee for the first Primary Lease Year which must be equal to 85% of the Proposed First Year Rent. The Minimum Annual Guarantee Offer must be submitted on Submittal 5.

**C. Submittal 5 – Creative Food Group**

- Creative Food Group as instructed on Submittal 5 detailed their Sales & Rents Calculations as follows:

	Sales	%	Rent
○ First Year F&B Sales (Pre-Security Units):	\$ 315,000 X	10% =	\$ 31,500
○ First Year F&B Sales (Post-Security Units):	\$ 1,882,500 X	12% =	\$ 225,900
○ First Year F&B Sales (Pre-Security Units):	\$ 802,500 X	14% =	\$ 112,350
○ TOTAL	\$ 3,000,000		\$ 369,750

- MAG Calculation based on First Year Projected Rents of \$ 369,750:
  - \$ 369,750 x 85% = **\$ 314,287**
- MAG Proposed by Creative Food Group on Submittal 5, in Numbers & in Letters:
  - **“Three Hundred Thousand Dollars (\$300,000)**
- Creative Food Group never intended to propose a higher MAG. As a matter of record and fact, they proposed less than the calculated MAG. The Rent Calculation as detailed above (\$ 369,750) can be cross referenced to their Submittal 7 Exhibit C - 10 Year Proforma “Total All Locations”, which further collaborates their intended MAG Proposal:
  - Line “TOTAL GROSS SALES” = \$ 3,000,000 (100%)
  - Line “Rents to the City” - \$ 369,750 (12%)
  - Calculation:
    - TOTAL GROSS SALES / Rents to the City = % Rent
    - \$ 3,000,000 / \$ 369,750 = 12%
- This is not a TYPO this is clearly a calculation detailed on an official submittal and cross referenced in the Proforma.

**D. Submittal 5 – OHM Concession Group**

- OHM Concession Group as instructed on Submittal 5 detailed their Sales & Rents Calculations as follows:

***This Chart is taken directly from OHM RFP Proposal***

RENT CALCULATIONS	\$	%	RENT	MAG (85%)
F&B Sales Pre Security	\$ 562,500	10.00%	\$ 56,250	\$ 47,813
F&B Sales Post Security	\$ 2,795,000	12.00%	\$ 335,400	\$ 285,090
Alcohol Sales All Units	\$ 542,500	14.00%	\$ 75,950	\$ 64,558
<b>TOTAL</b>	<b>\$ 3,900,000</b>	<b>11.99%</b>	<b>\$ 467,600</b>	<b>\$ 397,460</b>

- MAG Proposed by OHM Concession Group on Submittal 5, in Numbers & in Letters:
  - **“Three Hundred and Ninety Seven, four Hundred and Sixty Dollars (\$396,460) (NOTED TYPO between Words and Numbers.)**
- OHM Concession Group MAG Calculation and MAG Proposed is based on the instructions provided in the RFP.
- These Calculations can also be cross referenced in their Proforma Submitted (Submittal 7 and Business Plan Submittal 4).

**As a Point of Reference: See MSE Branded Foods Submittal 5**

**E. Submittal 5 – MSE Branded Foods (Did not make the Presentation Round)**

- MSE Branded Foods as instructed on Submittal 5 detailed their Sales & Rents Calculations as follows:

	Sales	%	Rent
○ First Year F&B Sales (Pre-Security Units):	\$ 351,000 X	10% =	\$ 35,100
○ First Year F&B Sales (Post-Security Units):	\$ 1,950,000 X	12% =	\$ 234,000
○ First Year F&B Sales (Pre-Security Units):	\$ 585,000 X	14% =	\$ 81,900
○ <b>TOTAL</b>	<b>\$ 2,886,000</b>		<b>\$ 351,000</b>

- MAG Calculation based on First Year Projected Rents of \$ 351,000:
  - \$ 351,000 x 85% = **\$ 298,350**
- MAG Proposed by MSE Branded Foods on Submittal 5, in Numbers & in Letters:
  - **“Three Hundred Thousand Dollars (\$300,000)**
- These Calculations can also be cross referenced in their Proforma Submitted (Submittal 7 and Business Plan Submittal 4.

**F. MAG Conclusion:**

Creative Food Group clearly intended to propose a MAG of \$ 300,000. Their Rent Calculations on Submittal 5 and the cross referenced line item on their P&L Roll Up match exactly. A TYPO would be either writing one or two numbers wrong or writing in Letters one amount and in numbers a different amount.

Creative Food Group clearly proposed a MAG of \$ 300,000 with a First Year Percentage Rent (% Rent) of \$369,750.

Each Proposer was supplied with the same Official form. Each Proposer filled out, executed and submitted the Official Submittal 5, therefore each Proposer must be held responsible for their initial submittal. Any change in the procedure must be made open and available to all proposers.

**NOTE – It’s is contrary to settled law to “give preferential treatment” or award to or give Preference to anyone in an RFP Process.** (As stated in cover letter and case law (Exhibit “A”))

**IV. CONCESSIONS FEES as Published in the RFP – Page 12**

**Concession Fee during the Primary Term** During each year of the Primary Term, Concessionaire shall pay to City the greater of the **Percentage Fee** or the **Minimum Annual Concession Fee (“MAG”)**, as follows:

- **Percentage Fee.** The “Percentage Fee” is the sum of the percentages of Gross Revenues, as proposed by Selected Respondent.
- **MAG Definition.** The MAG for the first year of the Primary Term of the Contract is determined as the successful proposer’s **MAG Offer (Submittal 5)** for the first Lease Year and is adjusted annually. In the second and later years of the Primary Term, the MAG is 85% of the prior year’s total Percentage Fee, but never less than the MAG during the first year of the Primary Term.

**SUBMITTAL 5 DETAIL BY PROPOSER**

	<b>Year 1 Sales</b>	<b>Percentage Fee</b>	<b>Year 1</b>	<b>MAG Offer Year 1</b>
MSE	\$ 2,886,000	\$ 351,000		\$ 300,000
Creative Food	\$ 3,000,000	\$ 369,750		\$ 300,000
OHM	\$ 3,900,000	\$ 467,600		\$ 397,460

ALL Year 1 Sales, Percentage Fee Year 1 and MAG Offer Year 1 can be cross referenced to the Pro Formas submitted by each company.

Instructions on how to calculate Percentage Rents and MAG are detailed in several places in the RFP Document