



SAN DIEGO COUNTY
REGIONAL AIRPORT AUTHORITY
STAFF REPORT

Item No.

7

Meeting Date: **OCTOBER 4, 2012**

Subject:

Authorize the Rejection of the Claim of Diego Concession Group, LLC

Recommendation:

Adopt Resolution No. 2012-0108, authorizing the rejection of the claim of Diego Concessions Group, LLC.

Background/Justification:

Claimant Diego Concessions Group, LLC ("DCG") filed a claim (Attachment A) on August 27, 2012, alleging that it suffered damages when the Board of the San Diego County Regional Airport Authority ("Authority") failed to award a concession agreement to DCG.

In 2011, the Authority issued a Request for Proposals ("RFP") for new food, beverage and retail concessions at the San Diego International Airport ("Airport"). The food, beverage and retail opportunities were grouped into packages with RFP provisions designed to limit the percentage of concession opportunities that could be awarded to any one company. DCG alleges in its claim that it was the bidder with the best monetary bid for the food service packages on which it bid and that the Authority did not make its selections using the evaluation criteria set forth in the RFP. Specifically, DCG alleges that the terms of the RFP were not honored by the Authority because concessionaires were selected on a basis other than using the terms and conditions set forth in the RFP. DCG also alleges that after the first RFP was withdrawn, the Authority had discussions with other potential concessionaires to the detriment of DCG. DCG further alleges that when the selectee, High Flying Foods, was unable to perform, the Authority selected another bidder for the concessions agreement without contacting DCG. And finally, DCG alleges that the Authority representatives falsely stated that DCG had failed to provide the necessary financial information to support its bid. DCG claims damages in excess of \$500,000 to include the costs and expenses associated with retaining attorneys, consultants, employee man hours and various out of pocket expenses.

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DCG filed a protest and an appeal during the RFP process wherein DCG made the same allegations as are now being raised in its claim. The Authority investigated the allegations made by DCG both at the protest level and the appeal level and made written findings that: (1) the selection and award process outlined in the RFP was followed; (2) no improper communication occurred during the RFP process; (3) financial benefit was only one of the criteria considered in the selection process and the RFP did not require award to the proposer who guaranteed the largest financial return to the Authority. [Attached as Exhibit A and Exhibit B are the Authority's written findings to the protest and appeal filed by DCG].

DCG makes two new claims not included in its original protest and appeal: (1) the Authority was required to contact DCG before it awarded a concession agreement to the next highest ranked proposer; and, (2) on June 22, 2012, Authority representatives falsely stated that DCG had failed to provide the necessary financial information to support its bid.

In response to the first new claim, the RFP allows the Authority to award a concession agreement to the next highest ranked proposer if the highest ranked proposer is unable to execute the concession lease. [RFP, Parts 6 and 10]. On September 1, 2011, the Authority awarded a concession lease to High Flying Foods for Food Service Package #6R. [Resolution No. 2011-0113]. However, on March 2, 2012, High Flying Foods notified the Authority that it was unable to execute the lease for Food Service Package #6R. Thereafter, on April 12, 2012, the Authority awarded a concession lease for Food Package #6R to SSP America, Inc. ("SSP"), the next highest ranked proposer. [Resolution No. 2012-0042]. The Authority's award of a concession lease to SSP, the next highest ranked proposer, is consistent with the provisions of the RFP. Furthermore, there is no requirement that the Authority notify DCG, the lowest ranked proposer, of its intent to award to SSP.

In response to the second new claim, staff conducted an investigation and found no evidence that such a statement (as alleged by DCG) was made on or about June 22, 2012. Further investigation into this allegation reveals: (1) the RFP required newly-formed organizations to provide certified statements of the net worth of the prime participants in the organization. DCG provided tax returns for Michelle Rojas-Siry but failed to provide certified statements of net worth for all prime participants; (2) the RFP required Partnerships/Individuals to provide balance sheet and income statements for the last three (3) fiscal years prepared in accordance with GAAP reflecting the current financial condition of the partners or individuals submitting the Proposal, also including a balance sheet and income statement of any significant financial events occurring subsequent to the closing date of the most recent financial statements and the three most recent completed IRS tax returns. DCG did not provide this information but did provide some financial information for a hotel and restaurant not operated DCG; (3) the lack of financial information for DCG resulted in the Authority's inability to determine financial ratios; and (4) DCG received the maximum points for their proposed MAG. Based upon the above, DCG failed to provide financial information requested in the RFP. For the reasons set forth above, DCGs's claim should be denied.

Fiscal Impact:

Not applicable.

Authority Strategies:

This item supports one or more of the Authority Strategies, as follows:

- Community Strategy Customer Strategy Employee Strategy Financial Strategy Operations Strategy

Environmental Review:

- A. California Environmental Quality Act: This Board action is not a project that would have a significant effect on the environment as defined by the California Environmental Quality Act (CEQA), as amended. 14 Cal. Code Regs. §15378. The Board action is not a "project" subject to CEQA. Cal. Pub. Res. Code §21065.
- B. California Coastal Act: This Board action is not a "development" as defined by the California Coastal Act. Cal. Pub. Res. Code §30106.

Equal Opportunity Program:

Not applicable.

Prepared by:

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PARALEGAL

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August 23, 2012

BY HAND DELIVERY

Ms. Thella F. Bowens
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Mr. Robert H. Gleason
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Amy S. Gonzalez, Esq.
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Re: San Diego County Regional Airport Authority Concessions RFP
Our Client: Diego Consulting Group
Our File No. 11737.00004

Dear Sirs or Madams:

We represent Diego Concession Group, LLC ("DCG"), which, as you know, was one of the potential concessionaires bidding on the Airport's Concession RFP. Although DCG has already entered I not a dialogue with the San Diego County Regional Airport Authority ("Authority") in an effort to address its concerns, this letter is sent to satisfy any statutory obligations under California Government Code Section 910, et seq., and the following information is provided pursuant to that Government Code Section.

1. Name and Address of the Claimant

Diego Concessions Group, LLC
1835 Columbia Street, Unit 204
San Diego, California 92101

2. Address to Which Notices Should be Sent

Gregory D. Hagen
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
655 West Broadway, Suite 900
San Diego, CA 92101

3. Circumstances Giving Rise to Claim

On or about February 2, 2011, the Authority issued an RFP for the concessions at the airport. On or about July 12, 2011, the Authority issued a revised and/or amended RFP for food service packages 1A, 2A, 3a and 4A. DCG was one of the concessionaires providing bids in response to these RFPs. Pursuant to the terms and conditions of the RFPs, DCG provided bid proposals for concession packages 1, 2, and 6(4A) (also numbered 6A or 4A). In fact, DCG provided the best monetary bid for each of the packages upon which it bid. DCG followed bid procedures; however, the bid packages were awarded to other concessionaires. During that timeframe, DCG believes that the terms of the RFP issued by the Authority were not honored by it; but, instead, concessionaires were selected on a basis other than the parameters set forth in the RFP package. Moreover, certain packages, including Package No. 6, later 4A or 6, were withdrawn, and discussions were held with other concessionaires to the detriment of DCG. Even after the selected concessionaire, High Flying Foods, was unable to perform, DCG, having provided the best monetary bid, was not selected, nor even contacted in relation to this bid package. Instead, this package was awarded to SSP America. Making matters worse, the Authority representatives stated, falsely, on or about June 22, 2012 that DCG had failed to provide the necessary financial information to support its bid. This is contrary to representations of the Authority made directly to DCG, that it had provided all of the necessary financial documentation.

4. General Description of Damages

As a result of the Authority's conduct in relation to the concessions RFP, DCG incurred costs and expenses, including such expenses in retaining attorneys and consultants and devoting numerous employee man hours to this task, in addition to various other out of pocket expenses.

5. Name of Public Employees Causing the Damage

DCG does not know all of the authority employees who caused its damages, but identifies the following individuals who were involved in the process resulting in those damages: Jana Vargas, Director, Procurement; Nyle Marmion, Manager, Concession Development; Bob Silvas, Director, Small Business Development; Karie Webber, Senior Procurement Analyst; Robert Gleason, Board Chair, Executive Committee Member; Thella F. Bowens, President, CEO; Laurie Berman, Board Member; Bruce R. Boland, Board Member; Greg Cox, Board Member; Jim Desmond, Board Member; Lloyd B. Hubbs, Board Member; Jim Panknin, Board Member; Pedro Reyes, Board Member; Paul Robison, Board Member; Tom Smisek, Board

Member; Anthony Young, Board Member; and Patrick Gleason (Airport Consultant or employee re Concession Consulting).

6. Amount Claimed

It is anticipated that this claim will be in excess of \$500,000 and thus would not qualify as a limited jurisdiction case.

7. Conclusion

Please respond to this claim within 45 days as required by Government Code Section 912.4 et seq.

Very truly yours,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP



Gregory D Hagen

GDH:sas



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Exhibit A

August 19, 2011

Via E-Mail and US Mail
gregory.hagen@wilsonelser.com

Gregory D. Hagen
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
655 West Broadway, Suite 900
San Diego, CA 92101

For: Diego Concessions Group

Re: Protest Letter, Food Service and Retail Concessions RFP and Food Service Concessions Supplemental RFP

Dear Mr. Hagen:

On August 16, 2011, the San Diego County Regional Airport Authority ("Authority") received a letter from Diego Concessions Group ("DCG") formally protesting: (a) the Authority's recommendation of award of a concession lease to other responsive bidders for the Food Service and Retail Concessions RFP issued February 2, 2011 ("RFP"), Food Service Package 1; (b) the Authority's rejection of proposals received in response to RFP Food Service Packages 2 and 6; and (c) the award of concession leases for Food Service Concessions Supplemental RFP issued July 12, 2011 ("Supplemental RFP"), Food Service Packages 1A, 2A, 3A and 4A; however, DCG submitted only to packages 1A & 4A. Each assertion made by DCG in its protest letter is set forth below and followed by the Authority's response.

First Assertion: "The Evaluation Panel Violated Part 1, Section I of the RFP" because the RFP states that the Authority reserves the right to modify, amend or withdraw RFP documents at any time prior to the date and time specified for receipt of proposals.

Procurement Administrator's Finding: DCG's assertion is flawed because it fails to recognize the following provisions included in the RFP (issued on February 2, 2011) clearly stating that the Authority may reject proposals at any time and is not required to respond to any proposal submitted:

- "The Authority reserves the right to cancel or modify the terms of this RFP at any time. The Authority will provide Respondents with written notice of any cancellation or modification. The Authority additionally reserves the right to accept or reject any or all proposals." [RFP, Part 2.N.].
- "The Authority reserves the right to postpone the Proposal submittal due date or to withdraw this RFP, or portions of this RFP, at any time." [RFP, Part 6.D.].



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- "The President/CEO reserves the right to reject any and all proposals . . . to withdraw this RFP . . . The Authority shall not be obligated to respond to any proposal submitted nor shall it be legally bound in any manner whatsoever by the receipt of a proposal.: [RFP, Part 14.A.]

After receiving proposals for Food Service Packages 2 and 6 in response to the RFP, the Authority rejected all proposals received for Food Packages 2 and 6 pursuant to the provisions set forth above. The Authority's action of rejecting the RFP after the proposals were received is consistent with the provisions of the RFP. Public Utilities Code §170040 states that the Authority may contract with any department or agency of the United States, with any state or local governmental agency, or with any person **upon those terms and conditions that the Authority finds are in its best interests.**

(Emphasis added). Authority Policy 6.01 states that the Authority shall grant leases "on a competitive basis to the prospective tenant that in the opinion of the Authority (1) proposes a development or utilization that fulfills Authority land use and development criteria for the property; (2) demonstrates an economically feasible program that will produce a market value rental return to the Authority over the term of the lease; and (3) possesses the financial capacity and managerial ability to develop and maintain the property at its highest and best use over the term of the lease." Consistent with the Public Utilities Code and Authority Policy, the RFP allows the Authority to reject all proposals, to withdraw or cancel the RFP at any time, to not award a lease and to take any actions that are in the best interest of the Authority. The right of the Authority to reject all proposals is consistent with the law in California. [Public Utilities Code §170040; *Swanson v. Hildebrand* (1949) 94 Cal. App. 2d 161; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 136 P.3d 194].

DCG cites to Public Contract Code §§10180 and 10344 in support of its protest. These sections apply to the award of public works projects by state agencies —the Authority is not a state agency and the RFP does not concern a public works project. It was determined to be in the best interest of the Authority and consistent with the terms of the RFP to reject all proposals and issue a Supplemental RFP.

In addition, DCG's protest to the Authority's action of rejecting the proposals received for Food Packages 2 and 6 is untimely. On July 12, 2011, the Authority notified DCG of its rejection of all proposals and intent to issue a Supplemental RFP. The Protest Procedures set forth in the RFP [Part 14.G.] required DCG to submit its protest no later than July 19, 2011. The RFP states that failure by a party originating a protest to comply with these procedures shall constitute a waiver of any right to further pursue the protest. [RFP, Part 14.G.]. DCG's protest was not received until August 16, 2011. Thus, DCG's protest as to the Authority's rejection of proposals for Food Packages 2 and 6 is untimely.

Accordingly, the Protest is denied as to DCG's First Assertion for two separate reasons, each of which standing alone would be and is sufficient to reject the Protest.



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Second Assertion: "The Authority Improperly Decided to Make Changes to the RFP Packages After Qualifying Submissions Were Made by DCG". DCG asserts that because it was the only qualified respondent on Packages 2 and 6, the Authority was required to award a concession lease to DCG and that it was "improper for the Authority to withdraw or reconstitute these packages after they had been submitted."

Procurement Administrator's Finding: DCG's assertion is flawed because it fails to recognize the following provisions included in the RFP clearly stating that the Authority may cancel the RFP at any time, may reject proposals at any time, and is not required to respond to any proposal submitted:

- "The Authority reserves the right to cancel or modify the terms of this RFP at any time. The Authority will provide Respondents with written notice of any cancellation or modification. The Authority additionally reserves the right to accept or reject any or all proposals." [RFP, Part 2.N].
- "The Authority reserves the right to postpone the Proposal submittal due date or to withdraw this RFP, or portions of this RFP, at any time." [RFP, Part 6.D.].
- "The President/CEO reserves the right to reject any and all proposals . . . to withdraw this RFP . . . The Authority shall not be obligated to respond to any proposal submitted nor shall it be legally bound in any manner whatsoever by the receipt of a proposal." [RFP, Part 14.A.]

After receiving proposals for Food Service Packages 2 and 6 in response to the RFP, the Authority rejected all proposals pursuant to the provisions set forth above. The Authority's rejection of proposals after receipt is consistent with the provisions of the RFP. Public Utilities Code §170040 states that the Authority may contract with any department or agency of the United States, with any state or local governmental agency, or with any person **upon those terms and conditions that the Authority finds are in its best interests.** (Emphasis added). Authority Policy 6.01 states that the Authority shall grant leases "on a competitive basis to the prospective tenant that in the opinion of the Authority (1) proposes a development or utilization that fulfills Authority land use and development criteria for the property; (2) demonstrates an economically feasible program that will produce a market value rental return to the Authority over the term of the lease; and (3) possesses the financial capacity and managerial ability to develop and maintain the property at its highest and best use over the term of the lease." Consistent with the Public Utilities Code and Authority Policy, the RFP allows the Authority to reject all proposals, to withdraw or cancel the RFP at any time, to not award a lease and to take any actions that are in the best interest of the Authority. The right of the Authority to reject all proposals is consistent with the law in California. [Public Utilities Code §170040; *Swanson v. Hildebrand* (1949) 94 Cal. App. 2d 161; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 136 P.3d 194].



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DCG cites to Public Contract Code §§10180 and 10344 in support of its protest. These sections apply to the award of public works projects by state agencies —the Authority is not a state agency and the RFP does not concern a public works project. It was determined to be in the best interest of the Authority and consistent with the terms of the RFP to reject all proposals and issue a supplemental RFP which constitutes a separate and independent competitive process.

In addition, DCG's protest to the Authority's rejection of all proposals for Food Packages 2 and 6 is untimely. On July 12, 2011, the Authority notified DCG of its rejection of all proposals and intent to issue a Supplemental RFP. The Protest Procedures set forth in the RFP [Part 14.G.] required DCG to submit its protest no later than July 19, 2011. The RFP states that failure by a party originating a protest to comply with these procedures shall constitute a waiver of any right to further pursue the protest. [RFP, Part 14.G.]. DCG's protest was not received until August 16, 2011. Thus, DCG's protest as to the Authority's rejection of proposals for Food Packages 2 and 6 is untimely.

Accordingly, the Protest is denied as to DCG's Second Assertion.

Third Assertion: "The Authority Treated DCG in a Discriminatory Manner, Particularly in Light of Its Response to the Retail Concession Packages". The Authority "belatedly withdrew" the packages, reconstituted the packages and opened bidding to entities that had not provided bids on the packages.

Procurement Administrator's Finding: DCG's assertion is flawed because it fails to recognize the Authority's right to reject all proposals at any time, to cancel the RFP at any time and to not enter into an agreement in response to proposals received. In addition, DCG fails to recognize that the Supplemental RFP issued July 12, 2011 ("Supplemental RFP") is a separate and distinct solicitation process. Specifically, the RFP contains the following provisions:

- "The Authority reserves the right to cancel or modify the terms of this RFP at any time. The Authority will provide Respondents with written notice of any cancellation or modification. The Authority additionally reserves the right to accept or reject any or all proposals." [RFP, Part 2.N.].
- "The Authority reserves the right to postpone the Proposal submittal due date or to withdraw this RFP, or portions of this RFP, at any time." [RFP, Part 6.D.].
- "The President/CEO reserves the right to reject any and all proposals . . . to withdraw this RFP . . . The Authority shall not be obligated to respond to any proposal submitted nor shall it be legally bound in any manner whatsoever by the receipt of a proposal." [RFP, Part 14.A.]

After receiving proposals for Food Service Packages 2 and 6 in response to the RFP, the Authority rejected all proposals pursuant to the provisions set forth above. The



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Authority determined that it was in its best interest to re-package the locations to promote increased competition and for other economic and administrative reasons. The Authority was not required to proceed with the evaluation process once this determination was made and the Authority was not required to award concession leases to DCG because it was the only proposer. The Authority's action of rejecting proposals after receipt but before evaluation is consistent with the provisions of the RFP. The Authority's decision to not award a concession lease as a result of the RFP process is consistent with the provisions of the RFP. Public Utilities Code §170040 states that the Authority may contract with any department or agency of the United States, with any state or local governmental agency, or with any person **upon those terms and conditions that the Authority finds are in its best interests.** (Emphasis added). Authority Policy 6.01 states that the Authority shall grant leases "on a competitive basis to the prospective tenant that in the opinion of the Authority (1) proposes a development or utilization that fulfills Authority land use and development criteria for the property; (2) demonstrates an economically feasible program that will produce a market value rental return to the Authority over the term of the lease; and (3) possesses the financial capacity and managerial ability to develop and maintain the property at its highest and best use over the term of the lease." Consistent with the Public Utilities Code, the RFP allows the Authority to reject all proposals, to withdraw or cancel the RFP at any time, to not award a lease and to take any actions that are in the best interest of the Authority. The right of the Authority to reject all proposals is consistent with the law in California. [Public Utilities Code §170040; *Swanson v. Hildebrand* (1949) 94 Cal. App. 2d 161; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 136 P.3d 194].

DCG cites to Public Contract Code §§10180 and 10344 in support of its protest. These sections apply to the award of public works projects by state agencies —the Authority is not a state agency and the RFP does not concern a public works project.

The Authority did not discriminate against Diego Concession Group. The Authority determined that changes to Food Packages 2 and 6 would result in a greater response which has been proven to be the case by the number of responses received to the Supplemental RFP. The reason for a different treatment in Retail Package 6 is that a reissue of the package would not have resulted in an increase in responses.

Accordingly, the Protest is denied as to Diego Concessions Group's Third Assertion.

Fourth Assertion: "The Authority has failed to follow its own policies, particularly Article II, Section 2.01(1)". This assertion is based upon allegations that: (1) the intent of the RFP was that the packages be scored and that DCG's proposal should have been scored; and (2) the Authority's Selection Panel failed to follow the evaluation criteria, disregarding – without notice, and after the submissions have been made - all of their evaluation criteria and scoring criteria in favor of a murky and undisclosed ranking system.



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Procurement Administrator's Finding: DCG's assertion that the Authority was required to score the proposals submitted in response to the RFP is flawed because it fails to recognize the Authority's right to reject all proposals at any time, to cancel the RFP at any time and to not enter into an agreement in response to proposals received. Specifically, the RFP contains the following provisions:

- "The Authority reserves the right to cancel or modify the terms of this RFP at any time. The Authority will provide Respondents with written notice of any cancellation or modification. The Authority additionally reserves the right to accept or reject any or all proposals." [RFP, Part 2.N.].
- "The Authority reserves the right to postpone the Proposal submittal due date or to withdraw this RFP, or portions of this RFP, at any time." [RFP, Part 6.D.].
- "The President/CEO reserves the right to reject any and all proposals . . . to withdraw this RFP . . . The Authority shall not be obligated to respond to any proposal submitted nor shall it be legally bound in any manner whatsoever by the receipt of a proposal." [RFP, Part 14.A.]

After receiving proposals for Food Service Packages 2 and 6 in response to the RFP, the Authority rejected all proposals pursuant to the provisions set forth above. The Authority determined that it was in its best interest to repackage the locations to promote increased competition and for other economic and administrative reasons. The Authority was not required to proceed with the evaluation process once this determination was made and the Authority was not required to award concession leases to DCG because it was the only proposer. In addition, the Authority was not required to award concession leases to DCG because it was the only respondent who submitted proposals for Food Packages 2 and 6. The Authority's action of rejecting proposals for Food Packages 2 and 6 after receipt but before evaluation is consistent with the provisions of the RFP. The Authority's decision to not award a concession lease for Food Packages 2 and 6 as a result of the RFP process is consistent with the provisions of the RFP.

Public Utilities Code §170040 states that the Authority may contract with any department or agency of the United States, with any state or local governmental agency, or with any person **upon those terms and conditions that the Authority finds are in its best interests**. (Emphasis added). Authority Policy 6.01 states that the Authority shall grant leases "on a competitive basis to the prospective tenant that in the opinion of the Authority (1) proposes a development or utilization that fulfills Authority land use and development criteria for the property; (2) demonstrates an economically feasible program that will produce a market value rental return to the Authority over the term of the lease; and (3) possesses the financial capacity and managerial ability to develop and maintain the property at its highest and best use over the term of the lease." Consistent with the Public Utilities Code and Authority Policy, the RFP allows the Authority to reject all proposals, to withdraw or cancel the RFP at any time, to not award a lease and to take any actions that are in the best interest of the



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Authority. The right of the Authority to reject all proposals is consistent with the law in California. [Public Utilities Code §170040; *Swanson v. Hildebrand* (1949) 94 Cal. App. 2d 161; *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 136 P.3d 194].

DCG cites to Public Contract Code §§10180 and 10344 in support of its protest. These sections apply to the award of public works projects by state agencies —the Authority is not a state agency and the RFP does not concern a public works project.

In addition, DCG's protest to the Authority's action of rejecting all proposals for Food Packages 2 and 6 is untimely. On July 12, 2011, the Authority notified DCG of its rejection of all proposals and intent to issue a Supplemental RFP. The Protest Procedures set forth in the RFP [Part 14.G.] required DCG to submit its protest no later than July 19, 2011. The RFP states that failure by a party originating a protest to comply with these procedures shall constitute a waiver of any right to further pursue the protest. [RFP, Part 14.G.]. DCG's protest was not received until August 16, 2011. Thus, DCG's protest as to the Authority's rejection of proposals for Food Packages 2 and 6 is untimely.

DCG's assertion that the Authority did not follow the evaluation process set forth in the RFP for the evaluation of Food Package 1 is without merit. Nothing was done arbitrarily. DCG's proposal to Food Package 1 was properly evaluated. The RFP states that "[a]n evaluation panel ("Panel") established by the Authority will evaluate the Proposals in accordance with Part 5." [RFP, Part 4.A., page 23]. Part 5 provides that the Proposals received will be evaluated in detail in accordance with the following criteria: (1) company background, experience and financial capacity; (2) concept/brand development and merchandise/menus; (3) designs, materials and capital investment; (4) management, staffing plan, and training; (5) operations and maintenance plan; (5) marketing and promotions plan. [RFP, Part 5, page 25]. The RFP goes on to state that the "listed evaluation criteria are not of equal value or decision weight". [RFP, Part 5, page 25]. Panel members were instructed to rank each proposer based upon the criteria set forth in the RFP using their expertise and independent judgment. The scoring by each panel member is subjective and based upon each individual's analysis of the proposals using the evaluation criteria set forth in the RFP. DCG offers no evidence that the evaluation process outlined in the RFP was not followed by the evaluation panel and it would be inappropriate for the Procurement Administrator to independently evaluate the proposals and substitute her judgment for that of the evaluation panel. Furthermore, it has been determined that the evaluation panel followed the evaluation process outlined in the RFP

In addition, DCG's protest to the Authority's award of Food Package 1 is untimely. On July 15, 2011, the Authority notified DCG of its recommendation to award to another firm. The Protest Procedures set forth in the RFP [Part 14.G.] required DCG to submit its protest no later than July 22, 2011. The RFP states that failure by a party originating a protest to comply with these procedures shall constitute a waiver of any right to further



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pursue the protest. [RFP, Part 14.G.]. DCG's protest was not received until August 16, 2011. Thus, DCG's protest as to the Authority's award of a concession lease for Food Package 1 is untimely. Accordingly, the Protest is denied as to DCG's Fourth Assertion.

Fifth Assertion: "The Authority decided in favor of packages that were less financially rewarding".

Authority's Response: DCG's assertion that the Authority did not follow the evaluation process set forth in the RFP for the evaluation of Food Package 1 is without merit. Multiple criteria was considered and used to evaluate all responses. Recommendations were not made solely on financial information provided. The response was evaluated based on all criteria. DCG's proposal to Food Package 1 was properly evaluated. The RFP states that "[a]n evaluation panel ("Panel") established by the Authority will evaluate the Proposals in accordance with Part 5." [RFP, Part 4.A., page 23]. Part 5 provides that the Proposals received will be evaluated in detail in accordance with the following criteria: (1) company background, experience and financial capacity; (2) concept/brand development and merchandise/menus; (3) designs, materials and capital investment; (4) management, staffing plan, and training; (5) operations and maintenance plan; and (5) marketing and promotions plan. [RFP, Part 5, page 25]. The RFP goes on to state that the "listed evaluation criteria are not of equal value or decision weight". [RFP, Part 5, page 25]. Panel members were instructed to rank each proposer based upon the criteria set forth in the RFP using their expertise and independent judgment. The scoring by each panel member is subjective and based upon each individual's analysis of the proposals using the evaluation criteria set forth in the RFP. DCG offers no evidence to support its assertion that the evaluation process outlined in the RFP was not followed by the evaluation panel and it would be inappropriate for the Procurement Administrator to independently evaluate the proposals and substitute her judgment for that of the evaluation panel.

In addition, DCG's protest to the Authority's award of Food Package 1 is untimely. On July 15, 2011, the Authority notified DCG of its recommendation to award to another firm. The Protest Procedures set forth in the Supplemental RFP [Part 14.G.] required DCG to submit its protest no later than July 22, 2011. The RFP states that failure by a party originating a protest to comply with these procedures shall constitute a waiver of any right to further pursue the protest. [RFP, Part 14.G.]. DCG's protest was not received until August 16, 2011. Thus, DCG's protest as to the Authority's award of a concession lease for Food Package 1 is untimely.

It is unclear whether the assertions set forth in number 5 of the Protest are directed at the evaluation process for the Supplemental RFP. The Supplemental RFP requires any protest document to "refer to the specific portion of the document that forms the basis for the protest." [Supplemental RFP, Part 10.G.]. Because DCG failed to follow this provision, the Authority cannot determine whether DCG's assertion is directed at the Supplemental RFP. Assuming DCG asserts that the evaluation process was not followed in the Supplemental RFP, the Authority provides the following response.



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DCG's assertion that the Authority did not follow the evaluation process set forth in the Supplemental RFP for the evaluation of Food Packages 1A and 4A is without merit. The RFP states that "[a]n evaluation panel ("Panel") established by the Authority will evaluate the Proposals in accordance with Part 5." [Supplemental RFP, Part 4.A.]. Part 5 provides that the evaluation of the Proposals "will focus primarily on Financial Offer, Financial Projections and Proposed Concepts/Brands. **Proposals will be evaluated and ranked by the evaluation panel.**" [Supplemental RFP, Part 5]. Panel members were instructed to rank each proposal based upon guidelines provided to them. DCG offers no evidence that the evaluation process outlined in the Supplemental RFP was not followed by the evaluation panel and it would be inappropriate for the Procurement Administrator to independently evaluate the proposals and substitute her judgment for that of the evaluation panel. Furthermore, it has been determined that the evaluation panel followed the evaluation process outlined in the RFP

DCG asserts that it should be given a preference because it is a local business. Federal law prohibits preferences to local businesses in the award of airport concessions. [49 FAR Part 23.79]. Accordingly, the Protest is denied as to DCG's Fifth Assertion.

Based upon the information received, this protest is denied on the grounds set forth herein.

Please be advised that pursuant to Part 14, section G entitled "Protest Procedures" of Supplemental RFP, DCG may appeal this decision. The pertinent section states: If the protest is rejected, the party filing the protest has five (5) working days to file an appeal to the Director of Procurement. The Director will issue a ruling within fifteen (15) working days following receipt of the written appeal. If the Director determines that the protest is frivolous, the party originating the protest may be determined to be irresponsible and that party may be determined to be ineligible for future contract awards."

Sincerely,

A handwritten signature in black ink that reads "Karie Webber".

Karie Webber
Senior Procurement Analyst
San Diego County Regional Airport Authority
P.O. Box 82776 San Diego, CA 92138-2776
619.400.2547



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SAN DIEGO COUNTY
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Exhibit B

P.O. BOX 82776, SAN DIEGO, CA 92138-2776
619.400.2400 WWW.SAN.ORG

August 31, 2011

Via E-mail and US Mail
gregory.hagen@wilsonelser.com

Gregory D. Hagen
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
655 West Broadway, Suite 900
San Diego, CA 92101

Regarding: Appeal of the Authority's denial of the protest filed on behalf of Diego Concessions Group – for Food Service and Retail Concessions – Food Packages 2 and 6.

Dear Mr. Hagen:

On August 26, 2011, the San Diego County Regional Airport Authority ("Authority") received a letter on behalf of Diego Concession Group ("DCG") formally appealing the Authority's denial of the protest filed on behalf of DCG ("Appeal") on the grounds that: (1) The RFP's language restricts the Authority's ability to withdraw and alter RFP terms; (2) Public Utilities Code § 170040 does not trump the RFP; (3) The Authority is not exempt from Public Contracting Laws; (4) The Authority's cited cases do not apply; (5) DCG's appeals are timely; and (6) The Authority apparently had improper contacts with other bidders.

This letter constitutes the written decision of the Procurement Director. Each assertion in the Appeal is summarized and set forth below followed by my determination. I incorporate by reference in this decision and adopt herein the comments and conclusions of Karie Webber, Procurement Administrator, as stated in her letter to you dated August 19, 2011.

First Assertion: The RFP's language restricts the Authority's ability to withdraw and alter RFP terms. The RFP contains conflicting terms and for that reason must be interpreted to limit the President/CEO's ability to reject all proposals to the time prior to the date and time specified for receipt of proposals. There is no evidence that the President/CEO was involved in the decision to withdraw and reissue certain packages.

Response to First Assertion: DCG's first assertion relates to the Authority's ability and actions to withdraw the first RFP, specifically the actions taken by the Authority in connection with the RFP issued on February 2, 2011 (the "first RFP"). Any protest with regard to the first RFP was required to be received by the Authority no later than July 18, 2011. Specifically, the RFP requires a "protest relative to a particular process must be submitted in writing to the President/Chief Executive Officer of the Authority on or before 5:00 p.m. of the 5th business day following notification to the Respondent of a recommendation to award a contract to another firm. The protest shall contain a full and complete statement specifying in detail the grounds of the protest and the facts in support thereof." [RFP, Section 14.G.].



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The RFP goes on to state that the "procedure and time limits set forth in this paragraph are mandatory and are the Respondent's sole and exclusive remedy in the event of a protest. Failure by a party originating a protest to comply with these procedures shall constitute a waiver of any right to further pursue the protest . . ." [RFP, Section 14.G]. All protests regarding the RFP for Food Packages 2 and 6 were required to be received by the Authority no later than 5:00 p.m. on July 18, 2011, the fifth business day following notification that no award would be made and that the Authority was exercising its right to reject all proposals. It was on August 16, 2011, that the Authority received a protest on behalf of DCG with the assertion that "the RFP's language restricts the Authority's ability to withdraw and alter RFP terms". DCG's protest regarding the rejection of Food Packages 2 and 6 was not received by 5:00 pm on July 18, 2011 and is therefore untimely. The First Assertion in the Appeal is rejected on the basis that it is untimely.

Even if the First Assertion in the Appeal is deemed timely, which is categorically denied by this Procurement Director, the following additional response is provided.

Contrary to DCG's assertion, the RFP does not contain conflicting terms regarding the Authority's ability to cancel or modify the terms of the RFP, to withdraw the RFP, or to reject all proposals. The RFP states:

- "The Authority reserves the right to modify, amend, or withdraw RFP documents at any time prior to the date and time specified for receipt of Proposals. The Authority will provide Respondents with written notice of any cancellation or modification." [RFP, Part 2.I].
- "The Authority reserves the right to **cancel or modify the terms of this RFP at any time**. The Authority will provide Respondents with written notice of any cancellation or modification. The Authority additionally reserves the right to accept or reject any or all proposals." (Emphasis added.) [RFP, Part 2.N.].
- "The Authority reserves the right to postpone the Proposal submittal due date or to **withdraw this RFP**, or portions of this RFP, **at any time**." (Emphasis added.) [RFP, Part 6.D.].
- The Authority reserves the right to request clarification of information submitted in any Proposal, to require additional information from any Respondent, or to **reject any or all Proposals for any reason** and to cancel, re-advertise, or postpone the RFP process for the Lease. (Emphasis added.) [RFP, Part 6.E].
- "The President/CEO reserves the right to **reject any and all proposals . . .** to withdraw this RFP . . . The Authority shall not be obligated to respond to any proposal submitted nor shall it be legally bound in any manner whatsoever by the receipt of a proposal. (Emphasis added.) [RFP, Part 14.A.]

The language cited above clearly and broadly grants the Authority the unequivocal right to cancel the RFP or to reject all proposals at any time — which includes both *before* proposals are received and after proposals are received. Furthermore, the RFP states the Authority "shall not be obligated to respond to any proposal submitted nor shall it be legally bound in any manner whatsoever by receipt of a proposal." In addition, the respondents are informed that the RFP "constitutes only an invitation to make proposals and is not a request for a competitive bid for services." [RFP, Part 14.A.]. The one provision that DCG relies upon (while disregarding all other relevant terms) to support its assertion that the Authority cannot cancel or reject the RFP at any time speaks only to modification, amendment or withdrawal of the RFP and ignores all other language in the RFP. In this instance, the Authority rejected all proposals in accordance with the language specified in the RFP.

The Authority's right to alter terms specified or withdraw portions or all of the RFP during the solicitation process in no way restricts the Authority's right to accept or reject any or all proposals received. Contrary to what DCG asserts, the President/CEO directed staff to reject all proposals received for Food Packages 2, 3, 5, and 6 upon a finding and determination that doing so will allow increased competition, which is in the best interest of the Authority. The President/CEO also directed staff to re-package the concession locations in a new and separate Request for Proposals in order to provide more financially sound concessions opportunities than were offered in the first RFP. The Authority's action in rejecting all proposals for Food Packages 2 and 6 is consistent with the provisions of the RFP. The RFP provides the Authority with the right to reject proposals without restriction. All terms in the RFP must be given meaning. The Authority had the absolute right to reject all proposals once received and it did so in accordance with the provisions of the RFP.

In its assertion, DCG implies that the RFP is an "adhesion contract." An adhesion contract is a "standardized contract that, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." [14 Cal. Jur. 3d Contracts §10]. The test of whether a contract is a contract of adhesion is whether the parties are free to alter or negotiate the terms of the proffered agreement. [*Id.*]. The RFP is a request for proposals not a bid. The RFP invites interested respondents to submit a proposal whereby the *respondent* provides the financial offer and the *respondent* offers the type of service to be provided. The RFP clearly states: "[t]his RFP constitutes only an invitation to make proposals and is not a request for a competitive bid." [RFP, Part 14.A.]. DCG's assertion that the RFP is an adhesion contract is without a basis in law or fact. There is no agreement "imposed" on respondents. Respondents, in their sole discretion, are making a financial offer to the Authority along with an offer to provide specific services – all at their own discretion.

Accordingly, DCG's First Assertion is denied on the basis that it is untimely. Even if the First Assertion is deemed timely, which is categorically denied, it is denied on the grounds set forth above.

Second Assertion: Public Utilities Code § 170040 does not trump the RFP. Once the Authority released the RFP to the general public for contracting purposes, it was bound by the terms of that proposal. The Authority was still bound by the laws applicable to it in public contracting situations.

Response to Second Assertion: The Authority followed provisions of the Authority Act and the RFP. The Authority's procurement power is governed by the Authority Act (Public Utilities Code §§170000 *et seq.*); specifically § 170040 which states that the Authority may contract with any department or agency of the United States, with any state or local governmental agency, or with any person upon those terms and conditions that the Authority finds are in its best interests. (Emphasis added.) Authority Policy 6.01 governs the granting of leases, franchises and grants of privileges and states that the Authority shall grant leases "on a competitive basis to the prospective tenant that in the opinion of the Authority (1) proposes a development or utilization that fulfills Authority land use and development criteria for the property; (2) demonstrates an economically feasible program that will produce a market value rental return to the Authority over the term of the lease; and (3) possesses the financial capacity and managerial ability to develop and maintain the property at its highest and best use over the term of the lease." Consistent with the Public Utilities Code and Authority Policy, the RFP invited interested parties to submit proposals regarding the Authority's proposed concession development program. The RFP identifies the evaluation criteria upon which each proposal will be evaluated. The RFP allows the Authority to reject all proposals, to withdraw or cancel the RFP at any time, to not award a lease and to

take any actions that are in the best interest of the Authority. The Authority followed the provisions set forth in the RFP which allow the rejection of proposals at any time.

In response to the assertion that the Public Contract Code applies to the award of a concession lease, please see paragraph below which is incorporated herein by this reference.

Accordingly, the Second Assertion is denied on the grounds set forth above.

Third Assertion: The Authority is not exempt from Public Contracting Laws. The RFP constitutes a "public works contract" because the concession lease requires the concessionaire to build out the concession space.

Response to Third Assertion: The proposed concession lease is not a "public works contract" under Public Contract Code § 1101. Any improvements contemplated by the concession lease are minor and incidental to the operation of a concession at the airport and are not for the benefit of the Authority but rather for the benefit of the concessionaire in operating its business. In addition, any tenant improvements installed by the concessionaire are the property of the concessionaire and may be removed at the termination of the lease.

Because the concession lease is not a public works contract, the provisions of the Public Contract Code cited by DCG do not apply. Public Utilities Code § 170040 states that the Authority may contract with any department or agency of the United States, with any state or local governmental agency, or with any person upon those terms and conditions that the Authority finds are in its best interests. (Emphasis added.) Authority Policy 6.01 states that the Authority shall grant leases "on a competitive basis to the prospective tenant that in the opinion of the Authority (1) proposes a development or utilization that fulfills Authority land use and development criteria for the property; (2) demonstrates an economically feasible program that will produce a market value rental return to the Authority over the term of the lease; and (3) possesses the financial capacity and managerial ability to develop and maintain the property at its highest and best use over the term of the lease." Consistent with the Public Utilities Code and Authority Policy, the RFP allows the Authority to reject all proposals, to withdraw or cancel the RFP at any time, to not award a lease and to take any actions that are in the best interest of the Authority. The right of the Authority to reject all proposals is consistent with the law in California. [Public Utilities Code § 170040; *Swanson v. Hildebrand* (1949) 94 Cal. App. 2d 161].

Assuming *arguendo* that the proposed concession lease is a "public works contract" under the Public Contract Code, the Authority is not required to engage in a competitive bidding process. The Authority, like other governmental entities, has the powers and authorities set forth in its enabling statute (Public Utilities Code §§ 170000 *et seq.*). The Authority's enabling statute does not require the Authority to engage in competitive bidding with respect to any contracts. The Authority's enabling statute merely states: "The Authority may contract with any department or agency of the United States, with any state or local governmental agency, or with any person upon those terms and conditions that the Authority finds are in its best interests." (Pub. Util. Code § 170040) (Emphasis added.) Similarly, no other California statute requires the Authority to engage in competitive bidding. California case law provides that a public entity such as the Authority is not required to engage in competitive bidding unless a statute specifically imposes such a requirement on the public entity. [See *San Diego Service Authority for Freeway Emergencies, et al v. The Superior Court of San Diego, et al* (1988) 198 Cal.App.3d 1466. ("[A]bsent a statutory requirement, a public entity is not bound to engage in competitive bidding . . . Notwithstanding the powerful purposes served by competitive bidding, there is no all-pervasive public

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policy, that requires all public entities to engage in that practice. Rather the legislature imposes competitive bidding requirements on public entities within its purview when the legislature determines it is in the public interest to do so . . . The enabling legislation does not set forth any limitations on a service authority's ability to contract. We must presume that if the legislature had wanted to require competitive bidding in all instances it would have done so specifically." (Emphasis added); and *Construction Industry Force Account Council, et al., v. Amador Water Agency* (1999) 71 Cal.App.4th 810. ("[A]bsent a statutory directive, a public entity is not bound to engage in competitive bidding.") (Emphasis added.) Competitive bidding is for the protection of the taxpaying public and not for the benefit and enrichment of the bidders. (*M & B Construction v. Yuba County Water Agency*, 68 Cal.App.4th 1353, 1360 (1999). Competitive bidding provisions must be construed from a practical perspective, lest we deny the public agency the authority to deal with problems in a sensible, practical way. (*bid.*)]"

The Public Contract Code does not contain a provision requiring the Authority to engage in competitive bidding. However, Authority Policy 5.02 addresses the procurement of contracts for public projects and permits the Authority to use a process that differs from the typical competitive bidding process for the award of agreements for public projects. Policy 5.02 provides flexibility in that it does not require contracts to be awarded to the lowest responsive and responsible bidder. Paragraph 1(d)(iv) of Policy 5.02 states: "After the time for submission of bids has expired, the Board may award a contract to the bidder whose bid the Board determines to be in the best interests of the Authority, taking into account: (a) the bidder's qualifications, fitness, capacity and experience; (b) factors relating to the public interest; (c) consideration of schedule and price where time has a financial impact and (d) such other factors as the Board reasonably deems appropriate and in the best interest of the Authority." If the concession lease is a public works contract, which is categorically denied, Policy 5.02 allows the Authority to award the concession lease to the entity that it finds to be in the best interest of the Authority.

Assuming *arguendo* that the concession lease is a "public works contract" and that the Authority is required to engage in competitive bidding as outlined in the Public Contract Code, an exception is appropriate in this instance because competitive bidding is undesirable and impractical. If competitive bidding is required by statute, ordinance or charter, there are well-recognized exceptions to the competitive bidding rule. One exception is where the nature of the subject of the contract is such that competitive proposals would be unavailing or would not produce an advantage, and the advertisement for competitive bid would thus be undesirable, impractical, or impossible. (*Graydon v. Pasadena Redevelopment Agency* (1980) 104 Cal.App.3d 631, 635, 636 citing *Kennedy v. Ross* (1946) 28 Cal.2d 569, 170 P.2d 904; *San Francisco v. Boyd* (1941) 17 Cal.2d 606, 110 P.2d 1036; *Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 291 P. 839; *Los Angeles G. & E. Corp. v. Los Angeles* (1922) 188 Cal. 307, 205 P. 125; *Meakin v. Steveland, Inc.* (1977) 68 Cal.App.3d 490, 137 Cal.Rptr. 359; *County of Riverside v. Whitlock* (1972) 22 Cal.App.3d 863, 99 Cal.Rptr. 710; *Hiller v. City of Los Angeles* (1961) 197 Cal.App.2d 685, 17 Cal.Rptr. 579; *Orange County Water Dist. v. Bennett* (1958) 156 Cal.App.2d 745, 320 P.2d 536; *Miller v. Boyle* (1919) 43 Cal.App. 39, 184 P. 421.)

"The rationale for the adoption of the above exception is found in the purposes of the provisions requiring competitive bidding in letting public contracts. Those purposes are to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public. (10 *McQuillin, Municipal Corporations* (3d ed.) § 29.29.) However, the competitive bid requirement is to be construed fairly and reasonably with sole reference to the public interest and in light of the purposes to be accomplished. (*City of Inglewood-L.A. County*

Civic Center Auth. v. Superior Court (1972) 7 Cal.3d 861, 103 Cal.Rptr. 689, 500 P.2d 601; Cyr v. White (1947) 83 Cal.App.2d 22, 187 P.2d 834, 10 McQuillin, Municipal Corporations (3d ed.) § 29.29.) Therefore, it has been held that where competitive proposals work an incongruity and are unavailing as affecting the final result, or where competitive proposals do not produce any advantage, or where it is practically impossible to obtain what is required and to observe such form, competitive bidding is not applicable. (2 Dillon, Municipal Corporations (5th ed.) § 802.)

This principle has been held applicable in California decisions in a variety of situations involving both the purchase of services and products and the construction of public improvements and buildings where it has appeared that competitive bidding would be incongruous or would not result in any advantage to the public entity in efforts to contract for the greatest public benefit. It has also been applied in fact situations in which the governmental entity has entered into contracts for personal services depending upon a peculiar skill or ability (Kennedy v. Ross, supra, 28 Cal.2d 569, 170 P.2d 904; San Francisco v. Boyd, supra, 17 Cal.2d 606, 110 P.2d 1036; Miller v. Boyle, supra, 43 Cal.App. 39, 184 P. 421); contracts for the purchase of patented products (Hodgeman v. City of San Diego (1942) 53 Cal.App.2d 610, 128 P.2d 412); contracts for the provision of services or the construction of public improvements by a government regulated monopoly (Los Angeles G. & E. Corp. v. Los Angeles, supra, 188 Cal. 307, 205 P. 125; County of Riverside v. Whitlock, supra, 22 Cal.App.3d 863, 99 Cal.Rptr. 710); contracts for experimental or unique products and/or services (Hiller v. City of Los Angeles, supra, 197 Cal.App.2d 685, 17 Cal.Rptr. 579); and actions or contracts for the acquisition or disposition of property for a particular use and with a special value to one person (Orange County Water Dist. v. Bennett, supra, 156 Cal.App.2d 745, 320 P.2d 536; Meakin v. Steveland, Inc., supra, 68 Cal.App.3d 490, 137 Cal.Rptr. 359)." (Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal.App.3d 631, 636, 637).

Here, the concession leases contemplated require specialized services, with an emphasis on customer service, creative concepts, and different menu designs. The proposed concession lease agreement does not lend itself to a competitive bid whereby the lease is awarded to the entity that provides the lowest bid. Instead, it is in the Authority's best interest to award the concession leases on the basis of qualifications, innovation and delivery of a concession that meets the traveling public's and the Authority's need and wants.

Accordingly, the Third Assertion is denied on the grounds set forth above.

Fourth Assertion: The Authority's cited cases do not apply.

Response to Fourth Assertion: The cases cited by the Authority support the concept that the provisions of an RFP reserving the right to reject all proposals *at any time* are enforceable. The court in *Swanson v. Hildebrand* (1949) 94 Cal.App.2d 161 noted that the invitation for bids issued by the City of Fresno contained a provision stating that the City Commission "reserves the right to reject any and/or all bids, or award the contract in any manner it considers that the best interest of the city will be served." (*Id.* at 164.) The court found that "... a municipality is not necessarily obligated to award such a contract to the lowest bidder merely because he is the lowest bidder", noting that the City is vested with certain discretionary powers as set forth in the invitation for bids. (*Id.*) Similarly, the Authority is invested with such discretion by the Authority Act, Authority Policy 6.01, and specifically by the provisions of the RFP.

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The case of *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065 is equally informative because it involves an RFP for the lease of a hanger facility at an airport. The RFP provided that Los Angeles World Airports ("LAWA"), the airport operator, could "... reject any or all proposals, could advertise for new proposals, or could 'proceed otherwise.'" (*Id.* at 1068.) The RFP contained the same provision allowing rejection of all proposals as is contained in the Authority's RFP. In addition, the court recognized that competitive bidding is not done for the benefit of the bidders, but rather to "... assure the best social, environmental, and economic result for the public." (*Id.* at 1073.) Although the issue before the court involved the California Public Records Act, the case provides an example of an RFP that includes the same discretionary language as that contained in the Authority's RFP with the comment from the court regarding the purpose of a competitive process.

Fifth Assertion: DCG's appeals are timely. DCG asserts "that the Authority did not 'reject' the proposals because the old RFP was withdrawn, reconstituted and reissued after proposals were made." After receiving the proposals, the Authority withdrew the RFP which is improper.

Response to Fifth Assertion: Contrary to DCG's assertion, the President/CEO directed staff to reject all proposals received for Food Packages 2, 3, 5, and 6 upon a finding that doing so will allow increased competition, which is in the best interest of the Authority. The President/CEO also directed staff to repackage the concession locations in a new and separate Request for Proposal in order to provide more financially sound concessions opportunities than were offered in the first RFP. The Authority's action of rejecting all proposals for Food Packages 2 and 6 is consistent with the provisions of the RFP. The Authority rejected all proposals in accordance with the provisions of the RFP.

Even if the Authority's action of rejecting the proposals is considered a withdrawal of the RFP, such an action is specifically allowed. The RFP states, "The Authority reserves the right to postpone the Proposal submittal due date or to **withdraw this RFP, or portions of this RFP, at any time.**" (Emphasis added.) [RFP, Part 6.D].

Whether the Authority rejected the proposals or withdrew the first RFP, DCG's protest is untimely. The RFP requires a "protest relative to a particular process must be submitted in writing to the President/Chief Executive Officer of the Authority on or before 5:00 p.m. of the 5th business day following notification to the Respondent of a recommendation to award a contract to another firm. The protest shall contain a full and complete statement specifying in detail the grounds of the protest and the facts in support thereof." [RFP, Section 14.G] The RFP goes on to state that the "procedure and time limits set forth in this paragraph are mandatory and are the Respondent's sole and exclusive remedy in the event of a protest. Failure by a party originating a protest to comply with these procedures shall constitute a waiver of any right to further pursue the protest . . ." [RFP, Section 14.G] All protests regarding the RFP for Food Packages 2 and 6 were required to be received by the Authority no later than 5:00 p.m. on July 18, 2011, the fifth business day following notification that no award would be made and that the Authority was exercising its right to reject all proposals. On August 16, 2011, the Authority received a protest on behalf of DCG with the assertion that "the RFP's language restricts the Authority's ability to withdraw and alter RFP terms". DCG's protest regarding the rejection of Food Packages 2 and 6 was not received by 5:00 pm on July 18, 2011 and is therefore untimely.

DCG asserts that the second RFP was a continuation of the first RFP and for that reason their protest was not untimely. The first RFP and the second RFP are separate and distinct processes and for that reason, a protest with regard to the first RFP was required to be filed no later than July 18, 2011.

DCG's protest (and Appeal) addresses the rejection of the proposals received in response to the first RFP and was not received by the Authority on or before July 18, 2011 and is therefore untimely. DCG asserts that the second RFP was a continuation of the first RFP because the second RFP had only a 2 week time frame for respondents to provide responses, had virtually the same locations as the original RFP, had a limited time frame for inquiries and the package designations were #1A, #2A and #4A. These facts do not void the President/CEO's order that the proposals be rejected and that a new RFP be issued. Consistent with the President/CEO's direction, all proposals to Food Packages 2, 3, 5 and 6 were rejected and a new RFP was issued on July 12, 2011 for Food Service Concessions – Packages #1A, #2A, #3A and #4A. Not only was the second RFP separate and distinct from the first RFP, it was issued in accordance with Authority Policy 6.01(1)(b) which states:

“ The Authority shall grant leases —on a competitive basis to the prospective tenant that in the opinion of the Authority (1) proposes a development or utilization that fulfills Authority land use and development criteria for the property; (2) demonstrates an economically feasible program that will produce a market value rental return to the Authority over the term of the lease; and (3) possesses the financial capacity and managerial ability to develop and maintain the property at its highest and best use over the term of the lease. ”

As stated above, Authority Policy requires a competitive process without mandating that a specific process be used. Therefore, an RFP with a two-week time to respond that allows a limited pool of participants to compete for the opportunity complies with both the law and the Authority policy.

Even if DCG's protest is timely, the Authority had the right to reject all proposals. The RFP states:

- “The Authority reserves the right to modify, amend, or withdraw RFP documents at any time prior to the date and time specified for receipt of Proposals. The Authority will provide Respondents with written notice of any cancellation or modification.” [RFP, Part 2.I]
- “The Authority reserves the right to **cancel or modify the terms of this RFP at any time**. The Authority will provide Respondents with written notice of any cancellation or modification. The Authority additionally reserves the right to accept or reject any or all proposals.” (Emphasis added.) [RFP, Part 2.N.]
- “The Authority reserves the right to postpone the Proposal submittal due date or to **withdraw this RFP**, or portions of this RFP, **at any time**.” (emphasis added) [RFP, Part 6.D.].
- The Authority reserves the right to request clarification of information submitted in any Proposal, to require additional information from any Respondent, or to **reject any or all Proposals for any reason** and to cancel, re-advertise, or postpone the RFP process for the Lease. (Emphasis added.) [RFP, Part 6.E]
- “The President/CEO reserves the right to **reject any and all proposals** . . . to withdraw this RFP . . . The Authority shall not be obligated to respond to any proposal submitted nor shall it be legally bound in any manner whatsoever by the receipt of a proposal. (Emphasis added.) [RFP, Part 14.A]

The language cited above clearly grants the Authority the right to cancel the RFP or reject proposals at any time, including both before the proposals are received and after proposals are received. Furthermore, the RFP states the Authority “. . . shall not be obligated to respond to any proposal

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submitted nor shall it be legally bound in any manner whatsoever by receipt of a proposal." In addition, the respondents are informed that the RFP "constitutes only an invitation to make proposals and is not a request for a competitive bid for services." [RFP, Part 14.A] The one provision that DCG relies upon (while disregarding all other relevant terms) in support of its assertion that the Authority cannot cancel or reject the RFP at any time speaks only to modification, amendment or withdrawal of the RFP and ignores all other language in the RFP. In this instance, the Authority rejected all proposals in accordance with the language specified in the RFP.

The Authority's right to alter terms specified or withdraw portions or all of the RFP during the solicitation process in no way restricts the Authority's right to accept or reject any or all proposals received. Contrary to what DCG asserts, the President/CEO directed staff to reject all proposals received for Food Packages 2, 3, 5, and 6 upon a finding that doing so will allow increased competition, which is in the best interest of the Authority. The President/CEO also directed staff to re-package the concession locations in a new and separate Request for Proposal in order to provide more financially sound concessions opportunities than were offered in the first RFP. The Authority's action of rejecting all proposals for Food Packages 2 and 6 is consistent with the provisions of the RFP. The RFP provides the Authority the right to reject the proposals without restriction. All terms in the RFP must be given meaning. The Authority had the absolute right to reject all proposals once received and it did so in accordance with the provisions of the RFP.

DCG's contention that once the Authority receives proposals to an RFP it loses its right to reject all proposals and must by law award an agreement to a proposer is spurious and misguided. Provided the Authority's RFP reserves the right to reject all proposals, which in this case it does, it is settled law that the right to reject is legally permissible.

Accordingly, DCG's Fifth Assertion is denied on the basis that it is untimely. Even if the Fifth Assertion is deemed timely, which is categorically denied, it is denied on the grounds set forth above.

Sixth Assertion: The Authority apparently had improper contact with other bidders. DCG's Appeal cites an email dated July 8, 2011 from Nyle Marmion, Manager of Concession Development to Anthony Alessi at Host providing additional information concerning a "'new entry' point for the concession."

Response to Sixth Assertion: This assertion relates to the first RFP – Food Package #1 the lease for which was recommended and approved by the Board at the August 5, 2011 Board meeting.


On July 6, 2011 the Authority sent a letter via email to both Host International ("Host") and DCG increasing the square footage for Food Package #1 based on architectural and engineering design in the Terminal 2 West expansion. Attached to the letter was a drawing of the proposed layout and space. The RFP permits the Authority to "request clarification of information submitted in any Proposal, or to require additional information from any Respondent". [RFP, Part 6E, page 28] Both Host and DCG were given one week to modify their proposal in light of the increased square footage. On July 8, 2011, Mr. Alessi contacted Nyle Marmion for confirmation on the point of entry in the new concession space. Nyle Marmion confirmed information already specified in the existing drawing via email to Mr. Alessi on July 8, 2011 at 4:25 p.m. and then sent a confirmation including the same information to DCG via email on July 8, 2011 at 4:27 p.m. It is evident by the responses received from both DCG and Host for additional information, that both proposers had an equal understanding of the expanded concept and point of entry. The clarifying communication to both parties complies with the reservations and terms specified in the RFP.

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Accordingly, the Sixth Assertion is denied on the grounds set forth above.

Conclusion: Based upon the information received, the Appeal of the Authority's denial of the protest letter submitted on behalf of DCG is denied on the grounds set forth herein.

Respectfully,

A handwritten signature in black ink that reads "Jana Vargas". The signature is written in a cursive, flowing style.

Jana Vargas
Director, Procurement
San Diego County Regional Airport Authority

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RESOLUTION NO. 2012-0108

A RESOLUTION OF THE BOARD OF THE SAN DIEGO COUNTY REGIONAL AIRPORT AUTHORITY AUTHORIZING THE REJECTION OF THE CLAIM OF DIEGO CONCESSIONS GROUP, LLC.

WHEREAS, on August 22, 2012, Diego Concessions Group, LLC filed a claim with the San Diego County Regional Airport Authority for damages it allegedly incurred as a result of not being awarded a concession lease at San Diego International Airport; and

WHEREAS, at its regular meeting on October 4, 2012, the Board considered the claim filed by Diego Concessions Group, LLC, the report submitted to the Board, and found that the claim should be rejected.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby authorizes the rejection of the claim of Diego Concessions Group, LLC.

BE IT FURTHER RESOLVED that this Board determines this action is not a "project" as defined by the California Environmental Quality Act (CEQA), Cal. Pub. Res. Code §21065; nor is it a "development" as defined by the California Coastal Act, Cal. Pub. Res. Code §30106.

PASSED, ADOPTED, AND APPROVED by the Board of the San Diego County Regional Airport Authority at a regular meeting this 4th day of October, 2012, by the following vote:

AYES: Board Members:

NOES: Board Members:

ABSENT: Board Members:

ATTEST:

TONY R. RUSSELL
DIRECTOR, CORPORATE SERVICES/
AUTHORITY CLERK

APPROVED AS TO FORM:

BRETON K. LOBNER
GENERAL COUNSEL

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