

Vice Chair Carollo: This is actually why it took a little longer to bring up and I asked for some time 'cause I was meeting with the Manager, Finance director, and so forth, in clearing up where exactly the funding was coming from, is it useful, and so forth, and that's why it took longer. And I think now we have, you know, what we all want. And you know, I ask, you know, to call the question.

Chair Sarnoff: All right. So we have a motion. We have a second. Any further discussion gentlemen? Hearing none, seeing none, all in favor, please say "aye."

The Commission (Collectively): Aye.

Vice Chair Carollo: Thank you, by the way.

Chair Sarnoff: Okay. It appears we are at --

Pamela L. Latimore (Assistant City Clerk): Passed as modified?

Chair Sarnoff: As modified.

Vice Chair Carollo: As modified.

RE.3 10-00318a

*Department of
Purchasing*

RESOLUTION

A RESOLUTION OF THE MIAMI CITY COMMISSION APPROVING THE CHIEF PROCUREMENT OFFICER'S DECISION TO DENY THE PROTEST OF ACS STATE & LOCAL SOLUTIONS, INC. , AND TO CONTINUE TO UPHOLD THE PROTEST OF AMERICAN TRAFFIC SOLUTIONS , PURSUANT TO RESOLUTION NO. 10-0110, ADOPTED MARCH 11, 2010.

10-00318a Legislation V1.pdf

10-00318a-SUB-Legislation-Version 2 pdf.pdf

10-00318aSubmittal-Glenn Marcos, Purchasing Director.pdf

Motion by Vice Chairman Carollo, seconded by Commissioner Dunn II, that this matter be ADOPTED FAILED by the following vote.

Votes: Ayes: 2 - Commissioner(s) Carollo and Dunn II

Noes: 3 - Commissioner(s) Gort, Sarnoff and Suarez

A motion was made by Commissioner Gort, seconded by Commissioner Suarez, and was passed unanimously, to reject all proposals for RFP No. 119057 (Traffic Safety Camera Program) and direct the City Manager to issue a new RFP that is clear and ensures competition and that an outside expert not be hired to assist with the new RFP.

Chair Sarnoff: All right, RE.3, protest.

Glenn Marcos (Director, Purchasing Department): Commissioner, good afternoon.

Chair Sarnoff: You're recognized for the record.

Mr. Marcos: Glenn Marcos, Purchasing director. If we can start the bid protest by perhaps allowing me ten minutes of an oral presentation?

Chair Sarnoff: I have no problem and I probably have no expectation of time with you guys, but if I think you're repeating yourself, I will move you along.

Mr. Marcos: Okay.

Chair Sarnoff: All right.

Mr. Marcos: One thing I have to forewarn the Commission, my theme will be a common theme, so it'll be extremely repetitive. So if you get the point, just let me know you've gotten the point.

Chair Sarnoff: We'll give you what's called a 303 analysis in federal court.

Mr. Marcos: If you recall, at the March 11 Commission meeting, you heard a protest by ATS (American Traffic Solutions), claiming that the first-ranked firm, ACS and Redflex, were non-responsible firms. An independent assessment conducted by Fabian Kalapach of the firm HNTB (Howard, Needles, Tammen & Bergendoff) revealed that both ACS and Redflex, at the time of RFP (Request for Proposals) submittal -- and I can't stress that enough -- had not installed a nonintrusive, freestanding red-light photo enforcement equipment as specified and required in the RFP. Again, operative words "as specified and required in the RFP." As a result, I determined and the City Commission concurred to uphold ATS's bid protest because ACS and Redflex were deemed non-responsible firms and award said contract to ATS. Now today we're affording ACS due process, and you will all hear ACS's bid protest, and I implore you not to let the current protester, ACS, to persuade you or confuse the issue at hand. Let me be clear what the issue here is. The issue is quite simple. It is whether or not the protester, ATS, had installed a red-light photo enforcement equipment at the time of RFP submittal as specified and required by the RFP. You are all reminded that the RFP evaluation selection committee review the responses based on the information provided by the firms at the due date and time. The committee did not and could not have reviewed any further information thereafter. You will hear -- you're going to hear today ACS perhaps present evidence after the fact, which was not part of their response. Further arguments that you will hear ACS probably make today. You will hear today ACS claiming that my reversal of the recommendation made by the evaluation committee and City Manager that would have allowed competitive negotiations with ACS is arbitrary and capricious. That argument falls flat in [sic] its face because it is abundantly clear that my determination of ACS's non-responsibility was based on the due diligence review conducted pursuant to the Code of the City of Miami, Section 18-95, and of the RFP, Section 1.34C. Said due diligence review and findings was made by the firm HNTB, not myself, not the City of Miami, but an independent firm. Therefore, the protester cannot argue that the chief procurement officer's reversal of the committee's and City Manager's recommendation was arbitrary and capricious when you have an independent study confirming exactly what we found out. You will further hear that ACS -- that the City Commission -- from ACS that the City Commission approval of my recommendation is a clear violation of Section 18-95(b) of the Code of Miami without so much considering ACS formal protest or provided ACS the reasonable opportunity to rebut the non-responsible determination before it was made final. So I ask you, why are we here today? We are offering them that due process. What is most troubling is that if you recall at the March 11 Commission meeting, I myself, after Commissioner Sarnoff -- Chairperson Sarnoff asked whether or not we can proceed with ACS's protest, I said I would want to give them due process, and that's why we're here today. We're offering and affording them due process. As a result, they have proceeded with submitting their formal protest to address the issue of non-responsibility, per Section 18-95(b), by protesting this award. Therefore, reasonable opportunity to rebut the non-responsibility determination is being afforded to them today, and the City in no shape or form has violated 18.95(b), as they will be stating today. You will further hear ACS claim that "to date" they have installed and begun operating 11 noninvasive signal detection-based red-light systems of the exact specifications required under our RFP in cities throughout Florida, including Bradenton and Miami Beach. However, I must remind you of the decision to deem ACS non-responsible was based upon HNTB's assessment, which concluded that ACS failed to submit documentation or references supporting similar services having been performed in the past at the time of RFP submittal. Once again, I must remind you that the City's basis on conducting its due diligence can be found in the City of Miami Code, the same Section 18-95 and Section 1.34C, determination of

responsibility. Some of the factors listed in the Code and some of the factors listed in the RFP is quite simple. It's right in your face. It can be read in the RFP. Responses will be considered from entities who are regularly engaged in the business of providing the goods/equipment services required by the formal solicitation. Bidder/proposer must be able to demonstrate a satisfactory record of performance and integrity and have sufficient financial material, equipment, facility, personnel resources, and expertise to meet all contractual requirements. The City may consider any evidence available regarding the financial, technical and other qualifications and abilities of a bidder/proposer, including past performance, which includes experience with the City or any other governmental entity in making the award. Based on their own admission -- this is coming straight from their formal protest -- they have acknowledged that the noninvasive, freestanding, self-sustaining system was a very new innovation for the photo enforcement industry at the time of issuance of the RFP in December 2008. That came from them. This is ACS talking. This is not Glenn Marcos talking. This is not the City Manager talking, the City Attorney talking. This is ACS acknowledging this. They further stated in their formal protest that it was developed primarily because of the fact that the state of Florida lacked legislation and program cooperation from FDOT (Florida Department of Transportation). ACS further stated that what may have constituted an incremental lead for ATS in Florida did not serve the ATS technology proven as of January 26, 2009. So now I ask, if this is them talking and they're saying this -- this is coming straight from their own formal bid protest -- then I ask, well, who is acknowledging that ATS has an incremental lead? I didn't say that. Is this ATS -- ACS saying this? Is this the industry speaking or is this the industry experts speaking? I also question the following: If others are acknowledging that ATS may have had an incremental lead in the industry at the time of the RFP submittal on the development and installation of this type of equipment, then logically, one might have to believe or make the assumption of their technology -- make the same assumption of their technology, qualification, record of performance, experience, personal resources, and expertise. If at the time of submission ATS had experience in installing this type of red-light camera system and ACS did not, then I would argue that this strikes the very core of the issue at hand of responsibility. It is for this exact reason that I determined -- that I -- that a determination of responsibility is so critical in this procurement. Having full knowledge that this type of technology was still in the infancy stages and this technology could face legal challenges and consequences to the City, I have a duty to protect the City. I serve and, to the best of my ability, ensure that the procurement process allows for the City to receive a proven technology. The protester will argue today and cite two court cases. They'll end up bringing in that the City of Sweetwater versus Solo Construction Corp. In that court case, the court stated that while a public authority has wide discretion in award of contract for public works on competitive bids, such discretion must be exercised based upon clearly defined criteria and may not be exercised arbitrarily or capriciously. Now I say how can they claim that anybody in the City had acted arbitrarily and capriciously when the criteria and standards can be found right in the RFP, right into [sic] the RFP? Furthermore, the requirements of a traffic safety -- of the traffic safety cameras itself is located in Section 3 in the specifications of the RFP. Therein twice, in plain language, it states cameras shall be installed at the selected locations as a freestanding, self-sustaining system and shall operate independent of the County's existing signal system. As a result, ACS, pursuant to Section 1.34C, must demonstrate to the City that they had been regularly engaged in the business of providing the equipment I just mentioned that was specified in the RFP. In doing so, the City may consider any evidence and other qualifications and abilities of a bidder/proposer, including past performance, which includes experience with any other governmental entity in making the award. You and I already know what the findings were by HNTB, and you're going to continue to hear this. That independent assessment revealed and concluded that ACS did not submit documentation or references supporting similar services having been performed in the past at the time they responded to the RFP and completely deemed the opposite of ATS. So once again, if ACS argues that the City has arbitrarily and capriciously exercised its discretion, this is far from the truth. Moreover, it appears that they want for all of us to define past performance to mean eventually up to the date the RFP's awarded and not way back, not way back to the time of the RFP submittal deadline. So if this is the case and if we're going to continue to allow ACS to

submit evidence after the fact, now you tell me when does the procurement process ever end? Because if you're going to do it for them, then we might as well go ahead and do it for others.

Commissioner Gort: Or throw the whole thing out.

Mr. Marcos: Okay.

Commissioner Gort: That's an option.

Mr. Marcos: So the protester is going to further cite two court cases claiming that responsibility as opposed to responsiveness may be presented after the bid opening and up until the time of an award. Well, ACS, I have news for you. That's exactly what the City did 'cause the City -- after the responses were due and the evaluation committee made its recommendation and the City Manager concurred, we hired HNTB. And HNTB came back and revealed exactly what we know today, that at the time of RFP submittal, you had no clients, no clients in which you had installed similar equipment in the basis of installing a nonintrusive, noninvasive, freestanding equipment. I think that the due diligence was conducted to review and examine and verify on whether the information provided by the respective firms were indeed true and correct. Obviously, when you have an evaluation selection committee, they're only looking at what's being written and submitted. We have our job to verify whether it's indeed true and correct. And let me remind you, it was here where ACS was given the reasonable opportunity to demonstrate more than their adequate experience prior to the non-responsible determination to satisfy the City's concerns. As ACS indicated in their formal protest, the city of Bradenton, Florida, was installed and operational since August 6, 2009. Well, this is exactly my point. This is after January, when the actual RFP's responses were due. Again, this is after the RFP submittal date, but yet, in their RFP submittal, we had some troubling sightings in that RFP submittal. They ended up listing the city of Bradenton under the header "Experienced in Providing Powerful First Impressions" as defined by -- first of all, they ended up -- let me go back. They ended up under the header entitled "Experienced in Providing Powerful First Expressions [sic]." Well, if you look at as far as the definition of experience, I think experience is the fact or the state of having been affected by or gained knowledge through direct observation or participation, or the practical knowledge, skill or practice derived -- that's past tense -- from direct observation of or participation in events or in a particular activity. So I guess I beg of ACS the following question. How can ACS claim experience for a project yet to be performed? Even more glaring is the ACS statement under the header which says that the following list of projects demonstrates their success in providing a well thought-out project implementation. Now I'm going to end up reading that sentence again. They went on to state that the following list of projects demonstrates their success in providing a well thought-out project implementation. If you look at that statement, it gives the general impression that the project had been completed. But a close examination of the words will reveal what perhaps the evaluation committee could not but the due diligence did. A well thought-out project implementation means that it has been designed, but not fully operational and tested. So if I'm sitting as part of the evaluation committee, I can see where I'm reading this, and I do believe that Bradenton is a project that had been undertaken, fully operational and installed. If you want the exhibits, I can go ahead and show you the exhibits. I have the response here. In comparison to ACS's proposal, you have admitted, you being ATS, in your formal protest that ATS had installed a noninvasive, nonphysical, freestanding red-light photo enforcement equipment in the city of Aventura. Well, I think that HNTB confirmed exactly what you just said and what the formal bid protest says. ATS possess such experience by installing similar systems pursuant to the specifications of the RFP by installing similar equipment in several other Florida municipalities, including the city of Aventura. So I'm not sure where is it that ACS can claim that the City engaged in any type of undisclosed reexamination when they, themselves, were contacted by HNTB, and yet never took the opportunity to show otherwise. Today you will hear that they're trying to submit evidence after the fact. And, again, I must remind the City Commission when does the procurement ever end. The protester will probably also incorrectly state that an independent evaluation selection

committee ranked ACS first amongst the five respondents and determined ACS to be qualified, responsive, and responsible. The operative word here is "responsible." I asked how can they end up making that claim when it's the Purchasing Department, not the selection committee members who can decide responsibility?

Chair Sarnoff: Who's on the committee?

Mr. Marcos: I'm sorry?

Chair Sarnoff: Who is on that committee?

Mr. Marcos: We had -- pursuant to the financial integrity principle, you have five -- I believe it was five members. Three of them were external members and two of them from the City, and I can get the names if you need.

Brian May: They're right on your screen, Mr. Chairman.

Chair Sarnoff: Okay.

Mr. May: You can actually see on your screen actually who the selection committees [sic] was and what their qualifications were. I think you'll find they're very qualified.

Mr. Marcos: Okay. May I proceed now?

Mr. May: Absolutely.

Mr. Marcos: Okay. So even though -- and I'm going to end up saying that even though certain criteria evaluated by the committee pertains to responsibility, the City has a duty to further examine the validity of the responses and statements submitted by the respective firms. Anybody can write anything and put it in writing and claim to have such experience. It's our duty -- it's incumbent for the City to do its due diligence. A ruling otherwise will not support a due diligence review. It basically will state that the Procurement Department and the evaluation selection committee, once they make their determination, why even go through a due diligence process. Furthermore, ACS will contend that the City's irrational, myopic analysis appears to completely ignore portions of its own code criteria cited in Section 18-95(c). Well, I'm not sure what you mean by that because of the fact that, once again, it's an independent assessment that concluded that ACS was not responsible. Moreover, ACS will continue to claim that the City has not fully complied with this requirement of Section 18-95(d). And, again, I will continue to reiterate the HNTB findings. In conclusion, I will end up stating that the issue here today is very, very simple. ACS was deemed nonresponsive for not having been engaged in the business of providing a freestanding, self-sustaining, nonintrusive, noninvasive red-light photo enforcement equipment as required by the formal solicitation pursuant to the specifications, Section 3 of the RFP, at the time of RFP submittal. While I do believe and have previously stated on the record that this is a narrow ruling and interpretation, my hands were and are still tied because as ACS stated in their formal protest, the noninvasive, freestanding, self-sustaining equipment was a very new innovation for the photo industry -- photo enforcement industry at the time of issuance of the RFP in December 2008 and developed primarily because of --

Chair Sarnoff: Wait, wait, wait.

Mr. Marcos: -- the fact that the state of Florida --

Chair Sarnoff: Slow down, slow down, slow down, slow down. Read back your last sentence.

Mr. Marcos: I'm sorry. I'm going to start right from the beginning.

Chair Sarnoff: 'Cause I'm trying to listen to what you're saying.

Mr. Marcos: Okay.

Chair Sarnoff: You went too fast.

Mr. Marcos: While I do believe and have previously stated in the record that this is a narrow ruling and interpretation, my hands were and are still tied because as ACS did in their formal protest, the noninvasive, freestanding, self-sustaining system was a very new innovation for the photo enforcement industry at the time of issuance of the RFP back in December 2008 and developed primarily for the state of Florida due to the lack of legislation and program cooperation from FDOT. Therefore, the state of Florida was and still is, unlike any other of their typical municipal clients located outside the state of Florida because it is not -- because the state of Florida is not similarly situated under the same predicament. Does -- this distinction of a freestanding, self-sustaining, nonintrusive and noninvasive red-light photo enforcement equipment is not a preference as ACS will state today. It is a requirement, folks. We're here because of the fact that we're in this predicament. There's no way out. My hands are tied. In closing --

Mr. May: That's right.

Mr. Marcos: -- the decision to deem ACS non-responsible is clearly correct, fair, logical and expected. Therefore, as the chief procurement officer, I am recommending to the Commission to deny the protest of ACS State and Local Solutions, to continue to uphold the protest of American Traffic Solutions, pursuant to Resolution 10-0110, adopted March 11, 2010, and rejecting the City Manager's concurrence with the evaluation selection committee's recommendation and findings.

Chair Sarnoff: What was the last thing you said, rejecting what?

Mr. Marcos: And rejecting the City Manager's concurrence.

Chair Sarnoff: Rejecting the City Manager's --

Mr. Marcos: At that particular time back when we heard the item on March 11, the item was -- the item that was before you was a protest submitted by ATS. And ATS was protesting the evaluation selection committee's findings along with the fact that the past or prior City Manager concurred with that recommendation.

Chair Sarnoff: So you're saying the former City Manager agreed that ACS was responsive?

Mr. Marcos: The City Manager concurred with the findings of the evaluation committee --

Chair Sarnoff: Of the evaluation committee, which rated --

Mr. Marcos: -- but the responsibility aspect had yet --

Chair Sarnoff: Was not done?

Mr. Marcos: -- to take place. Yes.

Chair Sarnoff: So you're -- all you're saying in that sentence is the City Manager agreed with the evaluation committee that rated ACS number one?

Mr. Marcos: That's correct.

Chair Sarnoff: Okay. And then you're saying but that evaluation committee did not get into the issue of responsive and responsible?

Mr. Marcos: Responsibility, the actual due diligence happens after the fact --

Chair Sarnoff: Okay.

Mr. Marcos: -- 'cause we want to know who is the first-ranked firm. And instead of conducting due diligence on all the firms, we wait for concurrence by the City Manager so we can proceed with the due diligence.

Chair Sarnoff: Okay.

Mr. Marcos: Okay. In closing, again, for the third time, I will tell you that I have the duty to inform you that pursuant to Section 18-104 of the City of Miami procurement code, the protester can only argue today the specific facts and laws submitted in their bid protest. Anything beyond that is not permissible. Thank you.

Chair Sarnoff: Thank you. If we do this organized wise, why don't we let you go next and then if they want to respond or reply to your --?

Commissioner Gort: Of course they do.

Mr. May: Sure.

Chair Sarnoff: It'll make a little bit of sense, I think. Just state your name for the record, Mr. May.

Mr. May: Mr. Chairman, members of the Commission, my name is Brian May, with Floridian Partners, offices at 235 Catalonia, in Coral Gables. First of all, appreciate your indulgence today. And I want to start by saying that ACS is a company understands Mr. Marcos' position very clearly and he has put out here something that he says is very simple, which is if you, as a company, did not have installed at the time of the submission of the RFP, okay, then you could not be found to -- you cannot be found either to be responsible or to meet the minimum qualifications under the RFP. And although ACS does not agree with that interpretation, and I would tell you that all the firms, but ATS, who submitted under the RFP would concur with that, everybody thought that experience under the RFP meant -- and I will just show you very quickly what we believe it meant -- it meant that you had to have experience, significant experience in the red-light photo enforcement industry, but no one read it, and I purport to you no one on the evaluation committee read it, nobody in the City Attorney's office read it this way, and nobody in the procurement department read it this way. It wasn't until over a year later, at the behest of a bid protest by ATS, was it determined by the procurement director, not by HNTB, not by anybody else, but by the procurement director that it was a bright-line requirement of the RFP that you had to had [sic] installed one of these noninvasive, nonintrusive, freestanding systems prior to the submission date on the RFP. Here is the big problem though with that assertion. The big problem with that assertion is that by definition, there is only one company, ATS, that could possibly qualify for the RFP under that requirement. And I have a tough time believing that it was the intent of this City Commission or the one that preceded it or you would going forward to draft an RFP that would be meant for only one company to qualify under because that is, in effect, sole-sourcing a contract to a vendor. Now we, again, do not agree with the procurement director's assessment that that's what the RFP called for. And we don't believe that because it's not the norm in the industry. No other city in Florida has put forth a bright-line test that said you had to have it installed prior to the submission date. And the reason is because it is new

technology, it is new for Florida, but the other reason is because all of the top five players in this industry who bid on this RFP and submitted, they are all companies that are in the business of integrating technology in the photo enforcement space. That's what they do. So the three things I'd like to point out to you today is, if you were to take our interpretation and the layman's interpretation of the RFP that you would qualify if you were in the photo enforcement industry, then I find it really hard-pressed to say that ACS, my client, is not qualified under the RFP. We've been in the business for 15 years, okay. We do it all over the country. We do it for the City of Miami Beach now and Bradenton, Florida, and, yes, even though it was after January 26, 2009, ACS is operating a freestanding, noninvasive, nonintrusive system issuing violations in Florida today. So I think it's a real stretch to say under normal circumstances and a normal reading of the RFP that my client was not qualified or didn't meet the minimum specs or wasn't responsible enough to carry out the solution that they proposed. And I would submit to you that's as far-fetched as trying to stretch a rubber band from here to the moon. It might sort of make sense on paper, but when you try it, it just doesn't hold up. It just doesn't make sense and it doesn't work. Now I do want to also point out to you that the five very qualified people on this selection committee, they obviously didn't read the RFP the way that Mr. Marcos has purported. And number two, they certainly were not directed by Mr. Marcos or the Legal Department that that's the way the RFP should have been interpreted because had they done so, they would have eliminated on the spot the other four firms and only been left standing with ATS. So I point out to you also -- and this goes to the independent expert analysis also. If you look on your screens now, you will see an e-mail (electronic) from one HNTB employer -- employee to another where they are actually asking the question during their due diligence. Is there anywhere in the RFP where it says that the vendors must have cameras in place at time of proposal submittal? If so, where?

Chair Sarnoff: That's an ATS employee?

Mr. May: That is a HNTB employee, the --

Chair Sarnoff: So that's a --

Mr. May: -- independent consultant of the City. So the question becomes, first of all, do you really believe that it was the City's intent when the RFP was issued that only one company could qualify under the RFP? I don't believe so. And number two, do you think it's fair for anybody submitting under the RFP to go through a year and three month process from the time that they submitted, okay, and then be told, look, everybody's out under this definition but ATS? Because no one disputes that ATS was the only company that had a freestanding, noninvasive, nonintrusive system installed in Florida or anywhere else on January 26, 2009. Those are just simply the facts. Now I will raise one other issue that I think is really super important. In our bid protest, in the response from Mr. Marcos, he cites, the formal solicitation -- and this is on page 6 of his response -- in the case of this RFP allows for competition. How could that be if only one firm could qualify? And goes on to say disqualification of a firm in a competitive process does not stifle competition; instead, it may prevent a firm from obtaining an unfair advantage or unjust reward. The only firm that's gotten an unjust or unfair reward here because there is, in effect, no competition now is ATS. And they got that advantage through an interpretation of the RFP by the procurement director, and we respect his interpretation. If that's his interpretation, then we all have to live by it, but please, someone should have at least made it clear prior to everybody submitting under the RFP because had you done that, then you would have had only one responder and a light bulb would have went off in everybody's head and say, gee, why did that happen? It's because only one company could qualify. Let me go on to say that in our protest we raised issues with regard to ACS and their responsibility as a vendor that were just simply not addressed. The first being that ATS's TC-16 MP solution that they proposed under the RFP, from the best of our knowledge, has never been installed yet, okay. They have not installed the exact system that they proposed under the RFP. In fact, if you look at the images on the screen, you will see that those images are from a Legacy system and the dates

on the images are 2008. The second thing is that ATS has proposed the TC-16 MP system for other jurisdictions but did not actually install that system. If you look at Collier County, on the left is what they proposed out of their bid document, and on the right is what was actually installed. The new system proposed, the old system installed. If you look at Hillsborough County, same thing, TC-16 MP proposed, Legacy system actually installed. And that one was just recently, as I understand. Now you will see what the ACS system looks like on the left in Bradenton, Florida versus what the ATS system looks like in the Aventura, the city of Aventura that ATS has. So I submit to you that at the end of the day, there is only one way that you could look at this RFP. If you buy into Mr. Marcos's interpretation of the RFP, it is by definition an unfair advantage for only one firm because only one firm could qualify under the RFP. That was not the intent of the City. I don't think that Mr. Marcos would say that that was the intent of the City. So what are the choices before the Commission today? Obviously, ACS would like you to simply follow the recommendation of the selection committee under a normal reading of the RFP, okay, and under a selection-ranking process in which ACS was ranked ahead of ATS by every single selection committee member. Not one of them ranked them above us. And if you don't want to do that, I would suggest to you that the City should throw this process out and start over with an expedited RFP process in which it is clear that everybody can compete under that process. That would be a fair thing to do also. And I would submit to you that the City, having been through this process, could craft an RFP, get it out, get responses back quickly and not lose much time.

Chair Sarnoff: How much time would that take?

Mr. May: You would have to talk to Mr. Marcos about that.

Chair Sarnoff: How much time would that take?

Mr. May: I'm sure he will tell you it'll take a long time.

Chair Sarnoff: I'm just curious.

Mr. Marcos: An expedited process, you're looking at 90 days.

Chair Sarnoff: Okay.

Mr. Marcos: Without any bid protest. There's no guarantee that there's not going to be a bid protest then.

Chair Sarnoff: Oh, we'd look forward to seeing everybody back here again.

Commissioner Gort: Of course, yeah.

Chair Sarnoff: It'd be so much fun.

Mr. Marcos: Might as well put a revolving door.

Commissioner Gort: Everybody's making money.

Mr. May: And Mr. Chairman, I would also submit to you that 90 days is not much more time or is comparable time to what's going to happen if you award it to us or ATS today, which is both firms are going to end up trying to take this to court because they really have no choice. I know that ACS doesn't have a choice because it's just clear as day if you buy into the City's interpretation and the procurement director's interpretation that this is an unjust and unfair process that, by definition, favored one company.

Chair Sarnoff: Let me see if we could establish one fact. Is it an established fact, Mr. Marcos, that if, in fact, we read the RFP minimum requirement, that there would be only one responsive bidder?

Mr. Marcos: No, sir. As a --

Chair Sarnoff: Okay. So it's --

Mr. Marcos: -- matter of fact --

Chair Sarnoff: -- a fact in contention?

Mr. Marcos: They're contending that.

Chair Sarnoff: No, no. I just want to know from both -- he's saying it's an established fact. I'm asking you is it a fact in contention?

Mr. Marcos: No.

Chair Sarnoff: So it is an established fact?

Mr. Marcos: It's not an established fact.

Chair Sarnoff: Okay. So you're saying -- you're contending others would have fit the minimum requirement?

Mr. Marcos: At the very least, if others did not have that opportunity because, as Mr. May claimed, the actual specifications were so restrictive, Mr. Commissioner, I can cite to you that under the procurement code Section 18-104, they had the opportunity to protest the actual solicitation. They could have protested the specifications and informed the City at that --

Chair Sarnoff: Wait, wait, wait.

Mr. Marcos: -- particular point in time --

Chair Sarnoff: My question is different. And I want to ask -- I want a direct answer to my question. Four people bid on this?

Mr. Marcos: Five.

Chair Sarnoff: Five. Of the five bidders, based on your criteria established, would anyone else have been a responsible bidder?

Mr. Marcos: We only looked into the top three firms, Commissioner, so I can only answer what HNTB looked into.

Chair Sarnoff: Okay.

Miguel Diaz de la Portilla: Mr. Chairman, I can answer that question for you.

Chair Sarnoff: I just want to know is it a fact in contention or is it a fact established?

Mr. Diaz de la Portilla: Well, that is a statement --

Pamela L. Latimore (Assistant City Clerk): You have to speak on the mike, sir.

Mr. Diaz de la Portilla: Well, if I may. Miguel Diaz de la Portilla.

Ms. Latimore: Name for the record.

Mr. Diaz de la Portilla: Becker Poliakoff. My name is Miguel Diaz de la Portilla. I'm with Becker Poliakoff. I'm an attorney for ATS. My address is 121 Alhambra Plaza, Coral Gables, Florida. That isn't a -- that is -- that's a misstatement by the ACS representative.

Chair Sarnoff: All right, so --

Mr. Diaz de la Portilla: There were at least two companies -- and I'll give you the names --

Chair Sarnoff: That's all.

Mr. Diaz de la Portilla: -- at the time. One of them did propose, and that's TrafficPax (phonetic). They were ranked fifth. They've had a noninvasive system in the City of Gulf Breeze since 2006. And the other company is Laser Craft (phonetic), which has had a noninvasive system in place.

Chair Sarnoff: That has one or does not?

Mr. Diaz de la Portilla: Has. Has one.

Chair Sarnoff: And where --

Mr. Diaz de la Portilla: And had it in place at the time the RFP was issued.

Chair Sarnoff: I got you, December 2008. Now where is Laser Craft's (phonetic) system in place?

Mr. Diaz de la Portilla: Orlando, Florida.

Chair Sarnoff: Orlando, okay.

Mr. Diaz de la Portilla: Yes, sir. And the requirement of a noninvasive, nonintrusive system isn't something that you just wrote in your RFP. It's a requirement of state law and County code. That's why the RFP had to be written that way. The State required, FDOT required -- and in fact, the proposed state law now requires a noninvasive system. That wasn't something your procurement department dreamt up or put in there just 'cause they wanted to. That is a requirement of law. Unlike in other places, in Florida, you have to have a noninvasive technology.

Chair Sarnoff: All right. Stop there because I want to hear this from our City Attorney. Is there a Florida statute that says you must have a noninvasive, non-something --?

Ms. Bru: I don't -- I can't answer that question. But I do know that right now the Legislature's considering --

Chair Sarnoff: No, no, no. That's not my question.

Ms. Bru: Okay, because --

Chair Sarnoff: My ques -- lawyers address me.

Ms. Bru: Right. The County requires the noninvasive system --

Chair Sarnoff: Okay. Counsel --

Ms. Bru: -- and that's what regulates us.

Chair Sarnoff: -- said there are two requirements. Now I just want to whittle this down. Florida Statute -- I'm pretty familiar with those.

Ms. Bru: I am not.

Chair Sarnoff: It's going to be under Florida Statute 316 something. You don't know of one?

Ms. Bru: I'm not, but we can look --

Chair Sarnoff: All right. Is there a County ordinance?

Ms. Bru: There's a County requirement.

Chair Sarnoff: What does that say?

Ms. Bru: I don't have it in front of me, but I do know, based on the attorney who worked on this RFP, that there's an absolute requirement that the County has for the noninvasive, freestanding system.

Chair Sarnoff: Okay.

Mr. May: But Mr. Chairman, that is a -- if I may continue -- different requirement to actually call under the RFP that you install that as your solution. It's much different than the RFP saying you had to have had that system installed elsewhere prior to the submission date of the RFP, and that's where this falls down because once you put that bright-line out there, then all the competition goes by the wayside.

Chair Sarnoff: Mr. May, all I was trying to do is an old judge's trick, so to speak. What is an established fact and what is in contention.

Mr. May: Understood.

Mr. Marcos: If I may, Commissioner? Can I rebut some of the points Mr. May made?

Chair Sarnoff: Well, I mean, all I want to do is -- are you done?

Mr. May: No. I'd like to finish one other point actually because --

Chair Sarnoff: Okay, go ahead. Let him finish.

Mr. May: -- you know -- I do want to finish one other point, and I would like you to look on your screen and you will see -- and Mr. Marcos actually quotes this in his response to ACS, which is on your screen now. It says that ACS was deemed nonresponsive for not having been engaged in the business of providing a freestanding, self-sustaining, nonintrusive and noninvasive red-light photo enforcement equipment as required by the formal bid pursuant to the specs. But if you go back and you actually read the minimum qualifications further, you will see that the second clause says, in the minimum requirements under the RFP, that you in fact needed a three-year record of performance under the RFP. So, I submit to you if you now read the bright-line test of noninvasive, nonintrusive, freestanding by the time of the submission, if you read that in

accordance with a three-year minimum experience level, guess what? ATS doesn't even qualify under that.

Chair Sarnoff: Is that an established fact?

Mr. Diaz de la Portilla: May I address that?

Chair Sarnoff: Anybody who wants to address it from that side of the table? Is that an established fact?

Mr. Diaz de la Portilla: No. Once again, that is not an established fact.

Chair Sarnoff: Okay.

Mr. Diaz de la Portilla: ATS has --

Chair Sarnoff: That's a fact in contention.

Mr. Diaz de la Portilla: -- had a system in Apopka for --

Chair Sarnoff: That's all I need to hear.

Mr. May: Since when -- what was the date in Apopka? Two thousand seven, and the submission date was January 26, 2009, so by definition, you could not have been having one installed for three years. So all I'm saying to you, Mr. Chairman -- and I'm going to end on this note -- is that when you start taking this -- these minimal qualifications apart and you apply Mr. Marcos's bright-line test to those qualifications, what you end up with is, at the very best, one or two companies could comply, and at worst, no one can comply, which I purport to you was never the intent of the City Commission to stifle competition. And I don't think -- I heard earlier today this Commission considering, you know, some procurement issues, and it was made very clear by a number of you that you want to entice competition, you want to encourage competition. This is simply a process that has run amuck. It's gone on for too long. It's taken over a year and three or four months, and it's just going to end up in a tank. And I would submit to you either read the RFP as it was originally read by the procurement director and the evaluation committee and everybody else and award it to ACS or just simply throw the thing out and start over because at least, if you start over, you'll get a cleaner result than what you got today.

Chair Sarnoff: Thank you.

Mr. May: So I thank you for your time.

Chair Sarnoff: Thank you. Rebuttal or reply or --

Mr. Marcos: May I, Commissioner?

Chair Sarnoff: -- however you put it.

Mr. Marcos: I want to go back to the point that Mr. May made as far as sole source and restrictive specifications because I heard for the first time today that the specifications are restrictive and this claim of sole source. I have to end up then asking ACS then why, why didn't ACS, when they had the responsibility, raise that issue? Under Section 1.35 of the RFP, it has a section that says exceptions to the general and/or special conditions or specifications. Why wasn't that raised? Number one. Number two --

Chair Sarnoff: You know, Glenn, I got to tell you.

Mr. May: I have to respond to that, Mr. --

Chair Sarnoff: Wait, wait. Stop. Go through the Chair. I'm having trouble concentrating. Once you guys conceded that you didn't have the experience for three years, why should this Commission hear anymore?

Mr. Marcos: No, no, no.

Chair Sarnoff: Unless I'm mistaken, I heard somebody say 2007.

Mr. Diaz de la Portilla: No, no, no. Hold on. Look -- may I clarify, Mr. Chairman?

Chair Sarnoff: Sure.

Mr. Diaz de la Portilla: Because I think in the presentation that you read from ACS, there's a lot of obfuscation here. What your RFP required was the following. It required that you have experience in the business for at least three years. That's in the business. Everybody meets that. But it also required -- and it's separate. It's not part of the same thing. There's a deliberate attempt to confuse this board. It doesn't require that you have a noninvasive system for three years. That's a separate section of the RFP. What it does require you to have is some experience with a noninvasive system at the time that you submit your proposal. There were at least three companies that did. ACS was not one of them, plain and simple. They want to prolong the time because they could not meet the specifications of your RFP, which were in your RFP, because they're required by County code and by FDOT rules and will be required in the state law that is being debated today in the Legislature, plain and simple. Moreover, they had an opportunity, per the RFP and per your code, to object, if they wanted to, to the specifications. They chose not to do that at that time. That's in your code as well. But your specs are your specs and they require noninvasive technology because that's what you need to have in Florida. And that's as plain and simple on that issue. I mean, I have more.

Chair Sarnoff: Stop there for one second. Do you concede there are two parts of this RFP that have minimal require --? You do not?

Mr. May: No, absolutely not. Mr. Chairman, if you read the first clause -- this is all in the same sentence.

Chair Sarnoff: I just want to know it's a fact in contention.

Mr. May: No. It is a -- definitely a fact in contention. And if I might add, Mr. Chairman, I want to respond to Mr. Marcos's --

Chair Sarnoff: No, no, no, no. Respond to me.

Mr. May: Absolutely. I would --

Chair Sarnoff: So --

Mr. May: -- like to respond to the allegation that we never raised the issue under the RFP.

Chair Sarnoff: Yeah. You know what? I don't want that responded to.

Mr. May: Okay.

Chair Sarnoff: I want to know -- I think every Commissioner wants to know what were the

minimal qualifications? Are there two sets of minimal qualifications? Where would we look for them? Where would we find them? You're telling me to look at 2.2.5. They're telling me to look at 2.2.5 and some other place. You're saying, no, just look at 2.2.5. Am I getting this wrong?

Mr. May: Mr. Chairman, I'm saying that the minimum qualifications have been a moving target. For over a year, no one read the RFP the way Mr. Marcos has read it, and he only --

Chair Sarnoff: Okay.

Mr. May: -- read it that way after a protest from ATS.

Chair Sarnoff: I got you. Let me let them finish.

Mr. Marcos: Well, I would like to state, it seems like Mr. May knows more than what I know. I mean, how can he end up stating something that I can only claim myself? I mean, the fact of the matter is that this RFP was submitted on January 2009, and since then, we were looking closely as far as what will be the due diligence conducted here. There are two portions here. One has to do with experience as far as three years, and there's another one that has to do with the fact on whether or not you have installed in equipment of a similar nature, similar nature being as spec'ed out, nonintrusive, noninvasive, freestanding. I cannot emphasize any further, Commissioners, that we afforded everybody due process. We realize that sometimes we -- you have unintended consequences. We might write specifications that could be restrictive, but we have a way of curing that problem. If you look at the actual RFP and in all of the actual solicitations, which whatever goes out, we have the same affordability, which is that you have a deadline to submit any concerns that you may have. If ACS had that concern at that -- at any particular point in time up to that deadline for further clarifications, questions, or concerns, why didn't they submit that and let us know that they had problems with the specifications?

Mr. May: Mr. Chairman.

Mr. Marcos: That claim cannot --

Chair Sarnoff: I actually think I know what your answer's going to be.

Mr. May: I mean, my answer is --

Chair Sarnoff: It's going --

Mr. May: -- very simple. No other city in Florida has interpreted these requirements the same way that Mr. Marcos has. The reason we didn't raise the issue is because we didn't think there was an issue. And guess what? No other company raised the issue either because everybody read it the same way. And I would port to you everybody read it the same way all the way through until ATS filed the bid protest.

Mr. Marcos: Commissioner, that argument should fall flat in [sic] its face. How can he end up speaking for any other city? That's almost like saying that every other city did the same due diligence process that the City of Miami did here. Perhaps, maybe the City of Miami did the right thing, which is we hired an independent consultant to look into the due diligence, and the bottom line is they were caught with their pants down.

Commissioner Gort: Oh, my God.

Mr. Diaz de la Portilla: Mr. Chairman, may I provide some --

Chair Sarnoff: Absolutely.

Mr. Diaz de la Portilla: -- rebuttal on behalf of--?

Chair Sarnoff: I'm going to give you three minutes for rebuttal.

Mr. Diaz de la Portilla: Three minutes. Okay. I'll make the most of--

Chair Sarnoff: You had a pretty good advocate right there.

Mr. Diaz de la Portilla: Well -- but I think there are a couple of points that need to be clarified, and I think --

Chair Sarnoff: All right.

Mr. Diaz de la Portilla: -- the main issue here is the issue of responsibility. And you have been focusing on the issue of responsibility as far as whether they had any actual experience in terms of having a noninvasive technology, which is what you need to have in the state of Florida. That was a spec in the RFP. That was required by the RFP. And we've already discussed why it was required, because that's what you need to have according to FDOT and according to Miami-Dade County code.

Chair Sarnoff: Now, you say it's in the RFP. Is it in 2.2 something? Is it in 3.3 something? Is it --? Can somebody just show me where it is in the RFP?

Mr. Diaz de la Portilla: Sure. I'll have --

Chair Sarnoff: And I won't count that against you as time.

Mr. Diaz de la Portilla: Yeah, yeah. For the record, I'm here with --

Chair Sarnoff: Keep going, keep going.

Mr. Diaz de la Portilla: -- Carlos Gimenez and Robert Holland, who are cocounsel on this matter. But the issue of responsibility doesn't just begin and end there. There's a lot more that goes to responsibility. Responsibility means that the company can do what they tell you on paper they can do, that you can rely on them to provide you what it is that you spec'ed out. And there's a lot more to ACS's non-responsibility than what we've been discussing here and what we've been focusing on. And I'd like to draw your attention to that. And in fact, that was included in our protest and it was included in HNTB's analysis and conclusions. And that has to do with the quality of their data bars. We discussed it last time on March 11 when we were here. Their data bars are clearly erroneous. And HNTB, your independent consultant said, that with the data bars that they have on their system, those violations are not supportable in court. That's not our language. That's HNTB's own language in looking at their data bars, showing cars running a red light at zero miles per hour, showing vehicles in their own data bars running lights, and going from 0 to 90 miles per hour in half a second, et cetera, et cetera, et cetera. So their non-responsibility doesn't just go to the fact that they did not have noninvasive, nonintrusive technology, which was required in the RFP because it's required by law, but that they have erroneous data bars that are unsupportable in court and will give you tickets that you can't enforce. And it goes also to the fact that they basically misrepresented facts to the City. When a proposer presents something to a city, a municipal government, and says we've done this and the truth is revealed, and they are caught, as Mr. Marcos says, with their pants down, they're proven to have lied to the City and misrepresented experience. That says something about their responsibility as well. It isn't just an issue of not having the noninvasive technology. That's been proven. They didn't have it. They admitted in their own protest for Christ's sake. I mean, it's there. But the non-responsibility of ACS goes much further. Because it goes to the

data bar issues. And in fact, Mr. Arriola, of ACS, has acknowledged before other cities, Palm Beach, in particular, that they had a serious of problems with their data bars in their submittal to the City. Here they are right in front of you; you can look at them. Cars traveling 0 to 60 in five point -- half a second, point five seconds. Vehicles running an intersection at zero miles per hour, something that is unsupportable in court and will give you a non-enforceable program. Now, here's what's the problem, you know, in addition to that. They told you that they had a noninvasive system in place and they claim experience in Bradenton at the time of the RFP when they knew they didn't have it in place. They misled the City and they misled the selection committee. It wasn't until Glenn Marcos and HNTB did their due diligence that the City found out that what they told you wasn't true. There's another saying in Spanish (comments in Spanish), meaning you can put anything on paper. But then you have to prove it. And when they went out, your City, your independent consultant, to prove if what they said, ACS said was true, they found out that ACS had misled the City. Your RFP also required that proposers tell you about programs that -- where they had been fired. There are at least nine programs where ACS has been fired and replaced by ATS that ACS did not disclose in its proposal to the City, again, misleading the City. In fact, they claimed that they were the providers for Washington, DC when they knew that they haven't been the providers for Washington, DC since 2006, and on and on and on it goes because again, the issue of non-responsibility includes many, many, many things and they are non-responsible. Now, let's talk about the -- Miami Beach. They claim Miami Beach now. You know, the history of Miami Beach is a long and sad one for ACS. Why? Because they had to have cameras in place in January. They didn't comply. They were this close to being terminated. And in fact, they were capped at 15 cameras. And the City said hey, ATS, you finish the job because they couldn't do it. ACS couldn't do it. Now, let's go to just one final thing on this whole delay, delay, delay, delay tactics which is obviously what the representatives of ACS know is their best bet. What happens if the City, oh, starts the process all over, blah, blah, blah? They even threatened you with filing an appeal and litigation. I don't know. I mean, to me, it's not persuasive that somebody who wants to be your business partner is telling you, hey, we may sue if it doesn't go our way, but that's neither here nor there. Let's take it in terms of time frame. What we're talking about here is that each month that goes by that you don't have a system, lives are being lost because it's been proven that these programs save lives. And in addition, the revenue that is generated by these systems that you can program and earmark for more police patrolling -- 'cause you can't have a cop on every corner, but you can then free up the police department and use the revenue for more public safety will be lost to the City. It's taken us a year for this to come to birth here before you today. More than a year, year and three months. If we start this process all over again, you're talking about three conservatively speaking, three to fifteen million dollars a year in potential revenue from violators, from people who are breaking the law and placing lives at risk that the City wouldn't have to make their streets and to make our neighborhoods safer. So again, the delay argument may serve ACS's purpose, but it doesn't serve the City, it doesn't serve the people, and it doesn't serve the process. You've had a fair process. You've had a good process. You've given them several bites at the apple. They had notice of our protest in March of last year. They said nothing. HNTB called them; they didn't respond. They got faxes from HNTB. Nothing. They were here on the 11th of March, made their argument. You all heard it. We were here for an hour and a half. They filed a protest, and their protest is nothing more than obfuscation and name-calling. If you want to call the procurement director who was doing his job and was being responsible and he's standing here and taking the heat, myopic and irrational, you can go ahead and do that, but no amount of name-calling makes them responsible. No amount of name-calling makes their proposal a responsible proposal. What you need is a company that has proven technology. We have it. We have what you need. We've had it in six cities in the state of Florida at the time of submittal. We have Aventura and Miami Gardens, the two longest-running programs in Miami-Dade County. We won these RFPs because we've proven our technology, we've proven our track record. And finally, your own independent consultant has verified everything we've said about our responsibility, our responsiveness. They're not. They want a delay because that's in their best interest, but not in yours. Thank you.

Chair Sarnoff: Thank you. All right, coming back to the Commission. Anybody have any questions? Anybody --? Go ahead.

Commissioner Gort: I don't know. After so much confusion, I don't know what's true, what's going back and forth. I'm telling the truth.

Chair Sarnoff: Mr. Vice Chair, you're recognized.

Vice Chair Carollo: I was ready to make a motion to move it.

Chair Sarnoff: What is your motion?

Vice Chair Carollo: My motion is to approve the resolution that's before us, siding with our procurement director.

Commissioner Dunn: Second.

Chair Sarnoff: All right, we have a motion and we have a second.

Ms. Latimore: Chair, I hold in my hand a substitution for this item.

Commissioner Gort: Substitution?

Chair Sarnoff: What kind of substitution?

Vice Chair Carollo: RE.3?

Ms. Latimore: RE.3.

Mr. Marcos: If there's anything there, there should be minor changes, Commissioner.

Vice Chair Carollo: Mr. Marcos, if you could say the changes on the record?

Mr. Marcos: Commissioner, what you have before you is a resolution that's -- it's the very same resolution. If you recall, on Friday deliveries was [sic] made to your offices that was apart from the regular agenda that you received. That's why they're calling it a substitution, but it's one of the same language.

Chair Sarnoff: Yeah.

Mr. Marcos: Thank you.

Chair Sarnoff: All right, so we have a motion and we have a second. Any discussion?

Commissioner Gort: I have a question. My understanding is from what I'm hearing, this is going to go to court anyway. How long will this be in court? I mean, either way, whatever actions you take here today, one of the firms is going to go, is going to take it. I'm not an attorney and I rely on your guys, the attorneys, to let me know, and my own attorneys here. I think enough doubt has been placed here in the testimonies and -- I don't know. That's my way of thinking. If you're going to go to court, we're going to be as much as delayed. If we throw it out, we come out with another RFP with all the needs that we -- and with all the items and all the (UNINTELLIGIBLE) we need and we're specific and make it very clear to everybody. And let's face it, it's been a year since the last time. Things have changed quite a bit. That's my personal feeling.

Chair Sarnoff: Mr. Vice Chair.

Vice Chair Carollo: Thank you, Mr. Chairman. I don't know. Just a couple of observations. If we throw it out, start all over again, I just see one firm getting a bite at -- two bites at the apple. That's one observation I'm seeing. And the second observation I'm seeing is that it seems to me that every time Mr. May comes before us, he's threatening with a lawsuit. If we don't do this -- and he says it in a very nice way, very eloquent. However, if this doesn't happen, we're going to sue. It seems like every single time you've come before me --

Mr. May: That's not true.

Vice Chair Carollo: -- that's been my option, so -- I mean, that's why I make the motion and I -- -- let's vote it up or down.

Chair Sarnoff: Commissioner Suarez.

Commissioner Gort: Leave it up to the attorneys.

Commissioner Suarez: I mean, initially, I was very persuaded by the procurement officer's initial findings before the presentations today, and I think the presentations today have definitely put some things in my mind that are in doubt. For example, isn't it our intent, Mr. Marcos, that we want to have competition in our procurement process? I mean, isn't that part of --? I don't -- I mean, there seems to be a disputed fact over -- and according to the way that the Chairman had asked a question, there seem to be a disputed fact over whether any other firms would have qualified under the RFP. Is that --?

Mr. Marcos: Commissioner, what I can say is I'm going to end up reiterating what I said earlier. If any other firms who competed for this contract or any other firm that did not compete for the contract had any objections, they were afforded the opportunity under the RFP. They could always raise those questions. That happens in every -- that happens every single day in all of our procurements, every single day. We give them that afforded responsibility, because when it comes to public procurement, you have due process, you have to give them due process. That's why public procurement is so difficult.

Commissioner Suarez: Is there a deadline on that? Is there a --?

Mr. Marcos: Absolutely. I can tell you that the deadline for that was given to them, and for the record, that deadline was -- just give me just one second here -- 2.2, deadline for receipt of request for additional information and/or clarification. Any questions or clarifications concerning this solicitation shall be submitted by e-mail or facsimile to the Purchasing Department, attention Lourdes Rodriguez, fax number 305-400-5033, or e-mail LoRodriguez@miamigov.com, or actually at ci.miamifl.us [sic].

Commissioner Suarez: By when?

Mr. Marcos: All questions must be received no later than Monday, January 12, 2009, at 5 o'clock p.m.

Commissioner Suarez: So they were supposed to dispute this finding by January 12, 2009, but the determination that they were non-responsible wasn't made until this year?

Mr. Marcos: No, no. They had the opportunity to raise any problems with the specifications up to that deadline.

Chair Sarnoff: Right.

Commissioner Suarez: But how would they know that there were any problems with the specifications if those weren't made aware to them until this year, until 2010?

Mr. Marcos: He went ahead and said right now, Commissioner, that those specifications were restrictive. Besides the point when it was due, at the time that he had that solicitation in his hands, he should have raised those objections to begin with.

Commissioner Suarez: I understand your perspective, but this is where I get confused. How are you supposed to know --? You interpreted the RFP in a specific way in 2010 when you denied their -- when you upheld the protest, and my question is how are you supposed to know that there's something flawed with the RFP a certain number of days after the RFP when its done in 2009, when the decision that they are not responsible is made in 2010. How are you supposed to challenge that?

Mr. Marcos: Commissioner, I think that's besides the point. He should have -- if it would have been flawed, it would have been flawed from the very beginning. From the very inception of the RFP, he would have been able to tell us whether or not it was restrictive and whether or not he would be able to compete for it. As a matter of fact, I must remind the Commission that under 18-104, they have the ability even at the time of RFP issuance, they can end up protesting the specifications and they failed to do so.

Mr. May: Mr. Chairman --

Commissioner Suarez: But I think --

Mr. Marcos: At the end of the day --

Mr. May: -- please.

Mr. Marcos: -- I have to end up clearing this up -- they should not be given the opportunity to wait and sit and continue to sit until a determination be made to come back and claim that the specifications were restrictive and now it's a sole source.

Commissioner Suarez: But I don't understand that logic because they won the bid, okay, and then it was protested, and then that protest took a year and three months, right? I mean, you hired an independent --

Mr. Marcos: No.

Commissioner Suarez: -- consultant to analyze the protest and --

Mr. Marcos: No. The actual standard here is one of responsiveness and responsibility, Commissioner. Responsibility takes place after the fact that the evaluation selection committee makes its recommendation. So even after the fact that the evaluation committee might make their rankings, I mean, with all candidness, we have the responsibility to start conducting our due diligence. And if our due diligence reveals that the responsibility factor is something that needs to be considered and they failed on that mark, then they should not move forward.

Commissioner Suarez: But I have another question regarding that. Because your determination that we voted on was not a due diligence determination. It was not based on your due diligence. It was based on upholding the protest of the other company.

Mr. Marcos: Based upon due diligence. Due diligence has also been argued here, even before the City Commission on March 11, you heard me state HNTB, you heard me state independent assessment. This is not Glenn Marcos speaking. Again, this is not the City of Miami. This is

HNTB just coming out with their findings. We hired them because they had the expertise that the procurement department didn't have. And based upon that, they came and they made that statement, and it's one of responsibility. They have come here to end up saying that there's one section and one section states only one thing. That is not true. There's two sections here. I believe it's 1.34, under responsibility, and the other one is the one that he cited to, which I think it was 2.25. There's two different sections here.

Mr. May: We do not dispute -- if Mr. Marcos wants to read the RFP that way, we don't dispute his ability to read it that way. If that's the way he wants to read it, fine. The problem is when he did that, that wasn't done at the beginning of the process. It was done -- and I'm -- and let's go to the point of due diligence. There was no due diligence done, I guess, when Mr. Marcos and the City Manager both concurred with the evaluation committee's findings and recommended us the number-one ranked proposer to go to contract with. There was no due diligence done then. It was -- only due diligence was take -- took place after ATS filed a protest.

Mr. Marcos: Mr. May, that's a misstatement. I did not concur with that. Only the City --

Chair Sarnoff: All right, all right.

Mr. Marcos: -- Manager has the right to concur.

Chair Sarnoff: All right, all right. Enough. Anything else?

Mr. Diaz de la Portilla: Can I address the question that --

Chair Sarnoff: If he has a direct question, he'll direct it to you.

Commissioner Suarez: Yeah. I mean, my question is really anyone that can answer it. I mean, I think -- the issue that I have is that, you know, you've interpreted the bid in a certain way and you interpreted that bid in a certain way in upholding the protest, and that determination was made finally in, what is it, March of this year, a year and three months after the bid was -- the RFP -- yeah, the RFP process ended?

Mr. Marcos: The fact of the matter is is that yes. If you're asking on whether or not this was a lengthy process, Commissioner, I think that we all know why it's a lengthy process. This actual RFP has been a matter of contention not just based on a competitive nature; it's been a contention on whether or not the City wanted to be included in class action suit. So if you want to go ahead and talk about somewhat why there was somewhat a delay within the process, I must remind the Commission that that was an issue at hand that we had to consider on whether or not the City wanted to be involved in a class action suit. So as far as whether or not to proceed, that might have held up the procurement for a while. But at the end of the day, that doesn't change the outcome. It should never change the outcome. The fact is what it is. The facts is [sic] stated here. This is not Glenn Marcos opining. This is black and white. What you have here today is a solicitation and you can only go with the facts.

Commissioner Suarez: This is my -- this is where I'm confused. You have an RFP. It can be interpreted in, obviously, two different ways because two different people disagree on to how it can be -- as to how it can be interpreted. Your suggestion is that they should have objected to the language in the RFP by January when that decision on interpretation wasn't made until March of 2010. That's where I'm confused.

Mr. Diaz de la Portilla: May I take a crack --

Commissioner Suarez: Yes, please.

Mr. Diaz de la Portilla: -- at the question, if I may?

Mr. Marcos: Can I just read --

Mr. Diaz de la Portilla: Yes, Mr. Marcos.

Mr. Marcos: -- one thing, Commissioner?

Mr. Diaz de la Portilla: And I'll go to the other mike. I'm just borrowing this --

Mr. Marcos: And I'll end up -- and I'll then -- I will defer to Mr. De La Portilla. Remember this, there was another party involved. There was another party in the name of Redflex, who was a second-ranked firm, and they were deemed non-responsible just as well as ACS. And they were fully informed and aware of the fact of what my findings were. And the fact of the matter is that they found out that we end up doing our due diligence and they end up taking a step back and allowing the City to proceed because they acknowledge exactly what the protest acknowledged, which was that they were non-responsible. So if the process was so flawed and if I'm so wrong in determining that ACS is non-responsible, then why is Redflex not here to argue the same thing as ACS? They have more of a right than perhaps even ATS because they were the second-ranked firm. But at the end of the day, they acknowledged the fact that there was a due diligence, they were contacted, and they failed. In the same token, ACS failed also.

Mr. May: Mr. Chairman, could I just --? I have to correct one thing, if I -- if you will afford me.

Mr. Diaz de la Portilla: No, no, no, no, no. Well, I --

Chair Sarnoff: All right, here's how we're going to do this.

Mr. Diaz de la Portilla: May --

Chair Sarnoff: Wait. Are you done after this?

Mr. Diaz de la Portilla: -- I answer --?

Chair Sarnoff: I'm going to let you have 30 seconds --

Mr. Diaz de la Portilla: To answer his question.

Chair Sarnoff: -- to answer the --

Mr. Diaz de la Portilla: Sure.

Chair Sarnoff: -- to do whatever it is you're going to do.

Mr. Diaz de la Portilla: Okay.

Chair Sarnoff: You could even do tap dance. I'm going to give you 30 seconds, and then it's coming back to the Commission.

Mr. Diaz de la Portilla: Okay. To answer Commissioner Suarez's question, first of all, the requirement that you have noninvasive technology was in your RFP because County code requires it and Florida Department of Transportation requires it. They knew whether they had it or not at the time that the RFP was issued. I mean, who better than ACS themselves to know "Hey, we don't have this. We haven't done it." Okay? So they knew. Now they could have chosen at that point to say, well, we want it to say something else. We want it to say that hey, as

long as we get it sometime in the future but before award, and they could have protested that because the RFP gave them that right and your County --

Chair Sarnoff: Mr. Diaz De La Portilla, wrap it --

Mr. Diaz de la Portilla: -- code gave them that right.

Chair Sarnoff: -- up.

Mr. Diaz de la Portilla: So, finally, they knew that they didn't have that in place, but what's more, they misrepresented that to your selection committee --

Chair Sarnoff: Thank you.

Mr. Diaz de la Portilla: -- by claiming they had it when they didn't.

Chair Sarnoff: Thank you. Mr. May, your conclusion.

Mr. May: In 30 seconds, Mr. Chairman. We didn't -- we did not object to the RFP because we didn't read it the way it was read a year and three months later. We read it the way it had been read normally around the state. Second of all, we never -- we understood clearly you had to put that system in the ground, but we never doubted our ability to be able to deliver on that technology. We used that technology already in toll enforcement applications all over the country and including in Florida. So I just have to say that at the end of the day, it's become a mess. If you can't go one way or the other, throw it out; start over.

Mr. Diaz de la Portilla: And for the record, I would object.

Chair Sarnoff: All right. Anybody's --

Mr. Diaz de la Portilla: Just a legal point. Just to object --

Chair Sarnoff: I'll tell you what, you speak one more time --

Mr. Diaz de la Portilla: -- to that last statement of toll technologies.

Chair Sarnoff: -- and you'll sway my opinion. Sit down. You know, one thing that you don't get a lot up here is people think the last person heard is the person that wins. And I will tell you this, in my way of thinking of things, the guy that thinks he needs to get up last and shout something is a desperate man. And if you would just treat this tribunal, which it's sitting as right now, with a modicum more of respect and a modicum more of formality, we wouldn't have the going back and forth. I don't try to sit up here and say "through the Chair." We're five people. We're not 13. But if you would all treat us with just a modicum more of respect, I wouldn't even consider saying through the Chair, so let's move on. We've heard this issue. I will tell you what it comes down to for me. Due process. Whether it's due process of a police officer taking somebody in custody without probable cause or whether it's due process because somebody did not know that their rights were in peril or in dispute, it's the same due process. In order to have substantive due process, you must, as you put it, be on notice that there is a due process issue. Much easier when the police officer grabs you by the neck, you know your due process rights are in peril. Much different when you are the winner of a selection committee, the previous City Manager, and suddenly you learn that what is arguably to this Commission a vague and ambiguous RFP -- because I have yet to see somebody come up to me and say here's part two. That process to me is flawed. I was very much decided at the very beginning of this. I always want to support City employees. I have the upmost respect for Mr. Marcos, but in this circumstance, I have to admit: I don't think due process was followed any more than when a police officer walks up to

somebody and, for no good reason, grabs him by the neck and says you're coming with me. And it comes down to due process. So what I'm going to do is call for a roll call. Madam City Attorney, you have a first, you have a second. Roll call.

Ms. Latimore: I do not have a second.

Ms. Bru: Mr. Chair, is the motion -- the motion was to deny the protest?

Chair Sarnoff: No. The motion was to -- yes, was to deny the protest of ACS.

Ms. Bru: Wait. Vice Chair is saying --

Vice Chair Carollo: No. The motion was to, yes, deny the protest.

Commissioner Gort: Yeah.

Vice Chair Carollo: Yes, deny the protest and side with our Purchasing director.

Ms. Bru: Deny the protest.

Chair Sarnoff: Right. So just to be clear to the other Commissioners, if you think due process was denied, you should not be voting in favor. Let's have a roll call.

Ms. Latimore: It's a resolution. You still want a roll call?

Chair Sarnoff: I still want a roll call.

Ms. Latimore: For clarification, can I get your motioner and seconder 'cause I don't have the second?

Chair Sarnoff: We had a -- I thought we had a motion by Commissioner -- by Chair -- the Vice Chair and we had a second by Commissioner Dunn.

Commissioner Gort: Commissioner Dunn is the second. Commissioner Dunn.

Ms. Latimore: Roll call. Commissioner Gort?

Commissioner Gort: No.

Ms. Latimore: Commissioner Suarez?

Commissioner Suarez: Nope.

Ms. Latimore: Commissioner -- Vice Chair Carollo?

Vice Chair Carollo: Yes.

Ms. Latimore: Commissioner Dunn?

Commissioner Dunn: Yes.

Ms. Latimore: Chair Sarnoff:

Chair Sarnoff: No.

Ms. Latimore: The motion fails, 3-2.

Commissioner Gort: I'll make a motion --

Vice Chair Carollo: Mr. Chairman.

Chair Sarnoff: Let me hear --

Commissioner Gort: Go ahead.

Chair Sarnoff: -- Commissioner Gort, then the Vice Chair.

Commissioner Gort: No. I think -- I'll yield to Commissioner Carollo.

Chair Sarnoff: All right, Commissioner -- Vice Chair.

Vice Chair Carollo: Simple question: Now what?

Ms. Bru: Well, you have to give the Administration some direction. You have -- in fact, by denying -- by not approving the denial of the protest, you in fact upheld their protest.

Vice Chair Carollo: Microphone.

Ms. Bru: So a motion now to direct the Administration to do -- to either --

Commissioner Dunn: Could you repeat that again?

Ms. Bru: Okay. You have upheld the protest of ACS now.

Unidentified Speaker: No? No. That would --

Commissioner Gort: No, no.

Vice Chair Carollo: Your mike.

Ms. Latimore: Julie, is your mike on?

Ms. Bru: I'm sorry.

Unidentified Speaker: No.

Vice Chair Carollo: Your mike.

Ms. Bru: No. The motion to deny failed, so they need a motion to -- so now you need a motion to uphold.

Commissioner Gort: Or?

Ms. Bru: Or whatever else you want to do.

Commissioner Gort: Or whatever else we want to do. Yes.

Chair Sarnoff: You want to make a motion, Commissioner Gort?

Unidentified Speaker: Julie, is your mike on?

Commissioner Dunn: Yes, your mike. We couldn't hear you. Could you repeat it, ma'am? Could you repeat, Madam --?

Ms. Bru: What you did was you disagreed with your procurement officer.

Commissioner Dunn: Oh. But that's what -- you're right, you're right, you're right.

Ms. Bru: Okay. You have disagreed with the --

Commissioner Dunn: Yeah, 3-2. You're right.

Ms. Bru: The motion to deny the protest failed.

Commissioner Dunn: Okay.

Ms. Bru: So you, in effect, have agreed with ACS. You have agreed with their protest. Now you need a motion to direct the Administration how to proceed.

Unidentified Speaker: Right. Take an affirmative action.

Ms. Bru: Take an affirmative action now.

Unidentified Speaker: Right. Yeah.

Commissioner Gort: I'd like --

Chair Sarnoff: Go ahead, you're recognized, Commissioner Gort.

Commissioner Gort: You ready for a motion? I'd like to make a motion to have an RFP to come back out again with all the specific questions and equipment and the necessary so there won't be any doubt and worded correctly. And I would like, if possible, to have new City -- Assistant City Manager Martinez to participate on it too since he's got a lot of experience in that.

Chair Sarnoff: Why? 'Cause he drives a car?

Unidentified Speaker: I go through red lights.

Chair Sarnoff: He runs a lot of red lights.

Commissioner Gort: He knows technology. My motion is to take it back.

Chair Sarnoff: All right, there's a motion by Commissioner Gort. Is there a second?

Commissioner Suarez: I second the motion for discussion, Mr. Chairman.

Chair Sarnoff: Second by Commissioner Suarez. You're recognized for the record.

Commissioner Suarez: The motion, I'm assuming, is to throw out the process and start all over again?

Commissioner Gort: Yes.

Commissioner Suarez: And the City Attorney asked this board to give the City some direction, and there is some direction that I would like to give. I would like for the RFP to clearly ensure

that there's competition. Whatever standards -- and I'm not the writer of RFPs, whatever standard -- going off what Commissioner Gort says, that it's clear in the language as to what are the requirements and that it clearly, clearly ensures that there's competition so that the City and the citizens get best possible deal and the best possible product out of this process. And the other recommendation -- and maybe this would be an amendment to the motion. I don't know what it would be. -- is that the City not hire an expert to reevaluate the next process because it cost us \$20,000 to do it. And I think, at this point, we have all become experts on this process. So I would ask that it be expedited and that there not be an expert hired to evaluate the process because it will -- as you have evaluated the protest of the protest without an expert because you've -- and I understand the complexity here, because this is the first time that this City faces this kind of an issue. But I think, in the interest of time -- saving time, this process took a year and three months, that there shouldn't be an expert hired, that the citizens shouldn't have to pay for an expert. We've all become experts. Mr. Marcos, you've certainly become an expert because you were able to, without an expert, analyze the protest of the protest. So that would be my companion to the motion, that there -- that whatever RFP be done, it's clear, that it ensures competition so we get the best deal at the best product, and that there be no expert hired to evaluate the process because, you know, there wasn't an expert needed to analyze the protest of the protest. I think we've all become experts at this point.

Chair Sarnoff: All right.

Commissioner Gort: I'll make it part of my motion.

Chair Sarnoff: You're accepting that as part of the motion?

Commissioner Gort: Accepting the amendments.

Chair Sarnoff: Can you make one more amendment, which is that this particular proceeding be a part of the record, provided to each person who bids so they can see exactly what has been said here today? Is that acceptable?

Commissioner Gort: Yes.

Chair Sarnoff: All right. So we have a motion. We have a second.

Mr. Migoya: Mr. Chair.

Chair Sarnoff: And Vice Chair is recognized.

Vice Chair Carollo: I'll yield to the Manager real quick, but I would like to say something afterwards. I'll yield to the Manager.

Mr. Migoya: If I may, Mr. Chair. The concern is not so much for the hiring of the professional to evaluate it, but one of the issues that I believe we had here is that we didn't have a technical professional to help put the RFP together to be precise as to the equipment. We don't have anyone in-house that would know specifically all the technical issues around this to properly put the right RFP together. I think, if we had -- I think, from what I'm hearing from all of you, which I agree with, is that we need to have the right technical RFPs so there's no question. So I would encourage that we consider the possible hiring of a professional to help us with the formulation of the RFP to make sure that we have a very clear RFP.

Chair Sarnoff: Commissioner Gort, you're recognized.

Commissioner Gort: Well, my understanding, you've stated that several cities even here in Dade County, they already have it run. They did an RFP?

Mr. Marcos: Yes, Commissioner, that's correct. But I do believe that there are some cities that have the expertise in-house and some of them do not, so I do believe that, you know, they have gone out.

Commissioner Gort: Can we make one of those people part of the committee and help you draft it? I'm sure, if you request that -- I don't have any problem in hiring someone to draft it to make sure we don't have to go through this any other time, but I mean, if you can get -- I'm sure (UNINTELLIGIBLE) municipality, if you talk to the League of Cities, they cooperate with each other, so I'm pretty sure they will help you on it.

Vice Chair Carollo: Mr. Chairman.

Chair Sarnoff: Go ahead, you're recognized.

Vice Chair Carollo: thank you. Two quick things. I don't think it was ever the intention of the City to put out an RFP so only one company could qualify. I think the intention of the City -- and correct me if I'm wrong -- was this is the need of the City; go out there and bid it out. And if only one firm qualified, then one firm qualified. I don't think it was, you know, that it was cut in a way so only one firm could qualify. So I didn't say that before, but I keep hearing it and it keep coming up and I just want to address that, you know, just for future references. If we put an RFP and this is what we need and this is what's required of us and so forth and only one firm, you know, out of five or so forth is the one that qualifies, you know, so be it. I mean, do we just go out to RFPs again, then rearrange our RFPs so more companies can bid? I don't think so. But anyways, with that said, the second thing I have is that if we don't approve this now, what else can we do? Then we forget about red light cameras. So pretty much we're stuck in approving this RFP, correct? I mean, what are our options? Either we go out to RFP again --

Commissioner Gort: Yeah.

Vice Chair Carollo: -- or we forget red light cameras altogether?

Chair Sarnoff: No, no, no. We're -- correct me --

Commissioner Gort: Go to RFP.

Chair Sarnoff: -- if I'm -- wait, wait, wait. I think he's got a point, which is the other alternative is -- if I'm not mistaken, the way this stands procedurally, ACS would then be the responsive bidder.

Ms. Bru: Correct. So the choice that you have now, the affirmative action that you can take now is either to -- if you went -- by denying the recommendation of the procurement officer and, in fact, upholding the protest, they are now deemed responsible and responsive. So you can instruct the Administration to negotiate with them and award the contract to them, or you can reject all proposals and instruct the Administration --

Commissioner Gort: Yeah.

Ms. Bru: -- to issue another solicitation based on all these comments that have been made on the record about the ambiguities in the RFP and so forth and so on.

Commissioner Dunn: May I -- Mr. Chair.

Chair Sarnoff: You're recognized.

Commissioner Dunn: *But Madam Attorney, what happens in the interim of all of that?*

Vice Chair Carollo: *A lawsuit.*

Chair Sarnoff: *I don't think that's true.*

Ms. Bru: *Well, I mean, we can never predict what happens, but those are your available choices following the decision that you've made to --*

Chair Sarnoff: *Well, doing the rebid puts all parties back to the status quo ante, and at least we know these ambiguities will be dealt with. Trust me, lawyers can find new ones. All right, let's call the question. We had a motion. We had --*

Ms. Bru: *What is the motion? I'm sorry. I want to make sure. What is the motion that's on the floor now?*

Commissioner Gort: *The motion to throw out the -- to create a new RFP and remarket again.*

Ms. Bru: *So reject all proposals -- the motion would be --*

Commissioner Gort: *And to reject all bids.*

Ms. Bru: *-- all proposals and direct the Manager to issue a new solicitations [sic]?*

Commissioner Gort: *Correct, with the amendments stated by Commissioner Suarez.*

Ms. Bru: *Okay. With clear clarifications on the technical requirements.*

Commissioner Gort: *And Commissioner Sarnoff amendment.*

Commissioner Suarez: *Yeah. Well, it's twofold. One is that the RFP is clear and ensures competition so that the City gets not only the best system, but it gets the best deal on the system, and that's what benefits the taxpayers of the City of Miami. And secondly, that we do not hire an expert to evaluate the criteria because no expert was hired to evaluate the protest of the protest, so obviously, we don't need to keep hiring an expert every time there's a protest, you know, or to evaluate the due -- you know, to do your due diligence on whether the -- you know, the RFP is responsible or responsive or whatever. So it would be to direct the Administration not to hire any experts. You know, as far as having an expert to actually construct the RFP itself, to draft the RFP itself, I think I would agree with the Commissioner's suggestion, that we go to the Miami-Dade League of Cities and ask for copies of their RFPs, you know, that have very specific language that, you know -- and then we can also -- we have the City Attorney's Office that can help you to draft the RFP in such a way as to reduce or eliminate the confusion so that everyone is on the same playing field as far as what is the interpretation of responsibility, responsiveness, et cetera.*

Chair Sarnoff: *All right, we know the motion now?*

Commissioner Suarez: *You got it?*

Chair Sarnoff: *All right. All in favor, please say "aye."*

The Commission (Collectively): *Aye.*

Chair Sarnoff: *Okay. That was fun.*

END OF RESOLUTIONS