



CITY OF CRESTVIEW

OFFICE OF THE CITY CLERK

P.O. DRAWER 1209, CRESTVIEW, FLORIDA 32536

Phone # (850) 1560 Fax # (850) 682-8077

May 11, 2020

5:30 PM

Council Chambers

REGULAR COUNCIL MEETING

The Public is invited to view our meetings on the City of Crestview Live stream a
at <https://www.cityofcrestview.org/488/Agendas> or the City of Crestview Facebook Page. Most meetings are also available
on Crestview Community Television Facebook page.

Pursuant to Executive Order No. 20-69, issued by the Office of Governor Ron Desantis on March 20, 2020, municipalities may conduct meetings of their governing boards without having a quorum of its members present physically or at any specific location, and utilizing communications media technology such as telephonic or video conferencing, as provided by Section 120.54(5)(b)2, Florida Statutes. Procedures for the public comment will be provided via the website and social media before the scheduled meeting date. . The members of the City Council or LPA appearing remotely for this meeting will be announced at the beginning of the meeting.

1. Call to Order

2. Pledge of Allegiance

3. Open Meeting

4. Approve Agenda

5. Action Items

10.1. Photography Bid Protest

6. Comments from the Audience

7. Comments from the Mayor and Council

8. Adjournment

Note: The Reports section is for items that were submitted by a citizen or group of Citizens no later than the Wednesday 2 weeks prior to the meeting to the Clerk's office for approval. These items will be scheduled under the section titles Presentations and Reports. Supporting documents must be submitted at this time to be on the regular agenda. All Action Item are for staff and elected officials only and must be submitted for approval no later than the Wednesday 10 days prior to the meeting. Those not listed on the regular agenda who wish to address the council should fill out a yellow card. The Card must be submitted to the City Clerk. Speaking time should be three minutes or less, large groups may designate a

spokesperson. All remarks should be addressed to the Council as a whole and not to individual members. All meeting procedures are outlined in the Meeting Rules and Procedures brochure available outside the Chambers. If any person decides to appeal any decision made by the City Council with respect to any matter considered at such meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he or she may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based. The City Council of the City of Crestview, Florida does not discriminate upon the basis of any individual's disability status. Anyone requiring reasonable accommodation as provided for in the American With Disabilities Act to insure access to and participation in the meeting should contact the Office of the City Clerk at (850)682-1560 prior to the meeting to make appropriate arrangements.

Any invocation that is offered before the official start of the City Council meeting shall be the voluntary offering of a private person, to and for the benefit of the City Council. The views or beliefs expressed by the invocation speaker have not been previously reviewed or approved by the City Council or the city staff, and the City is not allowed by law to endorse the religious beliefs or views of this, or any other speaker. Persons in attendance at the City Council meeting are invited to stand during the opening invocation and Pledge of Allegiance. However, such invitation shall not be construed as a demand, order, or any other type of command. No person in attendance at the meeting shall be required to participate in any opening invocation that is offered. A person may exit the City Council Chambers and return upon completion of the opening invocation if a person does not wish to participate in or witness the opening invocation.



Staff Report

CITY COUNCIL MEETING DATE: May 11, 2020

TYPE OF AGENDA ITEM: Presentation

TO: Mayor and City Council
CC: City Manager, City Clerk, Staff and Attorney
FROM: Tim Bolduc, City Manager
DATE: 5/7/2020
SUBJECT: Photography Bid Protest

BACKGROUND:

The City of Crestview originally advertised for Photography Services on February 13, 2020, in the Northwest Florida Daily News.

The bid documents were furnished to known vendors in the Crestview area and to those who requested the package.

On March 23rd, the city council rejected all bids at the recommendation of the city manager.

At the City Council meeting on March 23, 2020, the City Council approved a new Purchasing Manual, that would be effective immediately. The new manual provided for clear instructions on the bidding and proposal process.

The manual was posted on the City's Website on Tuesday, March 24, 2020.

On March 28, 2020 a new request for proposals for photography Services was advertised in the Crestview News Bulletin.

This request for proposals followed the requirements in the Purchasing Manual dated March 23, 2020 as published.

DISCUSSION:

On March 28, 2020 the new bid package was also sent to the vendors who were previously notified.

On April 1, Mr. Bert Moore Filed a protest with the Finance Director on behalf of Gia DeMario doing business as GD Photography in accordance with the adopted manual. (Exhibit A)

On April 8, Ms. Gina Toussaint, Finance Director sent Mr. Moore a reply to his bid protest, denying the Protest. (Exhibit B)

On April 13, Mr. Moore appealed that denial to the City Manager Tim Bolduc. (Exhibit C)

On April 14, City Attorney Jon Holloway responded to the appeal, which included the language regarding Bid Protest Bonds. (Exhibit D)

On April 22, City Manager Tim Bolduc responded to the appeal dated April 13, 2020, denying the protest. (Exhibit E)

On Monday, April 27, 2020 the new bids were received and opened in a public and live broadcast meeting at 2:00 PM. An Agenda was posted on the City's website and the video is available for viewing.

On Thursday, April 30, 2020 the Bid Review Committee met in the Council Chambers at City Hall. This meeting was open to the public and live broadcast. An Agenda was posted on the Cities Website and the video is available for viewing.

On Friday, May 1, 2020 the City Clerk's office emailed an Intent to Award letter to the vendors who submitted bids. This letter was also posted on the City's website.

This agenda item is an administrative review of City Staff's application of the Purchasing Manual to the bid protest. Therefore, the question for the City Council is whether City Staff properly applied the Purchasing Manual to the bid protest submitted by the vendor.

As noted, the vendor failed to submit a Bid Protest Bond that the Purchasing Manual required as a part of any bid protest. While the vendor makes several arguments about the RFP process, the Bid Protest Bond is a preliminary requirement that must be satisfied before any other arguments may be considered under the Purchasing Manual. Staff notified the vendor of the deficiency and permitted additional time for the vendor to either post a bond or deposit a cashier's check or money order in lieu of a bond as allowed by the Purchasing Manual. The vendor did not meet this requirement. City Staff and the City Attorney believe this failure to follow the Purchasing Manual requires the bid protest to be rejected or denied.

It should also be noted that the vendor has an existing contract with the City which provides the vendor some of the same benefits the vendor now argues should not be allowed in the new RFP, such as the exclusive right to conduct certain business at specific City-owned properties during specified sporting events. While City Staff rejected the bid protest from this vendor due to failure to follow the requirements of the Purchasing Manual, City Staff and the City Attorney also believe the City's RFP was permissible and the City's intended action to award a contract is lawful.

GOALS & OBJECTIVES

This item is consistent with the goals in A New View Strategic Plan 2020 as follows;

Foundational- these are the areas of focus that make up the necessary foundation of a successful local government.

Financial Sustainability- Achieve long term financial sustainability

Organizational Capacity, Effectiveness & Efficiency- To efficiently & effectively provide the highest quality of public services

Infrastructure- Satisfy current and future infrastructure needs

Communication- To engage, inform and educate public and staff

Quality of Life- these areas focus on the overall experience when provided by the city.

Community Character- Promote desirable growth with a hometown atmosphere

Safety- Ensure the continuous safety of citizens and visitors

Mobility- Provide safe, efficient and accessible means for mobility

Opportunity- Promote an environment that encourages economic and educational opportunity

Play- Expand recreational and entertainment activities within the City

Community Culture- Develop a specific identity for Crestview

FINANCIAL IMPACT

There is no known financial impact at this time.

RECOMMENDED ACTION

Staff respectfully requests that the City Council affirm City Staff's decision to deny and/or reject the bid protest filed by GD Photography concerning RFP 20-04-27.

Attachments

1. Exhibits for Protest

Exhibit A

BERT MOORE
ATTORNEY
P. O. Box 1622
Crestview, Florida 32536
(850) 689-1603 ~ ~ FAX: (850) 689-1802
Email: bert@bertmoorelaw.com

April 1, 2020

To: Gina Toussaint, City of Crestview Finance Director
Gina.toussaint@cityofcrestview.org
198 North Wilson Street, Crestview Florida 32536

Re: Notice of Bid Protest

BID PROTEST

Gia DeMario doing business as GD Photography pursuant to the Crestview Purchasing Manual files this bid protest to the Request for Proposal 20-04-27 regarding provisions of sports photography services within the City of Crestview Florida. DeMario was sent an email of the Request for Proposal on Saturday morning March 28, 2020. DeMario has been in the business of sports photography primarily of the Crestview Florida city league teams including, cheerleading, football, soccer, basketball and baseball for over 18 years. DeMario has also been employed to photograph elected city officials. During the time that DeMario has been employed in sports photography, there have been at least a dozen other businesses similarly engaged in that endeavor. DeMario has been vetted as a coach and referee. DeMario has been approved under current policy to take photographs at sporting events and rent facilities at the Twin Hills gym for team basketball photography.

The nature of the business of sports photography requires a number of separate and distinct aspects, the majority of which are not accomplished on city property. DeMario will annually engage in over 300 telephone calls or personal contacts with coaches or team parents setting up team picture appointments. Team pictures, depending on the sports, maybe taken on or off site of City property. Action shots are taken during the actual athletic event. Athletic events generally are undertaken on city property, however there are activities at the Garden City venue which is located on County property.

DeMario edits all photographs before offering them for sale. DeMario does not edit on city property. For each hour of photography, DeMario spends 2 to 4 hours of editing. DeMario then initiates contacts with parents or family members who have ordered team photos or action shots. During the time that DeMario had been engaged in sports photography, there has never been use of the terminology "official" to describe team photography.

The granting of the rights to take sports photography at city venues as set forth in the Request for Proposal creates an unfair competitive advantage to the successful vendor. Any vendor who does not succeed in being granted the access set forth in the Request for Proposal will not have the same access or the ability market using the term "official." If the Request for Proposal is granted to another vendor or to DeMario, any competing photographer will have a significant and insurmountable burden to compete in the photography business at city venues. Action shots require action within the athletic event. Limiting access to the sporting venue creates an artificial monopoly for the successful proposal. As DeMario is not the only sports photography business in Crestview, there will be a significant impact on competition if the proposal is awarded.

Photographers have competed fairly and without unfair competitive advantage for years under the current system. DeMario has spent countless hours developing professional rapport with coaches and parents such that she has multi-generational business relationships. DeMario has operated lawfully within the limits of the city ordinances and policies to build her business. Whoever is awarded rights under the request will prevent any other individual from ever building their business in a manner which DeMario pursued. Any photographer attempting to develop that business will be laboring under an unfair government sanctioned competitive advantage.

Most importantly the Request for Proposal takes away consumer choice. The photography profession by its very nature is very personal. The photographer has in their possession the image of an individual. That image may be flattering or unflattering. Because of the nature of images, DeMario spends significant effort editing photographs before offering for sale. Now the individual will not have the same options to make a consumer decision. The decision of who will have their image will be made for them by the government.

(This protest relates to the sports photography aspect of the Request for Proposal as protester concedes request for city portrait style photography is fundamentally different)

This bid protest is made in two separate and distinct parts, first is the substantive issue as to whether there is a valid public purpose for submitting the Request for Proposal and secondly the procedural deficiencies of the Request itself. These two matters will be presented separately.

SUBSTANTIVE OBJECTION

The primary consideration whether a local government may operate a monopoly depends on whether there is a discernible public purpose for the anticompetitive restrictions. DeMario has been engaged in the business of sports photography involving city league teams for 19 years. During that time there have been a number of competitors and a number of policy changes regarding access to city facilities for the purpose of sports photography. (Composite Exhibit A) As a result of her efforts, DeMario has built a large and loyal clientele. During this time, she has never developed a monopoly nor does she believe that a monopoly for sports photography should

exist. The nature of photography is fundamentally personal as the photographer acquires the image of the subject in poses flattering and unflattering.

The City now proposes to contract for anticompetitive conduct. There are two aspects that effect individual rights related to sports photography; first the right of the photographer to contract for team and individual shots and as importantly the individual whose image is taken has the right to choose their own photographer. This right is a constitutionally protected right, the right to contract. As such the government must tread carefully in interfering with that right.

The court noted the fundamental right of Florida citizens to contract in Fraternal Order of Police v. City of Miami, 243 So.3d 894 (Fla. 2018):

When a statute encroaches on fundamental constitutional rights, the statute must be narrowly tailored to achieve the state's purpose. *Id.* We have previously considered section 447.4095 and found that while the statute implicates fundamental rights, i.e., the right to contract and collectively bargain, the statute satisfies strict scrutiny.

For over two decades, individuals have been able to engage in the business of sports photography within the City of Crestview Florida without overly burdensome rules and regulations. (Composite B) Crestview is seeking to create a government created monopoly for that service. This action is subject to very strict constitutional constraints. As the court stated in Davis v. Washington County, 670 So.2d 136 (Fla. 1st DCA 1996)

The United States Supreme Court has held that a political subdivision may engage in anticompetitive conduct and be exempt from federal antitrust law if the conduct is an act of the state government as a sovereign "pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 413, 98 S.Ct. 1123 1137, 55 L.Ed.2d 364 (1978). 3 When private parties are involved in the conduct, antitrust immunity exists where the following test is met: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) (quoting *City of Lafayette*, supra).

Municipalities are governed by the same laws prohibiting restraint of trade as are state agencies. The court made this clear in Duck Tours Seafari, Inc. v. City of Key West, 875 So.2d 650 (Fla. 3rd DCA 2004) when Key West was sued for anticompetitive activity:

Florida's antitrust laws prohibit restraints of trade. See §§ 542.16, 542.18, 542.19, Fla. Stat. (1995). Florida's antitrust laws apply to local government. See *id.* § 542.235. The remedies available against local government are injunctive or other equitable relief, but not damages. *Id.*

The City argues that it is entitled to state action immunity. State action immunity is a doctrine which originated under federal antitrust law. See *City of Columbia v. Omni Outdoor*

Advertising, Inc., 499 U.S. 365, 370-73, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). Under Florida law, "Any activity or conduct ... exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter [542]."3 § 542.20, Fla. Stat. (1995). Thus, the doctrine of state action immunity which has developed under federal antitrust law is also an available defense to a suit against a municipality for a violation of Florida's antitrust laws.

The relevant principles have been summarized by the United States Supreme Court as follows:

The starting point in any analysis involving the state action doctrine is the reasoning of *Parker v. Brown* [, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943)]. In *Parker*, relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature. 317 U.S., at 350-351, 63 S.Ct., at 313-314. Rather, it ruled that the Sherman Act was intended to prohibit private restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature. *Id.*, at 351, 63 S.Ct., at 313.

Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412, 98 S.Ct. 1123 1136, 55 L.Ed.2d 364 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*, at 413, 98 S.Ct., at 1137.

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) (emphasis in original).

"[B]efore a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Id.* at 40, 105 S.Ct. 1713.

It is not necessary that state law explicitly say that the municipality is allowed [875 So.2d 654] to suppress or limit competition. See *id.* at 43, 105 S.Ct. 1713. However, it must be clear that the state law has delegated to the municipality "the express authority to take action that foreseeably will result in anticompetitive effects." *Id.* The fact that the state has made a general delegation of home rule power to the local government is not enough to authorize anticompetitive action. *Id.*

The question is then whether or not there is any compelling state purpose regulating the provision of sports photography service. There is one statutory example in which photography monopoly is clearly prohibited. This statute regulates photography services for models, actors and individuals in the entertainment business. That statute provides:

468.410 Prohibition against registration fees; referral.—....(2) No talent agency shall, as a condition to registering or obtaining employment for any applicant or artist, require the applicant or artist to subscribe to, purchase, or attend any publication, postcard service, advertisement,

resume service, photography service, school, acting school, workshop, acting workshop, or video or audiotapes.

Clearly then there is a state mandated prohibition against limiting an individual's right to choose photography services.

There were some questions at the Council meeting regarding legitimate public purpose for limiting sports photography. Two areas come to mind, use of public property for a profit and safety of minor children. The first matter has been addressed by ordinance. (Exhibit C) As to youth safety, the city already has a mechanism in place to verify background of coaches and employees in contact with minors. That could be a least restrictive requirement for sports photographers.

The difficulty with the actions of the city were best summed up in the dissenting opinion of Justice BK Roberts in Snipes v. West Flagler Kennel Club, Inc., 105 So.2d 164 (Fla. 1958) a case addressing interference with a business relationships for the use of Greyhound dog tracks :

Although governmental regulation has made some inroads upon our system of free enterprise, fortunately we have not yet reached the stage where the selection of a trader's customers is made for him by the government against his will-at least, where no question of monopoly is involved. 'It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice.' Cooley on Torts, p. 278. The purpose of the Request for Proposal is that youth participants agree to be photographed not by photographers selected by themselves or their parents or to pay for those services at an amount agreed upon between the photographer and themselves or their parents, but those decisions will be made for them by the government. Nothing has changed in the City of Crestview over the last two decades to cause the city government to create an anticompetitive monopoly for sports photography services. Constitutionally there is no legitimate public purpose to restrain trade in the sports photography niche.

If the city has concerns regarding use of public lands for profit-oriented businesses, the city can charge a reasonable fee or modify license requirements. This would be the preferable constitutional response.

PROCEDURAL OBJECTIONS

A difficulty with the Request for Proposal is the lack of direction and specificity. A review of the Request for Proposal indicates that it does not meet the minimum threshold requirements as set forth in ADVOCACY CENTER FOR PERSONS v. State, 721 So.2d 753 (Fla. 1st DCA 1998)

A challenge to an RFP must be directed to specifications that are so vague that bidders cannot formulate an accurate bid, or are so unreasonable that they are either impossible to comply with or too expensive to do so and still remain competitive.

Several treatises articulate the purpose of specifications similarly:

Reasonably definite plans and specifications as a basis on which bids may be received must be adopted by a public authority prior to receiving bids. Without such specifications, bids cannot in the nature of things be competitive as several bids may not contemplate supplying identical materials. Uncertainty or unreasonableness of the terms of the specifications will render the award of a contract void.

43 Fla. Jur.2d Public Works & Contracts § 17 (1983) (footnotes omitted).

[I]t is essential ... that plans, specifications, and estimates be prepared in advance and filed or given out to all persons interested in the bidding, sufficiently definite and explicit to enable them to prepare their bids intelligently on a common basis... for there can be no intelligent bidding for a contract unless all bidders know what the contract is....

* * *

Such terms and conditions must ... be sufficiently certain and definite to secure a fair basis for competitive bidding, and should contain nothing that would otherwise prevent or restrict full and free competition.

64 Am.Jur.2d Public Works & Contracts § 50 (1972) (footnotes omitted).

In order to give all bidders an opportunity to bid on the same thing, it is essential that the proper public authorities shall, prior to the solicitation and reception of bids, adopt plans and specifications definitely fixing the extent and character of the work to be done or materials to be furnished, so as to set up a proper competitive [721 So.2d 756] standard and afford a basis for competitive bidding.

72 C.J.S. Supp. Public Contracts § 10 (1975) (footnote omitted).

The Request for Proposal is too open ended, requesting too much discretion from the bidder with too little direction from the City. There is no specific delineation of services to bid on and it is written in such a way to inhibit a fair comparison of the bidders. The request is not specific as to when and where and how many, all which are factors that affect price. For example, a set up outdoors in December for a tree lightening is fundamentally different than a setup to take a department of 70 individuals group photo indoors in July.

DeMario requests that the Request for Proposal be withdrawn.



Bert Moore
FL Bar No.: 0336378
P.O. Box 1622
Crestview, FL 32536
(850) 689-1603
(850) 689-1802 FAX
Email: bert@bertmoorelaw.com



**City of Crestview
Parks and Recreation**

100 N. Hathaway Street
Crestview, Florida 32536

Telephone No. (850) 682-4715

Fax No. (850) 682-1754

April 21, 2008

PHOTOGRAPHER POLICY

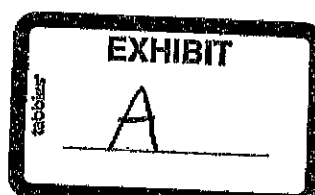
The following guidelines will be used when dealing with "on the field photographers". Only licensed and insured photographers will be allowed on the field during the game.

1. Photographers meeting the above requirements must be registered with the Parks and Recreation office prior to being allowed on the field.
2. Photographers shall remain in foul territory at all times.
3. Photographers shall not enter any area on the home plate side of the field entry gates.
4. Photographers shall not interfere; become a distraction or obstruction during the game. If this becomes a problem the umpire will ask the photographer to exit the playing area immediately.
5. At no time will the number of photographers exceed one (1). Photographers may alternate on and off the field during the game if so desired. This may be done only during dead ball situations.
6. The sale and distribution of photographs at the park will be done in a designated area. See staff person on duty for directions to the designated area.

In the event the guidelines can not be followed, the "on the field privileges" will be revoked.

Thank you,

Chuck A. Powell
Director
Parks and Recreation





**City of Crestview
Parks and Recreation Division**

Public Services Department
715 N. Ferdon Blvd.
Crestview, Florida 32539

Telephone No. (850) 682-4715

Fax No. (850) 682-7359

August 28, 2013

PHOTOGRAPHER DISCLAIMER

The City of Crestview Parks and Recreation Division does not endorse any one photographer over another. Photographers that may contact you are in no way affiliated with the City of Crestview Parks and Recreation Division.

Team pictures are the responsibility of the head coach or team mom. The Parks and Recreation Division does not arrange or negotiate pictures on the behalf of any of our league teams.

Parks and Recreation



CITY OF CRESTVIEW
Department of Public Services
715 Ferdon Boulevard North
Crestview, Florida 32536

Telephone No. (850) 682-6132
Fax No. (850) 682-7359

E-Mail: publicservices@cvflorg.gccoxmail.com

Director
Brona D. Steele
E-Mail: steele@cityofcrestview.org

TEAM PHOTOS

December 14, 2015

To: Coaches & Parents,

The city does not currently have a contract with any photographer for individual or team photos. Therefore the city **does not endorse any particular photographer** and have only granted permission to those wishing the opportunity to take pictures before and during games.

Anyone can take team or individual photos, if you are contacted by any photographer, **it is strictly up to you**, whether or not you want to schedule an appointment for the photo shoot.

It is not a required by the City that you take any individual or team pictures this is completely a parent and coach decision.

Please contact our Parks & Recreation office of any concerns about this policy.
(850) 682-4715

Sincerely,

Wayne Steele
Director Public Services

March 25, 2017

PHOTOGRAPHER POLICY

The following guidelines will be used when dealing with "on the field photographers". Only licensed and insured photographers will be allowed on the field during the game. **Photographers must provide a copy of both City of Crestview and Okaloosa County Occupational license. Proof of insurance shall be provided and a coaching application completed. The coaching application is for the initiation of a background check.**

1. Photographers meeting the above requirements must be registered with the Parks and Recreation office prior to being allowed on the field or court.
2. Photographers shall remain in foul territory or out of bounds at all times.
3. Photographers shall not interfere, become a distraction or obstruction during the game. If this becomes a problem the umpire/referee will ask the photographer to exit the playing area immediately.
4. A photographer of a photo business is allowed to only utilize one a field at a time. This photographer must be licensed and insured.
5. Photographers are **NOT** allowed to use city electrical services to produce their products.
6. The sale and distribution of photographs at the park will be done in a designated area not to exceed 100 square feet. See staff person on duty for directions to the designated area.

In the event the guidelines can not be followed, the "on the field privileges" will be revoked.

BERT MOORE
ATTORNEY
P. O. Box 1622
Crestview, Florida 32536
(850) 689-1603 ~ ~ FAX: (850) 689-1802
Email: bert@bertmoorelaw.com

April 25, 2016

Elizabeth Roy
City of Crestview Clerk

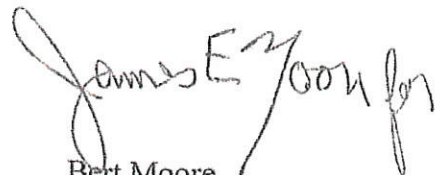
City Council Members

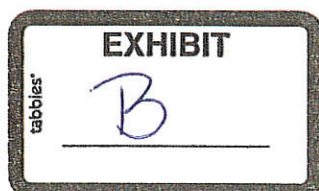
Ben Holley
City of Crestview Attorney

Sirs:

This office represents GD Photography. Late Friday afternoon, I was able to review a proposal regarding franchising photography for the City of Crestview Parks and Recreations Department. I am out of state on a previously scheduled engagement and will be unable to attend the City Council meeting tonight. In lieu of a personal appearance, I would request that the attached correspondence be provided to each councilmember in order that the Council is made aware that there is opposition to the proposal. Due to the lateness of the posting of the proposal, coupled with my being out of town, I would respectfully request this procedure. In the future if there is any necessity for further discussion of this matter, I will make arrangements to attend those meetings in person. Thank you for your consideration this matter.

Sincerely,

 #0056540
Bert Moore
#0336378



BERT MOORE
ATTORNEY
P. O. Box 1622
Crestview, Florida 32536
(850) 689-1603 ~ ~ FAX: (850) 689-1802
Email: bert@bertmoorelaw.com

April 25, 2016

Elizabeth Roy
City of Crestview Clerk

City Council Members

Ben Holley
City of Crestview Attorney

RE: GD Photography

Dear Sirs:

This office represents GD Photography and respectfully request an opportunity to address the proposal advocating for the creation of an exclusive photography vendor for the City of Crestview's Parks and Recreation Department. As background, GD photography has been engaged in providing high-quality athletic team photos and sports action shots for over 15 years in the City of Crestview. GD Photography has sold thousands of photographs of any number of sports teams including football, cheerleading, basketball, softball, baseball, soccer and T-ball. During this time, GD Photography has never had any exclusive rights to any of the sporting being used and has competed fairly with a number of other photography businesses.

Based upon the experience of the proprietor of GD Photography in the Crestview market, there are a number of concerns in conjunction with the City granting a monopoly for photography services. Of primary importance is that photography is an individualized service oriented business. It would be unfair to the consumers to require all two hundred plus teams to use the same photographer. Certainly, the City of Crestview, would be placed in a awkward position for sanctioning a volunteer coach for failing to use the city "franchised photographer." There is always a concern that the quality of service and innovation would decline with the lack of competition. Consumers have the right to freedom of choice for photography service. Competition helps keep prices competitive and requires photographers to be innovative in shot selections, marketing and other aspects of the business.

On behalf of GD photography, I have reviewed over two dozen city photography policies and can find no exclusive grant of franchise for photography in a recreation Department. Typically, the city policies require a fee and license for utilization of City properties as a venue for commercial photography or video activities. In fact, GD Photography recommended such a policy change to City officials this week.

From a legal perspective, there is the troublesome aspect of the anti-competitive component of any monopoly franchise. I quote at length from the thorough opinion of the Third District Court of Appeals in the case of Duck Tours, v. City of Key West, 875 So.2d 650(Fla. 3d DCA 2004) to illustrate Florida law regarding this matter as follows:

" Florida's antitrust laws prohibit restraints of trade. Florida's antitrust laws apply to local government. Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign... Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service," ...

"[B]efore a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy".... It is not necessary that state law explicitly say that the municipality is allowed to suppress or limit competition. However, it must be clear that the state law has delegated to the municipality "the express authority to take action that foreseeably will result in anticompetitive effects." ...The fact that the state has made a general delegation of home rule power to the local government is not enough to authorize anticompetitive action.... As the United States Supreme Court has said:

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers granted," since the term "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here.... Indeed, Boulder argues that as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act. Thus, in Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require...The central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism...."

I have been unable to find any specific grant of legislative authority or expressly enunciated state policy that would allow the City of Crestview to create a monopoly in the photography business for the Parks and Recreation Department. It is my opinion that such an monopoly ordinance would be an unlawful restraint of trade and prohibited by Florida law. For all the reasons enunciated herein, GD Photography would respectfully request that the City refrain from enacting any anti-competitive ordinance exclusively franchising photography with the Crestview's Parks and Recreation.

Thank you for your attention.

Sincerely,

James E. Moore for #0056540

Bert Moore
0336378

Exhibit B



CITY OF CRESTVIEW

P.O. DRAWER 1209, CRESTVIEW, FLORIDA 32536

PHONE # (850) 682-1560 FAX # (850) 682-8077

VIA EMAIL TO BERT@BERTMOORELAW.COM

April 8, 2020

Mr. Bert Moore
Post Office Box 1622
Crestview, Florida 32536

Re: RFP 20-04-27; Bid Protest filed by Gia DeMario d/b/a GD Photography

Dear Mr. Moore:

The bid protest submitted by you on behalf of Gia DeMario d/b/a GD Photography was received on April 1, 2020. Because a decision or intended decision to award a contract pursuant to the RFP has not been issued, the bid protest is considered a protest of the terms, conditions, and specifications contained in the RFP. Pursuant to the City of Crestview's Purchasing Manual adopted March 23, 2020, Section 9, Bid Protest Procedure, the following constitutes my decision on the bid protest.

The RFP was posted on Saturday, March 28, 2020. The Purchase Manual requires a two-step protest process, beginning with a Notice of Protest to be filed within 72 hours after posting the RFP. Saturdays, Sundays and legal holidays are excluded from the computation of time periods for bid protest purposes. Second, a formal written protest together with a bid protest bond shall be filed within 3 days after the date the notice of protest is filed. Your April 1, 2020 correspondence bearing the subject line "Notice of Bid Protest" was timely filed. Further, despite the subject line, your correspondence indicates that it is in fact a bid protest, and it appears to include the required contents of a bid protest as set forth in the Purchasing Manual. However, the protestor (GD Photograph) did not and has not provided a bid protest bond to the City of Crestview.

The Purchasing Manual provides as follows:

The formal written protest and bid protest bond shall be filed within 3 days after the date the notice of protest is filed.

Further, the Purchasing Manual specifies:

Bid protest bonds are required for all protests of intended City action to award contracts and to any protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract. The bid protest bond amount shall be the greater of \$25,000.00 or the amount of the bid indicated by the City as the recipient of an intended contract award. Bonds are not to be filed with the notice of protest, but must be filed with the formal written protest or within the 3-day period allowed for filing the formal written protest.

Mr. Bert Moore
April 8, 2020
Page Two

Last, the Purchasing Manual directs:

Failure to file a notice of protest or failure to file a formal written protest with a bond [. . .] shall constitute an absolute waiver of proceedings under this policy and a waiver of any protests or challenges by any person.

It is undisputed that the protestor did not file a bid protest bond with her bid protest. The time for filing the bid protest bond expired at the latest on April 6, 2020. The failure to file the bid protest bond constitutes an absolute waiver of any protest by Gia DeMario d/b/a GD Photography, and as such it is my decision to deny and reject the bid protest.

The protestor has a right to administrative review of my decision pursuant to the Purchasing Manual. If the protestor disagrees with the above decision, the protestor may appeal the decision to the City Manager, followed by the City Council, provided written notice of such appeal shall be submitted by the protestor to me within three (3) calendar days of service of this decision to the protestor.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gina Toussaint".

Gina Toussaint
Finance Director, City of Crestview

cc: City Clerk
City Manager

Exhibit C

**BERT MOORE
ATTORNEY
P. O. Box 1622
Crestview, Florida 32536
(850) 689-1603 ~ ~ FAX: (850) 689-1802
Email: bert@bertmoorelaw.com**

April 13, 2020

TO: Gina Toussaint, City of Crestview Finance Director
gina.toussaint@cityofcrestview.org
198 North Wilson Street, Crestview FL 32536

RE: Appeal of Denial Bid Protest

APPEAL OF DENIAL OF BID PROTEST

Gia DeMario doing business as GD Photography does hereby appeal the denial of the bid protest dated April 8, 2020 and says:

This appeal of the denial of this bid process is based upon three points, 1) the procedure utilized to review the bid protest was set forth in a purchasing manual that was conditionally approved and therefore not finally approved for use for this bid protest, 2) the challenge to the Request for Proposal was substantive i.e. whether the City had in fact the power to bid sports photography services and whether the request for proposal was so vague that there was no ability to respond and 3) the amount of the protest bid bond of \$25,000 was arbitrary and capricious when there was no bid awarded.

Purchasing Manual

The purchasing manual was conditionally approved by a vote of the City Council on March 23, 2020. Amendments were to be made to the purchasing manual post council approval. As they were amendments to be made, the general public is unaware if the protest process was to be modified by those changes. The minutes of the March 23, 2020 meeting had not been approved when protest was filed, so the general public is in a state of confusion as to what provisions were to be modified post-approval, therefore until there was a complete approval of the purchasing manual with minutes indicating any substantive or procedural changes, the City was bound to review the bid protest under the prior purchasing manual. The prior purchasing manual did not require a protest bid bond.

Purchasing manual language regarding bid protest bond

The City asserts "protest bonds are required for all protest of intended action to award contracts and to any protest of the terms, conditions and specifications contained in the solicitation, including any provisions covering the method for ranking bid proposals, replies, awarding contracts, reserving rights for further negotiation, or modifying or amending any contract"

That language does not apply to this protest, as the protest is made pre-award not post-award. To date, there is no “intended City action.” Until there is a review of the solicitation and an award, there is no intended City action. All action up to the award is speculative.

In Gyongyosi v. Miller, 80 So.3d 1070, 1075 (Fla. 4th DCA 2012) (when a term in a statute is not defined, courts must look to its plain and ordinary meaning, which can be discerned from a dictionary). Maxwell v. State, 110 So. 3d 958 (Fla. App. 2013)

Intended as defined in Webster’s dictionary: expected to be such in the future.

At this time any action on the Request for Proposal is not intended, but is speculative, no responses to the Request for proposals have been open, there has been no evaluation of the proposals nor has there been tentative award based upon the response to request for proposal. In fact, the City is unaware if any response will be presented at this time. Also, the paragraph of the purchasing manual with the word intended uses the word again “as a recipient of an intended contract award.” Clearly intended is utilized in this portion of the purchasing manual as post-award.

The amount of the protest bid bond is arbitrary and capricious.

The amount of the protest bid bond is set forth by the City as “the greater of \$25,000 or the amount of the award of the bid indicated by the City as a recipient of an intended contract award.”

As there has been no bid award, the City has as asserted that a \$25,000 bond is appropriate. This bid bond amount is far from reimbursing the City for monetary remuneration that the City could lose. Somewhere between 1000 and 1200 individuals participate in city sponsored sports. Based upon the fact that not every individual purchases a sports photography package, for this example, I will use 1000 actual purchasers of sports photography. Individual packages range in the area of \$12-\$18, for this example \$15 per individual package will be used. Assume that the successful responder to the Request for Proposal agrees to pay the City a percentage of gross income, so for this example will use 5%, 10%, 20% or 25% of gross revenue.

To reach \$25,000 revenues to pay the city at the rate of 5% of gross revenue, \$500,000 worth of sports income would have to be produced, at 10% \$250,000, at 20% \$125,000, and 25% \$100,000. At \$15 a package, using the highest percentage, 25%, each individual participant would have to purchase \$1000 of photography or 66.67 individual packages. At 5% that same individual would have to purchase \$5000 worth of packages or 333 individual packages. It is therefore abundantly clear that the \$25,000 requirement is draconian in proportionate to the city’s revenue of the potential contract.

The bid protest bond is to cover the expenses of the City in the protest. Attorney fees are to be awarded pursuant to statute or contract. (Nationstar Mortgage LLC v Famarzar, 275 So.3d 668, (Fla. 4th DCA 2019) At this point in time no contract exists between the City and GD Photography, so there would be no obligation to pay any fees pursuant to a contract. The City makes no reference by ordinance or statute to the requirement for payment of attorney fees for a bid protest. As such, if there is no obligation to pay attorney fees and at best City could recover cost less attorney fees, as the cost of the bid protest, then \$25,000 is arbitrary and capricious as there’s no rational relationship between the cost of the bid protest and the bond amount.

One example of what is a reasonable bid protest bond is found in Fla. Stat. Ch. 255.0516 which provides:

Bid protests by educational boards. The board may require the protestor to post a bond amounting to: (1) Twenty-five thousand dollars or 2 percent of the lowest accepted bid, whichever is greater, for projects valued over \$500,000; and (2) Five percent of the lowest accepted bid for all other projects, conditioned upon payment of all costs and fees which may be adjudged against the protestor in the administrative hearing. If at the hearing the agency prevails, it shall recover all costs and attorney's fees from the protestor; if the protestor prevails, the protestor shall recover from the agency all costs and attorney's fees.

Of note is the \$25,000 requirement when the project over \$500,000 and the reciprocal obligation to pay attorney fees. The bond form provided by the city provided only for payment of cost by the protester not by the City with no reciprocity. The bond form provided by the City makes reference to cost recovery and attempts attorney fee recovery without a basis in law for that recovery. As such the bid protest bond terms are unconscionable in application to this protest.

Based on the above stated points, the denial of the bid protest should be reversed and remanded for review on the substantive issues set forth in the protest.



Bert Moore
FL Bar No.: 0336378
P.O. Box 1622
Crestview, FL 32536
(850) 689-1603
(850) 689-1802 FAX
Email: bert@bertmoorelaw.com

Exhibit D

Elizabeth Roy

From: Jonathan Holloway <jholloway@okaloosalaw.com>
Sent: Tuesday, April 14, 2020 3:22 PM
To: bert bertmoorelaw.com
Subject: Gia DeMario bid protest

Bert,

As you know, I have the pleasure of serving as the City Attorney for the City of Crestview. I received a copy of the Bid Protest you filed with the City's Finance Director on behalf of Ms. DeMario, as well as the appeal you filed from the decision of the Finance Director. At this time, the City has not received a Bid Protest Bond from Ms. DeMario as required in the Purchasing Manual. The Bid Protest Bond was required to be provided to the City within 72 hours of the Notice of Protest in order to maintain a bid protest proceeding.

The City Manager and I have discussed Ms. DeMario's failure to post a Bid Protest Bond as required, and decided to provide you with specific notice of the lack of delivering the required bond (in addition to the notice in the Finance Director's decision) and an opportunity to cure this deficiency by providing the required bond. If Ms. DeMario wants the City to consider the bid protest and not reject it solely for failure to provide a Bid Protest Bond, Ms. DeMario must deliver the required Bid Protest Bond before 4:00 pm on Friday, April 17. I will accept the original bond at my office in lieu of delivery to City Hall, at your option.

Please call if you have any questions.

Jon Holloway

Jonathan Holloway, P.A.
420 East Pine Avenue
Crestview, Florida 32539
(850) 398-6808



CITY OF CRESTVIEW

OFFICE OF THE CITY MANAGER

P.O. DRAWER 1209, CRESTVIEW, FLORIDA 32536

(850) 682-3812

VIA EMAIL TO BERT@BERTMOORELAW.COM

April 22, 2020

Mr. Bert Moore
Post Office Box 1622
Crestview, Florida 32536

Re: RFP 20-04-27; Appeal of Bid Protest Denial filed by Gia DeMario d/b/a GD Photography

Dear Mr. Moore:

I received your appeal dated April 13, 2020 from the Finance Director's decision to deny the bid protest submitted by you on behalf of Gia DeMario d/b/a GD Photography.

My review of the bid protest revealed that Ms. DeMario did not file a bid protest bond as required in the City's Purchasing Manual. My understanding is that a copy of the Purchasing Manual was provided to you before you filed the bid protest on behalf of Ms. DeMario. After consulting the City Attorney on April 14, it was my decision to provide you with notice that Ms. DeMario failed to file a bid protest bond and to give you an opportunity to cure this deficiency by providing the bond, a cashier's check or money order by 4:00 pm on Friday, April 17. You will also recall that the failure to file the bid protest bond was specifically noted in the Finance Director's decision dated April 8. On Friday, April 17, you requested additional time to post a bond and indicated that your client had applied for such a bond. We provided you additional time, until Monday, April 20 to provide a bond or, as allowed in the Purchasing Manual, a cashier's check or money order in lieu of the bid protest bond. As of April 22, Ms. DeMario has not provided a bid protest bond, or cashier's check or money order in lieu of a bid protest bond.

The City allowed Ms. DeMario approximately three weeks to provide a bond, or in the alternative a cashier's check or money order. Bid Protest Bonds are common and cases addressing them are uniform in two important respects. First, if a vendor does not post a required bid protest bond after being on notice such a bond is required, agencies must follow their own rules requiring summary dismissal. Second, no case has found the amount of a bond set by an agency to be unconstitutional; in fact, a recent case involving a more than \$5 million dollar bid protest bond questioned if *any amount* could ever be high enough to present a legitimate constitutional question.

It is important to me that the City follow the rules it set. To do otherwise would be to potentially show favoritism or make subjective determinations on a case by case basis. My goal as City Manager is to avoid favoritism and encourage objectivity from my staff at all levels – including in my own decisions. As such, it is my decision to deny your appeal based on Ms. DeMario's failure to follow the clear procedures set forth in the City's Purchasing Manual.

Regardless of my decision to deny your client's appeal, I want to address some of the issues your client raised. The City is not limiting sports participants or their parents from choosing a photographer. The City is merely limiting commercial activity your client and others can take *on City-owned property* in accordance with a long-standing ordinance. This does not create a monopoly on sports photography in the City. Vendors are *competing* for the right to use a convenient venue, a result which is the product of superior skill and foresight in the industry. Your client, like any other photographer, is free to practice her trade on her own property, or someone else's property with permission – a fact which also belies any monopoly claim. As a vendor whose concessions contract is exclusive at City sports facilities, I am certain your client would strenuously object if another vendor sold concessions at those facilities and, as was the case recently, the City would not permit another vendor to make those sales. But nothing could be done by the City if that same vendor lawfully opened a facility across the street from a sports field and sold concessions. Photography on City-owned property is no different; the City can and will regulate commercial activity on its property by following this RFP process and enforcing existing ordinances.

The City's RFP is about moving forward with new goals and new views for the City's recreational programs, rather than looking to the past. The goal of competitive bidding is to obtain products or services offering the best value and best quality for taxpayers. We chose the RFP process because we felt it was equally as important to be able to qualify the vendor so we would know who is interacting with the youth of our community on our sports properties. City ordinances already prohibited commercial activity at City parks without City Council approval and this is a recognized, fair method for the City Council to permit limited commercial activity on terms set by the City Council, with a vendor we could contractually manage. In my view the process we chose and the reasons we chose that process could not be fairer or more beneficial to anyone in our community, and best serves the City's sports participants.

Your client has the right to appeal my decision to the City Council, provided written notice of such appeal is submitted to me within three (3) calendar days of service of this decision.

Sincerely,



Tim Bolduc
City Manager, City of Crestview

cc: City Clerk
Finance Director

Exhibit F

MOORE LAW OFFICE
BERT MOORE
P.O. Box 1622
Crestview, FL 32536
Ph: 850-689-1603 Fax: 850-689-1802
bert@bertmoorelaw.com

April 27, 2020

TO: CRESTVIEW CITY COUNCIL
198 N Wilson St, Crestview, FL 32536

RE: APPEAL TO CITY OF CRESTVIEW COUNCIL

APPEAL TO CITY OF CRESTVIEW COUNCIL

Gia DeMario, doing business as GD Photography, does hereby appeal the decision of the City Manager denying her appeal of her bid protest to the City Council of the City of Crestview and says:

The City of Crestview proffered a Request for Proposal for the provision of certain photography services. The services included providing photographs of City of Crestview events and personnel and photography services for City sponsored sports leagues. DeMario made no objection and can make no good faith objection to the provisions of the Request for Proposal for the photography for City events and photography of City employees, other than the vagueness in the Request for Proposal for guidance in pricing those services. However, DeMario objects to the right of the City to require bidding to engage in the business of sports photography and the onerous provisions as set forth in the purchasing manual of providing a \$25,000 bond to make this bid protest.

The decision to initiate a Request for Proposal for the purpose of providing photography services for City sponsored sports leagues is anti-competitive and not authorized by statute nor the Constitution under the grant of home rule power. The requirement of posting a \$25,000 bond for a bid protest is onerous and has no basis in statute nor City enacted ordinance.

The stated purpose of bidding for sports photography services is to prevent individuals from using City property to run their business. Such use of the City property would create an unfair competitive advantage to individuals unable to use City property to run their business. If that is the stated purpose, then the bidding for sports photography is inappropriate.

Any number of individuals are paid for their services performed on City property. Some services by their very nature require use of City property to perform the service for which the

individual is being compensated. For example, print and media journalist are compensated for providing coverage at City events and or City Council meetings. Attorneys, engineers, or consultant who appears before City Council are paid for services performed on City property. Google maps and real estate agents use City right-of-way to take photographs as part of their marketing strategy. History books routinely carry photographs taken on City property. These individuals are compensated for their services on City property because that is the venue where the services are rendered. None of those individuals have been required to submit a Request for Proposal to perform services by which they are paid for services rendered on City property. Those individuals are compensated because some of the work is performed by necessity on City property. This is in contrast to an individual who parks a food truck or sets up a vending stand on City property. There are private venues on which to ply that trade.

In the same vein, the taking of “action shots” by necessity must occur at the venue where the “action” is taking place, i.e. City property. The best venue for action shots require teams to be engaged in direct competition. As such the photographs must be taken where the teams are in direct competition, and that action occurs on City property.

Exercise of Proprietary Power not Permitted to be Anti-Competitive

There are many aspects to sports photography that are not performed exclusively on City property. Contact with coaches of the league teams to arrange for team shots, editing, proofing, printing, sales of finished product and delivery of the product may not occur on City property. Frequently, team pictures are taken off site also. However, action shot must be taken where the action is, typically on City property. An analogy is the work of an engineer or surveyor working for a private developer. Most of the work will be done off City property, but presentations to the City agencies must be done on City property.

The stated goal of the Request for Proposal is to prevent individuals from using City property to operate their business on City property in order to gain an unfair competitive advantage. However, the method utilized to prevent unfettered commercial use of Crestview property must not in and of itself be in violation of antitrust laws of the United States. Though sports photography involves pictures taken in Florida, those photos are sold to relatives in numerous states, therefore for the purposes of this appeal the sports photographer is engaged in interstate commerce. That suggestion is further bolstered by the fact one of the sports photos taken in the City of Crestview appeared in People magazine.

Crestview is attempting to create a monopoly services that is anti-competitive. In a contentious case from Key West Florida involving the conch trains the court addressed anti-competitive behavior in this matter:

Florida's antitrust laws prohibit restraints of trade. See §§ 542.16, 542.18, 542.19, Fla. Stat. (1995). Florida's antitrust laws apply to local government. See *id.* § 542.235. The remedies available against local government are injunctive or other equitable relief, but not damages. *Id.*

The City argues that it is entitled to state action immunity. State action immunity is a doctrine which originated under federal antitrust law. See *City of Columbia v. Omni Outdoor Advertising*,

Inc., 499 U.S. 365, 370-73, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). Under Florida law, "Any activity or conduct ... exempt from the provisions of the antitrust laws of the United States is exempt from the provisions of this chapter [542]."3 § 542.20, Fla. Stat. (1995). Thus, the doctrine of state action immunity which has developed under federal antitrust law is also an available defense to a suit against a municipality for a violation of Florida's antitrust laws.

The relevant principles have been summarized by the United States Supreme Court as follows:

The starting point in any analysis involving the state action doctrine is the reasoning of *Parker v. Brown* [, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943)]. In *Parker*, relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature. 317 U.S., at 350-351, 63 S.Ct., at 313-314. Rather, it ruled that the Sherman Act was intended to prohibit private restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature. *Id.*, at 351, 63 S.Ct., at 313.

Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412, 98 S.Ct. 1123 1136, 55 L.Ed.2d 364 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.*, at 413, 98 S.Ct., at 1137.

Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) (emphasis in original).

"[B]efore a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Id.* at 40, 105 S.Ct. 1713.

It is not necessary that state law explicitly say that the municipality is allowed [875 So.2d 654] to suppress or limit competition. See *id.* at 43, 105 S.Ct. 1713. However, it must be clear that the state law has delegated to the municipality "the express authority to take action that foreseeably will result in anticompetitive effects." *Id.* The fact that the state has made a general delegation of home rule power to the local government is not enough to authorize anticompetitive action. *Id.* *Duck Tours Seafari, Inc. v. City of Key West*, 875 So.2d 650 (Fla. App. 2004)

The Florida Supreme Court clarified the limits of City powers in *D'Agastino v. City of Miami*, 220 So.3d 410 (Fla. 2017) as follows:

In Florida, the power of a municipal government to legislate is derived from both constitutional provisions and statute. Generally speaking, the Florida Constitution authorizes and empowers municipalities to exist and conduct municipal powers except as otherwise provided by law:

(b) POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective. Art. VIII, § 2(b), Fla. Const. 7

Acting on its constitutional authority to address municipal powers, the Legislature clarified the powers of municipal government by enacting the Municipal Home Rule Powers Act, which is now codified in section 166.021 of the Florida Statutes. Specifically, section 166.021(1) provides in full:

166.021 Powers.—(1) As provided in s. 2(b), Art. VIII of the State Constitution, municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. § 166.021(1), Fla. Stat. (2008). However, these powers are subject to limitations; among others, municipalities may not enact legislation concerning subjects expressly preempted to the state by general law:

(3) The Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except:

(a) The subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to s. 2(c), Art. VIII of the State Constitution;

(b) Any subject expressly prohibited by the Constitution;

(c) Any subject expressly preempted to state or county government by the constitution or by general law ; and

(d) Any subject preempted to a county pursuant to a county charter adopted under the authority of ss. 1(g), 3, and 6(e), Art. VIII of the State Constitution. § 166.021(3), Fla. Stat. (2008) (emphasis added).

The actions of the City of Crestview in its solicitation under the Request for Proposal are not undertaken under their legislative authority but rather under their proprietary powers. The City acting in its proprietary function is fundamentally different than acting legislatively as the supreme court stated in *City of Largo v. AHF-Bay Fund, LLC*, 215 So.3d 10 (Fla. 2017):

First, the City did not act by sovereign right in entering into the agreement with RHF. Local governments operate in several different capacities, including proprietary (i.e., as a party to a contract), and governmental (i.e., by sovereign right). E.g., *Daly v. Stokell*, 63 So.2d 644, 645 (Fla. 1953) ; *Commercial Carrier Corp. v. Indian River Cty.*, 371 So.2d 1010 (Fla. 1979). Here, the City's decision to accept RHF's offer and enter into the PILOT Agreement was a proprietary one. See *Daly*, 63 So.2d at 645.

[A]ny contract ... that redounds to the public or individual advantage and welfare of the City or its people is proprietary, while a government function, as the term implies, has to do with the administration of some phase of government, that is to say, dispensing or exercising some element of sovereignty.Id.

The City did not exercise any element of sovereignty by entering into the PILOT Agreement. When a City enters into an express, written contract it waives sovereign immunity. *Pan-Am Tobacco Corp. v. Dep't of Corr.* , 471 So.2d 4 (Fla. 1984).

It is clear therefore that since that Request for Proposal seeks contract agreements and is not the exercise of legislative authority, then in its exercise of its proprietary authority of the City. In its exercise of that authority, the City cannot be anti-competitive. By allowing only one photographer to take action shots on City property, the City has become anti-competitive without the specific grant of authority by statute or Constitution to limit that activity.

The City Manager asserts that any unsuccessful bidder will be allowed to pursue sports photography services off City premises, explicitly recognizing that all functions of sports photography need not occur on City property. However, a significant segment of the business is photography where the action is occurring. The City seeks to monopolize that function without specific grant by Florida statutes or the Florida Constitution. By acting in its proprietary capacity, the City's action is unlawful.

Bid Protest Bond Requirement

GD photography re-incorporates its previous argument set forth in its first appeal that this protest is not covered by the requirements set forth in the purchasing manual for bid protest.

The City asserts “ protest bonds are required for all protest of intended action to award contracts and to any protest of the terms, conditions and specifications contained in the solicitation, including any provisions covering the method for ranking bid proposals, replies, awarding contracts, reserving rights for further negotiation, or modifying or amending any contract”

That language does not apply to this protest, as the protest is made pre-award not post-award meaning as yet there is no “intended City action.” Until there is a review of the solicitation and an award, there is no intended City action. All action undertaken by the City up to the award is speculative.

Courts are frequently provided guidance regarding the definitions of plain language. In *Gyongyosi v. Miller*, 80 So.3d 1070, 1075 (Fla. 4th DCA 2012) (when a term in a statute is not defined, courts must look to its plain and ordinary meaning, which can be discerned from a dictionary). *Maxwell v. State*, 110 So. 3d 958 (Fla. App. 2013)

Intended as defined in Webster's dictionary as: expected to be such in the future.

At this time any action on the Request for Proposal is not intended, but is speculative, no response to the Request for Proposals has been open, there has been no evaluation of the proposals nor has there been tentative award based upon the response to the Request for

Proposal. In fact, the City is unaware if any response will be presented at this time whether the responses will meet the terms of the solicitation.

Also, the paragraph with the word intended uses the word again to indicate that intended as "a recipient of an intended contract award." Clearly intended is utilized as post-award in this paragraph.

Florida state courts have addressed arbitrary and capricious bonds in the context of access to court as follows

The bond requirement also raises due process issues. In *Lasky*, we stated that "[t]he test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary, or oppressive." *Lasky*, 296 So.2d at 15.

Applying *Lasky* to the bond requirement statutes, we find that the statutes are not reasonably related to the legislature's objective of preventing disgruntled physicians from filing frivolous lawsuits against members of medical review boards for the purposes of intimidation or leverage. Under the bond requirement statutes, all plaintiffs, regardless of the merits of their claims, must post a bond before proceeding with their action. This requirement will not necessarily discourage frivolous lawsuits of the rich, but only those lawsuits where the plaintiff is too poor to post the bond. Thus, the effect of the bond requirement is to discourage lawsuits based on the plaintiff's financial ability rather than the merits of the claim. Further, under the bond requirement, a plaintiff with a complex meritorious case would have to post a larger bond than a plaintiff with a simple but frivolous case. Thus, as Judge Anstead stated, "[t]his kind of provision may net some sharks, but only at the price of also netting a substantial number of innocent fish." *Guerrero*, 548 So.2d at 1188 (Anstead, J. dissenting). We find that this result is not reasonably related to the permissible legislative goal of preventing frivolous lawsuits filed for intimidation or leverage....

As noted earlier, the bond requirement is also unreasonable because the statutes lack reciprocity which encourages defendants to dispute all claims instead of settling meritorious plaintiffs' claims. In fact, the bond requirement may have the unwanted effect of encouraging defendants to estimate costly defenses for all claims in order to obtain a prohibitively high bond. Furthermore, the bond requirement statutes are distinguishable from statutes that award a prevailing party reasonable attorney's fees at the conclusion of a case. Under these latter statutes, the court can accurately measure the reasonableness of the fees; whereas the bond requirement statutes compel the court to intuit the appropriate attorney's fees and costs in advance of any action. For all of the reasons discussed above, we find the bond requirement is an unreasonable means to reach the legislative goal of preventing frivolous lawsuits.

Even if we accepted the view that the bond requirement is reasonably related to a permissible legislative objective, the bond requirement would violate due process because it is arbitrary and capricious. The bond requirement arbitrarily cuts off a plaintiff's right to be heard solely because of inability to post a bond. Unlike other financial barriers to the courts, such as filing fees and bonds covering costs, the bond requirement statutes contain no provisions for a trial court to weigh a plaintiff's ability to post the bond or to waive the bond if the plaintiff is unable to pay. Thus,

these bond requirements are arbitrary and capricious because they deny plaintiffs, like Sittig, the right to be heard on the basis of one's financial status. *Psychiatric Associates v. Siegel*, 610 So.2d 419 (Fla. 1992)

The bond requirement in this matter is also arbitrary and capricious because it has no rational relationship between the amount in controversy and the bond. The bid protest bond is the same for challenging a million dollar plus sewer improvement or a \$15,000 consulting contract. Because the amount in controversy does not relate to the amount of the bid protest bond, the amount of the bid protest bond is arbitrary and capricious.

The bid protest bond affects one's ability to access courts. One of the requirements to bring an action against a municipality is the exhaustion of administrative remedies. Here administrative remedies cannot be effectively pursued because of an arbitrary and capricious bond. That requirement affects the ability to pursue any action in circuit court. For that reason, the bond requirement of \$25,000 denies due process.

A handwritten signature in black ink, appearing to read 'Bert Moore', with a stylized flourish at the end.

Bert Moore



City of Crestview

Office of the City Clerk

P. O. Box 1209, Crestview, Florida 32536

Phone # (850) 682-1560 Fax # (850) 682-8077

Email: cityclerk@cityofcrestview.org

NOTICE OF INTENDED DECISION

Photography RFP # 20-04-27

Date: May 1, 2020

The City of Crestview gives notice of its intended decision to award a contract to Shot in Focus Photography Studio at the May 11, 2020 Council Meeting.

Failure to file a notice of protest or failure to file a formal written protest with a bid protest bond in the form set forth in the City's Purchasing Manual shall constitute an absolute waiver of proceedings under City of Crestview's Purchasing Manual and a waiver of any protests or challenges by any person. Any protest must be timely received by the Finance Manager at City Hall, 198 North Wilson Street, Crestview, Florida 32536.

Elizabeth M Roy, City Clerk

Exhibit I

BERT MOORE
ATTORNEY
P. O. Box 1622
Crestview, Florida 32536
(850) 689-1603 ~ ~ FAX: (850) 689-1802
Email: bert@bertmoorelaw.com

May 4, 2020

TO: CRESTVIEW CITY COUNCIL
198 N Wilson St, Crestview, FL 32536

RE: SUPPLEMENT BID PROTEST

SUPPLEMENT BID PROTEST

COMES NOW, Gia DeMario doing business as GD Photography and supplements its previous appeal of denial of bid protest and asserts:

There are two additional points supporting the reasoning that there no necessities for a bid protest bond in this matter.

The original bid protest in this manner commenced on March 5 and 16, 2020. A copy of that protest is attached. A copy of the purchasing manual in effect at that time was sent to Counsel on March 16, 2020. The new purchasing manual was presented for vote on March 23, 2020. That purchasing manual has not been provided to Counsel. As this process commenced prior to the enactment of the new purchasing manual, the purchasing manual in effect when the protest commenced should remain in full and effect. That purchasing manual does not require a bid protest bond of \$25,000.

On May 1, 2020, the City provided its first Notice of Intended Decision. This is the act under the terms of the new purchasing manual that would trigger the necessity for posting of a bid protest bond. The Notice of Intended Decision specifically provides language regarding requirements of providing a bid protest bond if a bid protest is contemplated. The Request for Proposal did not contain any provision regarding bid protest, clearly indicating that bid protest bond was not a requirement of a protest of the fundamental right of the City to monopolize sports photography.

GD Photography request a formal hearing in this matter before the City Council.



Bert Moore

Exhibit J

**BERT MOORE
ATTORNEY
P. O. Box 1622
Crestview, Florida 32536
(850) 689-1603 ~ ~ FAX: (850) 689-1802
Email: bert@bertmoorelaw.com**

Date: March 16, 2020

To: Elizabeth Roy, City of Crestview Clerk
elizabethroy@cityofcrestview.org

Re: Bid Protests

This Bid Protest is made by Gia DeMario by and through her undersigned counsel and says:

1. Gia DeMario was provided with a Request for Proposal package for photography service in the City of Crestview.
2. The Purchasing Manual of the City of Crestview regarding Request for Proposal section 18.02(4) provides that advertising must be made in at least two publications of general distribution within the City of Crestview.
3. Advertisement for the Request for Proposal only ran in one publication.
4. There is an appearance of impropriety attached as set forth in Exhibit A.
5. The individuals designated to make the decisions regarding the award are a fundamental and material part of the Request for Proposal procedure.
6. The appearance of impropriety was only discovered in the last week and the City Attorney was immediately put upon notice of that concern.
7. There is no discernible public purpose in limiting the use of sports photography services.
8. There are over 150 athletic teams that would be covered by the sports photography requirement.
9. For over two decades there have been any number of photography businesses taking photographs of City Sponsored Sports Teams.

10. There has been no fundamental change that would require the creation of a monopoly and the creation of the monopoly for sports photography does not serve a discernible public purpose.
11. All matters set forth herein have been brought to the attention of the City Attorney as indicated by the attached correspondence. (Exhibit B)

Sincerely,

A handwritten signature in dark ink, appearing to read 'Bert Moore', with a stylized, cursive script.

Bert Moore, Attorney

BERT MOORE
ATTORNEY
P. O. Box 1622
Crestview, Florida 32536
(850) 689-1603 ~ FAX: (850) 689-1802
Email: bert@bertmoorelaw.com

March 5, 2020

To: Jonathan Holloway, Attorney
420 E. Pine Ave
Crestview, FL 32539
brandi@okaloosalaw.com

Re: Photography RFP

Sir:

This office has been contacted by a local photography business regarding a request for proposal for photography services for the City of Crestview. There are a number of significant issues regarding that Request for Proposal. First is the fundamental nature of whether or not an individual can legitimately respond to the Request for Proposal. It appears that the City is attempting to limit individuals or businesses taking team sports team-oriented photos on City property. It also appears to limit the ability of teams using City facilities from choosing their own photographer. Florida law requires a discernable public purpose for creating a monopoly situation. Sports photography on City property and off City property has been utilized by any number of entrepreneurs over at least the last two decades. It is difficult to understand how a discernible public purpose could have developed in the last year in order that a photography monopoly is required.

Secondly, the Request for Proposal has a number of structural difficulties. First there is no ascertainable timeframe to determine the length of time that the contract would be valid. Secondly it is relatively vague regarding services provided making a fair comparison as to which Proposal is superior and why.

Fundamentally however there is a fairness issue. My client received a copy of the Request for Proposal. We have reviewed the City of Crestview website attempting to find a posting for the Request for Proposal. From my review of the website I cannot find a posting of the Request for Proposal. This means that all the entities that received a copy of the Request for Proposal have a fundamentally unfair advantage over individuals who did not receive the Request for Proposal or are unaware that the proposal exists. For this reason, there is a fundamentally unfair bid process.

The baseball season is quickly approaching. My client has been informed that there is a directive from the City that no entity is to schedule appointments for team pictures. My client begins to schedule this far in advance as there are frequently over 60 teams photographed in a season. It appears that the City is now interfering with my client's business relationships.



Please advise.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bert Moore".

Bert Moore