SUNSHINE AND SHADE

NAVIGATING TRANSPARENCY LAWS AND PRESERVING PROTECTED INFORMATION

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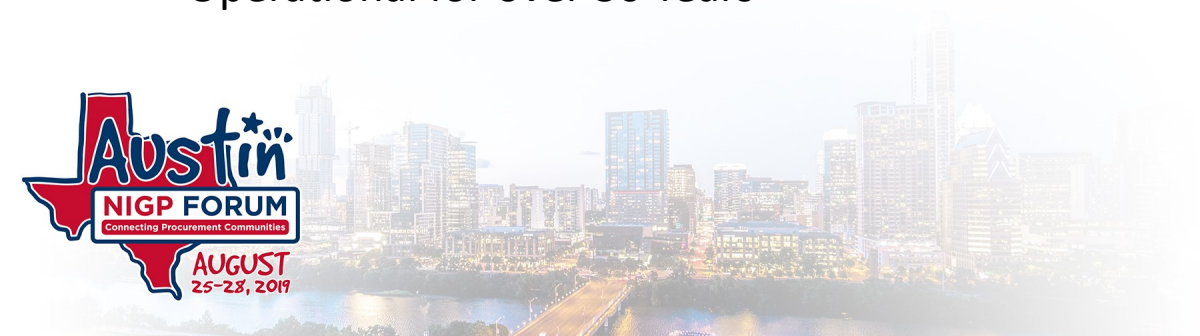
AUGUST 25-28, 2019

CARRIE MATHES, MPA, CPPO, CPM, CPPB, CFCM
ZULAY MILLAN, CPPO, CPPB

ORANGE COUNTY CONVENTION CENTER

- 7 Million Square Foot
  (2nd Largest in the US)
- 1.5 Million Attendees Annually
- 2.1 Billion in Economic Impact
- Operational for over 30 Years



Pre-Solicitation Considerations

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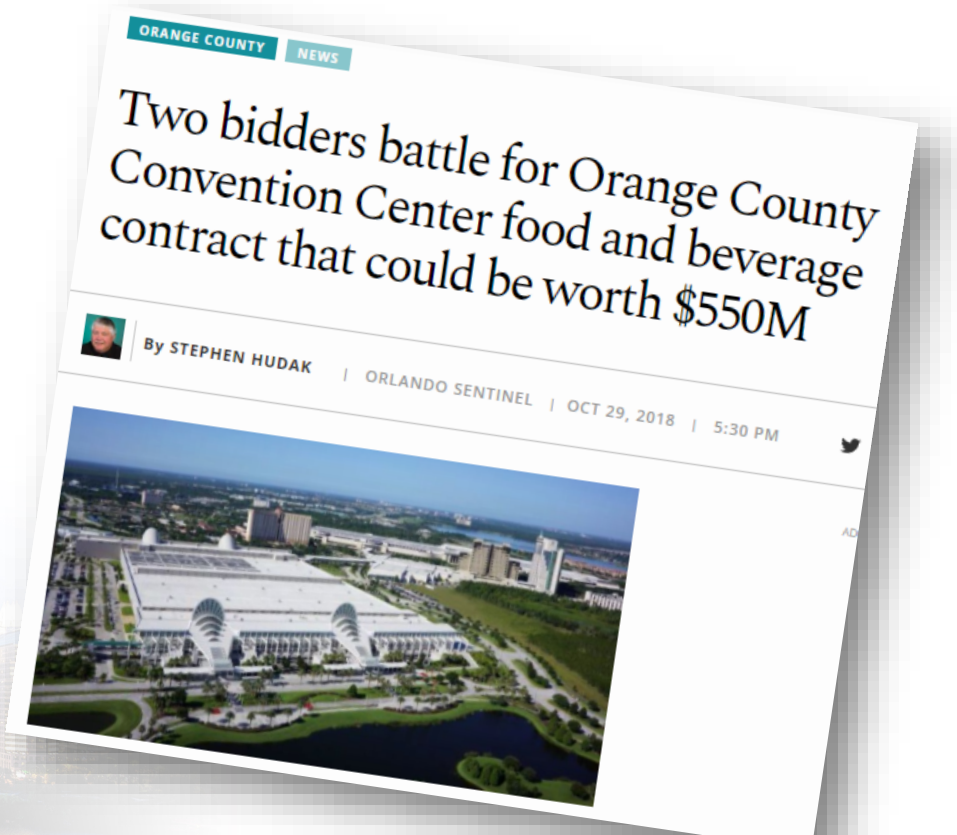
FOOD AND BEVERAGE SERVICES

- Estimated revenue value in excess of $550 Million
- 10+ Years
- Two-Phase RFP Process
- Niche Market with aggressive negotiators


ORANGE COUNTY NEWS

Two bidders battle for Orange County Convention Center food and beverage contract that could be worth $550M

By STEPHEN HUDAK | ORLANDO SENTINEL | OCT 29, 2018 | 5:30 PM

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PAST EXPERIENCE

Contract Number: Y15-1119
Name/Commodity: Airline Baggage Services and Valet Parking Services for OCCC Guests
Vendor (Orange County Code): Baggage Airline Guest Services, Inc. dba Bags (58257)
Expiration Date: 6/14/2020

Contract Number: Y17-155
Name/Commodity: Internet and Telephone Provider Services for the Orange County Convention Center
Vendor (Orange County Code): Smart City Solutions, LLC
Expiration Date: 2/21/2024

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TO DRAFT OR NOT TO DRAFT

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Solicitations Considerations

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SOLICITATION PROCESS

2 Phase RFP

- **Phase 1:** (1) Pre-Proposal Conference
  (2) Pre-qualification & Ranking
  (3) Protest Period

- **Phase 2:** (1) Video Presentations to the Board
  (2) Q & A
  (3) **Board Selection**

The best laid plans…

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Evaluation Considerations

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RESPONSIVENESS

- Screening for Confidential Information
- Identifying Legislative Exemptions

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POLLING QUESTION

- You receive a proposal that includes a non-disclosure agreement to access information critical to evaluation. Do you…
  - Deem the Proposal Non-Responsive
  - Consider executing the Non-Disclosure Agreement

RESPONSES

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STAGES OF GRIEF

Denial

Bargaining

Acceptance

Anger

Depression

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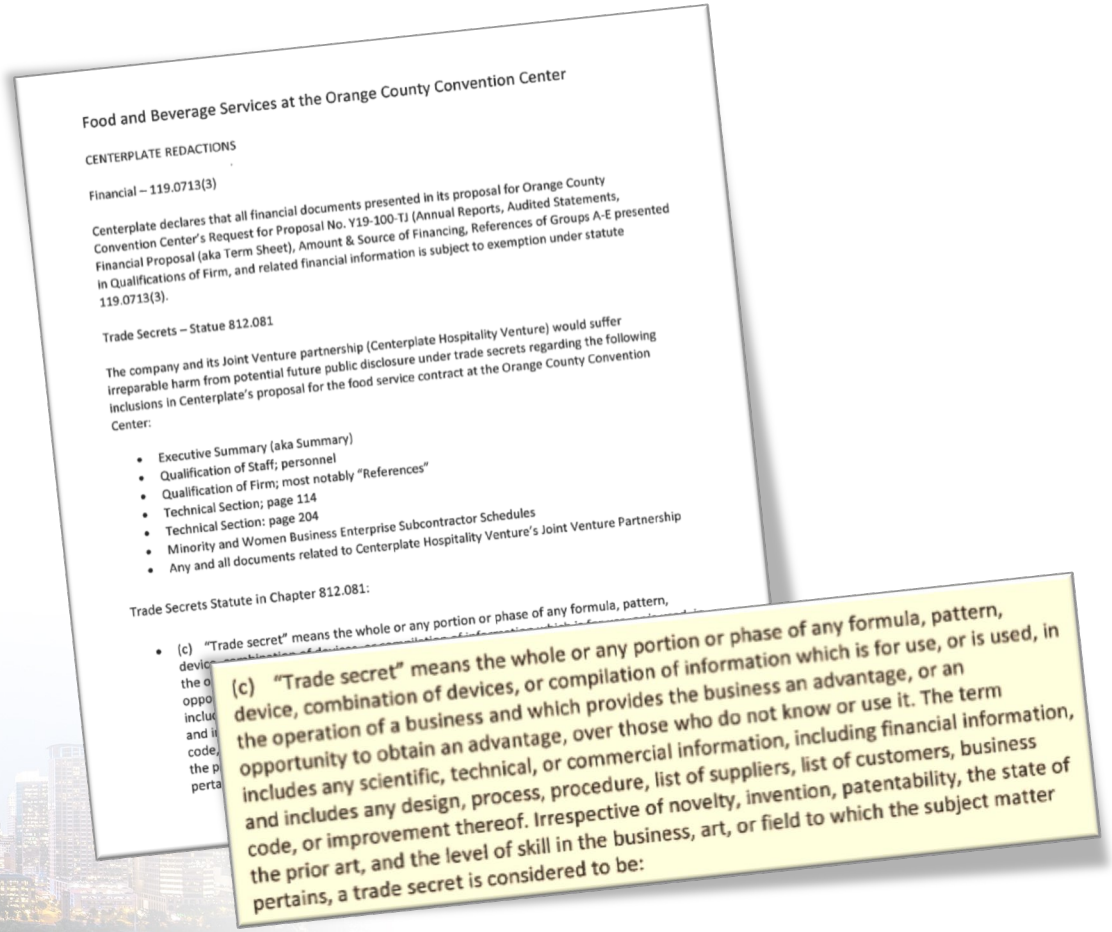
PROPOSER DECLARATION

- Exempting Legislation
- Irreparable Harm

- “Trade Secret” broad definition



Food and Beverage Services at the Orange County Convention Center

CENTERPLATE REDACTIONS

Financial – 119.0713(3)

Centerplate declares that all financial documents presented in its proposal for Orange County Convention Center's Request for Proposal No. Y19-100-TJ (Annual Reports, Audited Statements, Financial Proposal (aka Term Sheet), Amount & Source of Financing, References of Groups A-E presented in Qualifications of Firm, and related financial information is subject to exemption under statute 119.0713(3).

Trade Secrets – Statue 812.081

The company and its Joint Venture partnership (Centerplate Hospitality Venture) would suffer irreparable harm from potential future public disclosure under trade secrets regarding the following inclusions in Centerplate's proposal for the food service contract at the Orange County Convention Center:

- Executive Summary (aka Summary)
- Qualification of Staff; personnel
- Qualification of Firm; most notably “References”
- Technical Section; page 114
- Technical Section: page 204
- Minority and Women Business Enterprise Subcontractor Schedules
- Any and all documents related to Centerplate Hospitality Venture's Joint Venture Partnership

Trade Secrets Statute in Chapter 812.081:

- (c) “Trade secret” means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

(c) “Trade secret” means the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. The term includes any scientific, technical, or commercial information, including financial information, and includes any design, process, procedure, list of suppliers, list of customers, business code, or improvement thereof. Irrespective of novelty, invention, patentability, the state of the prior art, and the level of skill in the business, art, or field to which the subject matter pertains, a trade secret is considered to be:

WHAT IS EXEMPT?

The 2018 Florida Statutes

Title XIX
PUBLIC BUSINESS

Chapter 286
PUBLIC BUSINESS: MISCELLANEOUS PROVISIONS

View Entire Chapter

286.011 Public meetings and records; public inspection; criminal and civil penalties.—

The 2018 Florida Statutes

Title XLVI
CRIMES

Chapter 812
THEFT, ROBBERY, AND RELATED CRIMES

812.081 Trade secrets; theft, embezzlement; unlawful copying; definitions; penalty.—

(1) As used in this section, the term:

The 2018 Florida Statutes

Title X
PUBLIC OFFICERS, EMPLOYEES, AND RECORDS

Chapter 119
PUBLIC RECORDS

View Entire Chapter

119.021 Custodial requirements; maintenance, preservation, and retention of public records.—

The 2018 Florida Statutes

Title XLVI
CRIMES

Chapter 815
COMPUTER-RELATED CRIMES

View Entire Chapter

815.045 Trade secret information.—The Legislature finds that it is a public necessity that

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RISK OF DISCLOSURE

Felony

Florida Statute
812.081
Disclosure or Duplication of a Trade Secret is a Felony of the third degree.

Misdemeanor

Florida Statute
119.10
Violation of Public Records Disclosure is a Misdemeanor of the first degree.

Florida Statute
286.11
Violation of Open Meetings is a Misdemeanor of the second degree.

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INTERPRETING LEGISLATION

Whose responsibility is it to defend the exemption?

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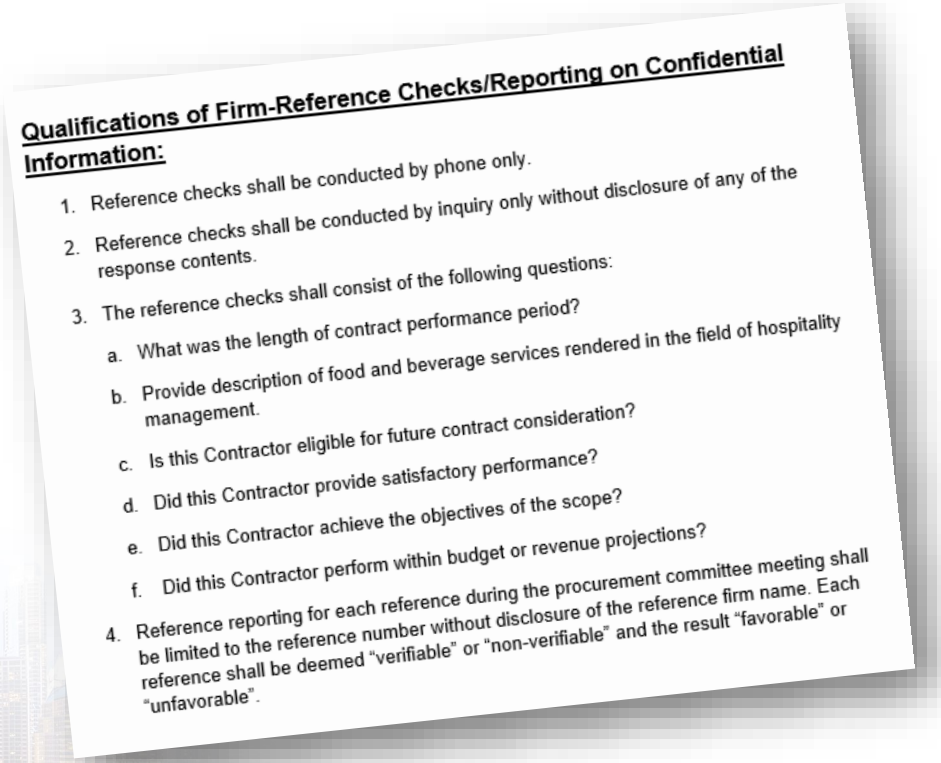
TRAINING

- Reference checks
- Communication during public meeting
- Equal treatment of proposers
- Warning concerning legal penalties



Qualifications of Firm-Reference Checks/Reporting on Confidential Information:

1. Reference checks shall be conducted by phone only.
2. Reference checks shall be conducted by inquiry only without disclosure of any of the response contents.
3. The reference checks shall consist of the following questions:
   a. What was the length of contract performance period?
   b. Provide description of food and beverage services rendered in the field of hospitality management.
   c. Is this Contractor eligible for future contract consideration?
   d. Did this Contractor provide satisfactory performance?
   e. Did this Contractor achieve the objectives of the scope?
   f. Did this Contractor perform within budget or revenue projections?
4. Reference reporting for each reference during the procurement committee meeting shall be limited to the reference number without disclosure of the reference firm name. Each reference shall be deemed "verifiable" or "non-verifiable" and the result "favorable" or "unfavorable".

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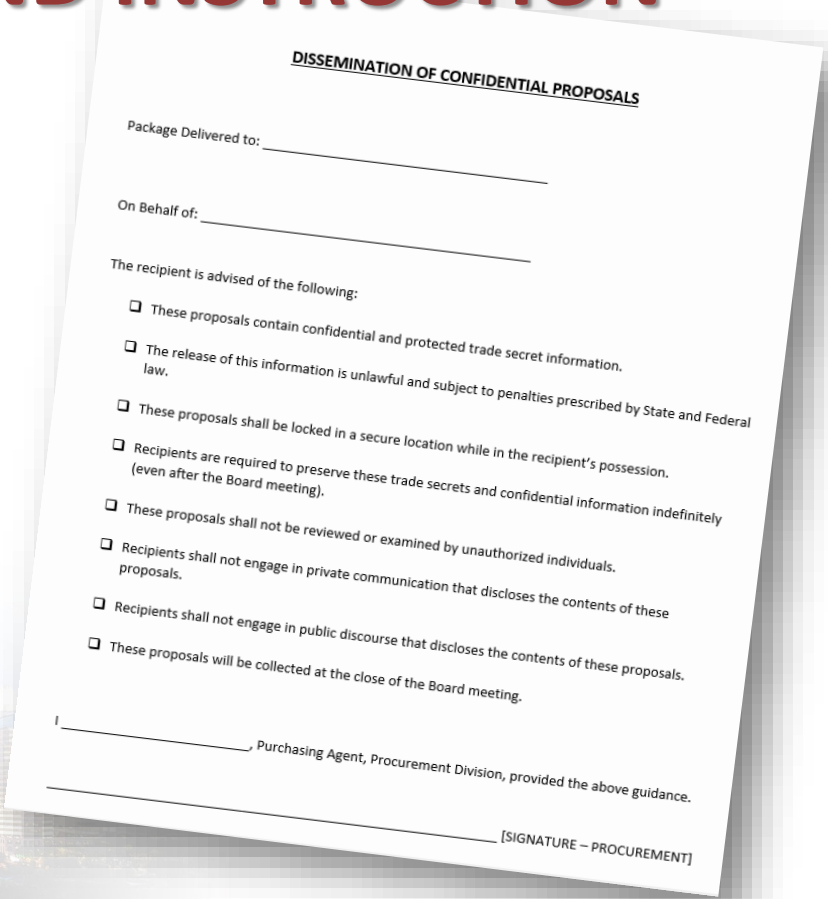
PRECAUTIONS AND INSTRUCTION

- Disseminating Materials
  - Secure Delivery
  - Chain of Custody Documentation
  - Verbal and Written Instruction



DISSEMINATION OF CONFIDENTIAL PROPOSALS

Package Delivered to: _____

On Behalf of: _____

The recipient is advised of the following:

- ❑ These proposals contain confidential and protected trade secret information.
- ❑ The release of this information is unlawful and subject to penalties prescribed by State and Federal law.
- ❑ These proposals shall be locked in a secure location while in the recipient's possession.
- ❑ Recipients are required to preserve these trade secrets and confidential information indefinitely (even after the Board meeting).
- ❑ These proposals shall not be reviewed or examined by unauthorized individuals.
- ❑ Recipients shall not engage in private communication that discloses the contents of these proposals.
- ❑ Recipients shall not engage in public discourse that discloses the contents of these proposals.
- ❑ These proposals will be collected at the close of the Board meeting.

I _____, Purchasing Agent, Procurement Division, provided the above guidance.

_____ [SIGNATURE – PROCUREMENT]

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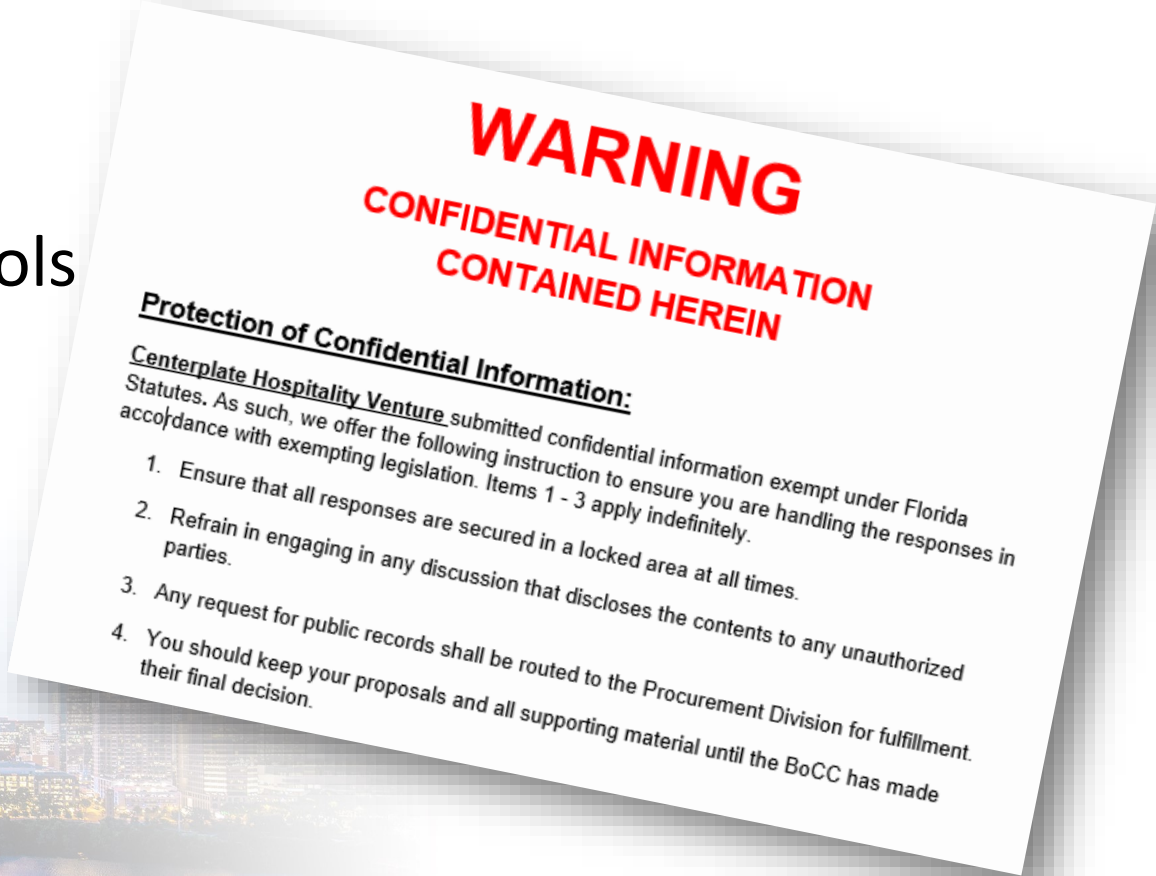
PRECAUTIONS AND INSTRUCTION

- Securing Materials
- Destruction Protocols



WARNING

CONFIDENTIAL INFORMATION CONTAINED HEREIN

Protection of Confidential Information:

Centerplate Hospitality Venture submitted confidential information exempt under Florida Statutes. As such, we offer the following instruction to ensure you are handling the responses in accordance with exempting legislation. Items 1 - 3 apply indefinitely.

1. Ensure that all responses are secured in a locked area at all times.
2. Refrain in engaging in any discussion that discloses the contents to any unauthorized parties.
3. Any request for public records shall be routed to the Procurement Division for fulfillment.
4. You should keep your proposals and all supporting material until the BoCC has made their final decision.

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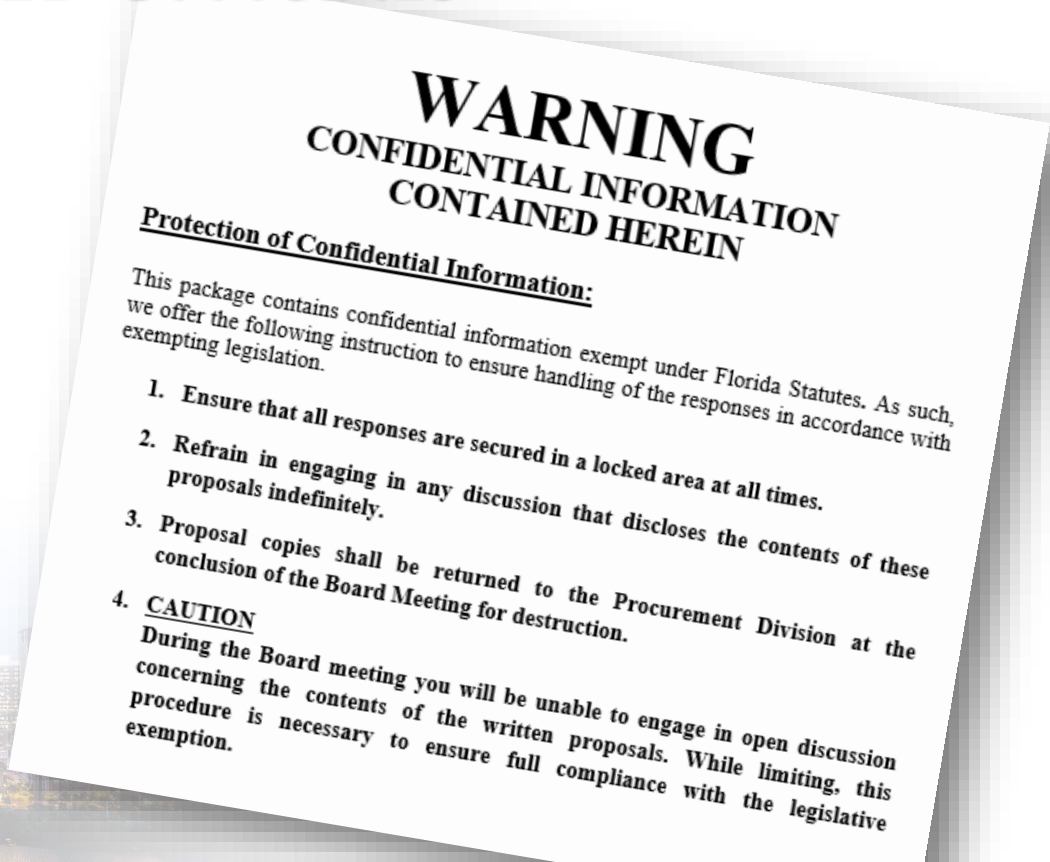
PUBLIC MEETINGS & ELECTED OFFICIALS

- Special Instruction to District Offices
- Chain of Custody
- Board Meeting Protocols



WARNING
CONFIDENTIAL INFORMATION CONTAINED HEREIN

Protection of Confidential Information:

This package contains confidential information exempt under Florida Statutes. As such, we offer the following instruction to ensure handling of the responses in accordance with exempting legislation.

1. **Ensure that all responses are secured in a locked area at all times.**
2. **Refrain in engaging in any discussion that discloses the contents of these proposals indefinitely.**
3. **Proposal copies shall be returned to the Procurement Division at the conclusion of the Board Meeting for destruction.**
4. **CAUTION**
   During the Board meeting you will be unable to engage in open discussion concerning the contents of the written proposals. While limiting, this procedure is necessary to ensure full compliance with the legislative exemption.

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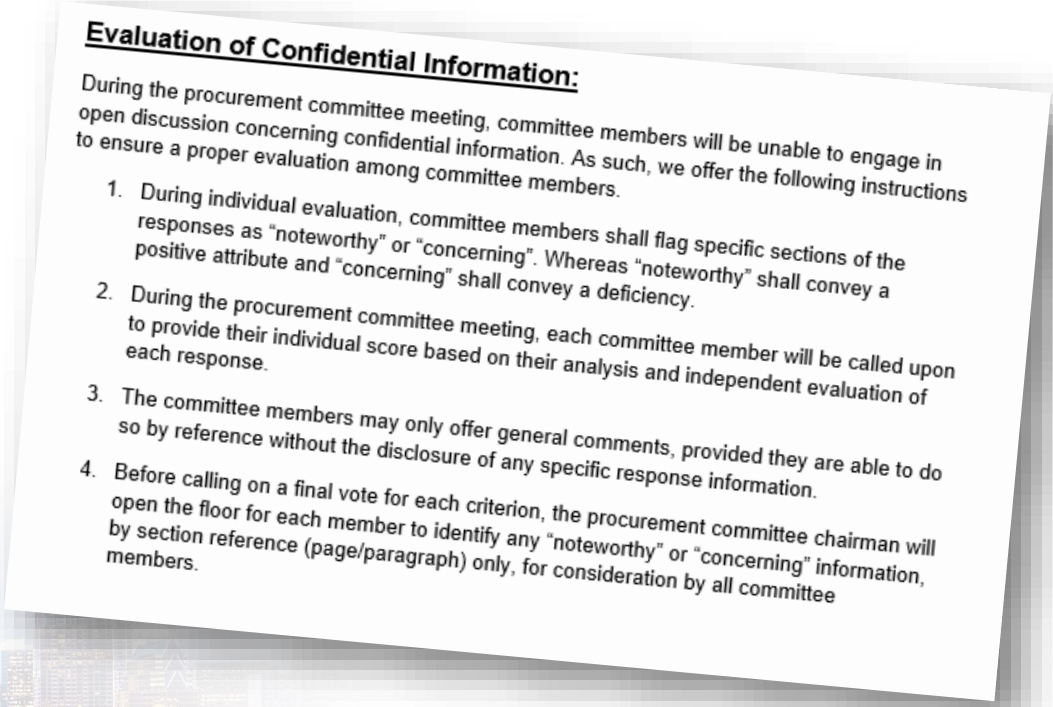
FACILITATION

- Information remained protected
- Communication in accordance with protocols
- Equal treatment of proposers
- Chain of Custody was preserved



Evaluation of Confidential Information:

During the procurement committee meeting, committee members will be unable to engage in open discussion concerning confidential information. As such, we offer the following instructions to ensure a proper evaluation among committee members.

1. During individual evaluation, committee members shall flag specific sections of the responses as "noteworthy" or "concerning". Whereas "noteworthy" shall convey a positive attribute and "concerning" shall convey a deficiency.
2. During the procurement committee meeting, each committee member will be called upon to provide their individual score based on their analysis and independent evaluation of each response.
3. The committee members may only offer general comments, provided they are able to do so by reference without the disclosure of any specific response information.
4. Before calling on a final vote for each criterion, the procurement committee chairman will open the floor for each member to identify any "noteworthy" or "concerning" information, by section reference (page/paragraph) only, for consideration by all committee members.

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POST EVALUATION

Public Record Requests

COMPETING PROPOSER OBJECTION

While I am aware that Chapter 119 of the Florida Statutes dealing with the public records law—generally referred to as the Sunshine Law—allows for confidential information to be maintained as a trade secret, the action allowed by the County, based upon what appears to be a bad faith act on behalf of Centerplate, goes far beyond the intent and specific language of Chapter 119, and is an abuse of discretion in violation of Florida law.

My client, as a competitor, is directly harmed by the County's failure to properly review the assertion that Centerplate's information is a trade secret. It should be noted that the RFP provides that the proposers are not permitted to provide new information to the County after the RFP response date from the information that is contained in the RFP. How can we, as a competitor, or the public determine whether Centerplate is engaged in a bait and switch operation if there is no way to compare the differences between what they set forth in the upcoming video and what they provided to the County?

While I am sorry that I must write a letter of this nature to the County, it is imperative that this matter be addressed immediately. I personally observed the entire process for scoring with respect to the RFP, and while I may have differences of opinions of what the scores should be, I was impressed by the professionalism and care taken at the hearing to avoid any hint of favoritism or impropriety. I am quite dismayed, however, to have found what I believe to be a very professional approach has been sullied by what appears to be an exercise of bad faith by Centerplate, and acquiescence by the County in that activity.

THE MEDIA'S OBJECTION

- Can they do this?
- Does not believe the exemption identified is applicable.
- Has the County made a determination on the claim of trade secret?

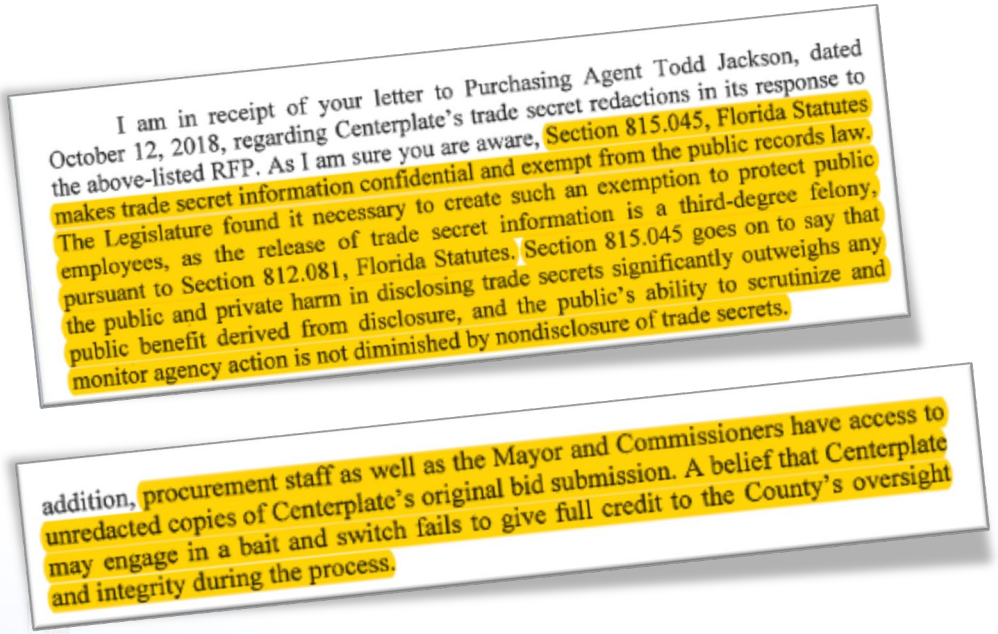
This year's process also sparked controversy. In a letter to county officials, attorney Hal Kantor, representing the Levy venture, expressed "disappointment and utter shock" that Orange County allowed Centerplate to black out most of its bid details as "trade secret" exemptions under Florida's Sunshine Law, the state's guiding public-records law.

The lawyer said the pervasive black-out of information appears to be "a bad faith act...and is an abuse of discretion in violation of Florida law."

Through its lawyer, the Orlando Sentinel also has objected to the heavy redaction.

OUR RESPONSE

- Enabling legislation to protect public employees
- Defending protection of trade secret redaction



I am in receipt of your letter to Purchasing Agent Todd Jackson, dated October 12, 2018, regarding Centerplate's trade secret redactions in its response to the above-listed RFP. As I am sure you are aware, Section 815.045, Florida Statutes makes trade secret information confidential and exempt from the public records law. The Legislature found it necessary to create such an exemption to protect public employees, as the release of trade secret information is a third-degree felony, pursuant to Section 812.081, Florida Statutes. Section 815.045 goes on to say that the public and private harm in disclosing trade secrets significantly outweighs any public benefit derived from disclosure, and the public's ability to scrutinize and monitor agency action is not diminished by nondisclosure of trade secrets.

addition, procurement staff as well as the Mayor and Commissioners have access to unredacted copies of Centerplate's original bid submission. A belief that Centerplate may engage in a bait and switch fails to give full credit to the County's oversight and integrity during the process.

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PRESENTATION PROTOCOLS

- Pre-recorded Presentations vs. Oral Presentations
  - Risk of Bait/Switch
  - Risk of Supplementing Proposal
    - Required Audit
    - Written Proposal Citations
  - Proposer assumes risk of Self-disclosure

What was the Result?

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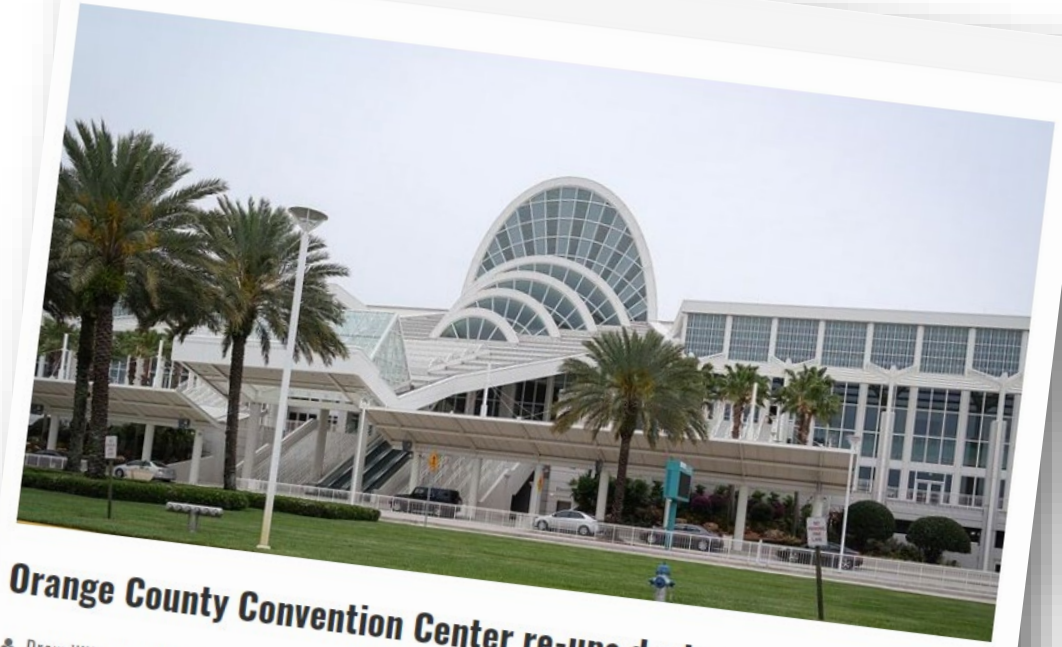
Orange County leaders decided Tuesday on a second helping of Centerplate, choosing the company for a another long-term contract as exclusive food-service provider at the Orange County Convention Center, a deal potentially worth $550 million.

Centerplate executives slapped one another on the back and embraced over the lucrative win.

Home > Our Politics



Orange County Convention Center re-ups deal with CenterPlate

Drew Wilson 11/08/2018 Our Politics

CenterPlate has been the Orange County Convention Center's **exclusive food-service provider** for a decade and based on its performance the Orange County Commission voted in favor of keeping the company around for another decade-plus.

After a lengthy bidding process that saw CenterPlate **go up against** a consortium of food-service companies including one-time contract holder Levy restaurants, the Commission opted to stick with what's working rather than turn back the clock to 2007. The commission handed down the decision with a resounding 5-1 vote.

Lessons Learned

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SOLICITING

- Requesting Confidential information
  - Is it valuable to the process?
  - Can you adequately evaluate it?

PROVISION OPTIONS

- Disallow Confidential Information
- Allow Confidential Information
  - Require Redactions
  - Require Legislative References
  - Separate Packaging

TRADE SECRET LEGISLATION

- Uniform Trade Secrets Act
- Defend Trade Secrets Act of 2016
- North American Free Trade Agreement

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TRADE SECRETS ARE FOREVER

- Handling Public Records Requests
- Record Retention and Protection
- Record Destruction

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