

MEMORANDUM

TO: MAYOR AND CITY COMMISSION
FROM: CITY ATTORNEY'S OFFICE
DATE: September 6, 2022
RE: **Agreement with Air Centers of Florida, Inc. for Instrument Air Equipment for the McIntosh Reciprocating Engine Project**

Attached hereto for your consideration is a proposed Agreement with Air Centers of Florida, Inc. (ACF) for procurement of Instrument Air Equipment for the McIntosh Reciprocating Engine Project (RICE Project). The equipment includes two (2) fully redundant rotary air compressors with 100% capacity, two (2) twin tower heated air dryers and two (2) storage tanks (one wet and one dry) for a continuous source of clean air. The equipment is required for the operation, control and protection of the RICE engines.

On May 6, 2022, the City's Purchasing Department issued Invitation to Bid No. 2147 seeking qualified contractors to provide the design, manufacturing, furnishing and delivery of air compressors, dryer packages and air receiver tanks. The City received responses from the three (3) contractors listed below.

| Contractor | Location | Bid Price |
|------------------------------|-----------------|------------------|
| Compressed Air Systems, Inc. | Tampa, FL | Non-responsive |
| Atlas Copco Compressors, LLC | Rock Hill, SC | \$335,800.00 |
| Air Centers of Florida, Inc. | Tampa, FL | \$342,080.00 |

Upon evaluation by City staff, ACF was selected as the most responsive, responsible bidder capable of providing the services in accordance with the City's Bid Specifications. Although the initial bid price by Atlas Copco Compressors, LLC (Atlas) was lowest, its bid contained technical exceptions that would have increased the cost of Atlas' bid, as well as extend the lead time for services beyond an acceptable limit for the City. Alternatively, ACF's bid revealed that it could offer a smaller compressor at a lower cost that met the City's Bid Specifications, which actually resulted in ACF providing its services at the lowest cost. Upon approval by the City Commission, ACF will commence work on the design and manufacturing of the instrument air equipment, which are scheduled for delivery in December 2022, after which the equipment will then be installed by a general contractor selected by the City pursuant to a separate bid.

ACF will perform all services pursuant to the terms and conditions set forth in the City Bid Documents, including conformed Specification M-8545 Rev C,

ACF's negotiated terms and conditions dated August 5, 2022 and ACF's quote dated August 12, 2022. The total cost of the work is \$334,971.00 and is included in Lakeland Electric's budget for the RICE Project, which was previously approved by the City Commission and funded through the City's Energy System Revenue Bond.

It is recommended that the City Commission approve this Agreement with ACF for procurement of Instrument Air Equipment for the RICE Project and authorize the appropriate City officials to execute all corresponding documents on behalf of the City.



Terms and Conditions of Sale

- 1. Acceptance** – ACF Holdings of Tampa Bay, Inc. including Air Centers of Florida, Inc., ACF Standby Systems, LLC, ACF Tool and Hoist, Arle Compressors of Florida, LLC, and ACF, Inc. is hereinafter referred to as "Seller" and the Buyer is hereinafter referred to as "Buyer." Any order that contains terms and conditions in addition to or inconsistent with the following shall not be binding upon Seller unless acceptance of each non-conforming term or condition is clearly and expressly made in writing by Seller, and failure of Seller to object to provisions contained in any purchase order or other communication from Buyer shall not be construed as a waiver of these terms and conditions nor as acceptance of any such provisions. Acknowledgements of Buyer's order forms or "releases" shall not be construed to be a waiver, amendment, or modification of these terms and conditions.
- 2. Payment** – Standard credit terms are NET-45 days from receipt of invoice in accordance with Florida Statute §218.74 et. seq., the Local Government Prompt Payment Act. Equipment, parts and service orders over \$50,000 are subject to progress payments of 25% upon order, 65% prior to shipment, and 10% NET-45 days from receipt of invoice in accordance with Florida Statute §218.74 et. seq., the Local Government Prompt Payment Act. Charges not paid within 30 days are considered past due. Past due accounts are subject to a finance charge of 1% per month, on the past due balance, with interest charges accruing from the invoice date in accordance with Florida Statute §218.74 et. seq., the Local Government Prompt Payment Act. If credit cards are used for purchases, then the portion of the purchase amount above \$5,000 is subject to a 3% fee. No retainage is permitted unless accepted in writing by Seller, but not to exceed 10% of the order value. All retainage held shall not to exceed 90 days from shipment. Purchase orders issued with a hold for release date are subject to re-evaluation at the time of release.
- 3. Order Acknowledgment** – All equipment purchase orders must reference Seller quotation and must be acknowledged in writing by Seller to be deemed accepted.
- 4. Shipments** – Merchandise is shipped F.O.B. Point of Destination (Lakeland). Freight cost is not included unless specifically stated in the quote and may be generated in a separate invoice. Partial shipments will be invoiced proportional to total quoted price. If job conditions or schedule results in partial or incomplete shipment of equipment, parts or services provided by Seller, Buyer will be invoiced per the dollar value of the items shipped or services performed, and Buyer agrees to pay the invoice as outlined in the payment policy herein. Completed equipment to be delivered to a 3rd party manufacturer for further fabrication will be invoiced upon shipment to the 3rd party manufacturer.
- 5. Price** – Quotation prices are firm for thirty (30) days from the date of the quotation, unless specifically stated to the contrary as part of a particular price quote and are subject to change without notice after the expiration of this thirty (30) day period. Any variations in quantity specified and/or rate of delivery may necessitate a revision in price.
Start-up and test costs may be invoiced separately at Buyer's request, but subject to Seller partial invoicing policy in payment policy herein.
Storage fees may be assessed if job site is not able to accept delivery on the requested date.
Seller will charge Buyer for time and costs at our normal service rates for required online portal entry system and specific training Seller's employee may be required to receive to do business with the Buyer.
Permit and license costs (AQMD, Fire, Building, etc.) are not included. Seller will provide information, if necessary, for the acquisition of permits and licenses, but does not assume any responsibility for obtaining any permits or licenses which may be required.
- 6. Taxes** – The price does not include any present or future federal, state, or local property, license, privilege, sales, use, excise, gross receipts or other like taxes or assessments applicable to this transaction or any services performed hereunder. Such taxes will be itemized separately to Buyer. The Seller will accept a valid exemption certificate from Buyer. If exemption certificate is not recognized by the governmental taxing authority, Buyer agrees to promptly reimburse the Seller for any taxes which the Seller is required to pay.
- 7. Delivery** – Seller will not accept purchase orders which specify delivery dates that are not subject to manufacturer's lead-times, contain penalty clauses, liquidated damage clauses, time is of the essence clause, require Seller to pay any legal expenses of the Buyer in the event of a dispute, require Seller to be responsible for system design work and/or guarantee that a performance standard for a system will be met, require completion and acceptance of the project by the owner before payment. Offloading, placement and anchoring of the goods shall be the Buyer's sole responsibility unless specified in the quotation. Deliveries outside normal business hours will be invoiced at additional charges.
- 8. Long Term Storage** – If equipment sold by Seller is not installed and ready for startup within 6 months of shipment, it will require long term storage maintenance procedures. Please refer to the Operation and Maintenance Manual for such requirements. Failure to follow these procedures may void warranty and affect equipment operation. All costs related to long term storage is the responsibility of the Buyer of the equipment. Buyer will be invoiced per the dollar value of the items and/or services performed and Buyer agrees to pay the invoice as outlined in the payment policy herein.
- 9. Cancellation and Return Policy** – Buyer cancellation charges for standard orders is 25%. Orders for non-standard equipment and parts are subject to the manufacturers cancellation policy if charges are greater than 25% of the sale up to 100% of the sale.
- 10. Assignment** – Neither party shall assign or transfer this contract without the prior written consent of the other parties.
- 11. Classification** – Seller is a supplier of equipment, parts and related service and is not a contractor.
- 12. Title and Risk of Loss** – Title and risk of loss or damage to the Equipment shall pass to the Buyer upon tender of delivery F.O.B. Destination (Lakeland) Destination (Lakeland).
- 13. Governing Law and Jurisdiction** – The rights and obligations of the parties shall be governed by the laws of the State of Florida excluding any conflicts of law provisions. The United Nations convention on contracts for the international sale of goods shall not apply to this agreement.
Venue for any litigation (and depositions) between the parties for any claims relating to debt collection for merchandise, supplies, or equipment purchased hereunder, or hereafter, shall only be in Polk County Florida. The parties do hereby waive their right to trial by jury for any litigation arising between the parties and any claims relating to debt collection for merchandise, supplies, or equipment purchased hereunder, or hereafter. The Seller will comply with applicable laws and regulations in effect on the date of the Seller's proposal as they may apply to the manufacture of the Equipment. Compliance with any local governmental laws or regulations relating to the location, use or operation of the Equipment, or its use in conjunction with other equipment, shall be the sole responsibility of the Buyer. If legal action is instituted to collect amounts owed or to recover materials or supplies purchased, the Buyer agrees to pay all reasonable attorney's fees and appellate attorney's fees and costs incurred by Seller.
- 14. Patents** – The Seller does not accept any liability whatsoever with respect to patents claiming more than the Equipment furnished hereunder, or claiming methods and processes to be carried out with the aid of said Equipment. The foregoing states the entire liability of the Seller with regards to patent infringement.
- 15. Warranty** – The Seller warrants that the Equipment sold and delivered hereunder will be free of defects in material and workmanship for a period of twelve months from the date of placing the Equipment in operation or eighteen months from the date of shipment, whichever shall occur first unless otherwise stated by the manufacturer. Warranty for parts is 6 months and equipment warranty is 12 months.
The Buyer shall be obligated to promptly report any failure to conform to this warranty, in writing to the Seller within said period, whereupon the Seller shall, at its option, correct such nonconformity, by suitable repair to such Equipment or, furnish a replacement part provided the Buyer has stored, installed, maintained, and operated such Equipment in accordance with good industry practices and has complied with specific recommendations of the Seller. Seller reserves the right to take possession of or direct Buyer to return any replaced parts, which shall become Seller property. Accessories or equipment furnished by the Seller, but manufactured by others, shall carry whatever warranty the manufacturers have conveyed to the Seller and which can be passed on to the Buyer. This warranty shall not apply to any component which Buyer directs Seller to use in or add to the Equipment, and which would not otherwise be used or added by the Seller. The Seller shall not be liable for any repairs, replacements, or adjustments to the Equipment or any costs of labor performed by the Buyer or others without the Seller's prior written approval.
The effects of corrosion, erosion, and normal wear and tear are specifically excluded. Performance warranties are limited to those specifically stated within the Seller's proposal, and the Seller's obligation for meeting such performance warranties shall be to correct in the manner, and for the period outlined herein.
THE SELLER MAKES NO OTHER WARRANTY OR REPRESENTATION OF ANY KIND WHATSOEVER, EXPRESSED OR IMPLIED, EXCEPT THAT OF TITLE, AND ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE, ARE HEREBY DISCLAIMED.
- 16. Liability** – Correction by the Seller of nonconformities whether patent or latent, in the manner and for the period provided herein, shall constitute fulfillment of all liabilities of the Seller for such nonconformities, with respect to or arising out of such Equipment.
The Buyer shall not operate Equipment, which is considered defective, and any such use of Equipment will be at the Buyer's sole risk and liability.
The remedies of the Buyer set forth herein are exclusive, and the total liability of the Seller with respect to this contract, whether based on contract, warranty, negligence, indemnity, strict liability or otherwise, shall not exceed the purchase price of the unit of Equipment upon which such liability is based.
Neither Party shall be liable to the Buyer, any successors in interest or any beneficiary or assignee of this contract for any consequential, incidental, indirect, special, or punitive damages arising out of this contract or any breach thereof, or any defect in, or failure of, or malfunction of the Equipment hereunder, whether or not such loss or damage is based on contract, warranty, negligence, indemnity, strict liability or otherwise.
- 17. Revisions** – Neither Party shall be bound by any contract or any modification thereto until approved in writing by an officer of the Party. The contract or modification, when so approved, shall supersede all previous communications, either oral or written.
- 18. Insurance** – IAW Bid documents

19. Public Records

IF THE SELLER HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO THE SELLER'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF

**PUBLIC RECORDS: KEVIN COOK - DIRECTOR
OF COMMUNICATIONS AT: PHONE: 863-834-
6264, E-MAIL:
KEVIN.COOK@LAKELANDGOV.NET, ADDRESS:
ATTN: COMMUNICATIONS DEPARTMENT, 228 S.
MASSACHUSETTS AVE., LAKELAND, FLORIDA
33801.**

In accordance with Florida Statute §119.0701, the Seller shall keep and maintain public records required by the Buyer in performance of services pursuant to the contract. Upon request from the

Buyer's custodian of public records, Seller shall provide the Buyer with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided pursuant to Florida Statute Chapter 119 or as otherwise provided by law. Seller shall ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the contract if the Seller does not transfer the records to the Buyer. Seller shall, upon completion of the contract, transfer, at no cost, to the Buyer all public records in possession of the Seller or keep and maintain public records required by the Buyer to perform services pursuant to the contract. If the Seller transfers all public records to the Buyer upon completion of the contract, the Seller shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If the Seller keeps and maintains public records upon completion of the contract, the Seller shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the Buyer, upon request from the Buyer's custodian of public records, in a format that is compatible with the information technology systems of the Buyer.