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TRANSMITTED VIA E-MAIL: ryan.scordato@lowndes-law.com

February 24, 2021

Ryan P. Scordato
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
215 North Eola Drive
Orlando, Florida 32801-2028

RE: Protest Filed Pursuant to Award Recommendation on Request for Proposals 2020-180-ND for Design-Build Services for the 72nd Street Community Complex (the "RFP")

Dear Mr. Scordato:

The City has reviewed the protest filed on behalf of PCL Construction Services, Inc. ("PCL") pursuant to the award recommendation by the City Manager on the above-referenced RFP (the "Protest") for Design-Build Services for the 72nd Street Community Complex (the "Project"). PCL's grounds for the filing of the Protest are based on the City's decision to not reject the proposal received from The Haskell Company ("Haskell") for its reference, as basis of design, of a Bradford Products pool system manufactured in North Carolina. After review of the particulars upon which PCL's protest has been filed, the City hereby denies said protest for the reasons as set forth below.

As a threshold consideration, the City's moratorium on North Carolina products and services has been lifted. PCL's Protest correctly states that Resolution No. 2016-29375, approved by the City Commission on April 13, 2016, imposed a moratorium on the purchase of goods or services sourced in North Carolina "until such discriminatory legislation is either repealed or declared unconstitutional by a court of law." The City resolution was in response to North Carolina's adoption of certain discriminatory legislation as part of its HB-2 legislation, which legislation was subsequently superseded in 2017 by HB-142. However, Section 4 of HB-142 provided for an expiration date of December 1, 2020. Accordingly, North Carolina's discriminatory legislation is no longer in place and the City's moratorium on the purchase of goods or services sourced in North Carolina was lifted contemporaneously with the expiration of HB-142.

Notwithstanding the expiration of the City moratorium on goods and services purchased in North Carolina as established in City Resolution No. 2016-2937, PCL's protest conveniently ignores the facts of the RFP in alleging that Haskell is non-responsive to the requirements of the RFP because (1) the referenced system was a "basis for design" only; (2) there was no material deviation from the solicitation because the RFP did not require the proposers to provide the qualifications of subcontractors; (3) the RFP provides for a process by which the design-build firm can substitute a non-complying subcontractor; and (4) pursuant to City Code Section 2-371, the City Manager and City Attorney's determination with regard to issues of responsiveness shall be binding upon the parties to the protest.

First, the RFP was released with the intent of receiving proposals for *design-build services* for the Project. Unlike a design-bid-build process where a contractor is solely submitting a price to build a facility in accordance with a set of final plans and specifications provided by the agency, the design-build process is much less rigid, requiring bidders to only submit preliminary design

concepts and pricing initially, with final construction documents to be completed after contract award in accordance with the Design Criteria Package (the “DCP”). Thus, the use of the term “basis of design,” a term used in both the DCP and in Haskell’s proposal with regard to the pool manufacturer, generally means the preliminary designs, principles, assumptions and considerations used by engineering professionals in developing a design. The term basis of design typically does not imply final decisions that are not possible until well into the design process. With regard to the pool system, the DCP states that Myrtha Pools USA is to be considered the basis of design, but also explicitly allows for alternative manufacturers to be *substituted with Owner approval* [emphasis added]. Therefore, the RFP provides the design-build firm the flexibility to consider one or more pool systems and sub-contractors may be replaced as noted below. Notwithstanding any preliminary basis of design considerations and the expiration of the moratorium referenced above, Haskell, pursuant to the required Bid Submittal Questionnaire it included in its bid, has agreed to be in full compliance with Resolution 2016-29375 (See Exhibit “Haskell’s Bid Submittal Questionnaire”).

Next, PCL argues in its protest that the pool manufacturer brand is a non-changeable “material” requirement of the RFP. In accordance with Florida law, the decision to use the pool manufacturer brand as a basis of design is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition. Robinson Electrical Co., Inc. v. Dade Co., 417 So.2d 1032, 1034 (Fla. 3d DCA 1982). While the initial RFP released initially required bidders to submit information regarding the qualifications of subcontractors and, specifically, the pool subcontractor (see Section 0400, Phase II Response Format, Tab 2 of the RFP), in the subsequent Addendum No. 7 to the RFP, the City intentionally deleted said requirement to eliminate any requirement for the bidder to name its subcontractors, including the pool subcontractor. In taking such action, the City has clearly demonstrated that review of the subcontractors is not material to its review and consideration of the proposals received. Further, even if the submittal of the pool subcontractor was a material requirement of the RFP (which it was not), the RFP provides for a process by which the design-build firm can substitute a non-complying sub-contractor. Specifically, Section 3.24 of the Project contract included in the RFP requires the design-build firm to seek the City’s approval in its final contract with any sub-contractor, and also allows a change in sub-contractor upon the City’s approval. Therefore, even if the design-build firm sought to contract with a non-complying sub-contractor, the City would deny said request and consider a change in sub-contractor. Therefore, PCL’s assertion that substituting a non-complying contractor is a non-changeable material deviation is not supported by the RFP or Florida law.

Third, regarding the responsiveness of Haskell’s proposal, and as further demonstrated above, the RFP does not provide that the failure to comply with the requirements of Resolution No. 2016-29375 would be a matter of responsiveness. A responsive response refers only to matters of form, and a responsive bid means that a bid is submitted on the correct forms, and contains all required information, signatures, and notarizations. Intercontinental Props., Inc. v. State Dep’t of Health & Rehab. Servs., 606 So. 2d 380, 381 (Fla. 3d DCA 1992). Notwithstanding the foregoing, as set forth in the Section 2-371 of the City Code (the City’s Bid Protest Ordinance) and, specifically, Section 2-371(e) thereof, the City Manager and City Attorney’s determination with regard to issues of responsiveness shall be binding upon the parties to the protest.

Finally, Florida courts have consistently held that a “public body has wide discretion” in the bidding process and “its decision, when based on an honest exercise” of the discretion, should not be overturned, “even if it may appear erroneous and even if reasonable persons may disagree.” Department of Transportation v. Groves–Watkins Constructors, 530 So.2d 912, 913 (Fla.1988)(quoting Liberty County v. Baxter’s Asphalt & Concrete, Inc., 421 So.2d 505 (Fla.1982))

(emphasis in original). “[The] sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly.” Groves–Watkins, 530 So.2d at 914.

Therefore, upon review of the basis upon which PCL’s Protest has been filed, the City concludes that said protest must be **DENIED**. You may appeal my decision by filing an original action in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, in accordance with the applicable court rules. Any action not brought in good faith shall be subject to sanctions including damages suffered by the City and attorney’s fees incurred by the City in defense of such wrongful action.

Thank you,

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Raul J. Aguila
Interim City Manager

Enclosures:
Haskell’s Bid Submittal Questionnaire

C: Mayor Dan Gelber
Members of the City Commission
Rafael Paz, Acting City Attorney
Alex Denis, Procurement Director