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February 9, 2021

VIA EMAIL

Natalia Delgado, Procurement
City of Miami Beach
1755 Meridian Avenue, 3rd Floor
Miami Beach, FL 33139
Via Email: NataliaDelgado@miamibeachfl.gov

Rafael Granado, City Clerk
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139
Via Email: RafaelGranado@miamibeachfl.gov

Raul Aguila, Interim City Manager
City of Miami Beach
1700 Convention Center Drive
Miami Beach, FL 33139
Via Email: raulaguila@miamibeachfl.gov

**Re: Protestant: PCL Construction Services, Inc.
Request for Proposals No. 2020-180-ND (the "RFP")
Design-Build Services for the 72nd Street Community Complex (the
"Project")
Notice of Protest (the "Protest")**

Dear Ms. Delgado:

We represent PCL Construction Services, Inc. ("Protestant") and respectfully submit this Protest of the recommended award of this Project to The Haskell Company ("Haskell"). This Protest is being delivered prior to 5 p.m. on Tuesday, February 9, 2021, in compliance with the notification of intended award sent from the City of Miami Beach (the "City") on February 5, 2021 (the "Award Notification"). Protestant has standing to submit this Protest as Protestant was the second-ranked proposer as outlined



in the Award Notification. See Award Notification, p. 1. A copy of the Award Notification is attached hereto as **Exhibit "A"**.

As set forth in City of Miami Beach Ordinance No. 2002-3344, Protestant respectfully submits:

1. Protestant is:

PCL Construction Services, Inc.
1805 Ponce De Leon Blvd., Suite 201
Coral Gables, Florida 33134 (South Florida address)

2. Protestant's Representatives are: Joseph A. Lane and Ryan P. Scordato, Lowndes, Drosdick, Doster, Kantor & Reed, P.A., 215 North Eola Drive, Orlando, Florida 32801.

3. Protestant's substantial interests are affected by the City's determination of this Protest. Protestant is the highest ranked responsible and responsive proposer qualified for award of this Project. Haskell is not a responsive proposer and must be disqualified. The following is a summary of the grounds of this Protest:

I. HASKELL'S PROPOSAL IS NON-RESPONSIVE IN THAT IT FAILS TO COMPLY WITH THE PLAIN LANGUAGE OF THE RFP

A. The City's intent for the Project intent includes significant aquatic construction, including a rooftop Olympic-sized pool and warm-up pool.

B. Prior to the RFP submissions for the Project, the City, on May 19 2020, conducted an information session by way of a Virtual Public Presentation for the Project (the "Presentation"), which was attended by Protestant and other interested proposers. The Presentation included a preview of the a portion of the design criteria package which was provided on Page 21 of the Presentation via a downloadable internet link. A copy of the Presentation is attached hereto as **Exhibit "B"**. Though the link is no longer active, Protestant, upon information and belief, has a copy of the relevant portion for the Swimming Pool Shell Construction (the "Presentation Pool Excerpt") available at the time of the Presentation. It reads:

Myrtha Pools USA shall be considered the basis of design utilizing a proprietary process of hot calendaring rigid PVC sheets to modular stainless-steel self-supporting panels. Alternative manufacturers of Natara, Bradford and Astral will be considered with Owner [the City's] approval.

See Presentation Pool Excerpt, p. 1. (emphasis supplied). A copy of the Presentation Pool Excerpt, with the relevant portions highlighted, is attached hereto as **Exhibit "C"**.

C. Bradford Products, LLC ("Bradford"), is a Leland, North Carolina based manufacturer of pools, spas, and water features. Bradford is registered in the State of Florida as a Foreign Limited Liability Company, with its mailing address listed as 2101 Enterprises Drive NE, Leland, North Carolina 28451. A copy of the Florida Division of Corporations profile on Bradford is attached hereto as **Exhibit "D"**.

D. Further, Bradford advertises on its website that its products are sourced in its North Carolina manufacturing facilities. A copy of a screenshot from Bradford's website is attached hereto as **Exhibit "E"**.

E. On April 13, 2016, the City of Miami Beach issued Resolution No. 2016-29375, which imposed a moratorium on the purchase by the City of goods and services from the State of North Carolina (the "Moratorium"). The Moratorium is public record and is not attached hereto as an exhibit.

F. The RFP was issued on June 26, 2020 and was structured as a two-phased process: Phase I was an evaluation and qualification exercise to determine a short-list of contractors to move forward. Under Phase II, the short-listed contractors were invited to submit a detailed rendering depicting the intended design and construction of the Project and a detailed response, including price. A copy of the final, published RFP is attached hereto as **Exhibit "F"**.

G. The RFP contains the following language on page 9 of 2,775 (the "RFP North Carolina Ban"):

Pursuant to Resolution 2016-29375, the City of Miami Beach, Florida prohibits official City travel to the states of North Carolina and Mississippi, as well as the purchase of goods or services sourced in North Carolina and Mississippi. Bidder shall agree that no travel shall occur on behalf of the City to North Carolina or Mississippi, nor shall any product or services it provides to the City by sourced from those states. By virtue of submitting bid, bidder agrees it is and shall remain in full compliance with Resolution 2016-29375.

See RFP, p. 9; *see also*: RFP North Carolina Ban, p. 1. (emphasis supplied). An excerpt of the RFP containing the highlighted RFP North Carolina Ban is attached hereto as **Exhibit "G"**.

H. The terms of the RFP expressly barred any responses from including a product or service sourced from North Carolina; that ban included the North Carolina-based Bradford.

I. Interestingly, an earlier (unpublished) iteration of the RFP, in its Swimming Pool Shell Construction section 6.2, included similar preliminary language as later was included in the Presentation Pool Excerpt, prior to the RFP being publicly offered (the "RFP Pool Excerpt"). It read:

Myrtha Pools USA shall be considered the basis of design utilizing a proprietary process of hot calendaring rigid PVC sheets to modular stainless-steel self-supporting panels. Alternative manufacturers of Natara, Astral, or equal, can be substituted with Owner [the City's] approval.

See RFP, p. 198; see also: p. 1, RFP Pool Excerpt. Notably, Bradford was omitted from the final RFP Pool Excerpt which was published as part of the actual RFP, even though Bradford had been allowed in the earlier draft (unpublished) RFP Presentation Excerpt. A copy of the published, final RFP Pool Excerpt is attached hereto as **Exhibit "H"**.

J. Consequently, the published RFP by the City expressly removed Bradford as an approved manufacturer of pool components for the Project.

K. Protestant, Haskell, and Kaufman Lynn Construction, Inc. ("Kaufman") each were short-listed in Phase I and advanced to Phase II, which utilized the published, final RFP described above (**Exhibit "F"**), which included the sourcing restriction noted above.

L. Protestant in its Phase II Proposal complied with the sourcing restriction and did not utilize any product or services sourced from North Carolina.

M. Following the Phase II submissions, Protestant requested and was provided with Haskell's proposal (the "Haskell Proposal"). The Haskell Proposal was announced as the intended award as referenced in the Award Notification. A copy of the entirety of the Haskell Proposal is attached hereto as **Exhibit "I"**.

N. The Haskell Proposal, on its face, contains products and services of Bradford which are clearly sourced from North Carolina. That sourcing directly violates the plain language of the RFP and, notably, the RFP North Carolina Ban, making the Haskell Proposal patently and materially non-responsive.

O. Specifically, pages 13 and 14 of the Haskell Proposal contain the following language regarding Haskell's utilization of Bradford on the Project (these pages have been extracted from the

Haskell Proposal, with highlights provided, and will be referred to as the “Haskell Proposal Bradford Excerpts”):

We will utilize a Bradford Products, LLC stainless steel pool system as the basis for our design.

See Haskell Proposal, p. 13; *see also*: Haskell Proposal Bradford Excerpts, p. 1.

The aquatics program will use a Bradford Products stainless steel pool system as the basis for our design rather than a Myrtha Pool system. [...] Furthermore, Bradford Pools are made in North Carolina, USA. [...] Overall, the value, simplicity and durability of the product make Bradford Products our choice for 72nd Street Community Center.

See Haskell Proposal, p. 14; *see also*: Haskell Proposal Bradford Excerpts, p. 2. Copies of the Haskell Proposal Bradford Excerpts are attached hereto as **Exhibit “J”**.

P. Further, page 102 of the Haskell Proposal actually specifies additional Bradford products which will be used by Haskell. *See generally*, Haskell Proposal, p. 102.

Q. The Haskell Proposal is patently and materially non-responsive as it was submitted with products and services sourced in North Carolina, which violates the RFP’s express provision (the RFP North Carolina Ban) banning such products and services.

R. A “responsive bid” in the State of Florida is statutorily defined as a “bid, or proposal, or reply submitted by a responsive and responsible vendor which conforms in all material aspects to the solicitation [RFP].” *See* Section 287.012(26), Florida Statutes. As matters stand, the Haskell Proposal is plainly non-responsive. It is a public procurement rubric that post-submission modifications or negotiations may not change, alter nor amend a non-responsive bid or proposal so that it becomes responsive. Such negotiations or modifications place the other bidders or proposers at a competitive disadvantage and unfairly favor the bidder for whom modification or negotiation is allowed. *See Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 2d. DCA 1977); *see also: Tropabest Foods, Inc. v. State Dept. of General Services*, 493 So.2d 50 (Fla. 1st DCA 1986).

S. By allowing Haskell to submit the Haskell Proposal with such North Carolina-based products and services included, the City permitted Haskell to directly and materially violate the RFP requirements which created prejudice and a competitive disadvantage to Protestant, which complied with the RFP’s requirements.

T. The City violates the RFP requirements if it is the City's position in this Protest to just ignore the RFP North Carolina Ban. The City, as a matter of public procurement law, is not free now to ignore the RFP requirements (which include the RFP North Carolina Ban). Those requirements applied to all interested proposers equally, and picking and choosing now which proposers must comply with this stated requirement creates a competitive advantage to Haskell and competitive disadvantage to PCL. Should the City ignore the RFP North Carolina Ban, the City effectively rewrites the RFP requirements which is prohibited. The City cannot revise the RFP requirements retroactively to benefit a single proposer, which is conspicuously anti-competitive to PCL, as Protestant, which complied with the RFP requirements and RFP North Carolina Ban.

IV. SUPPORTING CASE LAW

A. The following reported case law hold that failure to meet procurement requirements establishes non-responsiveness, requiring rejection of the non-responsive bid/proposal (these cases are included in the document package sent with this Protest).

(1) *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 3d. DCA 2019). Florida's Third District Court of Appeals addressed a parallel circumstance in which the second-ranked bidder filed a formal protest seeking to declare the winning bid non-responsive. Specifically, the subject bid documents contained specific manufacturers listed for water plant pumps to be used at the project. The winning bidder listed a brand of pumps that was not acceptable to the municipality; after discovery of this non-conformity with the bid documents (and after the bidding time period elapsed), the winning bidder was allowed to amend their bid to include a pump manufacturer acceptable to the municipality. The second-ranked bidder protested the winning bid directly to the municipality and by virtue of filing a temporary injunction in trial court; both the municipality and the trial court denied the second-ranked bidder the relief sought. The Third District Court of Appeals, however, declared the winning bid to be non-responsive because it materially altered from the requirements of the bid documents (and also that the municipality should not have permitted amendment to allow for the winning bidder to conform to the requirements). As such, the appellate court stated the municipality had two options: award the contract to the challenging party, which was the second-ranked bidder, or reject all bids and readvertise new ones. In its decision, the Third District Court of Appeals cited the case of *City of Opa-Locka v. Trustees*, 193 So.2d. 29 (Fla. 3d. DCA 1966) for the premise that permitting, under those facts, the city to waive the underlying ordinance requirement was conducive to favoritism by allowing some bidders to qualify after bid opening when such bidders did not comply with the bid document requirements. These cases are a signal in this Protest

that the City's failure to enforce its own RTP requirements would be reversible as an arbitrary and capricious action.

(2) *E.M. Watkins & Company, Inc. v. Board of Regents*, 414 So.2d 583 (Fla. 1st DCA 1982). This case arose out of a low-bidder whose bid was rejected as non-responsive, and the second lowest bidder was selected for the award. Specifically, the lowest-bidder failed to comply with the bid requirements by not listing three of the five major subcontractors to be used on the project. When the lowest-bidder's bid was deemed non-responsive, a protest was initiated. The First Circuit Court of Appeals ultimately upheld the administrative hearing officer's determination that deemed the low-bidder's bid non-responsive for failure to comply with the requirements of the bid documents.

These cases are a signal in this Protest that the City's failure to enforce its own RTP requirements would be reversible as an arbitrary and capricious action.

IV. CONCLUSION

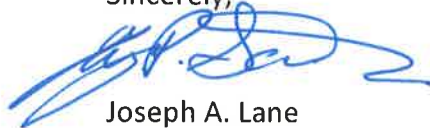
A. The City must stay the award to Haskell outlined in the Award Notification pending resolution of this Protest.

B. The City must determine the Haskell Proposal is non-responsive and award the Project to Protestant as the second-ranked responsible, responsive, and qualified proposer pursuant to the Award Notification. Protestant respectfully requests a reversal of the City's intended recommendation to award the Project to Haskell because Haskell is non-responsive in regards to the requirements of the RFP, specifically as to the RFP North Carolina Ban.

C. The City's intended Award must be to Protestant.

D. The City must not overlook or waive the RFP North Carolina Ban, which has a direct bearing on responsiveness and establishes a competitive disadvantage as a matter of law.

Sincerely,



Joseph A. Lane
Ryan P. Scordato

RPS/tae

Enclosures

c: PCL Construction Services, Inc. (via email)