

ITEM #43₍₂₎

**ADDITIONAL MATERIAL
10:00 A.M. REGULAR MEETING
SEPTEMBER 26, 2017**

**SUBMITTED AT THE REQUEST OF
FINANCE AND ADMINISTRATIVE
SERVICES**

September 25, 2017

Bank of America Centre
625 N. Flagler Drive, 7th Floor
West Palm Beach, Florida 33401

VIA EMAIL: jacoffey@broward.org

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VIA EMAIL: bbillingsley@broward.org

Brenda J. Billingsley, Director
Broward County Purchasing Division
115 S. Andrews Avenue, Room 212
Fort Lauderdale, FL 33301

Re: Solicitation No.: R2112554P2 for External Audit Services – Response to S. Davis & Associates letter dated September 24, 2017

Dear Ms. Armstrong Coffey and Ms. Billingsley:

We represent RSM US, LLP with regard to the above-captioned RFP for External Audit Services (“RFP”). This correspondence is in response to Davis’ letter dated September 24, 2017. Please attach this correspondence to any agenda item for tomorrow’s commission meeting, and please distribute this to the Board of County Commissioners prior to tomorrow’s meeting.

As you know, S. Davis & Associates, P.A. (“Davis”) has filed a protest with regard to the RFP, and a hearing on its appeal is in progress. It would be premature for the Commission to consider this matter while this quasi-judicial process is pending. Despite that, Davis now desperately seeks to subvert the administrative process by raising misleading allegations regarding issues that have already been considered by the Evaluation Committee for this RFP and are now being considered by a hearing officer. The Board of County Commissioners must refrain from hearing this item until the administrative remedies afforded to Davis have been exhausted, and all parties are afforded all due process rights. Interference at this stage would negatively impact those rights that the Commission insisted upon.

Davis’s protest, filed last June, alleged RSM did not disclose two cases under its Litigation History disclosure in its proposal, as well as several other arguments that Davis has since abandoned because they were not viable. The two cases identified were pending outside of Florida (Illinois and New York), did not involve government auditing services, did not involve anyone from RSM who would be providing services to Broward County, and were mere allegations contested vigorously by RSM. On June 29, 2017, upon request from the Purchasing Division, RSM provided additional information about those two cases, including Motions to Dismiss and affidavits from those lawsuits.

That information, along with Davis' protest and the Complaints from the two out of state lawsuits, was presented to the Evaluation Committee on July 10, 2017, ahead of a reconvened evaluation committee meeting on July 19, 2017. This process was pursuant to Section 21.84(g) of the Purchasing Code, when new, significant information is identified. In accordance with the Code, the Evaluation Committee considered the information, heard remarks from the County Attorney's office as well as RSM at the reconvened meeting, and **unanimously** determined for the second time that RSM was the number one ranked proposer. The County strictly followed its own procedure in reaching that result.

In preparation for the protest hearing on September 22, 2017, Davis sought an update from RSM on the two litigation cases. RSM provided updates as to those lawsuits, even though they are not material to the Evaluation Committee's analysis last July. **The first case identified, R.S. Investments, Ltd., a case pending in Cook County, Illinois, has since been dismissed with prejudice. Therefore, that case is no longer pending.** The second case, MVC Capital, Inc., in Westchester County, New York, is still pending.

The argument raised in Davis' September 24, 2017 letter, is that RSM misrepresented the status of the MVC lawsuit. As pointed out in Davis' September 24, 2017 correspondence, RSM had stated that it had filed a Motion to Dismiss based on "MVC's lack of privity with RSM." Davis points out that on April 6, 2017, the Court in the MVC lawsuit essentially ordered RSM (and RSM complied) to voluntarily withdraw its Motion to Dismiss without prejudice, pending discovery on the issue of privity between the Plaintiff and RSM. **RSM's Motion to Dismiss was not denied or otherwise adjudicated.**

Notably, Davis states, "Clearly, this statement was meant to give purchasing and the Evaluation Committee the impression that MVC's complaint would (or at least could) be dismissed for failure to state a claim." **What Davis fails to recognize is that statement is still accurate. Because the Motion to Dismiss was withdrawn without prejudice, the arguments therein could be reinstated at any time. In fact, RSM intends to file such a Motion or a Motion for Summary Judgment on the same grounds very soon. RSM continues to assert that MVC's lawsuit could be adjudicated based on the lack of privity between the parties. Substantively, RSM's position is not only unchanged, but was never misrepresented. RSM did file a Motion to Dismiss, and it believes the arguments raised therein are strong. Therefore, it is misleading on the part of Davis to suggest that RSM made a material misrepresentation to the Evaluation Committee last summer, when that is not the case.**

The Evaluation Committee has already considered the lawsuits filed against RSM (one of which is now dismissed with prejudice). **The Evaluation Committee determined in part that because these cases had not been adjudicated, and were just mere allegations against RSM which it contested, that it would continue to find RSM responsible and the top-ranked proposer. That fact has not changed.** Nothing has been adjudicated in the MVC lawsuit, and RSM continues to vigorously contest the allegations. **It is Davis which is making misrepresentations to Broward County.**

This ploy by Davis at this stage in the solicitation and in the midst of a protest hearing, is a desperate attempt by a second ranked bidder to try and thwart a sound evaluation process. **Davis's ploy should be concerning to Broward County, considering the fact that every single evaluator on the Evaluation Committee ranked RSM as the top-ranked, then ratified RSM as the top-ranked proposer, and the point disparity between RSM and Davis was not even close on the substantive evaluation merits of the RFP.**

Further, Davis' request that the Commission find RSM non-responsible would circumvent the spirit and intent of Florida law. **Section 218.391, Florida Statutes, governs the auditor selection procedures. Specifically, it requires an audit committee to establish factors to use for the evaluation of audit services, to evaluate proposals for qualified firms, and to rank the firms.** The purpose of doing so was to insulate the process and allow those who evaluated all the proposals to come to the best conclusion and make the proper recommendation. While the Commission ultimately has the authority to award the contract, undoing the evaluation and ranking, and substituting its judgment, based on a twisting of the facts by a second-ranked proposer, and before the protest appeal process is completed, would be unreasonable, arbitrary and capricious. To date Florida law and Broward County's code have been followed precisely, and RSM remains the top-ranked proposer.

RSM is a national audit, tax and consulting services firm. It operates in more than 80 cities in nearly 30 states across this country. RSM has been in business for more than 90 years. Like any large national professional services firms, RSM is subject to various forms of litigation, like these two cases at issue, in the standard course of business. For this reason, RSM maintains significant insurance coverage to insulate itself from the potential impacts of litigation. RSM does not consider the MVC lawsuit to be material to its financial condition as a whole and does not expect that it will in any way impact its ability to perform the services contemplated in its proposal for Broward County or its clients generally.

For the reasons stated, the Commission must refrain from hearing this item until all administrative remedies by Davis have been exhausted, and the parties are afforded all due process rights. Interference at this stage would hamper with those rights that the Commission insisted upon.

Joni Armstrong Coffey, Esq.
Brenda J. Billingsley, Director
September 25, 2017
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Thank you for your consideration of the foregoing.

Sincerely,

A handwritten signature in blue ink that reads "Mark J. Stempler". The signature is written in a cursive style with a large, stylized "M" and "S".

Mark J. Stempler
For the Firm

MJS2/jhb

cc: Daphne E. Jones, Esq. (via email)
Glenn Miller (via email)
Bernie J. Friedman (via email)

ACTIVE: M17097/384683:10143160_I_MSTEMPLER