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June 20, 2017

**VIA HAND DELIVERY AND EMAIL [BBILLINGSLEY@BROWARD.ORG](mailto:BBILLINGSLEY@BROWARD.ORG)**

Brenda J. Billingsley, Director  
Purchasing Division, Finance and Administrative Services Department  
Broward County, Florida  
115 South Andrews Avenue, Room 212  
Fort Lauderdale, FL 33301

**Re: Bid Protest of S. Davis & Associates, P.A. as to Solicitation No.: R2112554P2  
for External Audit Services**

Dear Mrs. Billingsley:

We represent S. Davis & Associates, P.A., and, pursuant to the Procurement Code of Broward County ("Procurement Code") § 21.118, we file this bid protest challenging the County's selection of RSM US LLP ("RSM") pursuant to Broward County, Florida (the "County")'s Solicitation No.: R2112554P2 for External Audit Services (the "Solicitation"). A copy of the Solicitation is attached hereto as **Exhibit 1**. Furthermore, S. Davis & Associates requests that the County stay further efforts to implement the award to the intended awardee during the pendency of this protest.

The County's award to RSM is improper because the County and its Evaluation Committee failed to comply with County's Procurement Code and the Solicitation. In part, in Section 21.44, the Procurement Code states that the unreasonable failure of an offeror to supply information in connection with an inquiry into responsibility may be grounds for a determination of nonresponsibility. In this procurement, the County sought an extensive litigation history so as

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to assess the vendors' responsibility. RSM unreasonably failed to disclose such litigation history, and the County arbitrarily failed to properly evaluate RSM's responsibility as a result of such omission.

By failing to provide such information, RSM wrongfully induced an award from the County. Specifically, RSM indicated in its proposal that it has had no material litigation within the last three years. In fact at least one action for negligence and another, separate action for fraud have been filed against RSM. The County did not discover these omissions because it did not evaluate proposals in a manner consistent with the terms of the Procurement Code or Solicitation. Similarly, the County failed to score proposals in a manner consistent with the Procurement Code's procedures.<sup>1</sup>

In support of this bid protest, S. Davis & Associates states as follows.

**I. Background**

S. Davis & Associates is a certified County Business Enterprise ("CBE"). **Exhibit 2**, S. Davis & Associates Proposal, at p. 83.<sup>2</sup> Moreover, S. Davis & Associates has significant experience working with local governments in Broward and is even a subcontractor for the County's former external auditor for these Single Audit services for fiscal years 2005-2009, Marcum, LLP (formerly Rachlin).

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<sup>1</sup> S. Davis and Associates is not challenging any alleged misrepresentations by RMS in this bid protest. Instead, the protest is focused on the County's obligations to comply with its Procurement Code and the Solicitation as they relate to a responsibility determination. To the extent in reviewing this protest, the County determines that these omissions rise to the level of misrepresentations, then the County may handle such under Section 21.49 of the Procurement Code.

<sup>2</sup> Pagination as per page numbers in lower right corner.

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On or about March 31, 2017, the County issued the Solicitation, which sought offers from Independent Certified Accounting Firms duly licensed to practice in Florida. Essentially, the awardee will the County's financial statements and accounts and make sure everything is in order. The current RFP represents a unique opportunity for a CBE such as S. Davis & Associates to grow by an order of magnitude, but, as explained below, the County's staff failed to recognize this opportunity when evaluating proposals and selecting an awardee.

**A. *Litigation History***

In regards to Litigation History, the Solicitation provided:

Litigation History

- a. All Vendors are required to disclose to the County all "material" cases filed, pending, or resolved during the last three (3) years prior to the solicitation response due date, whether such cases were brought by or against the Vendor, any parent or subsidiary of the Vendor, or any predecessor organization. A case is considered to be "material" if it relates, in whole or in part, to any of the following:
  - i. A similar type of work that the vendor is seeking to perform for the County under the current solicitation;
  - ii. **An allegation of negligence, error or omissions, or malpractice against the vendor or any of its principals or agents who would be performing work under the current solicitation;**
  - iii. A vendor's default, termination, suspension, failure to perform, or improper performance in connection with any contract;
  - iv. The financial condition of the vendor, including any bankruptcy petition (voluntary and involuntary) or receivership;
  - v. A criminal proceeding or hearing concerning business- related offenses in which the vendor or its principals (including officers) were/are defendants.
- b. For each material case, the Vendor is required to provide all information identified on the Litigation History Form.



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- c. *The County will consider a Vendor's litigation history in its review and determination of a Vendor's determination of responsibility.*
- d. If the Vendor is a joint venture, the information provided should encompass the joint venture and each of the entities forming the joint venture.
- e. A Vendor is also required to disclose to the County any and all case(s) that exist between the County and any of the Vendor's subcontractors/subconsultants proposed to work on this project.
- f. Failure to disclose any material case, or to provide all requested information in connection with each such case, may result in the Vendor being deemed nonresponsive.

**Exhibit 1**, RFP, at p. 17 (emphases added).<sup>3</sup>

In its Litigation History Form, S. Davis & Associates accurately noted it had no material litigation filed against it in the past three (3) years). **Exhibit 2**, S. Davis & Associates Proposal, at p. 142. RSM also noted in its litigation form that it had no material litigation filed against it. **Exhibit 3**, RSM Proposal, at p. 117.<sup>4</sup> However, contrary to the requirements of Section 29.41 of the Procurement Code, RSM failed to supply information that was required by the Litigation History Form. On or about November 21, 2016 RS Investments, Ltd. filed a complaint against RSM for fraudulent inducement. **Exhibit 4**, RS Investments' Complaint. Additionally, on or about December 23, 2016 MVC Capital, Inc. filed a complaint against RSM for negligent misrepresentation. **Exhibit 5**, MVC's Capital Complaint.

Unfortunately, the County did not discover RSM's omission regarding its Litigation History because the County did not properly evaluate offers consistent with its Procurement Code and the Solicitation. Specifically, the County's review of offerors' Litigation Histories was

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<sup>3</sup> Pagination as per page numbers in lower right corner.

<sup>4</sup> Pagination as per page numbers in lower right corner.

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limited only to a search for litigation between the offerors and the County itself. **Exhibit 6**, May 11, 2017 Email from James Rowlee to Carolyn Messersmith. However, the Solicitation clearly states the County “will consider a Vendor’s litigation history in its review and determination of a Vendor’s determination of responsibility” and does not limit the Vendor’s Litigation Histories to litigation against the County. The Solicitation only limits the Litigation Histories of Vendor’s proposed subcontractors to litigation against the County.

***B. Evaluation of Proposals***

In terms of scoring, the Solicitation provided the following evaluation scheme: (1) Ability of Professional Personnel (30 points); (2) Ability to Furnish the Required Services/Project Approach (30 points); Experience/Past Performance (20 points); Price (20 points). **Exhibit 1**, RFP, at pp. 29-31. S. Davis & Associates submitted a responsive proposal, for a total proposed price of \$3,825,000.00. **Exhibit 2**, S. Davis & Associates Proposal, at p. 3. RSM also submitted a proposal for a total price of \$4,419,150.00 (or \$594,150.00 more than S. Davis & Associates’ proposal). **Exhibit 3**, RSM Proposal, at p. 2. The County assigned S. Davis & Associates a non-price score of 347.00 and a price score of 98.05, for a total score of 445.05, and assigned RSM a non-price score of 392.00 and a price score of 84.85 for a total score of 476.85. **Exhibit 7**, Evaluation Committee Score Sheets.<sup>5</sup>

**II. Jurisdiction, Standing & Timeliness**

S. Davis & Associates is a responsive and responsible offeror in this procurement, and per the vote of the County Commission on June 13, 2017 is the second-ranked offeror in this

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<sup>5</sup> Initially, the Evaluation Committee gave S. Davis & Associates a non-price score of 322, but the County Commission noted the Committee had failed to give S. Davis & Associates 25 points for being a CBE. *Cf.* **Exhibit 10**, June 12, 2017 Revised Score Sheet.



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procurement.<sup>6</sup> The County posted a Revised Recommendation of Ranking on June 14, 2017. This protest is timely pursuant to Procurement Code § 21.118(a)(2) because it is filed within 5 business days of the County's posting of the Revised Recommendation of Ranking issuance of a new final award recommendation on June 14, 2017. *Cf.* **Exhibit 8**, June 19, 2017 Email from Carolyn Messersmith to Joseph M. Goldstein; **Exhibit 10**, June 12, 2017 Revised Score Sheet.

The County's failure to find RSM non-responsible and reject its proposal as non-responsive was clearly erroneous, an abuse of discretion, contrary to competition, arbitrary and capricious. But for the County's erroneous failure to find RSM non-responsible, S. Davis & Associates would have been awarded the contract. Moreover, for the reasons explained below, even if RSM is not eliminated from the competition, the County's evaluation of offers was inconsistent with the Procurement Code and the Solicitation. A proper evaluation would have resulted in S. Davis & Associates being recommended for award. Therefore S. Davis & Associates is an interested party with standing to protest. Procurement Code § 21.118(a). Finally, this bid protest is accompanied by a cashier's check in the amount of \$3,000.00. Procurement Code § 21.118(a)(6). Accordingly, the Director of Purchasing has jurisdiction over this matter.

### **III. Standard of Review**

Florida's public procurement laws serve "[t]o protect the public against collusive contracts; to secure fair competition upon equal terms to all [actual or prospective offerors]; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [government] at the lowest possible expense; and to afford an equal advantage to

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<sup>6</sup> <http://www.broward.org/Commission/Meetings/Pages/AgendasAndMinutes.aspx>.

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all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.” *Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977) (reversing decision of trial court to allow city to award a contract to low bidder who had been allowed to correct a non-responsive bid after bids had been opened) (internal citations and quotations omitted).

While the government has wide discretion when procuring contracts the terms of a solicitation constitute the ground rules for the procurement. The government’s failure to follow those ground rules is arbitrary and capricious. *City of Sweetwater v. Solo Constr. Corp.*, 823 So. 2d 798, 801-02 (Fla. 3d DCA 2002) (affirming injunction where city’s evaluations and award decision deviated from the terms of the solicitation); *State Dep’t of Lottery v. GTECH Corp.*, 816 So. 2d 648, 652-53 (Fla. 1st DCA 2001) (affirming trial court ruling sustaining bid protest, agency’s evaluation of proposals deviated from criteria in solicitation, offerors were entitled to rely on the RFP process). *Cf. Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm’rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007) (reversing dismissal of protest alleging that agency failed to comply with terms of the RFP, if the allegations were true, agency acted arbitrarily and capriciously). An improperly awarded contract “is absolutely void, and no rights can be acquired thereunder[.]” *Harris v. Sch. Bd. of Duval Cnty.*, 921 So. 2d 725, 735 (Fla. 1st DCA 2006) (contractor not entitled to any compensation for work performed pursuant to government authorization given in violation of competitive bidding rules; contractor should have known the work was not properly authorized).



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**IV. Analysis**

**A. *RSM Should Have Been Eliminated from the Competition as it is Nonresponsible Based on its Litigation History***

A “Responsible Bidder or Offeror means an offeror who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.” Procurement Code § 21.8(b)(64). Procurement Code § 21.41(a) further provides “[t]he unreasonable failure of an offeror to supply information in connection with an inquiry into responsibility may be grounds for a determination of nonresponsibility of such a bidder, offeror, proposer, or vendor.”

In general, the submission of a misstatement which materially influences consideration of a proposal should disqualify the offeror as nonresponsible. The integrity of the system demands no less. Any further consideration of a proposal in such circumstances would provoke suspicion and mistrust and reduce confidence in the competitive procurement system. *E.g.*, Procurement Code § 21.3(b) (“This Code provides safeguards for the maintenance of a procurement system of quality and integrity and also is intended to provide for increased public confidence in the procedures followed by public procurement.”); Procurement Code § 21.41(b) (“The Director of Purchasing or the Director's authorized designee may, within a reasonable time period after bid or proposal opening, request additional information of the offeror concerning his or her responsibility to perform and the offeror may voluntarily, after bid opening, provide additional or corrective information concerning his or her responsibility as a vendor. Notwithstanding the foregoing, the Director of Purchasing or designee cannot consider additional or supplemental information provided by a bidder, offeror, proposer or vendor which amends, alters, explains,



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varies or contradicts unequivocal statements or false or misleading statements made by a bidder, offeror, proposer or vendor to render that bidder, proposer, offeror or vendor responsible.”<sup>7</sup>

In *Solo Constr. Corp.*, 823 So. 2d at 801-03 the solicitation provided the contract “will be awarded to the responsive, responsible Bidder submitting the lowest acceptable Proposal.” However, the city commission decided to award the contract to the “most responsible bidder.” The Third District held the city’s failure to follow the solicitation’s evaluation and award scheme was unlawful, enjoined the award to the “most responsible bidder” and ordered the city to award the contract to the lowest, responsive and responsible bidder. Furthermore, in *Sprinklermatic Fire Protection Systems, Inc.*, IFB No. T1099318B1 (Broward Cnty. Aug. 23, 2013), the County eliminated the original awardee from the procurement because it had made misrepresentations to the County to the effect that one of the unit prices in its bid was the result of a non-judgmental clerical error. The original awardee presented what appeared to be invoices from its upstream supplier to establish that a clerical error had been made so the County would allow the awardee to “correct” the unit price upwards. However, the protester used the same upstream supplier who provided evidence establishing that the apparent invoices were really backdated documents created at the request of the original awardee for the purpose of misleading the County. **Exhibit 9**, May 25, 2017 Memorandum.

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<sup>7</sup> Another independent basis for this protest is that the Purchasing Director herself (or her designee) failed to make any responsibility determination. Under Section 21.41(a), it is the Purchasing Director’s obligation to make the responsibility determination. While it is the Selection Committee’s obligation to make a responsiveness determination pursuant to Section 21.83, no such authority is granted under the Procurement Code to delegate the responsibility determination to the Selection Committee. Instead, under Section 21.41(a), the Purchasing Director’s nonresponsibility determination is merely advisory, and should be decided by the Board of County Commissioners.

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Here, the County arbitrarily and capriciously failed to evaluate the vendors' Litigation History in a manner consistent with the terms of the Solicitation. *Solo Constr. Corp.*, 823 So. 2d at 801-03. Had the County properly assessed responsibility, the County (and the County Commission) would have known of RSM's omission regarding Litigation History and the underlying facts raised in such litigation. For example, in the RS Investments Complaint the plaintiffs essentially allege RSM was an auditor for a hedge fund that was seeking investors and RSM's audits were relied upon by investors such as the plaintiff. Apparently however, a substantial portion (if not all) of the hedge fund's investments were a scam that would have been revealed by even a modicum of professional care. Therefore, the plaintiffs allege RSM fraudulently induced them to enter into a worthless investment. Similarly, in the MVC Complaint the plaintiff hired RSM to conduct an audit of a potential borrower. RSM knew the audit was being conducted so that the plaintiff could make an informed decision as to whether or not to loan the borrower money. In reliance on RSM's audit the plaintiff loaned the borrower money, but the borrower's financial statements (which RSM had used for their audit) were fraudulent. Again, because a modicum of professional care would have discovered the fraud the plaintiff sued RSM for negligent misrepresentation. Had the County (and the County Commission) known of RSM's sordid Litigation History and its omission of that Litigation History it should have been eliminated from the competition as nonresponsible. *Sprinklermatic*, IFB No. T1099318B1. But for the County's arbitrary and capricious failure to eliminate RSM from the competition, S. Davis & Associates would have been selected for award.



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***B. The County's Evaluation of Proposals Deviated from the Procurement Code and the Solicitation***

The County's evaluation of proposals was arbitrary and capricious for several reasons. Such evaluation deviated from established Committee procedures set forth in Procurement Code, existing Broward County written Guidelines, and the Solicitation requiring fair evaluations. First, the County erroneously failed to consider S. Davis & Associates' work as a subcontractor for the County's former provider of these services. Although S. Davis & Associates did not list that subcontract as a reference, the information was simply too close at hand for the County to ignore. It is true "[t]here appears to be nothing in the [Procurement Code] which requires the [County to consider past performance information not included within an offeror's proposal], but the reasonable exercise of power by municipal governmental authorities is always required as a matter of public policy and fidelity to the public trust." *Adolphus v. Baskin*, 116 So. 225, 225-26 (Fla. 1928) (permanently enjoining award for not doing something that was not expressly required by local charter) (emphasis in original). Moreover, Procurement Code § 21.32(f) provides in relevant part that "[a]ward shall be made to the responsive, responsible offeror whose proposal is determined, in writing, to be the most advantageous to the County, taking into consideration the evaluation factors set forth in the Request for Proposals." (emphasis added).

"[I]n certain limited circumstances, an agency has an obligation (as opposed to the discretion) to consider outside information bearing on the offeror's past performance when it is too close at hand to require offerors to shoulder the inequities that spring from an agency's failure to obtain and consider the information." *DKW Commc'ns, Inc.*, B-411182, 2015 WL 3759366, at \*7 (Comp. Gen. June 9, 2015) (sustaining protest that agency unreasonably failed to



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consider past performance assessment that was in agency's possession even though it was not in protester's proposal).<sup>8</sup> "Specifically, [past performance information already] in an agency's possession [is] past performance information too close at hand to ignore. [. . . A] critical consideration in [any] review of an agency's past performance evaluation is whether it is based on relevant information sufficient to make a reasonable determination of the firm's overall past performance rating. By ignoring the [past performance information] it had at hand, the [County] here failed to satisfy this standard in its evaluation of past performance." *Shaw-Parson Infrastructure Consultants, LLC*, B-401679.7, 2010 WL 1180085, at \*7 (Comp. Gen. Mar. 10, 2010) (sustaining protest) (internal citations and quotations omitted). Had the County reasonably evaluated non-price proposals as required by the Procurement Code, S. Davis & Associates would have had the highest scores and would have been awarded the contract.

It appears that the County's failure to recognize the fact S. Davis & Associates has already performed these services successfully as a subcontractor is one of the main factors for S. Davis & Associates' unreasonably low scores. It would also appear that the Evaluation Committee violated Procurement Code § 21.32(f) in that they simply assumed S. Davis & Associates could not do as good a job as RSM because of an improper assumption that "bigger is always better":

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<sup>8</sup> The GAO hears more than 90% of all bid protests relating to federal contracts, and its decisions are generally accorded great respect because of its expertise. *E.g., Transdev Services, Inc. v. S. Fla. Reg'l Transp. Auth.*, CACE1700087, Order Dissolving Ex Parte Injunction, at p. 18 n.4 (Fla. 17th Cir. Ct. Jan. 23, 2017) (favorably citing GAO decision: "The GAO[']s . . . decisions are generally accorded great respect by the judiciary because of its expertise."); *Centech Grp., Inc. v. U.S.*, 554 F.3d 1029, 1038 n.4 (Fed. Cir. 2009) ("While not binding authority on this court, the decisions of the Comptroller General are instructive in the area of bid protests."); *Supreme Foodservice GmbH v. U.S.*, 112 Fed. Cl. 402, 434 n.22 (2013) ("Given the diverse factual scenarios that appear before GAO, its decisions traditionally have been accorded a high degree of deference by the courts, particularly those involving bid protests. While GAO decisions are not binding upon this court, they may be considered as expert opinion, which the court should prudently consider.") (internal quotations omitted).

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- Evaluation Factors I.1 and I.2, as a CBE/SBE, S. Davis & Associates has not had an opportunity to audit a County as a prime and never will be given the prevailing “bigger is always better” attitude. But as demonstrated by S. Davis & Associates’ proposal its proposed personnel have performed all facets of the County’s audit service, either working for a subcontractor or a prime;
- Evaluation Factor I.3, S. Davis & Associates’ proposal demonstrates S. Davis & Associates’ commitment and ability to maintain the most highly qualified staffing the contract period. Furthermore, S. Davis & Associates professional development program ensures staff exceed their Governmental Education CPE hours, which is also reflected in resumes. The County’s failure to follow this criteria in violation of § 21.32(f) is particularly troubling because it is a completely objective factor;
- Evaluation Factors II.4, II.5., II.6, II.7, and II.8, S. Davis & Associates’ proposal meets the required scope and exceeds the CBE goal. Furthermore, to the extent the Evaluation Committee improperly believed “bigger is always better,” S. Davis & Associates’ team is rounded out by BDO, which is the 5th largest CPA firm worldwide;
- Evaluation Factors III.9 and III.10, S. Davis & Associates’ proposal answers these questions completely, and demonstrates that S. Davis & Associates and its team have the requisite experience, skills and integrity required to perform. The only reason for S. Davis & Associates’ low scores is the Evaluation Committee’s improper assumption that “bigger is always better.” But such an improper assumption in violation of § 21.32(f) is particularly troubling in regards to factor III.10 because it is a completely objective factor.

Had the County or the Evaluation Committee followed the procedures required by the Procurement Code and Solicitation, S. Davis & Associates would have been selected for award.

**V. Request for Relief**

S. Davis & Associates requests that the award to RSM be stayed during the pendency of this protest, that the Purchasing Director recommend that RSM be eliminated from this procurement, that S. Davis & Associates be awarded contract, and for all other relief the County deems fit.

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Sincerely,

SHUTTS & BOWEN LLP

A handwritten signature in blue ink that reads "Joseph M. Goldstein". The signature is written in a cursive style.

Joseph M. Goldstein  
Andrew E. Schwartz

Daphne Jones, Assistant County Attorney ([djones@broward.org](mailto:djones@broward.org))  
Glenn Miller, Assistant County Attorney ([gmiller@broward.org](mailto:gmiller@broward.org))