



Finance and Administrative Services Department
PURCHASING DIVISION

115 S. Andrews Avenue, Room 212 • Fort Lauderdale, Florida 33301 • 954-357-6066 • FAX 954-357-8535

Certified Mail No. 7003 3110 0005 0259 3652

July 25, 2017

Joseph M. Goldstein, Esq.
Shutts & Bowen LLP
200 E. Broward Boulevard
Suite 2100
Fort Lauderdale, FL 33301

Re: Protest – Request for Proposals (RFP) No. R2112554P2, External Audit Services

Dear Mr. Goldstein:

We are in receipt of your timely protest letter dated June 20, 2017 which included the required \$3,000 protest filing fee. In your letter, you state on behalf of your client, S. Davis & Associates, P.A. ("S. Davis") that "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". Specifically you allege that "In this procurement, the County sought an extensive litigation history so as 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." Additionally you state that "Similarly, the County failed to score proposals in a manner consistent with the Procurement Code's procedures".

Regarding the basis for protest, Broward County Procurement Code Section 21.118.a stipulates that "Protests arising from the decisions and votes of Selection and Evaluation Committees shall be limited to protests based upon alleged deviation(s) from established Committee procedures set forth in this Code and existing Broward County written Guidelines. Any allegations of misconduct or misrepresentation on the part of a competing vendor will not be considered a protest, but will be reviewed and, if appropriate, in the County's sole discretion, used for purposes of evaluating the responsibility or qualifications of the vendor(s)".

Because the procedures and events surrounding Request for Proposals (RFP) No. R2112554P2, External Audit Services, are in conformity with the procedures and practices set forth in the Broward County Procurement Code, and existing Broward County written guidelines, there is no deviation from established Committee procedures in the instances and examples you have cited. Your stated protest, therefore, does not establish valid reasons for protest under the Broward County Procurement Code and is therefore denied. Throughout the following pages, your assertions will be reviewed, point by point, to explain our determination based upon the Procurement Code, written guidelines and established Committee procedures.

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Protest Assertion No. 1: "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 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."

Response No. 1: It is correct that RSM US LLP ("RSM") made no litigation disclosure in its RFP proposal. In answer to the RFP's instruction 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...", RSM responded there were no "material" litigation history.

Because 'materiality' can be argued and its definition subjective, the Purchasing Division will address the more serious allegation in the context of public procurement protests that "the County arbitrarily failed to properly evaluate RSM's responsibility as a result of such omission." This is a wholly incorrect and insupportable statement.

For a number of years, the County has steadfastly maintained the disclosure 'material' litigation history as a continuing requirement in Request for Proposals and we find the same requirement in RFP No. R2112554P2. The County Attorney's Office over those many years has expended countless review hours delving into various legal databases (federal, state and local) as to the three-year litigation of all proposers. During that period of time a small number of cases have been revealed that were not disclosed in the RFP proposal submittals. Many times, when undisclosed cases have been discovered in the litigation reviews, the materiality of those cases was not crystal clear and, as stated previously, could be disputed and has been.

On April 12, 2017, the County Attorney's Office published a memorandum within which the prospective policy and practice regarding review of vendors' litigation histories states that litigation review would involve only review of the vendors' cases with Broward County. This newly-revised policy for litigation history reviews has been practiced, as it was for RFP No. R2112554P2, External Audit Services.

An additional fact should be acknowledged that, not only did the Purchasing Division and County Attorney's Office practice consistent litigation review in keeping with the Procurement Code, the RFP solicitation document and established practice, the litigation histories of all four vendors were performed equally within the County litigation database for all four vendors, disadvantaging no one. The County has not "arbitrarily failed to properly evaluate RSM's responsibility" but has reviewed each vendor's litigation disclosure equally, consistently practicing the County's established policy for litigation reviews.

Protest Assertion No. 2: "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 limited only to a search for litigation between the offerors and the County itself. Exhibit 6, May 6, 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 Vendors 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."

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Response No. 2: As stated in our response to Assertion No. 1, it is correct that RSM made no litigation disclosure in its RFP proposal. In answer to the RFP's instruction 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...", RSM omitted specific response to the requirement for disclosure of 'material' litigation history. RSM instead provided information regarding termination from engagements, debarment/suspension from contracts, as well as providing financial information.

Contrary to your assertion that "the County did not properly evaluate offers consistent with its Procurement Code and the Solicitation", the County has been true and faithful to the litigation review policy and practice as established on April 12, 2017.

Not only did the Purchasing Division and County Attorney's Office practice consistent litigation review in keeping with the Procurement Code, the RFP solicitation document and established practice, the litigation histories of all four vendors were performed equally within the County litigation database for all four vendors, disadvantaging no one. The County has not failed to "properly evaluate offers consistent with its Procurement Code and the Solicitation" but has reviewed each vendor's litigation disclosure equally, consistently practicing the County's established policy for litigation reviews.

If you believe that RSM's omission is a misrepresentation by RSM, Broward County Procurement Code Section 21.118.a states, "Any allegations of misconduct or misrepresentation on the part of a competing vendor will not be considered a protest, but will be reviewed and, if appropriate, in the County's sole discretion, used for purposes of evaluating the responsibility or qualifications of the vendor(s)".

Protest Assertion No. 3: "Similarly, the County failed to score proposals in a manner consistent with the Procurement Code's procedures."

"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."

Response No. 3: The protest assertion recited above concerning scoring is not defined, ("Similarly, the County failed to score proposals in a manner consistent with the Procurement Code's procedures."). We find the above recitation of the evaluation scoring points and vendor prices to be correct. These figures are exactly the same figures that the Purchasing Division and Evaluation Committee dealt with and have documented.

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The Purchasing Division staff appropriately applied the numerical price formula to the vendor prices proposed by both S. Davis and RSM arriving at the correct scoring points for each price. The numerical formula is published in the RFP solicitation and because the proposed prices are an objective criteria, not subjective, Purchasing Division staff calculates the scoring points and applies those price scores at the conclusion of the subjective scoring of other evaluation criteria by the Evaluation Committee. Refer to the summary scoring sheet that includes the calculated points for each proposer.

The Procurement Code and the solicitation document were therefore correctly and consistently followed without deviation. Your assertion is not correct that "the County failed to score proposals in a manner consistent with the Procurement Code's procedures". This statement not supportable and is incorrect.

Protest Assertion No. 4: "The County's evaluation of proposals was arbitrary and capricious for several reasons. Such evaluation deviated from the 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."

"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."

Response No. 4: The protest assertion cited above alleging that the County's evaluation of the S. Davis' proposal "deviated from the Procurement Code, existing Broward County written Guidelines, and the solicitation requiring fair evaluations" because "(a)lthough S. Davis did not list that subcontract as a reference, the information was simply too close at hand for the County to ignore", is remarkable in the fact that this is the first time in our recollection that a vendor has omitted information they consider important from their RFP proposal, and then charged the County staff with the responsibility to produce and distribute that omitted information to the Evaluation Committee for the Committee's review and favorable evaluation.

Although this protest assertion is singular, it is wholly incorrect that County staff and the Evaluation Committee "deviated from the Procurement Code, existing Broward County written Guidelines, and the Solicitation requiring fair evaluations". Based upon the proposals received from all four vendors, County staff produced appropriate review documents as it has in all previous instances of RFP procurements and their subsequent Evaluation Committee Meetings. These review documents and the determinations by the Evaluation Committee for RFP No. R2112554P2 were consistent with the Procurement Code, existing Broward County written Guidelines and the Solicitation. County reviews are based on the four corners of the written proposals.

Additionally, County staff reviews and makes available for the Evaluation Committee the Performance Evaluations for vendors performing contracts for Broward County, but does not review subcontractors whose contractual relationship is with the prime contractor, not with the County. County staff has been consistent in its process of providing this additional information regarding the performance of vendors who are prime contractors.

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Neither the Broward County Procurement Code, Broward County written guidelines or the RFP solicitation, charge County's staff or the Evaluation Committee with responsibility for producing vendor information which the vendor has omitted from their proposal. Should this gambit be successful, there would be no end to information which vendors could omit from their proposals and, when unsuccessful in obtaining first-ranking, charge the governmental entity with not ferreting-out this information and distributing it to the Evaluation Committee because "the information was simply too close at hand for the County to ignore". This protest allegation is wholly incorrect and not supported by the County's past practice.

Additionally, the information which was omitted by S. Davis involves, as we understand it, the subjective evaluation criteria for Experience/Past Performance worth 20 points. Since this information would involve subjective evaluation scores, not objective scores produced by a mathematical formula, it is not possible to know how the Evaluation Committee's scores were impacted by this omission of information by S. Davis. The protest assertion is based on speculation which is not provable and, which, as we have already established, is wholly incorrect.

In accordance with Procurement Code, Section 21.84.g, ***"A Committee need not meet after ranking/evaluating the vendors unless there is new significant information or a significant change in the staff, subcontractors, or qualifications of the first-ranked/highest-evaluated vendor. When the Purchasing Director identifies such information or change, the Purchasing Director or designee will present such information to the Committee for consideration in order to ratify the ranking/evaluation or to reorder the list."***

On July 19, 2017, the Evaluation Committee was reconvened to review the additional new information. After review, the Evaluation Committee ratified and re-affirmed the rankings as approved by the Board of County Commissioners on June 13, 2017. Refer to summary meeting minutes (**Exhibit 1**).

In conclusion, after reviewing your protest letter and the Evaluation Committee process for RFP No. R2112554P2, I do not find that the County and its Evaluation Committee failed to comply with the County's Procurement Code and the solicitation. The standards of the Procurement Code, the Solicitation and adherence to established guidelines were consistently observed and applied. I do not find merit in your protest and therefore cannot support your proposed remedy "that RSM be eliminated from this procurement (and) and that S. Davis & Associates be awarded the contract. Consequently, your protest is denied.

In accordance with the Broward County Procurement Code, Section 21.120.a.1, "(a)ny person having a substantial interest in the matter, who is dissatisfied or aggrieved with the notification of the Purchasing Director's determination regarding the resolution of a protested solicitation or proposed award or a determination to debar or refusal to reinstate, must, within ten (10) calendar days of such notification, appeal said determination to the County in accordance with the hearing procedures contained in sub-section 21.118." In accordance with sub-section 21.120.c.4 of this Code, "(t)he Hearing Officer shall determine whether procedural due process has been afforded, whether essential requirements of law have been observed, whether the Purchasing Director's findings are arbitrary, capricious, or an abuse of discretion, or whether such findings are in accordance with the law or are unsupported by substantial evidence as a whole." Substantial evidence means such relevant evidence as a reasonable mind might accept adequate to support a conclusion.

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In order to request a hearing before a Hearing Officer, you must, within ten (10) calendar days of receipt of this letter, provide a written request for such a hearing. Your written request must be addressed to the Director of Purchasing, 115 South Andrews Avenue, Room 212, Fort Lauderdale, Florida 33301. The request must briefly state the facts and arguments upon which the appeal is made; must be timely made; and must be accompanied by an appeal bond equal to 1% of the estimated contract amount as defined in sub-section 21.118.a.6 of the Broward County Procurement Code or \$25,000, whichever is less and conditioned upon payment of all costs and fees awarded the County pursuant to sub-section 21.120.c.7 of the Procurement Code in the form as attached hereto. In lieu of the appeal bond, the County may accept cash, money order, certified check, or cashier's check, payable to Broward County Board of County Commissioners. Failure to provide the written request and the bond or other security within the time prescribed shall constitute a waiver of proceedings under the Procurement Code.

Sincerely,



Brenda J. Billingsley, Director
Purchasing Division

Attachments

BJB/kw/cm/lg

c: Robert Melton, County Auditor
Jedidiah Shank, Audit Manager, Office of the County Auditor
Glenn Marcos, Assistant Director, Purchasing Division
Karen Walbridge, Purchasing Manager, Purchasing Division
Connie Mangan, Purchasing Manager, Purchasing Division
Carolyn Messersmith, Purchasing Agent, Senior, Purchasing Division
Glenn Miller, Assistant County Attorney, Office of the County Attorney
Daphne Jones, Assistant County Attorney, Office of the County Attorney

Exhibit 1

**SUMMARY MEETING MINUTES FOR
RECONVENE EVALUATION COMMITTEE**

**RFP No. R2112554P2
External Audit Services**

**July 19, 2017
10:00 AM**

**Governmental Center Building, 115 S. Andrews Avenue, Room GC430,
Fort Lauderdale, FL 33301**

Ms. Carolyn Messersmith, Senior Purchasing Agent, and non-voting committee meeting Chair, called the reconvene evaluation committee meeting to order at 10:03 A.M., on Wednesday, July 19, 2017.

The meeting was held in Room 430 of the Governmental Center Building, 115 S. Andrews Avenue in Fort Lauderdale, Florida. The Chair requested that all cell phones were turned off or silenced. The Chair then requested the Purchasing Division to make introductory remarks about this project.

Mr. Mark Roberts, Purchasing Agent, then announced the County Staff which was present at the meeting:

- Jed Shank - Project Manager
- Connie Mangan - Purchasing Division
- Glenn Miller - County Attorney's Office
- Daphne Jones - County Attorney's Office
- Nichole Francis - Office of Economic and Small Business Development
- Lori Fortenberry - Finance and Administrative Services Department

Mr. Mark Roberts continued by stating the Request for Proposals RFP No. R2112554P2 for External Audit Services, was approved by the Board of County Commissioners on Tuesday, March 14, 2017, Agenda Item 87 and at the time of the RFP advertising deadline, 5:00 PM on April 24, 2017, there were four (4) submittals. He announced submittals were received from the following firms:

- BCA Watson Rice LLP
- Cherry Bekaert LLP
- RSM US LLP
- S. Davis & Associates, P.A.

A Combination Initial and Final Evaluation Committee Meeting was held on May 30, 2017. After presentations, evaluation, and scoring, the Evaluation Committee named RSM US LLP as the first-ranked firm, Cherry Bekaert LLP as the second-ranked firm, S. Davis and Associates, P.A. as the third-ranked firm, and BCA Watson Rice LLP as the fourth-ranked firm.

Exhibit 1

He continued by stating that on June 13, 2017 (Item No. 67), the Board approved the revised ranking of S. Davis & Associates, P.A. as the second-ranked firm, based on the fact that scoring points for principal place of business/headquarters location were inadvertently omitted from the total score. The Board indicated that the revised ranked firms would be given an opportunity to protest since the previous protest period had expired with no protests or objections.

On Tuesday, June 20, 2017, S. Davis & Associates, P.A., filed a timely protest of the first-ranked firm, RSM US LLP (RSM). The assertions of the protest that are within the purview of the Committee have to do with undisclosed litigation history of the first-ranked firm, RSM. The Purchasing Division will be addressing the protest in its entirety.

On Thursday, June 29, 2017, RSM provided their response to the protest regarding the litigation.

On July 10, 2017, the Director of Purchasing issued a memorandum to the Evaluation Committee notifying them that the Committee would be reconvened to review new information concerning the project.

The Procurement Code, Section 21.84.g describes the procedural requirements of new significant information. "A Committee need not meet after ranking/evaluating the vendors unless there is new significant information or a significant change in the staff, subcontractors, or qualifications of the first-ranked/highest-evaluated vendor. When the Purchasing Director identifies such information or change, the Purchasing Director or designee will present such information to the Committee for consideration in order to ratify the ranking/evaluation or to reorder the list."

He finished by stating this Reconvened Evaluation Committee Meeting has been publicly noticed and thanked the Chair.

The Chair then announced a quorum of members were present, with the following attendees:

- George Tablack, Chief Financial Officer, Finance and Administrative Services Department
- Kathie-Ann Ulett, Deputy County Auditor, Office of the County Auditor
- Helena James-Rendleman, Director, Finance Division, Broward County Aviation Department
- Linda Levinson, Finance Director, Broward County Supervisor of Elections Office (External Member)
- Michael Novar, Auditor, Broward Sheriff's Office (External Member)

The Chair continued by stating the purpose of the reconvene meeting was to review new information. The Chair announced a sign-in sheet was being circulated, and to please be sure that everyone signs in.

The Chair then announced that the Cone of Silence for this project was in effect since March 31, 2017 which prohibits potential vendors from discussing this RFP with the Evaluation Committee, the County Administrator, Deputy County Administrator, Assistant County Administrator, Assistants to the County Administrator, their respective support staff, and any

Exhibit 1

other person authorized to evaluate or recommend Evaluation in this RFP process. Upon the first meeting of the Audit Committee, on March 31, 2017, the Cone of Silence expanded to also include County Commissioners and their staff. Potential vendors and their representatives are substantially restricted from communicating with County Commissioners and their staff regarding this RFP as stated in the Cone of Silence Ordinance. After the application of the Cone of Silence, all inquiries regarding this RFP should be directed to the Project Manager (Jed Shank) or the Director of Purchasing. The Cone of Silence terminates when the County Commission or other awarding authority takes action which ends the solicitation.

The Chair stated that in accordance with Broward County Procurement Code Section 21.84.d, "All Committee members shall be free of conflicts of interest as provided by Part III, Chapter 112, Florida Statutes, as amended, and the Broward County Employee Code of Ethics, as amended. The appointing authority shall not appoint a person to a Committee whose service would create the appearance of a conflict of interest.

In regards to the conflict of interest, the Chair announced that Kathie-Ann Ulett submitted the following message to the Director of Purchasing, which was read into the record at the previous Committee Meeting:

"While I do not believe I have a conflict of interest, in an abundance of caution, please be advised that prior to my employment with Broward County over thirteen years ago, I have worked with members of responding firms in various capacities. Since that time, I have held no continuing relationships with any of the members. Please advise of any further actions I should take relative to this disclosure".

Ms. Messersmith, the non-voting Chair, then announced that there is now an opportunity for the Committee to discuss, review and ask questions regarding the new information. Specifically the Chair asked if there were any questions or discussion from any Committee Members on:

1. Agenda Item No. 67 from June 13, 2017
2. Additional Material provided to the Board on June 13, 2017
3. Protest Documents by S. Davis & Associates, P.A.
4. RSM US LLP Response to Protest

The Chair stated the County Attorney's Office, County Auditor's Office, and Purchasing staff are available to answer questions about the new information.

Ms. Kathy Ann-Ulett (Evaluation Committee member) began with a question of the County Attorney's Office, requesting what is looked at for material litigation.

Mr. Glenn Miller, Assistant County Attorney, answered the question by explaining the current and previous process in regard to reviewing litigation history, to give an overview to the Evaluation Committee. Mr. Miller then read the County Attorney's Memorandum to the Board of County Commissioners, dated April 25, 2017. He continued by stating that the vendor requirements to disclose has not changed; however, what was changed was how the Office of the County Attorney reviewed information.

Exhibit 1

He then read the definition of materiality in regards to litigation history from the RFP. He further explained the process and what the vendor is requested to complete. He proposed questions the Evaluation Committee can review to help in determining responsibility and materiality of cases. He further explained that there is a difference between a case that was adjudicated versus a case that is pending. A pending case includes two-sides and that has not been decided. His role is defending the Evaluation Committee's decision in regards to responsibility.

Ms. Helena James-Rendleman (Evaluation Committee member) then asked for RSM US LLP to answer why they did not consider the cases material.

Mr. Bob Feldmann, Partner, RSM US LLP, responded to why the cases were not disclosed. He said they reviewed the scope of services to the RFP (which the cases did not involve a governmental entity) and did it involve any team members that would service the County.

Ms. Kathy Ann-Ulett (Evaluation Committee member) then announced that she believed that the cases were not relevant and would like to continue with ranking, as previously approved.

The Chair then told the committee members, based on the new information which was distributed to the Evaluation Committee Members from the Director of Purchasing, the Evaluation Committee has the following options:

1. Re-affirm the action already taken by the Board on June 13, 2017 with no change;
OR
2. Re-score the firms

The Chair asked if there was a Motion to Ratify the Revised Final Evaluation Scoring and Ranking of the firms, as approved at the June 13, 2017 Board of County Commissioners Meeting or a Motion to Re-score the firms.

A motion was made and seconded by the Evaluation Committee. The Chair stated the Motion passed.

The Chair then asked for a Motion to Ratify and Accept the Revised Scoring and Ranking of the Firms from the June 13, 2017 Board of County Commissioners Meeting and reaffirm RSM US LLP as the first-ranked firm?"

A motion was made and seconded by the Evaluation Committee. The Chair stated the Motion passed.

The Chair announced since the Evaluation Committee has ratified the revised ranking determination made on June 13, 2017, re-posting of this decision is not necessary and the Negotiation Team can start negotiations with the first ranked firm.

The Chair asked if there was any other business that needs to be discussed and seeing none, she adjourned the meeting at 10:23 A.M.

(Recording of this meeting is available)

BROWARD COUNTY
PROCUREMENT PROTEST APPEAL BOND

Bond Number: _____

Contract Number: _____

KNOW ALL PERSONS BY THESE PRESENTS:

That we, _____ a (mark one) corporation, partnership, proprietorship, organized and existing under the laws of the State of _____, and having its principal place of business at _____, as **PRINCIPAL**; and _____, a surety company, organized under the laws of the State of _____, duly authorized to do business in the State of Florida, whose principal place of business is _____, as **SURETY**, are held and firmly bound unto BROWARD COUNTY, as **OBLIGEE**, in the amount of equal to one percent (1%) of the estimated contract amount [as defined in Subsection 21.118.a.6 of this Broward County Procurement Code] or \$25,000, whichever is less, and conditioned upon payment of all costs and fees awarded the County pursuant to subsection 21.120.c.7, for the payment of which sum we, as Principal and Surety, bind ourselves, our heirs, personal representatives, successors and assigns, jointly and severally.

THIS BOND is issued to comply with Section 21.120, Broward County Procurement Code. The above-named Principal has initiated an appeal of the Purchasing Director's determination on Principal's administrative protest regarding the Obligee's decision or intended decision pertaining to (mark one) Bid, RLI, RFP other solicitation, Number _____ submitted by _____. Said appeal is conditioned upon the posting of the bond at the time of filing the formal written request for hearing before a hearing officer.

NOW, THEREFORE, the condition of this Bond is that if the hearing officer denies the appeal, the Principal shall pay all costs and fees awarded the County pursuant to subsection 21.120.c.7 of the Broward County Procurement Code, then the obligation shall be null and void; otherwise it shall remain in full force and effect.

The Obligee may bring an action to a court of competent jurisdiction on this bond for the amount of such liability, including all costs and attorneys' fees.

PRINCIPAL: _____

BY: _____

(Print name and title)

ATTEST: _____

(Print name and title)

(CORPORATE SEAL)

(CORPORATE SEAL)

SURETY: _____

BY: _____

(Print name and title)

Florida Resident Agent _____

(Note: Power of Attorney showing authority of Surety's agent or Attorney in Fact must be attached).



JOSEPH M. GOLDSTEIN
PARTNER
Shutts & Bowen LLP
200 East Broward Boulevard
Suite 2100
Fort Lauderdale, Florida 33301
DIRECT (954) 847-3837
FAX (954) 888-3066
EMAIL jgoldstein@shutts.com

June 20, 2017

VIA HAND DELIVERY AND EMAIL 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.¹

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. 83.² 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).

¹ 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.

² 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).³

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. 117.⁴ 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

³ Pagination as per page numbers in lower right corner.

⁴ 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.⁵

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

⁵ 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.⁶ 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

⁶ <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.”).⁷

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.

⁷ 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).⁸ "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":

⁸ 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.

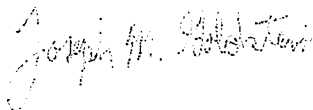
V. Request for Relief

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



Joseph M. Goldstein
Andrew E. Schwartz

Daphne Jones, Assistant County Attorney (djones@broward.org)
Glenn Miller, Assistant County Attorney (gmler@broward.org)