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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 Appeal 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 appeal 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 non-responsibility.

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.

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, Marcum, LLP (formerly Rachlin), with S. Davis & Associates rendering opinions (as if the firm were a prime contractor) on the County's Single Audit and

[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 may 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.

Financial Statement Audits of the Supervisor of Elections, Property Appraiser, Clerk of Courts, Housing Finance Authority and Health Facility Authority for fiscal years 2005-2009,.

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 audit 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***.

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 in an audit engagement. **Exhibit 4**, RS Investments' Complaint.

[3] Pagination as per page numbers in lower right corner.

[4] Pagination as per page numbers in lower right corner.

Additionally, on or about December 23, 2016 MVC Capital, Inc. filed a complaint against RSM for negligent misrepresentation in an audit engagement. **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 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.

Even more unfortunately, when the Evaluation Committee re-convened on July 19, 2017, Assistant County Attorney Glenn Miller essentially told the Evaluation Committee to find RSM to be responsible:

> For us to really tell you specifically whether or not something is material, I would look at the words of this document and say in this particular case is it of a similar type of work the vendor is contemplating doing or is there allegations of negligence or malpractice. ***Even if a case is material meaning the subject matter is relevant, that in of itself does not necessarily make a litigation an issue of non-responsibility. And the reason I say that is if the cases were shown to be a judgment, a decision by a Court. Then you would have practical objective determination that said somebody was at fault and who was at fault***. If a case is pending it is pending. There are allegations on one side and there are defenses on the other. The two cases that are currently at issue and I'm going to defer to the attorneys who are representing that particular vendor if you chose to have them speak to address it. But as we read in their response they're both pending and there's

> both a motion to dismiss for both. You have the discretion to deem somebody non-responsible for their litigation. ***I have a responsibility to defend that decision and all I can say is that in order for us to be able to defend a decision of the EC it cannot be arbitrary and arbitrary means there must be a fact basis with decision you're going to make today***.

Exhibit 11, Audio Recording Transcript of July 19, 2017 Evaluation Committee Meeting, 14:56-16:30 (emphases added).[5] *Cf.* **Exhibit 12**, Transcript of Audio Recording of July 19, 2017 Evaluation Committee Meeting. In essence, Mr. Miller told the Evaluation Committee it would be arbitrary to find RSM non-responsible on the basis of litigation that was merely pending because the allegations against RSM may be without merit. However, as explained below, this advice caused the Evaluation Committee to make an arbitrary and capricious finding that RSM is responsible.

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

[5] This is not being attached to the S. Davis & Associate's appeal but is available on the County's website and will be brought by S. Davis & Associates to the appeal hearing.

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.[6]

II. Jurisdiction, Standing & Timeliness

S. Davis & Associates is a responsive and responsible offeror in this procurement, and is the second-ranked offeror in this procurement.[7] On June 20, 2017, S. Davis & Associates timely filed a protest challenging the award to RSM which was accompanied by a bond in the proper amount. Although the protest established that the award to RSM was arbitrary and capricious, on July 25, 2017, the County denied it. **Exhibit 14**, July 25, 2017 Letter from Brenda J. Billingsley to Joseph M. Goldstein. This protest appeal is timely pursuant to Procurement Code § 21.120(a)(1) because S. Davis & Associates is filing it within 10 calendar days of being notified on July 25, 2017 that its appeal was denied. Moreover, this protest appeal is accompanied by an appeal bond in the amount of $25,000 as required by Procurement Code § 21.120(a)(3). Accordingly, this protest appeal may be reviewed by a Hearing Officer.

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

[6] 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 locally headquartered business. *Cf.* **Exhibit 10**, June 12, 2017 Revised Score Sheet.

[7] http://www.broward.org/Commission/Meetings/Pages/AgendasAndMinutes.aspx.

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); 21.120(a)(1).

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 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).

IV. Analysis

A. RSM Should Have Been Eliminated from the Competition as a Nonresponsible Offeror

A "[r]esponsible 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." *Cf.* 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, 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.").[8]

1. RSM is Nonresponsible Because of its Failure to Disclose Material Litigation

In this case, Mr. Miller essentially advised the Evaluation Committee it would be arbitrary to find RSM non-responsible on the basis of litigation that was merely pending because the allegations against RSM may be without merit.[9] It is true RSM may ultimately prevail in these actions, and RSM could have explained this to the County in its proposal while disclosing them. But RSM didn't. It intentionally withheld the existence of these cases from its proposal. Proposals were submitted to the County on April 24, 2017. RSM's outside counsel in the MVC Capital action filed a motion to dismiss on March 21, 2017, and RSM's outside counsel in the RS Investments action filed a motion to dismiss on February 27, 2017. **Exhibit 13**, June 29, 2017 Letter from Mark J. Stempler to Carolyn Messersmith (with attachments), at pp. 7-8, 129.[10]

[8] 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.

[9] In addition to causing the Evaluation Committee to ignore RSM's misrepresentations, Mr. Miller's "advice" caused the Evaluation Committee to ignore the terms of the RFP which clearly put offerors on notice that the County "will" consider pending cases when determining offerors' responsibility.

[10] Pagination as per Bates numbers in lower right corner.

Although Procurement Code § 21.118(a) provides "[a]ny 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)" it is also true "[u]nreasonable action taken under color of authority that materially affects substantial rights of persons and of taxpayers is contrary to the principles upon which our system of government is founded." *Adolphus v. Baskin*, 116 So. 225, 226 (Fla. 1928). In *Adolphus* the Supreme Court of Florida enjoined the award, holding:

> [A]lthough the bid of Gillespie was $7,261, or more than 15 per cent. above the bid submitted by B. F. Walker & Son, the city commission awarded the contract to Gillespie and entered upon the official minutes of the commission that the contract was awarded to Gillespie because 'he is a local man, will use local contractors and local labor, and will patronize local supply houses. [. . . .] There appears to be nothing in the city charter which requires the city commission to let contracts for public work to the lowest responsible bidder, 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.

116 So. at 225 (emphasis in original).

Here, the County abused its discretion when it ignored RSM's failure to comply with the Solicitation's Litigation History requirement (as pointed out in S. Davis & Associates' protest) and acted arbitrarily and capriciously when it found RSM responsible. The RFP sought offers from accounting firms for accounting services; accountants occupy a position of special trust. *Brooks Tropicals, Inc. v. Acosta*, 959 So. 2d 288, 295 (Fla. 3d DCA 2007) ("professionals, such as lawyers and accountants are always agents of their clients") (internal citations and quotations omitted); *Rudolph v. Arthur Andersen & Co.*, 800 F.2d 1040, 1044 (11th Cir. 1986) ("Where it gives an opinion or certifies statements, an auditing firm publicly assumes a role that carries a

special relationship of trust") (internal citations and quotations omitted). The RFP also specifically stated that in order to make an informed decision as to whether an offeror had sufficient "integrity and reliability," the County needed offerors to disclose all pending litigation alleging negligent or improper accounting. **Exhibit 1**, at pp. 16-17.

However, RSM started its "special relationship of trust" with the County by withholding the very information the County said it needed from RSM to determine whether RSM was honest. The reason RSM did so is because RSM decided the County "didn't really need" that information even though the County clearly said in the RFP that it did. *Compare* **Exhibit 1**, RFP, at pp. 16-17 *to* **Exhibit 13**, June 29, 2017 Letter from Mark J. Stempler to Carolyn Messersmith (with attachments), at pp. 2 ("RSM denies any liability or wrongdoing and is vigorously defending these claims. Further these cases do not have any bearing on the services to be performed by Broward County. [. . .] For these reasons, and those stated below, RSM believes these cases are immaterial to its response to this RFP.").

The County's failure to consider RSM's failure to comply with the Litigation History requirement was arbitrary and capricious, and an abuse of its discretion. *Adolphus*, 116 So. at 225-26. Had the County bothered to rationally considered the matter, it would have found RSM non-responsible and selected S. Davis & Associates for award.

2. The County's Evaluation of Offerors' Litigation Histories Was Arbitrary and Capricious

As noted above, offerors are "entitled to rely on the RFP process [. . .] under Florida's system of competitive bidding[.]"*Gtech Corp.*, 816 So. at 651-54. Therefore, the government's evaluation of proposals is arbitrary and capricious if it deviates from the terms of the solicitation.

For example, 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.

Similarly, in *Gtech*, which was also a best-value procurement, the Lottery Department did not follow the process contemplated by the RFP. The First DCA affirmed the Florida Division of Administrative Hearings' decision to remand the procurement back to the Lottery Department for re-evaluation: "We hold that Gtech was entitled to rely on the RFP process in submitting a responsive proposal under Florida's system of competitive bidding[.]" *Gtech*, 816 So. 2d 651-54. The First DCA was also careful to note that it did not matter that the agency had acted in good faith:

> Finally, we are cognizant of the fact that affirming the trial court's judgment will not, nor should it, result in the award of a gaming contract to Gtech. It is of no moment to us which vendor is successful in securing said contract. Our only concern is that the procedure utilized in the award comport with the requirements imposed by Chapter 287, Florida Statutes, from which mandate the Lottery is not exempt. To some, this decision will be interpreted as penalizing AWI [(the awardee)] for the shortcomings of the process which resulted in this dispute. To others, the prospect of returning to ground zero will be frustrating, at best. However, we believe that fundamental fairness requires the decision we reach today. We ascribe no intentional wrongdoing to any party to this dispute. The failure here seems to us to be one of commitment, rather than conscience.

Id. In short, under Florida law inconsistent with the RFP is inconsistent with the RFP, and, assuming competitive prejudice is present, an award based on an evaluation that is inconsistent with the terms of the RFP cannot stand. *Id.*

Here, the RFP required offerors to disclose all cases that had been filed against them in the last three years that relate in or whole or in part to (1) "[a] similar type of work that the vendor is seeking to perform for the County under the current solicitation"; (2) "[a]n allegation of negligence, error or omissions, or malpractice against the vendor"; or (3) "[a] vendor's default, termination, suspension, failure to perform, or improper performance in connection with any contract[.]" Furthermore, although the RFP provides "[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" it does not similarly limit the cases relating to offerors themselves to those that exist between the offeror and the County, thereby establishing that offerors were required to disclose all material cases that had been filed against them in the past three years regardless of who they were against.[11] Finally, the RFP provided that "[t]he County ***will*** consider a Vendor's litigation history in its review and determination of a Vendor's determination of responsibility." **Exhibit 1**, RFP, at p. 17.

Of course, the County cannot review an offeror's litigation history as it said it would in the RFP if it doesn't have it. Even so, the County limited its review of offerors' litigation

[11] The interpretation of a solicitation for a public contract is a question of law subject to *de novo* review by the courts. *Volusia Cnty. v. Abderdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 131 (Fla. 2000) (affirming summary judgment: "where the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only") (internal quotations omitted). *Cf. Shumrak v. Broken Sound Club, Inc.*, 898 So. 2d 1018, 1020 (Fla. 4th DCA 2005) (affirming dismissal for failure to state a claim because "It is a fundamental principle of contract construction, known as *expressio unius est exclusio alterius*, that the expression of one thing is the exclusion of the other.") (internal quotations omitted)

histories to cases involving the County pursuant to an internal April 12, 2017 Memo. **Exhibit 14**, July 25, 2017 Letter from Brenda J. Billingsley to Joseph M. Goldstein, at pp. 2-3. The County claims that its actions were sufficient because it was acting in good faith pursuant to its internal policy, which was not included in the RFP. However, 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). The Procurement Code does not say that the proposals shall be evaluated per internal policies contrary to solicitations that are neither included nor referenced in the RFP, just that they shall be evaluated per the terms of the RFP.

Moreover, while it is fairly clear the County really does believe what it is doing is proper, it is not. By relying on internal policies that are inconsistent with its solicitations the County is turning it procurements into "insiders' games." The point is amply explained in *Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist.*, DOAH Case No. 01-4385BID, 2002 WL 76312 (Fla. Div. Admin. Hrgs. Jan. 18, 2002) the solicitation provided that under the "Previous Work" criteria "[a] proposer with no previous work will receive a higher score than a proposer who has received work." *Syslogic*, 2002 WL 76312, at *3. When evaluating proposals, SFWMD used a sliding scale to award points which provided that all offerors who had $0-$50,000 in previous work would receive 5 points. *Syslogic*, 2002 WL 76312, at *3-4. It was undisputed that SFWMD had consistently used this sliding scale method for scoring previous work for nearly a decade as a matter of policy; however the sliding scale had not been included or incorporated by reference in the solicitation. *Syslogic*, 2002 WL 76312, at *4. Syslogic, the protestor, had no previous work

with SFWMD, and DUA Computer Resources, Inc., the awardee, had $47,000 worth of previous work, and SFWMD awarded both offerors 5 points per the sliding scale, which ultimately resulted in award to DUA. *Syslogic*, 2002 WL 76312, at *5-6. Syslogic protested, challenging SFWMD's actions as inconsistent with the terms of the solicitation, and SFWMD defended by arguing that it was merely applying its long-standing internal procurement policy in good faith. The Florida Division of Administrative Hearings ("DOAH") rejected SFWMD's argument and sustained the protest:

> One of the evaluation criteria, worth five points out of 100, focused on whether the proposer had received previous District work. Intending to achieve "equitable distribution of contracts among qualified firms," see Rule 40E-7.206(2)(a)6., Florida Administrative Code, the District desires that proposers having had little prior business with the District receive comparatively higher scores on this criterion than those that have had significant prior business and that proposers who have had no previous District work be awarded the highest score. To this end, the RFP provided that "[a] proposer with no previous District work will receive a higher score than a proposer who has received work.
>
> In the instant evaluation, DUA, Syslogic, and third-place Radiant each received, from each evaluator, the maximum five points on the previous District work criterion. In fact, however, DUA and Radiant had done business previously with the District, whereas Syslogic had not. Syslogic complains that it should have been awarded a higher score than its rivals, according the RFP's plain language.
>
> The District defends its committee's action by pointing out that established agency policy and practice provided for the award of maximum points to any proposer who had been paid up to $50,000 for District work during the preceding three years. Because neither DUA nor Radiant had been compensated more than $50,000 during the relevant period, the District argues, the committee was justified in awarding all three competitors the same number of points.
>
> The awarding of points based on stated evaluation criteria is, generally speaking, a discretionary matter that will not be second-

guessed except upon a showing that such discretion was abused. Thus, for example, if the District were to award the same four points to firms that had received, respectively, $27,000 and $48,000 in previous District work, it is highly unlikely that such action would be upset in a protest. Conversely, if the District awarded four points apiece to companies with $10 million and $10,000, respectively, in previous District business, it is doubtful such decision would be upheld over challenge.

But some aspects of the scoring plainly are not discretionary. For example, in this procurement, the maximum number of points that could be awarded on the "previous work" criterion was five. Thus, a committee member did not have the discretion to award one proposer, say, 12 points for this criterion. If he had, his action would have been both contrary to the RFP and contrary to competition and hence reversible. Similarly, the committee did not have the discretion to award points to the proposer with the snazziest corporate logo, because that was not a stated evaluation criterion. Such action, if taken, would be reversed in a protest for being contrary to a governing statute and contrary to competition. Note that the result in either of these examples would be the same even if the District were able to articulate some plausible basis in fact or logic for the action.

The present situation is analogous to the foregoing examples. The RFP mandated that a proposer with ***no*** prior District work receive a higher score than one who has received such work. "No previous District work" clearly and unambiguously means "none" not "less than $50,000 worth." As a matter of the RFP's plain language, therefore, the committee simply did not have the discretion regardless of District policy or practice to award the ***same*** number of points to a proposer with no previous District work and a proposer who previously had received District work. The issue is not how many points to assign (which is discretionary) but obedience to a clear instruction in the RFP (which is not a matter of discretion).

By awarding five points apiece to Syslogic, a proposer with no previous District work, and DUA and Radiant, proposers who had received such work, the committee members acted contrary to the RFP. Further, this breach of the standard of conduct was contrary to competition, for at least three reasons. First, it was genuinely unfair. Syslogic was entitled under the plain rules of the contest to a higher score on this criterion than its rivals, and every point counts, as the tie which resulted in this evaluation process

> underscores. Second, the clear departure from the plain terms of the RFP created the appearance of and opportunity for favoritism; although in this case the District was, in fact, acting pursuant to an established policy and practice, and not out of partiality, agencies cannot be permitted to circumvent the plain terms of their RFPs by relying on ***contrary*** policies or practices.[27] Finally, to deprive a competitor of an advantage to which it clearly was entitled under the RFP would tend to undermine public confidence that the contract was being awarded equitably.
>
> [27] The emphasis on ***contrary*** cannot be overlooked because that adjective makes all the difference. There is nothing wrong with an agency's reliance on policies or practices that are ***consistent*** with the RFP's plain terms. The problem with implementing ***contrary*** policies or practices is that doing so at least appears to bend the rules to someone's advantage and obviously creates opportunities to show favoritism. Accordingly, an agency's procurement policies or practices should be reflected in the RFP's terms, to the extent it intends to follow them.

Syslogic, 2002 WL 76312, at *21-22 (emphases in original, additional footnotes omitted).

Because the County's evaluation of offerors' litigation histories was inconsistent with the RFP they violated Procurement Code § 21.32(f) and were arbitrary and capricious. But for this arbitrary and capricious action the County would have discovered RSM's failure to comply with the Solicitation and eliminated it from the competition.

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 because their audit work done for the County was outside of the five-year period established in the RFP, S. Davis disclosed their previous work history with the County in several places in their proposal. 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*, 116 So. at 225-26 (emphasis in original). Moreover, as noted above Procurement Code § 21.32(f) requires the County to "tak[e] into consideration the evaluation factors set forth in the Request for Proposals."

"[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 consider past performance assessment that was in agency's possession even though it was not in protester's proposal).[12] "Specifically, [past performance information already] in an agency's

[12] 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

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 opining on the Single Audit, Financial Statement Audits of the Supervisor of Elections, Property Appraiser, Clerk of Courts, Housing Finance Authority, and Health Facilities Authority, and issuing the County's additional required Special Reports 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":

- 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 team's personnel has performed all facets of the County's audit service, either working as a subcontractor or a prime;

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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).

- 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.

Sincerely,

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