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May 29, 2018

VIA OVERNIGHT AND ELECTRONIC MAIL
bbillingsley@broward.org

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

Re: **Leo A. Daly Company's Response to Saltz Michelson Architects' Protest**
Solicitation No.: S2115731P1
Project: Broward County Medical Examiner's Office and Crime Lab

Dear Ms. Billingsley:

Our office represents Leo A. Daly Company ("Daly") in connection with the above-referenced protest (the "Protest") filed by Saltz Michelson Architects ("Saltz Michelson") regarding Broward County's Solicitation #S2115731P1 (the "RFP") for Broward County's Medical Examiner's Office and BSO's Crime Lab Combined Facility (the "Project"). Saltz Michelson's Protest is nothing more than a thinly-veiled attempt to substitute Saltz Michelson's judgment for that of the Evaluation Committee. Not one of the five points raised by Saltz Michelson comes close to being proper pursuant to Broward County's Procurement Code or the existing guidelines for the RFP. Thus, Saltz Michelson's Protest should be rejected and the Final Recommendations for Ranking, ranking Daly as number one, presented to the Board for approval.

I. THE APPLICABLE LEGAL STANDARD

The law relied upon by Saltz Michelson in its Protest is inapplicable as it applies to Invitations for Bids. The solicitation at issue was presented as a Request for Proposal, which affords the awarding entity more control over evaluations. In contrast to bids, RFPs are used when the public authority is incapable of completely defining the scope of work required, when the service may be provided in several different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity. *Sys. Dev. Corp. v. Dep't of Health & Rehabilitative Servs.*, 423 So.2d 433, 434 (Fla. 1st DCA 1982).

In addition, the consideration of a response to a request for bid is controlled by the estimated costs, whereas the response for a request for a proposal is controlled by estimated cost

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and technical excellence in the field. *Id.* Awards of contracts pursuant to an RFP are generally based not solely on price, but also on the results of an extensive evaluation which includes criteria, qualifications, experience, methodology, management, approach, and responsiveness to the RFP. *Id.* Further, at the end of the RFP process, the procurement officer will seek authorization from the governing body to begin negotiating the terms of the contract with the highest-ranking bidder. *H. Gore Enters., Inc. v. City of West Palm Beach*, 617 So.2d 1160, 1161 (Fla. 4th DCA 1993).

Section 255.20, Florida Statutes, provides:

(1) A county...seeking to construct or improve a public building...must competitively award to an appropriately licensed contractor each project that is estimated in accordance with generally accepted cost-accounting principles to have total construction project costs of more than \$200,000. . . . As used in this section, the term “competitively award” means to award contracts based on the submission of sealed bids, proposals submitted in response to a request for proposal, proposals submitted in response to a request for qualifications, or proposals submitted for competitive negotiation. This subsection expressly allows contracts for construction management services, design/build contracts, continuation contracts based on unit prices, and any other contract arrangement with a private sector contractor permitted by any applicable municipal or county ordinance, by district resolution, or by state law. * * * Subject to the provisions of subsection (3), the county...may establish, by municipal or county ordinance or special district resolution, procedures for conducting the bidding process.

Section 255.20 affords counties discretion in adopting procedures for conducting the proposal process using their county or municipal ordinances. Broward County has adopted its own ordinances – the Broward County Procurement Code¹ – that govern the competitive bidding or proposal process for a public service facility such as the one involved in this dispute.

Section 21.82 of Broward County Procurement Code provides:

It is the policy of this County to publicly announce through the Purchasing Division all requirements for professional services and other selected goods or services, and to award contracts on the basis of demonstrated capability and qualifications at a fair and reasonable price with the ultimate selection based on the best interest of the County and maximum value received.

¹ The key provisions from the Broward County Procurement Code were outlined in the RFP.

Saltz Michelson is correct that a public authority may not arbitrarily or capriciously discriminate between bidders or make the award based on personal preference. *City of Sweetwater v. Solo Constr. Corp.*, 823 So.2d 798 (Fla. 3d DCA 2002) (applying this arbitrary and capricious standard to RFPs as well as bids). However, whether the Board acted arbitrarily is generally controlled by a determination of whether the Board complied with its own proposal criteria as outlined in the RFP. *Id.* at 802 (holding that the criteria espoused in the published invitation to bidders controlled the analysis of whether the city acted in an arbitrary manner).

There is no question that the Evaluation Committee complied with its own proposal criteria in evaluating the proposals. Indeed, even in its Protest, Saltz Michelson does not allege that the Evaluation Committee failed to comply with the proposal criteria. As such, Saltz Michelson's Protest is meritless and must be denied.

II. THE REQUEST FOR PROPOSAL

The RFP sets forth the requirements for the solicitation. Daly timely submitted its proposal and was deemed both responsive and responsible by the Director of Purchasing who recommended that Daly, Saltz Michelson, and four other vendors be "short listed." The "short listed" firms were then asked to give an oral presentation to the Evaluation Committee on the "Vendor's approach to this project and the Vendor's ability to perform."²

The Evaluation Committee was charged with the task of evaluating the vendors using the established Evaluation Criteria.³ Daly was evaluated using the same criteria that were applied to Saltz Michelson and the other vendors. Daly was ranked highest by the Evaluation Committee based upon the established Evaluation Criteria. After the Proposed Recommendations for Ranking is approved by the Board, the County can begin negotiations with the highest ranked vendor, Daly.⁴

Any Vendor Protest must proceed pursuant to Section S (5) of the RFP, which states:

Protests arising from the decisions and votes of a Selection or Evaluation Committee **shall be limited to protests based upon the alleged deviations from established committee procedures set forth in the Broward County Procurement Code and existing written guidelines. Any allegations of misconduct or misrepresentation on the part of a competing Vendor shall not be considered a protest.**⁵

Not once in its entire Protest does Saltz Michelson claim there was any deviation from the established committee procedures. Instead, Saltz Michelson relies upon repeated, and unsupported, allegations of misconduct or misrepresentations by Daly and suspicions of

² Attached as Exhibit A is a true and correct copy of the Standard Instructions to Vendors Request for Proposals, Request for Qualifications, or Request for Letters of Interest, "RFP" § G.

³ See RFP § E (1).

⁴ See RFP § V.

⁵ See RFP § S (5) (emphasis added).

committee fatigue, none of which are proper grounds to support a protest. Even if the County gave complete credence to each and every one of Saltz Michelson's enumerated bases for protest, the County's only viable response would be to deny Saltz Michelson's Protest as failing to assert a proper basis for protest under the County's own procurement laws. Put differently, the only way the County could grant any aspect of Saltz Michelson's Protest would be to violate the County's procurement laws and treat as a viable protest allegations that the County's procurement laws unambiguously define as not constituting a protest.

III. DALY'S RESPONSES TO SALTZ MICHELSON'S ALLEGATIONS

Saltz Michelson's Protest is improper. Not only did Saltz Michelson fail to comply with the requirements of a protest, its alleged support for the Protest does not come close to constituting sufficient grounds to challenge the evaluation and Proposed Recommendations of Ranking by the Evaluation Committee which ranked Daly as number one.

A. Saltz Michelson May Have Failed to Meet a Condition Precedent to Filing a Protest.

Pursuant to Section S (6) of the RFP:

As a condition of initiating any protest, the protestor shall present the Director of Purchasing a nonrefundable filing fee in accordance with the table below.

<u>Estimated Contract Amount</u>	<u>Filing Fee</u>
\$30,000 - \$250,000	\$ 500
\$250,001 - \$500,000	\$1,000
\$500,001 - \$5 million	\$3,000
Over \$5 million	\$5,000

Saltz Michelson's Protest did not specify that it had tendered the required nonrefundable filing fee to the Director of Purchasing. Certainly, it is within the County's knowledge whether or not such a filing fee was actually tendered. If Saltz Michelson did not timely tender the filing fee required by the RFP when this Protest was submitted, then pursuant to the plain terms of the RFP, Saltz Michelson's Protest is void and must be rejected outright for failure of a condition precedent.

B. Daly is Well-Qualified to Perform the Work Required by the RFP.

Saltz Michelson claims that Daly made misrepresentations regarding Daly's experience during the oral presentations. This allegation is completely unfounded, and indeed is contrary to the factual record. First, as noted above, challenges to Daly's experience are not proper challenges pursuant to Section S (5) of the RFP. The only challenges Saltz Michelson can raise in its Protest are allegations of deviations from the established committee procedure. Second, Saltz Michelson's claims are incorrect—Daly is well-qualified and more than meets the requirement for the work as set forth in the RFP, *just as the Evaluation Committee concluded.*

Saltz Michelson's challenge to Daly's experience relies entirely upon Saltz Michelson's misrepresentation of the required qualifications of the RFP as limited to "experience in medical examiner facilities" only. This is incorrect and in direct conflict with the Vendor Qualifications described in various documents and provided by the County to all competing firms for this Project, including:

- RFP Packet, SUMMARY SCOPE OF WORK, paragraphs 1 and 2: "Broward County seeks a Consultant to provide comprehensive architectural and engineering services required of a new *combined facility* for Broward County's Medical Examiner's Office *and Broward Sheriff's Office Crime Laboratory Facility*... Consultant will be tasked with the programming, site analysis and design of a highly functional, efficient structure(s) that includes(s) the latest technologies in *forensic laboratory* standards."⁶
- Audio from the Evaluation Committee Meeting: Verbal comment from the Evaluation Committee member noting that many of the shortlisted firms have a crime lab consultant, but not sure if the firms have the experience in similar project types.⁷
- Short List Letter: The letter listed five questions of interest to the Evaluation Committee. These questions acknowledged that (a) these facility types are rare and unique, and (b) the "specialized" consultant expertise is from out-of-town consultants, thereby recognizing that the expertise is not only rare, but those that do possess it are mostly present at a national platform, and (c) opened up the opportunity to include laboratories, police crime labs, and "other similar" project experiences, as relevant to the Committee's interests.
 - Question 1 "...this is a unique facility that must meet legal and forensic requirements"
 - Question 3: "We realized that the consultant teams are made of specialized, out-of-town consultants ..."
 - Question 4: "...provide examples of challenges the team has encountered on similar type projects ...?"
 - Question 5: "Please provide a list of the past laboratories your team has worked on .the exact role on your previous forensic & police crime laboratories"⁸

Thus, the RFP documents made it clear that the County was interested in a vendor's experience in *both* medical examiner's offices *and* crime labs. Saltz Michelson's Protest proceeds from the factually incorrect assumption that *only* medical examiner's office experience was relevant.

Daly's experience in relevant project types was set forth in its proposal, presentation graphics, and oral presentation, including experience in "mission critical, criminal justice, law

⁶ Attached as Exhibit B is a true and correct copy of excerpts of the RFP regarding the Summary Scope of Work (emphasis added).

⁷ Attached as Exhibit C is a rough transcript of the Evaluation Committee Meeting.

⁸ Attached as Exhibit D is a true and correct copy of the Short List Letter.

enforcement, forensics, BSL-3, laboratories and medical examiner facilities.” Daly further represented its experience regarding forensic lab and medical examiner facilities, including the experience of its subconsultant Gartek Engineering in mechanical engineering for corrective actions to “deal with humidity and cross contamination” in a forensic laboratory, and the experience of its subconsultant, McClaren, Wilson, & Lawrie, Inc. (“MWL”) as a forensic and medical examiner lab consultant, including working directly with the prime and engineering team to establish the ventilation, airflows, and performance of these spaces.

Moreover, Daly outlined its own experience designing a combination Medical Examiner & Forensic Sciences facility, entitled Georgia Bureau of Investigations Headquarters Lab Annex and Morgue. Additionally, in its proposal and in the interview, Daly presented its experience in connection with the Palm Beach Sheriff’s Office new Evidence building and Forensic Lab project, the Hennepin County Regional Medical Examiner’s Office project (a project with subconsultant MWL), MWL’s experience on similar projects (which included medical examiner and forensic facilities), and other projects, including a combination of mission critical, police, federal government, forensic, laboratory and evidence facilities that were designed by either the presenting MWL team members or by Daly.

Daly’s experience was presented and accepted by the Purchasing Division and the Evaluation Committee. Saltz Michelson cannot now substitute its own evaluation of Daly’s experience for that of the Evaluation Committee, and yet that is precisely what its Protest attempts to do.

C. Daly Did Not Make Any Changes to its Proposal During the Oral Presentation.

In its Protest, Saltz Michelson makes a material misrepresentation claiming that, during the oral presentation, Daly improperly substituted itself as the mechanical, plumbing, and electrical engineer (“MEP”) for the Project in place of Gartek Engineering, the MEP consultant identified in Daly’s written proposal. Based upon this misrepresentation, Saltz Michelson attempts to argue that Daly does not comply with the Certified Business Enterprise (“CBE”) requirements, as Gartek Engineering was Daly’s CBE qualifier. This argument is without merit or support. **Nothing in Daly’s proposal has changed.** Gartek Engineering is still the MEP for this Project and, as a CBE, still accounts for 22% of the total Project value.

A review of the transcript of the presentation reveals Saltz Michelson’s misrepresentation. During the oral presentation, Ms. Cindy McCleary of Daly was asked a question about the mechanical knowledge *of the Project team*. Ms. McCleary responded:

We also have [in addition to Gartek Engineering] mechanical engineers that have experience in medical examiner office and, in fact, are working on the Hennepin County Medical Examiner project, with this team. So, we do have tremendous bench capacity shall that be necessary, and we have access to a tremendous

number of additional mechanical electrical in particular resources within LEO A. DALY.⁹

Nothing in Ms. McCleary's remarks indicates that Daly intended to replace Gartek Engineering or reduce Gartek Engineering's scope of work on the Project. Ms. McCleary simply responded directly to a question that asked about the experience of the team as a whole, by providing information about Daly's experience and capacity. As such, Saltz Michelson's claims that Daly materially changed its proposal, and that Daly's proposal does not comply with the CBE is false.

D. Daly Was Scored Higher than Saltz Michelson by the Evaluators for Both the Medical Examiner and the BSO.

Saltz Michelson's Protest claims that "the two evaluators from the two departments for which these facilities are being built, the BSO and the Medical Examiner, both ranked Saltz Michelson number one in the evaluations."¹⁰ Like much of Saltz Michelson's Protest, this is simply factually false. The scoring sheets prepared by the Evaluation Committee indicates that Dr. Craig Mallak (the Medical Examiner's Evaluator) gave Saltz Michelson 68 points and gave Daly 72 points.¹¹ Colonel Jack Dale (the BSO's Evaluator) gave Saltz Michelson 80 points and gave Daly 81 points. What Saltz Michelson appears to have done in its Protest was to add these points, given by the Evaluators, to the points given to Saltz Michelson by the County Purchasing Department staff, which are designated on the scoring sheets as "Points Entered by Purchasing." In so doing, Saltz Michelson misrepresents the cumulative scores given by the Evaluators plus the Purchasing staff as though they were the rankings assigned by the Evaluators. Such is not the case. Both Evaluators gave Daly higher scores than they gave Saltz Michelson.

E. Saltz Michelson's Claim that Daly was Afforded an Unfair Competitive Advantage is Without Merit.

Saltz Michelson attempts to argue that because, by purely random chance, Daly presented last during the oral presentation, Daly obtained some unfair advantage. Saltz Michelson's basis for this claim is based upon unfounded assumptions and illogical leaps. First, Saltz Michelson claims that Daly strategically altered its oral presentation to omit mentioning one of its sub-consultants, TLC Engineering, because TLC came under "scrutiny" during another presenter's (Cartaya) presentation;¹² and second, that the Evaluation Committee was too tired by the time Daly presented to properly evaluate Daly and score the proposals. Both claims are utterly absurd.

⁹ Attached as Exhibit E is a rough transcript of the Evaluation Selection Committee meeting.

¹⁰ This statement appears, in bold text, on the first page of the Protest.

¹¹ The scoring sheets are attached as Exhibit F.

¹² Saltz Michelson had the benefit of listening to two presenters before it made its own presentation, but apparently finds nothing unfair in the fact that it out-ranked one of those presenters, Bermello Ajamil & Partners, Inc., by a mere 5 points. Apparently, Saltz Michelson either has no objection to listening to other presenters when it benefits itself, or believes that some dividing line exists between presenting third and presenting sixth that makes presenting third okay but presenting sixth unfair.

Saltz Michelson's claim that Daly altered its presentation is unfounded. The presentation order was previously given to the presenters during the initial shortlist evaluation. Daly prides itself on its integrity and respects the open bidding laws, as well as the professionalism of the industry. Daly spent a great deal of time preparing its presentation. Daly's presentation followed the line of questioning set forth in the Short List Letter and focused on the qualifications of Daly and its key team members and subconsultants. Daly's PowerPoint presentation included photos of critical team members and presenters. To alter it "on the fly" would have been unreasoned if not impossible, particularly because *Cartaya presented immediately before Daly*. TLC Engineering was clearly identified in Daly's proposal. If Daly truly had concerns about TLC's qualifications or the selection committee's perception of those qualifications, Daly would have asked the TLC representative not to attend Daly's presentation. Instead, TLC's representative was in attendance when Daly presented. Finally, it should be noted that the selection committee apparently critiqued TLC's qualifications *for MEP engineering* (this was unknown to Daly at the time, but has become known since the presentation). In contrast, TLC's scope as part of Daly's team is completely different, and far more limited. For these reasons, it makes sense that the Evaluation Committee was not concerned with TLC's involvement as part of Daly's team.

Saltz Michelson further accuses Daly of improperly using its subconsultant MWL, who was also involved in prior presentations, to glean the Committee's concerns and then adjust Daly's responses during its presentation. As acknowledged by the Evaluation Committee, the pool of qualified consultants for this type of work is extremely limited. Indeed, the top three national consulting firms—CLD, MWL, and Smith Group—were *all* represented among the six short-listed vendors. Daly diligently maintains confidentiality and equality when working with subconsultants, including MWL. When MWL pursues marketing opportunities with other firms, the names of those firms are kept confidential, nor does MWL disclose to Daly the unique concept or approach of another firm. To suggest that Daly would interrogate a subconsultant to learn the details of a competitor's presentation suggests more about Saltz Michelson's business practices than Daly's. That Saltz Michelson feels free to make such an allegation without any factual evidence to support it further illuminates Saltz Michelson's *modus operandi*, and bolsters the Evaluation Committee's decision to rank Daly ahead of Saltz Michelson.

F. The Sunshine Law is Not Applicable.

Finally, Saltz Michelson claims that the entire evaluation process violated the Florida Sunshine Law. This is an attempt to grasp at straws. The Sunshine laws, as quoted in Saltz Michelson's Protest, require open-to-the-public meetings, except for negotiations. Saltz Michelson attempts to characterize the Evaluation Committee meeting as a "negotiation," and thus argues that it should not have been open to other presenters. This is not true.

Black's Law Dictionary defines "negotiations" as "[t]he deliberation, discussion, or conference *upon the terms of a proposed agreement*; the act of *settling or arranging the terms and conditions* of a bargain, sale, or other business transaction. Also, the transfer of, or act of putting into circulation, a negotiable instrument." (emphasis added.) No "terms" were being negotiated at the oral presentation. Indeed, pursuant to the RFP, the only things to be discussed at the presentation were "the Vendor's approach to this project and the Vendor's ability to perform." Negotiations on terms are not set to begin until "two weeks after approval of the final

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ranking as recommended by the Selection or Evaluation Committee[,]” not during the Committee meeting.¹³ Indeed, it is the County, not the Evaluation Committee, who has the right to “negotiate pricing as in its best interest.”¹⁴

The fact that the Broward County Commission has an agenda item to propose changes to the Administrative Code – changes which have not yet taken effect – has no bearing whatsoever on the “established committee procedures set forth in the [current] Broward County Procurement Code or existing written guidelines,” which govern challenges over this RFP.¹⁵ As such, Saltz Michelson’s reliance on the Sunshine Law, or on potential future changes to the law, is nothing more than a red herring.

IV. CONCLUSION

Saltz Michelson’s Protest is full of misrepresentations, irrational leaps of logic, and blatant falsehoods. The Purchasing Division, the Evaluation Committee, and Daly all properly complied with the Broward County Procurement Code as well as the RFP. At no point in Saltz Michelson’s Protest did it present any evidence of “alleged deviations from the established committee procedures,” and as such, its Protest is invalid under the RFP.

For all of these reasons, Saltz Michelson’s Protest should be rejected. The Purchasing Division should proceed with the approval of the final ranking, with Daly ranked number one.

Sincerely,
GORDON & REES SCULLY MANSUKHANI



Ben Patrick

BP/CDB:lh

Enclosures as stated

¹³ See RFP § V.

¹⁴ See RFP § E(3)(d).

¹⁵ See RFP § S (5).