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January 15, 2014

BY E-MAIL to rcallwood@rcgov.us and US MAIL

Roldolfo Callwood
Director, Office of Procurement
Richland County South Carolina
2020 Hampton Street
Suite 3064
Columbia, SC 29204-1002

Re: Protest of Notice of Intent to Award - Solicitation/Proposal ID# RTP-001
Request for Sealed Proposals for Furnishing a Program Development Team (PDT) to assist Richland County staff in the oversight and management of capital programs as directed by the County Administrator or his designee ("solicitation" or "RFP")

Dear Mr. Callwood:

Pursuant to South Carolina law, the Procurement Ordinances of Richland County, South Carolina, including but not limited to Sections 2.598, 2.600, 2.601 and 2.621 thereof, and the solicitation referenced above, Civil Engineering Consulting Services, Inc. ("CECS"), a local company headquartered in Richland County, South Carolina, herewith protests the Notice of Intent to Award, dated January 8, 2014 issued in regard to the above referenced solicitation to the out of state firm, ICA Engineering ("ICA").

CECS is a local Richland County based company, headquartered here. CECS believes and alleges that its proposal was ranked the most qualified by an experienced and impartial committee of experts composed by the County to conduct the evaluation based on published criteria as required by law, and that it also offered a far higher percentage of local headquartered firm participation, minority, and Small and Local Business participation than that of the out of state firm that was inexplicably awarded the job by County Council.

INTRODUCTION

CECS attended the January 13, 2014 public meeting of the Richland County Transportation Penny Advisory Committee ("TPAC"). You were present at that meeting as well.

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At that meeting, numerous serious concerns were raised about the intended award to ICA. CECS heard these concerns, which reflected vital considerations of voters, taxpayers, local workforce, and indeed the multi-disciplinary group of experts who were selected by the County under Ordinance 2-600(3) as the Selection Committee. The Selection Committee's role was to judge, score and rank proposals submitted by contractors to determine, based on true expertise, the best vendor to perform the work. Based on what CECS heard at that meeting, CECS has no choice, as a responsible contractor, to set forth its objections to this intended award.

As you know, this solicitation arose from the approval of a referendum by local voters of a penny tax for the specific purpose of funding (with anticipated combined federal assistance for which the County could have been eligible) local projects, and to hire a qualified, locally headquartered contractor, local subcontractors and local skilled and unskilled workers to perform the local improvements to roads and infrastructure in our County. As you also know, it was well-publicized that this added tax was advertised and "sold" to voters on the premise that it would entitle the County to benefit from these improvements, the local economic stimulation, and the millions of dollars in federal funding. There is no doubt that the monies were to be used for truly local employment and truly local economic benefit, as well as for local projects. As you heard at the recent TPAC meeting, members of TPAC understood that "local" businesses are defined as those headquartered in Richland County. Richland County Council itself adopted a Small and Local Business Ordinance (SLBE) to facilitate and ensure the wishes of the citizenry was carried out in this regard. In fact, significant materials were requested by the County during the solicitation process to support the local nature of each Proposing team by the RFP, the Addendum (see Exhibit 1, Example Employment Presence Forms), and by Council members in the interviews. Employee presence forms, firm headquarters, SLBE participation levels, and minority business involvement data were collected, purportedly for the purpose of evaluation of teams. Council, as well as Staff, the Selection Committee and the TPAC all recognized that under governing Ordinances, the only local businesses were ones with a local headquarters, or for whom over half of their revenue is locally based. It has become evident that *the vendor that Council selected in its closed door session did not even claim in its proposal that it was a local business as defined by the Ordinance*. This concern and sentiment was explicitly discussed, at length, at Monday's meeting. The history of the Penny Tax, its purposes and the issues that have arisen as described above are largely captured in recent news accounts. See Exhibit 2.

Our protest is based on a number of issues that were expressed at Monday's meeting. First, it is clear from the discussion at the meeting that the rules of the competition (as set forth in the published RFP, Exhibit 3) were changed or erroneously applied by Council members, without notice by way of Amendment to the RFP, in violation of law and County Ordinance. Selection criteria that were published were informally and without amendment to the RFP changed at the last minute and the published criteria were simply not used and scored to support the final selection, which undermined the selection that had been made previously in accordance

with the RFP and the law. This abrupt action by County Council - which contradicted the proper and lawful handling of this Qualification Based Selection procurement by the Selection Committee, and by the County Procurement Office - violates the law and jeopardizes millions of dollars of federal funding. It also violates the public trust. CECS echoes the sentiments of TPAC members who voiced serious disappointment that elected officials had acted improperly in displacing the selection process and criteria published in the RFP in violation of county procurement ordinances, ignoring the evaluation and scoring of professional staff designated to evaluate the proposals, and ultimately making a selection of an inferior team in terms of the published selection criteria, and adopted Richland County Ordinances. This resulted in Richland County publishing a notice of the Intent to Award to the out of state ICA team based on an erroneous evaluation.

PROTEST

As shown below, the selection process in regard to this solicitation was performed properly and lawfully until late in the game, when it went entirely off the tracks. Up to the point that County Council was involved, the selection process was proper and lawful, and, on information and belief, it resulted in the ranking of a local, Richland County headquartered company, CECS, as the most qualified vendor for the work. On information and belief, that process, properly conducted in accordance with the RFP, demonstrated that the local top ranked competitor, CECS, based upon the published selection criteria, and subsequent addendums, also offered the highest level of local, minority, women-owned, and small business participation, and guaranteed the most local employment and local economic benefit. As you know, the TPAC is a Citizen Advisory Committee. They are not employees of the County, they are citizens chosen for their wide range of expertise, serving in a voluntary capacity. Their mission is to provide advice and transparency to the program. The Selection Committee was a group of Richland County employees – professionals, who were empaneled to evaluate and rank the proposals submitted as a result of the solicitation for the Richland County Transportation Penny Program Development Team. The Selection Committee and scoring will reveal this once it is made public as required by law. Once County Council entered the process, the very problems that the TPAC and Selection Committee were designed to prevent arose, and an inferior, lower ranked, out of state firm was selected. Council ignored and overrode the scoring and results of the Professional Staff comprising the Selection Committee, the established selection criteria, the Small and Local Business Enterprise Ordinances which were designed to favor businesses with a local headquarters, the desires of the TPAC and the overall intent of the Transportation Penny Program as authorized by the voters of Richland County.

Pursuant to Ordinances Sec. 2-598 (a) "[a]ll public purchases shall be made in a manner which provides for the greatest economy for the taxpayer, the fairest selection of vendor, and the prevention of conflicts of interest. Towards this end, it shall be the policy of the county that,

whenever practical, leases, goods, and services required by county agencies shall be procured through a competitive purchasing policy which may be achieved through competitive bidding or through requests for proposals."

Here, the RFP was properly published and, pursuant to law, it set the rules for the competition. *See Ordinances Sec. 2.600 and 2.601(2) (5) and (7).*¹

The RFP published selection criteria which were to be used in making the selection. These criteria were as follows:

VIII. SELECTION CRITERIA

Selection may be based on the following criteria:

A. Program Understanding- Proposer's suggested division of work and outline of how the PDT will interface with other consultants and County staff. (10%)

B. Program Approach- Proposer's best approach to completing the program in a timely, effective, and efficient manner. (20%)

C. Experience- Proposer's previous experience with other County Sales Tax Programs, with State Department of Transportation's, Cities, Towns, or Counties. (20%)

D. Mobilization- Proposer's ability to mobilize quickly with adequate staffing to undertake the project. (10%)

E. Location of PDT and subconsultants. (20%)

F. Past performance in utilizing DBE's and Projected Minority

¹ Ordinance Section 2.601 provides in part as follows: (2) Request for proposals. ... **Evaluation factors upon which the proposals will be evaluated for award of the contract shall be stated in the request for proposals....** (5) **Evaluation factors.** The request for proposals shall state the relative importance of price and of each other evaluation factor but shall not require numerical weightings of each factor. The evaluation factors shall be examined with respect to each proposal in determining which proposal is most advantageous to the county. There are no restrictions on the kind or number of evaluation factors that may be used, as long as they are stated in the request for proposals and relate to the purpose of the procurement.

(7) Award. ... the award shall be made to the responsive and responsible offering vendor whose proposal is determined to be the most advantageous to the county, **taking into consideration price and the other evaluation factors set forth in the request for proposals....** The contract file shall contain the basis on which the award is made and be sufficient to satisfy external audit.

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Business goal to be included in PDT contract. (20%)

See Exhibit 3, RFP at page 15.

In accordance with the published RFP process, a Selection Committee was established by the Administrator. The Selection Committee and TPAC were specifically chosen and selected to be comprised of subject matter experts - engineers, financial experts, environmental experts, business development, and planning experts. The roles of the TPAC and the Selection Committee team included bringing expertise and transparency to this important selection process, and also, ensuring that "politics" were removed from the selection process.

In accordance with the RFP process, an evaluation was made by the subject matter experts chosen by the County. This evaluation was conducted in accordance with the RFP. The RFP had been approved by the Transportation Ad hoc Committee, reviewed by TPAC, and approved by County Council, and was consistent with the law.

On information and belief, the proposal of CECS was ranked the highest, most advantageous to the County of all proposals evaluated. Further, CECS believes and understands that the proposal of the out of state vendor, ICA was actually ranked a distant third. This result was reported and presented to the Transportation Ad Hoc Committee by the Selection Committee. At the Ad Hoc Committee meeting, the results of the top three firms were provided to a public audience and to Committee members and other council member attending. There was an agenda and published information indicating the short list (in accordance with the RFP and Ordinance) was to be announced at this meeting. See Exhibit 4, Transportation Penny Ad Hoc Committee meeting agenda of December 16, 2013)

The Selection Committee scoring that was performed in accordance with the published RFP standards, and reported to the Ad Hoc Transportation Committee, on information and belief, ranked CECS first by a wide margin over another firm, followed distantly by ICA, an out of state firm. This scoring and ranking was unlawfully ignored and rejected and ignored by County Council. As stated at the most recent TPAC meeting, the top ranked prime contractor - so ranked by the broad based professional selection Committee of experts - was bypassed by County Council in a closed door meeting in favor of an out of state contractor. As stated by one participant in the meeting, it is frankly absurd that Council bypassed the company which was ranked the best by these dedicated experts, especially when that top ranked company was a local, Richland County headquartered company, who also offered far greater local participation and minority employment than the "Kentucky" firm (ICA) that was inexplicably chosen by Council in closed door session.

The selection process that had been performed in accordance with law and the RFP was undermined when Council chose to interview five firms. The RFP expressly stated that:

The above selection criteria will be used to short list a maximum of three firms. Richland County will invite the short listed firms to make individual presentations based on their RFP submittal. Selection Committee recommendation for final selection will be based on the selection criteria of the individual RFP's and subsequent presentations.

Exhibit 3, RFP, p. 15 (emphasis added). This provision reflects the policies set forth in County Ordinances which likewise provide for three vendors to be presented to Council. Ordinance 2-600. There is simply no reading of the above RFP language that would permit five firms to be presented to, interviewed by, and voted on by Council. It should be noted that the other procedures mandated by Ordinance 2-600, including reporting the detailed results to competitors and order of preference, ranking, among others, has not been done, in violation of law. Instead, requests for this information by the public and the TPAC have been rebuffed by Council and County employees, in violation of the Freedom of Information Act.

After the Transportation Ad Hoc Committee was provided the staff report as per procurement procedures, issuing its report and conclusions regarding its evaluation pursuant to the published solicitation's proper evaluation criteria, Council indicated that it would conduct interviews on January 6th, 2013. Before the interviews, Council provided written guidance as to the scoring that would be applied to the interview process. This guidance was contrary to and inconsistent with the established selection criteria published in the RFP, in violation of law and governing Ordinance. See Exhibit 5, Oral Presentation Invitation.²

After publishing guidance (with memorandum of December 23, 2013) as to the scoring of the interview process, Council also chose to ignore its own guidance. To our knowledge there was no scoring of the interviews in accordance with the guidance, even though the guidance itself was not in keeping with the selection criteria in the RFP. Additionally, there is no indication or evidence that the interviews were scored by the Selection Committee as required by the RFP, or even fully attended by Council members.

After the Selection Team issued its report and conclusions regarding its evaluation pursuant to the published solicitation, there was no short listing of firms to "a maximum of three

² Among other things, there are specific criteria such as the SLBE percentage, Proposer team location, and other factors that do not appear to have been considered in the selection process once Council became involved. This is a violation of the RFP and currently adopted County ordinances. See Ordinance 2-639 defining LBE and "Principal Place of Business."

firms" as required by the published solicitation. This deviation is also contrary to Council Ordinances. All five submitting firms were invited to the interview – thereby bypassing the selection Committee, and Council's own approved selection process, as well as County ordinances, to give presentations to Council. This serious deviation from the published rules for competition and from the law jeopardizes millions of dollars in federal funding that would otherwise contribute to the projects voted for by County residents. In effect, by acting in this improper and unlawful manner, County Council has taken from the residents of the County these millions of dollars in otherwise available federal funding. This action by Council is unacceptable as well as unlawful.

CECS alleges that Council took more than one vote on an initial roster of five firms, and that the voting was specifically affected, improperly and to CECS's detriment, by this unlawful deviation from the RFP.

CECS is also concerned that the scoring and voting, by Council, to select ICA may have been done in closed, private executive session, in violation of the FOIA law. No action may be taken in executive session except to (a) adjourn or (b) return to public session. The members of a public body may not commit the public body to a course of action by a polling of members in executive session. *S.C. Code Ann. § 30-4-70 (b)*. Any such vote is void *ab initio*, is of no effect, and is invalid.

You were in attendance at the most recent TPAC meeting. You heard the frustration and outrage of the TPAC, publicly stated on the record, at the improper conduct and selection by Council. As you know, at the meeting, numerous questions were raised about the scoring, the rankings and the methods for selection - as well as the justification for Council overriding the clear scoring that was done consistent with the solicitation. Shockingly, Council and its representatives refused to answer such questions, stating that they were advised not to answer these questions. It appears the only answer that Council members offer is that "maybe the proposal of ICA can be improved after the award." Mr. Callwood, you know, as a trained procurement professional, such a consideration is not only absurd; it is a violation of recognized procurement procedure, and is absolutely prohibited. That answer also constitutes a recognition that the ICA proposal as submitted and evaluated was not adequate or desireable.

A participant in the TPAC meeting Monday noted that the scoring data and selection data are public record under FOIA, S.C. Code Ann. § 30-4-10 et seq.³ Even so, the publication of and

³ Under S.C. Code Ann. § 30-4-15, the General Assembly stated that "[t]he General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible

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access to this information was improperly refused. You are aware that S.C. Code § 11-35-410 (A) provides specifically that "Procurement information must be a public record to the extent required by Chapter 4, Title 30 (The Freedom of Information Act) with the exception that commercial or financial information obtained in response to a request for proposals or any type of bid solicitation that is privileged and confidential need not be disclosed." Further, you know that only "pre-decisional" evaluative records can be exempt. *Id.* Once the Notice of Intent to Award was issued, a decision had been made, Council had voted. It is a violation of law, and the public trust, for government employees to withhold access to the public's records at this stage. It should be noted that FOIA provides for serious penalties in the case of such violations.

Such transparency must not be refused. This question was indeed asked by one participant, who read aloud from the County's own publication, "Educational Facts About the Transportation Penny" (Exhibit 6 at page 9) in which the County professed and promised residents and voters transparency in this process. Even so, there was no transparency at the meeting. Only a refusal to answer. Hence, this protest is asserted to rectify this wrong. CECS asks for a copy of the public's data and records, under S.C. Code Ann. § 30-4-10 et seq, held in the hands of public servants, to expose these facts which have been concealed, even from the Transportation Penny Advisory Committee that that Council created to provide transparency, ensure citizen input and oversight related to the Penny Program.

CECS is especially concerned that the selection method used to choose ICA was inconsistent with the RFP and was therefore illegal, and that as a result, millions of dollars of federal funding in support of these projects will be lost, due to Council's improper handling of this selection. See generally, Exhibit 7, Cooperative Intergovernmental Agreement. This inevitable loss of millions of dollars of federal funding should give you serious concern, and places an onus on you, as a responsible public officer, to grant the relief requested herein.

Finally, CECS alleges that ICA's proposal in response to the above referenced solicitation was inferior under the published selection criteria, and that ICA's team make up and proposal does not merit the award of the contract, should have been rejected, and the notice of intent to award issued to ICA in connection with the above referenced solicitation is unlawful. CECS would rely on public records that have, to date, been withheld in order to assert the further details of this allegation. Pursuant to the protest Ordinance, CECS reserves its right to raise any issues that are disclosed by the records once they are released as required by law.

for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings."

CONCLUSION

The processes and commitments made by the County to vendors in the published RFP were not followed, and were specifically violated, in a manner that awards a contract to one of the lowest ranked competitors - an out of state competitor - when the highest ranked competitor is a local Richland County Competitor, and is further, a minority vendor. All the above described deviations by the County in its selection process are serious, material and jeopardize federal funding, and are improper and unlawful. Further, the manner in which the solicitation has been evidently managed is in direct violation of law of Richland County and state laws regarding public contracting.

Richland County Council, contrary to the terms of the solicitation and fair commercial dealing, rejected the recommendations of its own Selection Committee, rejected the process it published for selection entirely, and substituted an unfair and non-transparent process in its place.

CECS believes and alleges that its proposal was the highest ranked under the published evaluation criteria in terms of quality. CECS is a local Richland County based company, headquartered here. CECS also believes and alleges that its proposal offered a far better percentage of minority and local participation than that of the out of state firm that was inexplicably awarded the job. CECS submitted a proposal which was responsive to every material and essential requirement of the solicitation; that CECS was ranked highest in all actual scoring performed in accordance with the published solicitation, and that CECS is a responsible vendor; accordingly, it is contrary to law for the notice of intent to award to be issued to any other bidder considering the Richland County SLBE ordinance, the published RFP and addendums, the established selection criteria, the CECS team's experience, local participation levels and the stated desire of Council through ordinances and statements to favor locally based firms in this process.

The damage done by Council's mishandling and deviation from published RFP processes can only be undone by a cancellation of the Notice of Intent to Award to ICA and an award to the top ranked vendor, CECS - the locally headquartered company that offered the most advantage to the County by offering the best combination of quality, cost, local ownership, minority ownership, local participation and employment. Under the applicable protest Ordinances, as Procurement Director, you have the power and the duty to correct these violations of law by re-awarding the contract to CECS.

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CECS requests that the notice of intent to award to ICA be stayed, that the County employees make prompt production of all requested public records, that an appropriate Due Process and FOIA complaint public hearing be held in connection with this protest. CECS further asks that all of the decisions and actions that resulted in the notice of intent to award to ICA be reversed, and that the notice of intent to award be issued forthwith to the local Richland County vendor, CECS, which was legitimately chosen by the team of qualified evaluators chosen by the County as the best proposal. Please advise me, or have staff advise me promptly that the stay request will be honored so that litigation to enforce a stay will not be made necessary by the County's own conduct. In the event that the protest is not resolved in CECS' favor, this letter further constitutes notice of request for administrative review.

CECS is prepared to meet with you and all necessary persons in accordance with Ordinance 2-621.1, Friday or Monday, prior to commencement of formal review, to administratively settle this protest, consistent with the ordinance and procurement regulations promulgated by Richland County.

Very truly yours,



John E. Schmidt, III

cc: Rob Perry, P.E.
Director of Transportation
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