

October 24, 2012

**Via Email (Nancy.locke@seattle.gov)
& U.S. Mail**

Ms. Nancy Locke, Director
City Purchasing and Contracting Services
PO BOX 94687,
Seattle, WA 98124-4687

*Re: Vehicle Impound Management Services (VIMS) RFP
Bid Protest/ABC Towing, Inc.
Public Records Request*

Dear Ms. Locke:

This firm represents ABC Towing, Inc. (“ABC”), a woman-owned business enterprise (“WBE”) and a bidder on the Vehicle Impound Management Services project (the “Project”). On October 22, 2012, ABC (a WBE prime contractor) was informed by the City of Seattle (the “City”) that ABC was not selected to proceed to Round 4 (“short listed”) predominately due to the City’s purported Inclusion Plan “counting” approach, which only provides credit for contractors who *subcontract* to woman and minority owned firms (“WMBE”)—not prime contractors who are WMBEs. This letter is ABC’s formal protest of the City’s “short list” selection of respondents for interviews and/or demonstrations.¹ The City’s rejection of ABC’s conforming RFP and Inclusion Plan strikes at the very purpose of the Equity in Contracting ordinance and, in fact, ultimately discriminates against WMBEs rather than increasing their participation. Thus, the City’s determination should be reversed, the Round 3 scores be recalculated, and ABC should be placed on the short list.

1. The City’s Purported Inclusion Plan “Counting” Approach Violates The City’s Equity In Contracting Ordinance.

The City enacted the Equity In Contracting ordinance (“EIC”) for two main reasons: (1) “the City finds that [WMBEs] are significantly under-represented and have been underutilized on City Contracts,” and (2) “[a]dditionally, the City does not want to enter into agreements with

¹ Pursuant to the City of Seattle’s Solicitation and Selection Protest Protocol, this protest is timely as it filed prior to the Intent to Award announcement by the City. Although there is a conflicting and ambiguous provision in the Protocols that states a protest must be made within three business days after the announcement of the “short list,” ABC was not provided with the information necessary to discern if it even had a basis to protest until October 22, 2012. Therefore, under either approach, ABC’s protest is timely.

businesses that discriminate in employment and the provision of services.” SMC 20.42.010. Accordingly, the purpose of the ordinance is stated as follows:

The purpose and intent of this chapter are to provide **the maximum practicable opportunity for increased participation by minority and women owned and controlled businesses**, as long as such businesses are underrepresented, **and to ensure that City contracting practices do not support discrimination in employment and services when the City procures public works, goods, and services from the private sector.**

Id. (emphasis added). To achieve this purpose and address both underlying reasons for the EIC, the Seattle Municipal Code provides that each Contract awarding authority shall make the following “Affirmative Efforts”:

Each Contract awarding authority shall adopt a plan, developed in consultation with the Director, **to afford Women and Minority Businesses the maximum practicable opportunity to directly and meaningfully participate on City Contracts.** The plan shall include specific measures the Contract awarding authority will undertake to **increase the participation of Women and Minority Businesses.**

SMC 20.42.060 (emphasis added). “Affirmative Efforts” are defined as “documented reasonable attempts in good faith to contact and employ women and minorities and to contact and contract with Women and Minority Businesses.” SMC 20.40.020(A).

ABC is a woman-owned business. Thus, ABC is the very business the City’s EIC ordinance is designed to promote. Nevertheless, ABC—the only WBE bidder—was issued the lowest score on its Inclusion Plan, the document which the City created to assure that bidders’ proposals’ are aimed at increasing WMBE participation in City contracts. Here, the Inclusion Plan scoring for the bidders was as follows:

| Max Points | ABC | All Day | AutoReturn | DTS | ET | Lang | Lincoln | UR VMS |
|------------|-----|---------|------------|-----|----|------|---------|--------|
| 100 | 17 | 55 | 55 | 55 | 22 | 91 | 83 | 80 |

In your email to ABC dated October 22, 2012, you informed ABC that as part of the Inclusion Plan, it is the City’s “approach to ‘counting’” to issue points only for those contractors who use women and minority *subcontractors*—not a WMBE prime contractor. Your statement that this approach is “counterintuitive” is an understatement and strikes at the stated purpose of the EIC ordinance.

The stated purpose of the EIC ordinance is **not** to improve the participation of WMBEs in subcontracting roles *only* but rather to provide WMBEs “**the maximum practicable opportunity to directly and meaningfully participate on City Contracts**” and “increase the participation of WMBEs.” SMC 20.42.060. In violation of the ordinance’s requirements, the City, however, has adopted a plan that is designed to prevent such direct and meaningful

participation on City Contracts by WMBE prime contractors. Specifically, by failing to recognize or give credit to WMBE prime contractors, the City is in fact penalizing WMBEs who, rather than subcontracting for a smaller portion of the work, wish to contract directly with the City. A WBE which is self-performing 100% of the work should receive the maximum 100 points as the entire contracting opportunity (i.e., the maximum practicable opportunity) to participate in the contract inures to a **woman** (in contrast, the City's interpretation resulted in a mere 17 points!).

For example, upon information and belief, many of the other bidders have listed ABC (a woman-owned business) as part of their "Good Faith Efforts" to contract with a women or minority-owned business. These other bidders (all of which are owned by non-minority males) have not requested a bid or pricing information from ABC, and ABC is skeptical at best that these bidders will ultimately contract with ABC (or any other WMBE for that matter) when those prices are requested. Although there is no accountability if bidders bait and switch their EIC assurances, overstate percentage, and ultimately fail to employ WMBEs, the City has somehow reached the conclusion that these "good faith efforts" fulfill the purpose of the EIC ordinance more so than if a WMBE contracts directly with the City, guaranteeing 100% participation by a WMBE. For some inexplicable reason, the City has deemed that ABC (the very WBE contractor the other bidders rely upon) is not entitled to *any* credit when in the role of prime contractor, decreasing ABC's overall score and preventing ABC from proceeding to Round 4. Such an absurd proposition in fact rewards these non-minority, male owned companies, increases these bidders' scores for their potential use of ABC while decreasing ABC's own score for seeking to complete the work itself (100% WMBE). The City's "approach" directly violates the ordinance's requirements that the City afford WMBEs the maximum practicable opportunity to directly and meaningfully contract and "increase the participation" of WMBEs and instead relegates WMBEs to the lesser subcontractor role. Accordingly, the scoring for round 3 should be re-evaluated and WMBEs (prime contractors and subcontractors) should be afforded the appropriate ranking.

2. Contrary To The City's Position, The City's Equity In Contracting Ordinance Does Not Preclude The "City" From Crediting a WBE Prime Contractor But, Instead, Encourages It.

In your October 22, 2012, response to ABC's request for information concerning ABC's low Inclusion Plan Rating, you rely on SMC 20.42.050 ("Affirmative efforts in employment and subcontracting, non-discrimination in services required."). In doing so, you assert that the City's position that bidders are only provided Inclusion Plan points for using subcontractors and there is no provision that allows for points to WMBEs who act as prime contractors. This position, however, materially mischaracterizes and misreads the clear import of SMC 20.42.050.

First, SMC 20.42.050 does not provide any basis for "points" or how to assign credit for WMBE participation. Rather, SMC 20.42.050 simply requires that Contractors shall "actively solicit the employment of women and minority group members" and actively solicit "Available, and Capable Women and Minority Businesses to perform commercially useful functions." The ordinance does not define how the Inclusion Plan scores these actions or prohibit providing a

WMBE points for self-performing the work. In fact, SMC 20.42.050, does not once reference the “Inclusion Plan.” The reasonable reading of the provision, however, would provide that a Contractor (when not a WMBE) must fulfill the following requirements. WMBEs, as Woman and Minority owned businesses, already meet these requirements by definition and subcontracting is of only minor significance. Accordingly, the City’s position has no merit, and ABC’s Inclusion Plan should be reevaluated.

Second, the provision does not—in any way—prevent “crediting” WMBE prime contractors for self-performing the work. As confirmed by the legislative history, the purpose of the ordinance is to increase the contracting opportunities for WMBEs. To read into the ordinance a requirement that a WMBE does not receive credit when it self-performs the work defeats this purpose in its entirety. Instead, as noted above, it does not logically follow that although other bidders (non-WMBEs) will receive substantial points for stating they are potentially utilizing ABC, ABC does not receive *any* credit for self-performing the contract. In violation of the ordinance, such a proposition discriminates and penalizes WMBEs. Further, there is no authority in SMC 20.42.050 for this proposition. Thus, again, the City’s position has no merit and ABC’s Inclusion Plan should be reevaluated and afforded proper credit for its self-performance of the work.

3. Upon Information and Belief, ABC’s Other Scores Were Downgraded Due To Bias Against Woman Owned Contractors.

Finally, ABC has requested but has yet to be provided with additional documentation that is necessary to fully evaluate ABC’s protest. Nevertheless, upon information and belief, it appears the City’s procurement officials also discriminated against ABC (in favor of larger, non WMBE companies) in the following areas:

- Technical Response:
 - Information Technology: ABC addressed all areas of technology capabilities required. In addition, the RFP requires that state vendors will equip all tow trucks with GPS tracking systems and appropriate software to monitor the real time location of any impounded vehicles. ABC has been informed that the bidders selected for the “short list” (Auto Return, UR and Lincoln) do not use the Truck GPS but rather smart phones. Nevertheless, although ABC’s bid included in-truck GPS with real time tracking (Page 14 of 31), ABC inexplicably received a lower rating.
 - Performance Measurement and Reporting: ABC complies in all respects with the City’s Performance Measurement and Reporting requirements. Therefore, there is no basis for any reduction in ABC’s rating.
- Management Response: Company organization – Although ABC provided this information and complies in all respects with the requirements, ABC was provided only one half of the available points. There is no rational basis for this rating.

Therefore, pursuant to the Washington Public Records Act, RCW 42.56, *et seq.*, ABC requests the City produce copies of all Documents² in the possession and control of the City of Seattle Purchasing and Contracting Office, including but not limited to:

- Any and all Documents, including but not limited to notes, emails, summaries, analysis, etc. that relate or pertain to the selection and scoring of the bidders proposals for Rounds 1-3;
- Any and all Documents, including but not limited to notes, emails, summaries, and analysis, that relate or pertain to the analysis of the bidders respective Inclusion Plans;
- Any and all Documents, including but not limited to notes, emails, summaries, and analysis, that relate or pertain to the analysis of the bidders respective Good Faith Efforts to achieve WMBE participation;
- Any and all Documents, including but not limited to notes, emails, summaries, and analysis, that relate to the bidders' respective Technical Responses;
- Any and all Documents, including but not limited to notes, emails, summaries, and analysis, that relate to the bidders' respective Management Responses;
- All bids, proposals, and related Documents submitted by the bidders in response to the RFP for this Project;
- All evaluation Documents prepared in connection with this procurement; and
- All other Documents or records relating or pertaining to this protest to the extent not already produced.

The Public Records Act provides that if some of a file is exempt from release, reasonable segregable portions shall, nonetheless, be produced. Thus, we request that if the City determines that some portions of the requested Documents are exempt, that it nevertheless provides this office with the remainder of the request. Please identify any document the City considers to be exempt, or to be withheld for any reason, or to the extent any documents have been destroyed, please identify with reference such document withheld or destroyed. Upon receipt of the information necessary to fully evaluate these additional protest bases, ABC will supplement this protest.

² The term "Documents" refers to any and all written, printed, typed, punched, taped, computer or other electronic data, however produced or reproduced, of every kind and description, in the actual or constructive possession, custody, trust, care or control of the City, its agents or attorneys, including, but not limited to, any correspondence (including letters, cables, telegrams, faxes, email), paper, book, record, manual, memorandum, contract, agreement, report, notes, meeting minutes, worksheets, presentation materials, computer files, video, audio recording, or other materials which contain any verbal, graphic or pictorial information, including all drafts thereof.

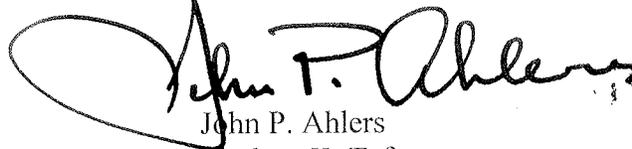
Ms. Nancy Locke
October 24, 2012
Page 6

4. Conclusion.

In scoring ABC's RFP, the City has directly violated the Equity in Contracting ordinance and, rather than increasing WMBE participation, is discriminating against WMBEs and thwarting (not promoting) WMBE participation. ABC is a women-owned business, yet, of all the bidders, ABC received the lowest inclusion plan rating. Such a result is arbitrary and capricious and is not supported by any legal authority or rational basis. Therefore, the City's determination must be reversed and ABC should be placed on the "short list."

Very truly yours,

AHLERS & CRESSMAN PLLC



John P. Ahlers
Lindsay K. Taft

JPA: grl
cc: ABC Towing, Inc.