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November 7, 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  
ABC Towing, Inc. Bid Protest Supplement  
Public Records Request*

Dear Ms. Locke:

As you are aware 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 24, 2012, ABC provided notice of its protest of the purported Round 4 "Short List" bidder selection. Specifically, ABC protested the City's "counting" approach with regard to the bidders' Inclusion Plan. ABC also noted potential additional grounds for its protest that required the review of public records to confirm. Accordingly, ABC requested those documents.

Yesterday, November 6, 2012, ABC met with a representative of the City of Seattle (the "City") and selected the documents it would like to review. These documents are currently being prepared by the City and are anticipated by Friday, November 9, 2012. Although ABC has not had the opportunity to review these documents in detail, during the cursory review of the documents, ABC identified additional grounds for its protest. As your October 24, 2012 email indicated, you hoped to provide a response to ABC's request by today, November 7, 2012. To ensure any decision considers all protest issues, ABC supplements its previous protest and alerts you to the following additional protest grounds. ABC requests that a determination regarding ABC's protest be stayed pending the outcome of ABC's further review of its public record request. Once ABC receives the documents from its public records request and a full review of the documents has been performed, ABC will again supplement its protest.

**1. The Public Records Reveal Numerous Discrepancies Involving The Inclusion Plan Scoring.**

As noted in ABC's initial protest letter, although ABC is a woman-owned business, ABC 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.

After even a cursory review, it appears that the City's "approach to counting" was not uniformly applied to all bidders. For example, All Day Towing ("All Day"), who received a score of 55 on the subcontracting portion of the Inclusion Plan (50 more points than ABC) noted in its Inclusion Plan that while it intended to subcontract 20-30% of the contract to M/WBE's, All Day is also a MBE so the percentage is "more like 50%." In contrast, despite ABC's commitment to subcontract with as many W/MBEs as possible, **ABC received a subcontracting score of a nominal 5**. Similarly, UR VMS, who received one of the highest scores on the subcontracting portion of the Inclusion Plan (60 out of 75), had one of the lowest percentages of anticipated W/MBE subcontracts. The inescapable conclusion from just these two discrepancies, of which there are undoubtedly more, is that the evaluation criteria and scoring procedure was applied indiscriminately and varied from bidder to bidder.

**2. From UR VMS and Auto Return's Proposal's, It Appears These Firms Are Precluded By Law From Completing The Contract As Proposed. Accordingly, Any Allowance By The City To Modify These Proposals Or Waive Compliance With The Regulations After Bid Opening Provides Those Bidders With A Competitive Advantage Not Enjoyed By Other Bidders.**

Pursuant to RCW 46.55, *et seq.*, only Registered Tow Truck Operators ("RTTO") are permitted to engage in the impounding, transporting, or storage of unauthorized vehicles or the disposal of abandoned vehicles in the state of Washington. Notably, violation of this Chapter can result in criminal penalties. *See* RCW 46.55.03 (engaging in RTTO work without a current RTTO registration certification constitutes a gross misdemeanor). In this instance, two of the three "Short List" bidders are not currently classified as RTTOs: Auto Return and UR VMS. Rather, these two firms are out-of-state entities that operate as "management" companies. Therefore, these firms are precluded from operating a storage facility or legally auctioning abandoned vehicles. Nevertheless, in Auto Return and UR VMS's proposals, these firms fail to assert that a properly registered RTTO subcontractor will perform these activities, presumably meaning Auto Return and UR VMS, contrary to Washington law, intend to self-perform this work. Accordingly, as these two bidders are not legally capable or qualified to perform the contract work, these proposals must be deemed non-responsive and rejected.

Although the contract award process is currently "on hold," from email correspondence reviewed during the public records request review, it appears the City identified the above deficiencies in Auto Return and UR VMS proposals. ABC is not privy to the underlying reason as to why the contract award process is currently on hold, but should the reason be to allow Auto Return or UR VMS—after the bids were opened—modify its Proposal or obtain the necessary RTTO registration, such an action (after bid opening) is strictly prohibited by Washington law.



To do so would provide the non-responsive bidders an unfair advantage not enjoyed by other bidders.

It is well-established in Washington that on public projects, a public agency is prohibited from providing a bidder with a **substantial advantage or benefit not enjoyed by other bidders**. *Id.* In the seminal Washington case of *Gostovich v. West Richland*, 75 Wn.2d 583, 587, 452 P.2d 737 (1969), the Washington Supreme Court stated the public policy behind these rules:

Although the primary purpose for requirement of public bidding is for the protection of the general public, it is also recognized that **another purpose is to provide a fair forum for those interested in undertaking public projects. If there are material irregularities in the bidding process, the municipality should not accept the offensive bid.**

*Id.* at 587 (emphasis added). If a bidder is in a position where it can accept or reject a contract, the bidder has gained a substantial advantage not enjoyed by other bidders, and its bid should be rejected. *A.A.B. Electric*, 5 Wn. App. at 890. For example, in *A.A.B. Electric*, the court stated that a contractor who submitted an unsigned bid is in the position, after the bid opening, and after it had seen other bidders' prices, of deciding whether to: (1) sign its bid; or (2) walk away from the contract. Since the opportunity for "two bites at the apple" is not available to other bidders, the bidder who submitted the unsigned bid had a **substantial advantage** over the other bidders, and the irregularity was **material**, requiring rejection of the bid. *Id.* See also *Land Const. Co., Inc. v. Snohomish County*, 40 Wn. App. 480, 482-83, 698 P.2d 1120 (1985) (holding that a bid was non-responsive because the bidder would have no obligation to perform under a bid which failed to list a properly certified WBE subcontractor as required by the ITBs).

Strict adherence to the RFP and statutory requirements is necessary to preserve the integrity of the public bidding system. To enforce this public policy inherent in competitive bidding, the City is required to reject any bid that is non-responsive (i.e., a bid that varies materially from the RFPs or if a bidder cannot legally perform the work). Here, if Auto Return and UR VMS assert in their RFP that they will be perform RTTO work without being properly registered as an RTTO, these bidders are in violation of Washington law. This constitutes a material irregularity with Auto Return and UR VMS proposals and as Auto Return and UR VMS have the opportunity to walk away from the contract (in fact, legal considerations may force Auto Return and UR VMS from completing the contract). Further, should the City provide Auto Return, UR VMS, or any other bidder the opportunity to, after the fact, obtain the required registration or modify their proposals, these bidders will be improperly provided with a second bite at the apple. This provides these bidders with a substantial advantage not enjoyed by other bidders, and, thus, the proposal is non-responsive and must be rejected.

#### 4. Conclusion.

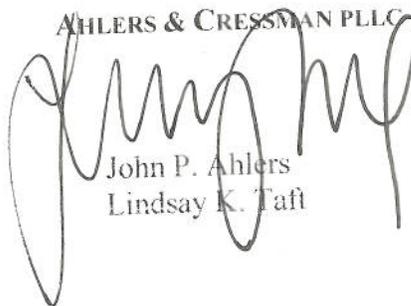
ABC's cursory review of the proposals highlighted significant discrepancies between the City's scoring calculations as well as proposals which violate state law. As these documents are not fully available, ABC has not had the opportunity to fully vet the proposals and apparent

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discrepancies. ABC, therefore, requests that any determination regarding ABC's protest be stayed pending a more in-depth review of the documents once produced by the City. Should you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

AHLERS & CRESSMAN PLLC

A handwritten signature in black ink, appearing to be a cursive combination of the names John P. Ahlers and Lindsay K. Taft, written over the printed name.

John P. Ahlers  
Lindsay K. Taft

LKT: grl  
cc: ABC Towing, Inc.