



City of Seattle
Department of Finance and Administrative Services

November 13, 2012

John Ahlers
Ahlers & Gressman PLLC
999 3rd Ave Ste 3800
Seattle, WA 98104

Reference: Protest of RFP #FAS-234

Dear Mr. Ahlers:

I received your October 24, 2012 protest for ABC Towing, and supplemental letters dated November 7, 2012 and November 13, 2012, regarding ABC's failure to short-list for interviews. A summary of your concerns is as follows:

1. The City used improper scoring criteria given the City ordinance for WMBE Inclusion.
2. The City did not score the WMBE Inclusion Plans consistently.
3. The City gave ABC an inexplicably low score for "Mandatory Technical Requirements," given the Information Technology and Performance Measurement criteria.
4. The City gave ABC an inexplicably low score for the Management response.
5. The two out-of-state firms were not properly registered RTTO's, eligible to submit an offer.
6. UR VMS Failed a portion of the technical response and therefore should be rejected.

Background:

The City issued a Request for Proposal (RFP) on August 14, 2012, with a Pre-Proposal Conference held on August 23, 2012 and a Question and Answer (Q&A) period that ran through September 6, 2012. The last Addendum and Q&A response was posted by the City on September 11, 2012, with responses due October 2, 2012. The City received eight responses; all met the minimum qualifications. The City scored and selected competitive responses for interviews, and announced three short-list firms on October 16, 2012.

Analysis:

Issue 1: WMBE Inclusion Plan. I have reviewed the WMBE Inclusion Plan scoring criteria, to determine if it was compliant to the City contracting ordinance.

- 1.1 The Seattle Municipal Code allows and expects consideration of the good faith efforts for a prime to subcontract to WMBE firms, but does not allow a preference to a WMBE prime based on the bidder's race/gender.

You argue the ordinance (SMC 20.42.010) provides "the maximum practicable opportunity to directly and meaningfully participate on City Contracts," and that the WMBE Inclusion Plan violates this purpose because it does not recognize or give credit to WMBE prime contractors. You base this upon the Purpose Statement made within the ordinance.

The Purpose Statement in the ordinance does not provide authority to give a preference to WMBE firms based only upon the race/gender of the bidder. The SMC provides authority for evaluating and requiring efforts to subcontract with WMBE firms, but does not authorize special preference to select or favor a WMBE firm over any other:

20.42.050 states "Contractors entering into agreements under this chapter shall actively solicit bids for subcontracts to qualified, Available and Capable Women and Minority Businesses to perform commercially useful functions. Contractors shall consider the grant of subcontractors to women and minority bidders on the basis of substantially equal proposals in the light most favorable to Women and Minority Businesses.....at the request of the Department, Contractors shall furnish evidence of the Contractor's compliance with these requirements of woman and minority employment and solicitation and will submit evidence of compliance with this section as part of any bid."

This requires the Bidder to submit a plan for Subcontracting, but does not authorize a stand-alone preference to a WMBE Contractor based on the contractor race/gender.

- 1.2 You cite Seattle Municipal Code 20.42.060 as evidence of intent to give preference to WMBE firms as bidders. Instead, this section of the code is directed to each City office and department. The "Contract awarding authority" is defined in code (SMC 20.40.020) to be "the City officer, department, commission, employee, or board authorized to enter into or to administer Contracts on behalf of the City." Although SMC 20.42.060 requires each department to adopt a plan to improve WMBE utilization, it does not authorize preferences to select based on the race/gender of the bidder.
- 1.3 Not only does the City code fail to authorize such a preference, it is arguably prohibited by I-200 which prohibits preferences resulting from the race/gender of the bidder. While a good faith effort to subcontract may be allowed and encouraged, a direct preference based upon the race/gender of the bidder alone is prohibited.

1.4 Finally, I turn to the obligation of this complaint to have been filed prior to the bid submittal deadline, for this complaint to have standing. The City offered a Pre-Proposal Conference and a Q&A time, to pose questions or raise concerns before bid submittal. No company, including ABC, raised issue over the WMBE Inclusion Plan scoring criteria.

These two provisions were within the RFP documents:

7.2 (page 18) Pre-Bid Conference: This is an opportunity for Proposers to raise concerns regarding specifications, terms, conditions, and any requirements of this solicitation. Failure to raise concerns over any issues at this opportunity will be a consideration in any protest filed regarding such items that were known as of this pre-proposal conference.

10.0 (page 29) Protests and Complaints: The City has rules to govern the rights and obligations of interested parties that desire to submit a complaint or protest to this RFP process. Please see the City website at <http://www.seattle.gov/purchasing/pan.htm> for these rules. Interested parties have the obligation to be aware of and understand these rules, and to seek clarification as necessary from the City.

This provision was stated within the City protest policy (see reference above to website documents):

When to Submit a Protest

Pre-Submittal:

Certain concerns must be filed before submittals are due. Any matter known – or that should have been known - before the submittal deadline, must be submitted to the City in writing when practical and three business days prior to the submittal deadline.

Such matters include, but are not limited to:

- Complaints about decisions or events that occurred before the submittals were due;*
- Complaints about the submittal specifications, minimum qualifications, or any aspect of the submittal alleged to unduly constrain competition;*
- Complaints that the pre-submittal conference was not fair or accessible;*
- Complaints that questions were not fully or properly addressed by the City;*
- Complaints that the submittal process did not provide adequate information or contained improper criteria; or*
- Any other matter known or that should have been known, to interested responders by reading the solicitation.*

Issue 2: Was the WMBE scoring consistently applied (November 7, 2012)

I reviewed scores assigned for the WMBE Inclusion Plan. The scores are done by the evaluation committee, within their independent judgment. Without any evidence of bias or conflict of interest, the scores would stand in accordance to the independent responsibility of that committee. In this case, I see no significant anomalies that show evidence of bias or conflict.

Issue 3. The City gave ABC an inexplicably low score for the Technical response

As above, the evaluation team has independent responsibility to use their best judgment in scores. In this case, the evaluation team awarded higher scores to those who more effectively described how performance measures would be integrated into their program and who seemed to better express the City's priority for reporting. Proposals from AutoReturn, DTS and UR VMS, which included examples of specific reports received higher scores. You noted a question about GPS capabilities, however this was not graded in the Technical Response (or any other part of the proposal) and thus did not benefit or harm any proposer.

Issue 4. The City gave ABC an inexplicably low score for the Management response

As above, the evaluation team again has an independent responsibility to use their best judgment in scores. For Management response, the team considered three elements within Company Organization: (a) a logical and effective company organization that could best support the services sought by the City, (b) low employee turnover rate, and (c) a locally based office for project implementation. ABC had low turnover rate and offered strong locally-based project implementation, however the evaluation team found the company organization to be more that of traditional tow services model rather than a structure that best supported the management services. For example, AutoReturn presented a technology division that the evaluation team considered to be of benefit given that information technology was an important component of these services.

Issue 5 (dated November 7, 2012)

UR VMS and Auto Return's Qualifications as an RTTO

Regarding this issue, you cite RCW 46.55.020 and protest that the two out-of-state firms are not RTTO certified and are therefore ineligible to accept a contract as proposed. I note your complaint that the City should prohibit a bidder from retroactively establishing an RTTO status in order to become eligible to bid.

I defer this protest issue since the protest is premature and no award decision has been made. If the City determines that UR VMS or Auto Return are successful, then I will examine this protest issue.

The time on hold allowed the City to respond to this protest, and it is customary and our policy to hold decision points until protest issues have been fully considered and responses have been issued.

Issue 6 (dated November 13, 2012)

UR VMS failed a portion of the technical response and therefore should be rejected.

I reviewed all the documents to research this issue. This involved a question about a "Pass/Fail" status for a sub-element (item 7.c.iv) requested in the technical response. In review of the RFP, the City carefully distinguished Minimum Qualifications and Minimum Technical Requirements from other RFP elements. All other elements were stated in the RFP as scored elements subject to evaluation. The specific documentation sought in Item 7.c.iv was not "required" as you characterized it in your protest, but instead requested as part of the scored technical response.

I reviewed the scoring matrix which confirmed this as well. Additionally, the RFP listed all mandatory submittals; this was not one. In fact, the details within 7.c.iv were not scheduled to receive any points. None of the 5 firms were rejected for the "fail" status assigned to that element, confirming the City intent that this be evaluated and not an item for mandatory rejection.

With that, I find that the evaluation team evaluated that element as intended.

Conclusion: I do not find any material error in the proposal evaluations. I defer Issue 5 until that time when an award decision is made and the protest issue becomes timely.

This concludes my protest response. The City will proceed with the solicitation process and respond to protest Issue 5 after an intention to award is determined.

Sincerely,



Nancy Locke
City Purchasing and Contract Services Director
Department of Finance and Administrative Services