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June 26, 2017

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Jennifer Alvarez, MPA, CPPO
Manager, Procurement and Contracts
City of Fort Lauderdale Procurement Services Division
100 N. Andrews Avenue
Fort Lauderdale, FL 33301

Re: *Solicitation 275-11844 – Ground Lease and Development of Parcel C*
(Property ID: 494209010170)

Dear Ms. Alvarez:

Introduction

This firm represents Midgard Group, Inc. (Midgard”) in relation to the above-referenced solicitation. Pursuant to Section 2-199.1 of the City of Fort Lauderdale Code of Ordinances, Midgard files its protest in relation to the intended award to Drive Shack, Inc. Enclosed is an attorney’s trust account check payable to the City of Fort Lauderdale (“City”) for the protest application fee in the amount of \$200.00.

Background

In March of 2017, the City advertised Solicitation 275-11844, Ground Lease and Development of Parcel C (Property ID #494209010170) (“Bid”). The Bid and attachments thereto are attached as Exhibit “1.” In accordance with the Bid, the City seeks a qualified and responsible firm for the long-term ground lease and development of Parcel C, comprised of Parcels 8 through 11, at Section 2 of the City’s Industrial Airpark (the “Property”). The Bid specified that ***aviation-related uses are preferred***. Further, proposals are required to comply with the “Permitted Uses” in the AIP zoning district.¹

19Z

19Z

¹ See, Section 3.3.1 of the Bid, and Answer Number 1 posted by the City on April 3, 2017.

In response to the Bid, the City received three proposals, to wit:

- Midgard Group, Inc. (“Midgard”) (attached as Exhibit “2”)
- Drive Shack, Inc. (“Drive Shack”) (attached as Exhibit “3”)
- Eastgroup Properties, LP (“Eastgroup”) (attached as Exhibit “4”)

Midgard is the owner of substantial property; and a long term tenant at the Fort Lauderdale Executive Airport (“FXE”) with a vested interest in the development of the Property. Midgard submitted its timely proposal on April 11, 2017. In sum, Midgard’s proposal provides for: 142,000 square feet of LEED Certified warehouse/distribution center to expand and complement its existing Crown Center and to benefit all of the Airport properties and businesses. The Crown Center currently includes a 475,000 square foot office park and is directly south of parcel C.

Midgard’s substantial interests will be affected by an award of the lease as a proposer; a property owner; and as an existing tenant at the Airpark. The intended award to Drive Shack, Inc. (“Drive Shack”) would be arbitrary and capricious and illegal pursuant to Florida law. Drive Shack’s proposal does not adhere to the requirements of the Bid.

Protest Grounds

In sum, an award to Drive Shack must not proceed and the City is urged to rescind the intended award and find Drive Shack’s proposal non-responsive. Drive Shack’s proposal as described in its submission includes: “an entertainment destination combining golf, competition dining and fun” in a 60,000 square foot building. Based upon the fact that the Property falls within the Airport Industrial Park (“AIP”) zoning district, however, the proposed entertainment facility is not a permitted use. Commercial recreational use is neither a Permitted nor Conditional Use pursuant to Section 47-14.11 of the City’s Unified Land Development Code (attached as Exhibit “5”), and the Bid terms required that “proposals comply with the permitted uses in the AIP zoning district....”² On that basis alone, Drive Shack’s proposal must be rejected as non-responsive.

Additionally, and as the City also made clear, the Property is subject to the City of Fort Lauderdale, Florida, Corrected Declaration of Deed Restrictions and Protective Covenants (“Declaration”)(attached as Exhibit “6”). The Declaration, in pertinent part, prohibits development of the Property in violation of applicable zoning ordinances. Further, in approving any development at the Airpark, the City is required to “give due regard to anticipated us of the property and as the same may affect other properties located in the Fort Lauderdale Industrial Airpark; uses and operations to be conducted upon the property and upon adjoining properties..” (Clause IV); and “*to protect the owners and tenants of other building sites located in the Fort Lauderdale Industrial Airpark from any undesirable or improper use of the property described herein as will depreciate the value of any other properties...*” (Clause III).

Indeed, the City’s own appraiser found that the highest and best use for the Property would

² See, Answer Number 1, April 3, 2017.

be for “light industrial development”.³ Based on the terms of the Bid, as well as the impact on the Airpark and its existing tenants and uses, an award to Drive Shack is impermissible. In fact, Drive Shaft’s proposal does not “support” the Airport in that it will not provide Airport services or help grow the surrounding office parks.

The intended award to Drive Shack violates express terms of the Bid, but also its specified intent. The Bid states that aviation-related uses for the site are preferred. Since that is the City’s stated preference, an aviation-related proposal would be “in the City’s best interest,” as specified in the Bid.

Public authorities have wide discretion in awarding public contracts through the competitive bid process. That discretion, however, “must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously.” Liberty County v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982); Emerald Correctional Management v. Bay County Bd. Of County Commissioners, 955 So. 2d 647 (Fla. 1st DCA 2007). Public authorities cannot exercise that discretion in a manner that is illegal, dishonest, fraudulent, unreasonable, arbitrary, capricious, or in any other way that would subvert or undermine the purpose and object of competitive bidding. D.O.T. v. Groves-Watkins Constructors, 530 So.2d 912, 913-14 (Fla. 1988); Caber Systems v. Department of General Services, 530 So.2d 325, 336 (Fla. 1st DCA 1988); *see also* William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So. 2d 550, 551 (Fla. 2d DCA 1960) (an agency’s wide discretion in evaluating bids will not be interfered with unless, “exercised arbitrarily or capriciously, or unless based upon a misconception of law, or upon ignorance through lack of inquiry, or in violation of the law, or was the result of improper influence.”).

“A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic.” Agrico Chem. Co. v. Dep’t of Envir. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Arbitrary and capricious has also been defined to include acts taken with improper motive, without reason, or for a reason which is merely pretextual. City of Sweetwater v. Solo Const. Corp., 823 So. 2d at 798, 802 (Fla. 3d DCA 2002); *citing* Decarion v. Monroe County, 853 F.Supp. 1415 (S.D. Fla. 1994).

The object of competitive procurement is:

“to close all avenues to favoritism and fraud in its various forms; to secure the best values for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids’....

From the above quote, it is apparent that the entire scheme of bidding on public projects is **to insure the sanctity of the competitive atmosphere** prior to and after the actual letting of the contract.” (**Emphasis added**).

³ See, Meacham and Associates, Inc. Appraisal dated February 8 2017 at p. 81.

Harry Pepper & associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1190; *quoting, in part, Wester v. Belote*, 138 So. 721, 723-23 (Fla. 1931).

Moreover, the irregularities in applying the evaluation criteria cannot provide one proposer with an unfair competitive advantage, and cannot be deemed minor technicalities. See Robinson Electrical Co., Inc. v. Dade County, 417 So.2d 1032 (Fla. 3rd DCA 1032).

An agency acts arbitrarily when it fails to follow its own evaluation procedures. Moore v. HRS, 596 So. 2d 759 (Fla. 1st DCA 1992). If an agency fails to observe pre-established specifications, or its code or written guidelines, “that action will render meaningless the basis upon which bids were initially sought, and so must be deemed arbitrary, illegal, fraudulent, or dishonest.” MCI Telecommunications Corp. v. Dept. of Corrections, 1995 WL 1053092 (Fla.Div.Admin.Hrgs.); *citing Proccaci v. HRS*, 603 So. 2d 1299 (Fla. 1st DCA 1992); Courtenay v. HRS, 581 So. 2d 621 (Fla. 5th DCA 1991); Spiliotis v. Department of Education, 2005 WL 2484798 (Fla. Div. Admin. Hrgs); NEC Business Communication Systems, Inc. v. Seminole County School Board, 1995 WL 1053245 (Fla. Div. Admin. Hrgs).

Here, Midgard submitted a proposal that is responsive, responsible, and adheres to the requirements of the Bid. Midgard’s proposal reflects its effort to provide the City with the type of project it advertised for. Instead, the City has penalized Midgard for doing so. In contrast, Drive Shack’s proposal clearly runs afoul of the Bid terms, Declaration, and zoning code. Moreover, it should be noted that the Aviation Advisory Board (“Board”) was asked to make a recommendation on the land lease to the Commission. On June 22, 2017, the Board voted to table consideration in order to be provided additional RFP information from City Staff. The Board did not receive copies of all proposals and information it deemed helpful for the Board’s consideration. An award of the lease to Drive Shack would violate Florida law, and must not proceed.

In addition, Eastgroup’s proposal also fails to meet the requirements of the Bid, and is therefore non-responsive. Section 2-173 of the City’s Purchasing Code defines a responsive bidder as one whose bid conforms in all material respects to the bid. Section 3.3.2 of the Bid states that the term of the lease is for a maximum of thirty (30) years, with an extension option for an additional twenty (20) years. The Bid only contemplates a twenty year extension. Eastgroup’s proposal, however, is for two 20 year options, for a total of forty (40) years. Eastgroup’s proposal clearly ignores and runs afowl of the Bid’s lease terms. It is telling the City that the proposal cannot comply with the lease duration requirements.

Further, Section 4.2.7 of the Bid lists the forms that are required to be included in a proposal. Subsection (c) requires the inclusion of a Non-Collusion Statement. Eastgroup did not include the Non-Collusion Statement in its proposal. Failing to do so renders its proposal non-responsive, based on the City’s Purchasing Code and Section 4.1.3 of the Bid which states that, “failure to use the forms provided may cause the proposal to be rejected and deemed non-responsive.”

Conclusion

Based upon the foregoing, Midgard respectfully requests that the City grant this protest, and rescind the intended award to Drive Shack. Further, that the City proceed to negotiate a lease with Midgard as the responsive and responsible proposer that has submitted the proposal in the City's best interest and that comports to the zoning code and Declaration.

Very truly yours,



William J. Cea
Mark J. Stempler
For the Firm

WJC/jhb

cc: Jim Hemphill, Sr. Procurement Specialist

jhemphill@fortlauderdale.gov

Client

ACTIVE: 9879441_1

Notice to Purchaser - In the event that this check is lost, misplaced or stolen, a sworn statement and 90-day waiting period will be required prior to replacement. This check should be negotiated within 90 days.

Cashier's Check - Customer Copy

No. 0796510847

Void After 90 Days 30-1/1140

Date 06/26/17 03:25:47 PM

LAS OLAS

0013 0005890 0069

NTX

Pay



****\$200.00****

****Two Hundred and 00/100 Dollars****

To The Order Of CITY OF FORT LAUDERDALE

Not-Negotiable

Customer Copy

Retain for your Records

Remitter (Purchased By): ROBERTO CHAMIZO III

001641001973

Bank of America, N.A.
SAN ANTONIO, TX

00-53-3364B 11-2010



Cashier's Check

No. 0796510847

Notice to Purchaser - In the event that this check is lost, misplaced or stolen, a sworn statement and 90-day waiting period will be required prior to replacement. This check should be negotiated within 90 days.

Void After 90 Days 30-1/1140

Date 06/26/17 03:25:47 PM

LAS OLAS

0013 0005890 0069

NTX

Pay



****\$200.00****

****Two Hundred and 00/100 Dollars****

To The Order Of CITY OF FORT LAUDERDALE

Remitter (Purchased By): ROBERTO CHAMIZO III

Bank of America, N.A.
SAN ANTONIO, TX

Monique L. Cat
AUTHORIZED SIGNATURE

⑈0796510847⑈ ⑆114000019⑆ 001641001973⑈

THE ORIGINAL DOCUMENT HAS A REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO VIEW WHEN CHECKING THE ENDORSEMENTS.