

August 7, 2018

(Via FedEx Overnight and Hand Delivery)

Jodi S. Hart, Manager Procurement and Contracts 100 N. Andrews Avenue Fort Lauderdale, Florida 33301 jhart@fortlauderdale.gov

(Via Email Only)

Ben Sorensen Vice Mayor/Commissioner City Hall 100 N. Andrews Avenue

Fort Lauderdale, Florida 33301 BSorensen@fortlauderdale.gov

(Via Email Only)

Robert L. McKinzie, Commissioner City Hall 100 N. Andrews Avenue Fort Lauderdale, Florida 33301 RMckinzie@fortlauderdale.gov

(Via Email Only)

Kirk Buffington, Director of Finance 100 N. Andrews Avenue Fort Lauderdale, Florida 33301 KBuffington@fortlauderdale.gov

(Via Email Only)

Mayor Dean J. Trantalis

City Hall

100 N. Andrews Avenue Fort Lauderdale, Florida 33301

dtrantalis@fortlauderlae.gov

(Via Email Only)

Heather Moraitis, Commissioner

City Hall

100 N. Andrews Avenue

Fort Lauderdale, Florida 33301 hmoraitis@fortlauderdale.gov

(Via Email Only

Steven Glassman, Commissioner

City Hall

100 N. Andrews Avenue

Fort Lauderdale, Florida 33301

SGlassman@fortlauderdale.gov

(Via Email Only)

Tanzania Johnson, Team Lead Senior Procurement

Specialist Public Works

100 N. Andrews Avenue

Fort Lauderdale, Florida 33301

tajohnson@fortlauderdale.gov

Re: WEST CONSTRUCTION, INC.'S LETTER OF PROTEST OF AWARD

Bid Number:

12139-983

Solicitation Name:

New Fire Station #8 Construction

Protester:

West Construction, Inc.

Dear Honorable Mayor, Vice Mayor, City Commissioners, City Manager and Procurement Manager:

This law firm represents West Construction, Inc. ("West") in connection with West's sealed response to the City of Fort Lauderdale, Florida's (the "City") Invitation to Bid No. 12139-

7111 Fairway Drive, Suite 302, Palm Beach Gardens, FL 33418 P 561.615.5701 F 561.615.5708 lorenkeanlaw.com 1580 Sawgrass Corporate Parkway, Suite 130, Ft. Lauderdale, FL 33323 P 954.474.7200 F 561.615.5708 lorenkeanlaw.com 983 (the "Bid") for the New Fire Station No. 8 Construction (the "Project"). This shall serve as West's Letter of Protest of the City's Intent to Award the Project to Burke Construction Group, Inc. ("Burke"). As required by City Ordinance, this Letter is accompanied by a \$5,000.00 fee. 1

Despite the undisputed facts that West was the lowest bidder for the Project and West's bid was responsive to the invitation, City's staff recommended that West be disqualified as "not responsible." The City's staff based its recommendation upon the pretense that there were deficiencies in West's bid submittal, West's references and West's prior projects with the City. The basis of West's protest is the following:

- (1) the City's unsupported and arbitrary finding that West was not a responsible bidder based upon some undisclosed deficiency in West's bid submittal;
- (2) the City's unsupported and arbitrary finding that West was not a responsible bidder based upon some undisclosed responses from West's references;
- (3) the City's unsupported and arbitrary finding that West was not a responsible bidder based upon some undisclosed deficiency in West's previous projects with the City (presumably as punishment for a prior lawsuit between West and the City); and
- (4) the City's actions are arbitrary and capricious, vesting unbridled discretion in the City and violating the competitive bidding requirements in the award of the Project.

I. Governing Law

Florida courts have held that the purpose of the competitive bidding process is as follows:

- (1) To protect the public against collusive contracts;
- (2) To secure fair competition upon equal terms to all bidders;
- (3) To remove not only collusion but temptation for collusion and opportunity for gain at public expense;
- (4) To close all avenues to favoritism and fraud in its various forms;
- (5) To secure the best value for the City at the lowest possible expense; and
- (6) To afford an equal advantage to all desiring to do business with the City by affording an opportunity for an exact comparison of bids.

See Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977) (second lowest bidder in lawsuit sued city for accepting amended bid of winning bidder after bid closing; held that amendment violated purpose competitive bidding).

Florida courts have further held that the award of public contracts must not be arbitrary and capricious:

While a public authority has wide discretion in award of contracts for public works on competitive bids, such discretion must be exercised based upon clearly defined criteria and may not be exercised arbitrarily or capriciously. . . . the United States District Court for the Southern District of Florida defined arbitrary and capricious for substantive due process to include acts

¹ Although West is including full payment as required by City Ordinance, West objects to the exorbitant fee as it violates due process and is designed as a pretext to avoid any legitimate bid protests.

taken with improper motive, without reason or for a reason that is merely pretextual.

See City of Sweetwater v. Solo Construction Corporation, 823, So. 2d 798 (Fla. 3d DCA 2002) (lowest responsible bidder on public project challenged bid award to another bidder; Court held that the city was required to award the bid to the lowest responsible bidder).

II. Statement of Entitlement to Relief

A. The City's Finding That West Was Not A Responsible Bidder Was Arbitrary and Capricious.

West timely submitted its response to the Invitation to Bid ("West's Bid") in full compliance with all Bid requirements. There is no dispute that West's bid was responsive and was the lowest bid.

First, the City, without any support or explanation, determined that West was not responsible because of the City's review of West's bid submittal. But, the City fails to identify any deficiencies in West's bid. What was missing? What was incorrect? Presumably nothing, as any valid deficiency would have likely resulted in the City finding that West's bid was unresponsive. Without any explanation, the bidder and the public are left to guess why the lowest bidder was not awarded the project. Without any disclosed basis by the City, its decision is purely arbitrary.

Second, again without any support or explanation, the City states that its review of West's references was a basis to find that West was not responsible. West identified four references in compliance with the Bid requirements. Upon information and belief, each of these references did or would have (if the City had contacted them) provided favorable recommendations to the City regarding West's work on previous projects. In fact, despite the short turnaround required to submit this Letter of Protest, West was able to contact two of the four references it provided. Specifically, West spoke with Luis Seta (Project Manager, Broward County) who confirmed that he was contacted by the City by phone and provided an excellent reference on West's behalf based upon West's work on the Broward County Public Safety Complex for Buildings 2, 3, 4 and 5. Another reference identified by West, Sean S. Holway, P.E. (Project Manager, AKEA, Inc.) confirmed he was contacted by the City and provided the favorable review of West's work on the AUTEC Federal Building – SSA Build Out Project attached as Exhibit A. Nevertheless, without any basis and as a pretense to disqualify West, the City arbitrarily found that West was not responsible.²

B. The City's Finding That West Was Not A Responsible Bidder Based Upon Prior Projects Was Merely Pretextual and Meant to Punish West For Disputing The City's Payments On A Prior Project.

² Notably, simultaneous with this protest, West has submitted a public records request seeking any documents that were relied upon or used as a basis for the City's staff's recommendation. Should the City come forward with the basis for any of its findings or should West's public records request reveal relevant information, West reserves the right to supplement this protest to address each individual basis.

The final basis for the City's finding that West was not a responsible bidder was "previous projects with the City." Again, the City provides no explanation, but presumably City staff is referring to a previous award to West for a contract for the South Side School Restoration & Hardy Park Redevelopment – Bid Package 3, Project No. 10777D, located at 701 N. Andrews Avenue, Fort Lauderdale, Florida (the "South Side Project"). After disputes regarding the South Side Project arose, West brought suit in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida, Case No. 12-008336(12). Eventually, West recovered a sizeable settlement from the City. West was obviously justified in pursuing monies owed.

The Bid that is the subject of this protest is not the first time that the City has punished West for bringing suit on the South Side Project. In a prior bid, West submitted a sealed response to the City's Invitation to Bid No. 273-11865 for the New Fire Station No. 54 Facility (the "Fire Station 54 Project"). There, the City deemed West's bid unresponsive because West's references were allegedly unverifiable. However, the City failed to even attempt to contact West's references and used this reason as a pretense to disqualify West from the Fire Station 54 Project. The City deemed West's bid protest on the Fire Station 54 Project late. Ironically, the Fire Station 54 Project was also awarded to Burke (the third highest bidder), even though Burke's bid was more than \$40,000 higher than West's bid amount.

Continuing with its arbitrary and capricious conduct of disqualifying West from its projects as a penalty for West's previous good-faith (and ultimately successful) conduct, the City once again has fashioned an excuse to avoid awarding the Project to West. The City's staff's finding that West is not a responsible bidder based upon "previous projects with the City" is patently false, arbitrary and capricious, merely pretextual and violates the competitive bidding requirements in the award of the Project.

III. Relief Sought

In conclusion, West requests that all City action related to the Project must cease immediately because the recommended award to Burke was a violation of the Competitive Bidding Requirements, Florida Statutes and Florida law.

Accordingly, West requests that the City make the following findings and grant the following relief:

- 1. West is a responsible bidder;
- 2. Burke was erroneously ranked as the lowest responsive and responsible bidder and cannot be considered for award of the Project;
- 3. West is the lowest responsive, responsible bidder; and
- 4. West is entitled to award of the contract for the Project.

Please contact me should you require additional information or documents.

Sincerely yours,

Meelforen

Bruce E. Loren bloren@lorenkeanlaw.com

Enclosure

Copies to:

(By email only)

Alain E. Boileu, Esq., Interim City Attorney City Hall 100 N. Andrews Avenue Fort Lauderdale, Florida 33301 aboileau@fortlauderdale.gov

(By email only)

Lee R. Feldman, City Manager City Hall 100 N. Andrews Avenue Fort Lauderdale, Florida 33301 jfeldman@fortlauderdale.gov Official Check
SUNTRUST

Purchaser West Construction, inc

Pay FIVE THOUSAND DOLLARS and 00 CENTS

To the Order of City of Fort Lauderdale

Memo

Bid Protest FS-8

Payable at Sin Trust Bank

Payable at Sin Trust Bank

Authorized Signature

Authorized Signature

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RFP# 12149-885 TITLE: Disaster Debris Removal and Management Services DATE: 8/9/2018

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RFP# 12149-885

TITLE: Disaster Debris Removal and Management Services

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RFP# 12149-885
TITLE: Disaster Debris Removal and Management Services
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PROPOSING FIRM	Weight Factor	Ranking	Point Subtotal	Weight Factor	Ranking	Point Subtotal	Weight Factor	Point Subtotal	Weight Factor	Ranking	Point Subtotal	Neight Factor	Ranking States	Meioht Easter	orizon orizona	Soint Subtotal	Weight Factor	Ranking	Point Subtotal	Weight Factor	Ranking	Point Subtotai	Veight Factor	Ranking	Point Subtotal	Weight Factor	Ranking Point Subtotal		Ranking	oint Subtotal	Neight Factor	Ranking	oint Subtotai	Weight Factor	Ranking	Point Subtotal	Veight Factor	Ranking	oint Subtotai	bedrak alilog leto						
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DRC EMERGENCY SERVICES, LLC	0.10	. 3	0.30	0.05	3 0	0.15	.10 3	0.3	0 0.1	3	0.30	0.05	3 0.	15 0.)5 2	2 0.1	10 0.0	5 3	0.1	5 0.05	5 3	0.15	0.05	3	0.15	0.05	3 0.1	5 0.05	3	0.15	0.27	2 0.	.54 0	.015	2	0.03	0.015	2	0.03	2.65	7					
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DRC EMERGENCY SERVICES, LLC	0.10	3	0.30	0.05	3 0).15 (.10 3	0.3	0.10	3	0.30	0.05	3 0.	15 0.0)5 1	0.0	0.0)5 3	0.1	5 0.05	5 3	0.15	0.05	3	0.15	0.05	3 0.1	5 0.05	3	0.15	0.27	2 0.	.54 0	0.015	2	0.03	0.015	2	0.03	2.60	7.	.80	2.60	2.60)	3



RFP# 12149-885 TITLE: Disaster Debris Removal and Management Services DATE: 8/9/2018

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ASHBRITT, INC.	0.10	1	0.10	0.05	1 (0.05	0.10	1 0	.10 0	.10	1	0.10	0.05	2	0.10	0.05	3	0.1	5 0.)5 :	2 0.	.10 0	.05	2 0	0.10	0.05	1	0.05	0.05	2	0.10	0.05	3	0.15	0.2	7 3	0.8	0.0	15	3 0	.05	0.015	1	0.02	1.97	.]						
CERES ENVIRONMENTAL SERVICES, I	0.10	2	0.20	0.05	3 0	0.15	0.10	2 0	.20 0	.10	2	0.20	0.05	1	0.05	0.05	1	0.0	5 0.	05	r 0.	.05 0	.05	1	0.05	0.05	2	0.10	0.05	1	0.05	0.05	1	0.05	0.2	7 1	0.2	0.0	15	1 0	.02	0.015	3	0.05	1.48	.]						
DRC EMERGENCY SERVICES, LLC	0.10	3	0.30	0.05	2 0	0.10	0.10	3 0	.30 0	.10	3	0.30	0.05	3	0.15	0.05	2	0.1	00.	05	3 0	.15 0	.05	3 0	0.15	0.05	3	0.15	0.05	3	0.15	0.05	2	0.10	0.2	7 2	0.54	0.0	15	2 0	.03	0.015	2	0.03	2.55	_						
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ASHBRITT, INC.	0.10	2	0.20	0.05	1 (0.05	0.10	2 0	0.20	.10	1	0.10	0.05	2	0.10	0.05	3	0.1	5 0.	05	2 0	.10 0	.05	1 (0.05	0.05	2	0.10	_	2	0.10	0.05	_	0.10	0.2	_	0.8	0.0	$\overline{}$			0.015	1	0.02	2.12	7						
CERES ENVIRONMENTAL SERVICES, I	0.10	1	0.10	0.05	2	0.10	0.10	1 0	0.10	.10	2	0.20	0.05	1	0.05	0.05	1	$\overline{}$	5 0.		_	.05 0	_	-	0.10	$\overline{}$		0.05	_	-	0.05	0.05	1	0.05	-	_		+	-	-	_	0.015	3		1.23	1					1	
DRC EMERGENCY SERVICES, LLC	0.10	3	0.30	0.05	3 (0.15	0.10	3 0	0.30	.10	3	0.30	0.05	3	0.15	0.05	2	0.1	0 0.	05	3 0	.15 0	.05	3 (0.15	0.05	3	0.15	0.05	3	0.15	0.05	3	0.15	0.2	7 2	0.54	0.0	15	2 0	.03	0.015	2	-1	$\overline{}$	7						
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ASHBRITT, INC.	0.10	2	0.20	0.05	-	-	-	-	0.20	-	-	0.20	0.05	_		0.05	_	0.1	_		_	.05 0	-	-	0.10	-		0.10	_		_	0.05	_	0.10	1	_	\neg		_	-	-	0.015	-	╅—	2.17	6.2	26	2.09	2.0	9	2	_
	0.10	1	0.10	0.05	2 (0.10	_).10		_	0.10	0.05			0.0	_	_	0 0.	\neg	_	.10 0			-	0.05	1	0.05	-	_	0.05	_	+ -	0.0	_	$\overline{}$		_	-		-	0.015	-	10.00	1.23	3.9)4 .	1.31	1.3	31	1	_
DRC EMERGENCY SERVICES, LLC	0.10	3	0.30	0.05	3 (0.15	0.10	3 0	.30 (.10	3	0.30	0.05	3	0.15	0.0	1	0.0	5 0.	05	3 0	.15 0	.05	3 (0.15	0.05	3	0.15	0.05	3	0.15	0.05	3	0.15	0.2	7 2	0.5	4 0.0	15	2 (.03	0.015	2	0.03	3 2.60	7.8	so :	2.60	2.6	50	3	