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February 1, 2023

Via Email: rgleason@broward.org

Robert Gleason, Director
Broward County Purchasing Division
115 S. Andrews Avenue, Room 212
Fort Lauderdale, FL 33301

**Re: RFP No. PNC2124755P1 - 2023 Port Everglades Master/Vision Plan
Update ("RFP")**

Dear Mr. Gleason:

Hatch Associates Consultants, Inc. ("Hatch") submitted an Objection Letter on November 28, 2022, concerning the above-referenced RFP. While the Purchasing Division has not yet responded to the Objection, we submit this correspondence after reviewing public records produced yesterday by Broward County in response to our request on December 9, 2022. The County produced documents concerning communications with AECOM Technical Services, Inc. ("AECOM"), the current firm recommended for award for the RFP, since the date of Hatch's Objection.

There are two sets of communications which prompt this correspondence, both of which are attached. First, on December 1, 2022, AECOM admitted to Broward County that it incorrectly represented that it was qualified as a "locally based subsidiary" under Broward County's Code of Ordinances, Section 1-74. In its proposal to the County under the RFP, AECOM submitted a Location Certification representing it was a locally based subsidiary and received local preference points based on its certification. Without these local preference points Hatch would have been awarded the project. However, on December 1st, months after it submitted its proposal and months after its proposal was evaluated and scored, AECOM acknowledged that its certification was erroneous and sought to change its local certification to a "local business," under that same ordinance section.

Instead of determining that AECOM would not be permitted to make a material change to its proposal, the County on January 5, 2023, sought additional information from AECOM regarding the percentage of tasks to be performed from AECOM's Broward-based office under

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the proposal at issue. On January 10th, AECOM responded by claiming percentages of performance of the service from its, "Broward based offices," (plural).

Hatch does not presume to know how the Purchasing Division will determine Hatch's Objection. However, Hatch presumes the Purchasing Division will follow its established guidelines set forth in the County's Procurement Code, the RFP, and as well as Florida case law in determining AECOM made a material misrepresentation in its proposal, and is not permitted to make a material change to its proposal at this time.

First, the Procurement Code is clear that misrepresentations in a proposal shall be grounds for finding a vendor nonresponsive or nonresponsible. Section 21.36 of the Procurement Code states:

A vendor's material misrepresentation in a response to a solicitation shall be grounds for finding a vendor nonresponsive or nonresponsible and may be grounds for suspension or debarment of the vendor. ...

Section 21.40 of the Procurement Code pertains to determinations of responsiveness and responsibility. Section 21.40b(4) states that while, "a vendor may submit information regarding its responsibility; **provided, however, that such information shall not be considered if it contradicts or materially alters the information provided by the vendor in its original response to the solicitation.**" The RFP states that, "A Responsible (Vendor) means a vendor who is determined to have the capability in all respects to perform fully the requirements of a solicitation, as well as the integrity and reliability that will ensure good faith performance." That section goes on to include the same language set forth in Section 21.40 of the Procurement Code regarding the submission of information after proposals are submitted.

Here, AECOM materially misrepresented that it was a locally based subsidiary to secure additional points in its evaluation. In fact, AECOM's misrepresentation resulted in it receiving an additional six points for being a locally based subsidiary, when in fact it did not qualify as such. This was not detected by the Purchasing Division during its review of the proposal, despite clear contradictions in AECOM's proposal as identified in Hatch's Objection.

Again, on December 1, 2022, it submitted information indicating that it was not a locally based subsidiary, but rather a local business. This submission of information well after proposals were submitted and scored, and proposers were ranked, contradicts and materially alters the information provided in the proposal. As such, AECOM must be found nonresponsible, or must not be permitted to materially change the Location Certification in its proposal. Making material misrepresentations to achieve additional local points does not lend to the integrity and reliability of a vendor.

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The purpose of the public procurement process is, “To provide for equitable treatment of participating vendors; To provide safeguards to ensure and maintain the quality and integrity of the County’s procurement system; and To promote public confidence in the procedures followed in public procurement by promoting transparency and uniformity in application.” Broward County Procurement Code §21.2(e)-(g). 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'....” *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1190).

Public authorities have wide discretion in awarding a public contract through the competitive procurement 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). An agency abuses that wide discretion when it acts arbitrarily or capriciously, based upon misconception of law, ignorance through lack of inquiry, in violation of the law, or as a result of improper influence. William A. Berbusse, Jr., Inc. v. North Broward Hospital District, 117 So. 2d 550, 551 (Fla. 2d DCA 1960). **This means that 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. 3d DCA 1032). **A bidder cannot be permitted to change its proposal after the proposals are opened, except to cure minor irregularities.** *Harry Pepper & Associates, Inc.* 352 So. 2d at 193. 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). Further, “a public body is not entitled to omit or alter **material** provisions required by the RFP because in doing so the public body fails to ‘inspire public confidence in the fairness of the [RFP] process.’” *Emerald Corr. Mgmt. v. Bay Cty. Bd. of Cty. Comm’rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007); quoting *State, Dep’t of Lottery v. Gtech Corp.*, 816 So. 2d 648 (Fla. 1st DCA 2001). **If an agency fails to observe pre-established specifications, or its code, “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.) (Emphasis added). In one case, a school board’s request for proposal (RFP) process for obtaining Internet service provider was in violation of law, where bidder was permitted to revise its price after opening of sealed proposals. *Bright House Networks v. AT&T Corp.*, 205 So. 3d 837 (Fla. 5th DCA 2016).

Here, AECOM’s alteration of its Location Certification to try to qualify as a local business months after it was submitted, evaluated and scored is a material alteration that is impermissible, and should not be considered in the evaluation under this RFP. Since AECOM admits it was not a locally based subsidiary as represented in its proposal, it can no longer keep the six points it was awarded for being a locally based subsidiary. When those six points are subtracted, Hatch will have the highest total points, and must be recommended for award.

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CONCLUSION

The Purchasing Division must grant Hatch's Objection to the recommendation of award, and determine that Hatch is the top ranked proposer. The information provided in response to Hatch's public records request confirms that. Allowing AECOM to make a material change to its proposal after submission and after scoring would violate the County's Procurement Code, the specifications of the RFP, and well established Florida law. Hatch looks forward to the County's response to its Objection, and remains ready, willing and able to perform these important services for the County at Port Everglades.

Thank you for your consideration of this issue.

Respectfully submitted,



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For the Firm

MJS/lb

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