

**CITY OF TALLAHASSEE**

**PROTEST HEARING**

**RFP No. 0112-17-RM-RC**

**CIVIL ENGINEERING SERVICES—DESIGN OF STORMWATER, ROADWAY, LANDSCAPE  
AND HARDSCAPE IMPROVEMENTS FOR THE MARKET DISTRICT MULTI-PURPOSE  
STORMWATER PROJECT**

**FINAL DECISION**

As City Attorney and pursuant to the grievance procedures set forth in Section 20 of the above-referenced Request for Proposals, I conducted a protest hearing on the Bid Protest filed by sub-contractor DPB & Associates, LLC (“DPB”) to the Recommended Award to GGI, LLC d/b/a Genesis Group (“Genesis”). The hearing was conducted on Thursday, November 16, 2017, in the Procurement Conference Room in City Hall. There were numerous representatives of both sides present at the hearing, including Gavin Bowden, Counsel for DPB, and Joseph Goldstein, Counsel for Genesis. Also present were Andre Libroth, Ron Mayo and Robert Threewitts from the City’s Procurement Department, as well as Matt Scanlan and Nick Cleary from my office. Charles Redding, a representative from DRMP -- the firm who actually submitted a response to the RFP and included DPB as a sub-contractor -- was also present and indicated DRMP was not supporting DPB’s bid protest. Acting City Manager Reese Goad provided oral testimony at the hearing as well. I allowed all parties to present evidence and argument, and provided additional opportunity for any person to submit, by e-mail, any additional evidence or argument to me. Both parties did so.

**ISSUES**

The main thrust of DPB’s argument is that pressure from City management caused the City to ignore its own procurement policies and procedures, which resulted in DPB being unfairly excluded from participating in an open and fair competitive bid process. Specifically,

DPB notes that the City was receiving negative press due to the familial relationship between Mr. Rich Buss, a principal in DPB, and Mr. John Buss, Director of Stormwater Management for the City. John and Rich are brothers, and John is married to City Commissioner Nancy Miller. DPB's contentions include the following<sup>1</sup>: 1) the City unfairly "urged" DPB to pursue the project as a sub-contractor, rather than as a prime; 2) due to management pressure, the City failed to follow its normal Procurement Procedures when selecting members of the Evaluation Committee; and 3) there were improprieties with the scoring of the proposals.

## DISCUSSION

### I. Standing

This protest puts the City in a peculiar position. Under both the City's normal Procurement Process and the specific parameters of this particular RFP, the right to protest a recommended award is reserved for "actual bidders". There is no question that DPB is not an actual bidder, and Genesis rightfully points out various decisions where sub-contractors lack standing to dispute a procurement award. However, DPB advances the argument that the reason it is not an actual bidder is because of actions of the City, and thus, unique circumstances exist to allow the protest to go forward. I am not certain that I agree that this situation presents itself as a "unique circumstance", and I am hesitant to create a precedent where every sub-contractor of a failed bid has standing to circumvent the clear intent of the City's policies to limit protests to actual bidders. However, if DPB's claims are to be believed, the only reason they did not actually bid on this project is because of actions or statements made by City representatives.

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<sup>1</sup> DPB raised numerous arguments in its various written protests. My opinion primarily focuses on the arguments raised in the hearing and in the follow-up submittal presented to my office on November 21, 2017.

Under the City's Procurement Manual, there is another requirement for the protest of a recommended award. Under §2.4, in order to file a valid protest of a recommended award, a vendor must be an "actual bidder" and must demonstrate it "would have been awarded the contract but for the aggrieved action." Herein lies the problem for DPB. Because it did not bid on the project, it can rely on nothing but pure speculation that it would have been awarded the contract but for these alleged improprieties. This appears to be a hurdle DPB cannot overcome, and the protest should probably be dismissed on this ground alone. Finally, as counsel for Genesis points out, the case law strongly supports its client.

However, due to the specific circumstances presented here, and the nature of the allegations, I will address the issues raised in DPB's protest and evaluate its claims on the merits.

Although the representatives of DPB clearly *believed* they were being discouraged from pursuing Phase III of this project as a primary contractor, there is no evidence that the City affirmatively prevented DPB from doing so. Furthermore, and perhaps more importantly, there is no evidence that DPB had any concerns about pursuing this project as a sub-contractor until after the results were determined. Surely DPB could have noted somewhere, in some fashion, that it intended to be a primary contractor "but for" the suggestions by the City. By raising its concerns for the first time now, it reeks of "Monday Morning Quarterbacking". On balance, it is equally likely, as Genesis pointed out at the hearing, that DPB made a business decision that it now regrets. This is not grounds to overturn an award recommendation.

## II. Procurement Process

A significant portion of DPB's protest involves alleged improprieties in the procurement process, and violations of the City's own Procurement Manual. Specifically, DPB alleges that the Manual requires the City to establish the Evaluation Committee prior to the release of the

RFP, that the members of the Evaluation Committee must have the proper expertise for the project, that the Assistant City Manager acted inappropriately in changing the suggested Evaluation Committee, and that the Project Manager must be on the Committee.

While it is true some technical provisions of the Manual were not precisely followed, it is also true that the Manual serves only as a guide for the Procurement Department to follow. I note that DPB encouraged a liberal reading of the Manual when trying to convince me that it had standing to file a protest, but now suggests that other provisions should be strictly construed.

Section 6.19 describes the process for creating an Evaluation Committee. The title of the section is "Evaluation Committee Guidelines", and the introductory language clearly indicates these provisions are an "aid" and can be adjusted as needed. Section 6.19.1 states the committee members "will be subject to approval by the City Manager, appropriate ACM or appointed official." These two provisions, taken together, clearly give city management some leeway to change the normal process if necessary. Here, there was a clear need to alter the normal Procurement Process. As Mr. Goad clarified at the hearing, it had been brought to his attention by the City Auditor that there were some concerns with previous work done by DPB and possible appearances of improprieties on earlier phases of this very same project. Rather than forbid DPB from responding to the RFP, Mr. Goad made a choice to consciously remove the appearance of impropriety that could exist in the procurement process.

I agree with DPB that ideally, the majority of the committee would be made up of individuals from the Stormwater Department, and the Project Manager would be the Committee chair, which is the City's usual process. However, in this particular instance, the head of the Department issuing the RFP (John Buss) was related to a principal of a vendor that was likely to respond to and evaluate the RFP (Rick Buss). Furthermore, the project manager reported directly to Mr. Buss. Given the concerns raised by the Auditor, and the appearance of a

potential conflict of interest due to the familial relationship between the parties, Mr. Goad made the decision to eliminate the appearance of impropriety completely and have the bids evaluated by individuals a bit more removed from John Buss' department.

While it is true that two of the individuals selected to be on the Committee were still employees of Mr. Buss, Mr. Goad explained why these individuals were "more acceptable" members of the committee. Recognizing that a large portion of this project was Stormwater-related, it was impossible to avoid Mr. Buss' department completely. As Mr. Goad explained, surely, as far as appearances go, individuals that report directly to Mr. Buss (and have for many years) would be more likely to be swayed by the fact that they are evaluating the bid by their supervisor's brother than someone a bit more removed on the organizational chart. Thus, he selected employees that had knowledge of the project, were qualified to evaluate the proposals, but yet were more removed from the direct influence of Mr. Buss.

It is not my role to determine whether these were the best possible decisions, but rather I am to evaluate whether they were made in an arbitrary or capricious fashion, and/or made in a manner that caused some prejudice to DPB. When the totality of the circumstances surrounding this particular RFP are evaluated on the whole, I find Mr. Goad's actions were perfectly reasonable. I also fail to see how changing committee members created prejudice against any vendor (or potential vendor).

### III. Scoring

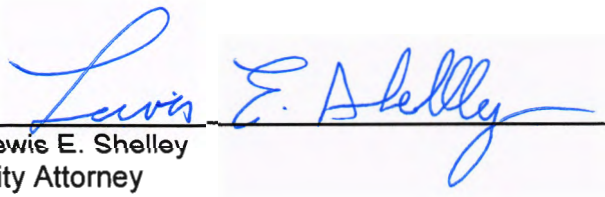
DPB also takes exception to the scoring of one of the evaluators, and has provided a statistical analysis to demonstrate that his scores are "unpredictable" and "statistically improbable." Part of their argument seems to be that it was improper for one evaluator, Mr. Cowart, to change the scores to the degree that he did after seeing the presentations of each vendor. However, common sense dictates that the presentations should effect the scores. It

would be far more concerning if the evaluators felt exactly the same about each submittal after the presentations as they did before. The entire purpose of the presentation is to make a final sales pitch to the committee as to why they should select your product. Based upon my review of the scoring, it appears the committee, as a whole, thought Genesis did an outstanding presentation (their score increased by almost 10 points, and every evaluator increased their original score), Kimley-Horn basically met expectations (their score increased by 2.5 points and 3 out of 5 committee members increased their score), and DPB clearly fell short of the committee's expectations (score decreased overall, and 2 committee members decreased the score, 1 increased, and 2 made no changes). It should be noted that all vendors were provided with a list of topics to cover in their presentation, and the score changes could reasonably be based on the committee's subjective belief as to whether the topics were adequately covered.

As to the perceived bias of Mr. Cowart, I have not been presented with any evidence to suggest the foundation of such a bias, and there is simply nothing other than speculation as to what the "original" committee members may have scored the various vendors. In fact, the notion that the scores for DPB would have been higher if employees of Mr. Buss were on the committee is the exact appearance of bias City Management was trying to avoid. Even if DPB's statistical analysis is to be believed (I question how reliable a sample size of 4 evaluators is), the mere fact that Mr. Cowart scored one vendor "too high" and another "too low" is evidence of nothing besides Mr. Cowart's subjective belief that one vendor was significantly better than the others and the other was significantly worse. In fact, evaluating and ranking the various vendors is the goal of the entire exercise. Absent clear evidence of a pre-conceived bias for one vendor or against another, I do not believe it is proper to impute any ill will on any evaluation committee member, and I certainly do not feel qualified to question their subjective beliefs.

**DECISION**

Based upon the foregoing, the protest of DPB & Associates, LLC (“DPB”) is Denied, and the City should proceed with the Recommended Award to GGI, LLC d/b/a Genesis Group (“Genesis”). The bid protest bond/check should be released/returned to DPB.

  
Lewis E. Shelley  
City Attorney