



JOSEPH M. GOLDSTEIN
PARTNER
Shutts & Bowen LLP
200 East Broward Boulevard
Suite 2100
Fort Lauderdale, Florida 33301
DIRECT (954) 847-3837
FAX (954) 888-3066
EMAIL jgoldstein@shutts.com

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VIA EMAIL PBASSAR@HOLLYWOODFL.ORG

Paul Bassar, Director of Procurement and Contract Compliance
City of Hollywood, Florida
2600 Hollywood Blvd., Room No. 303
Hollywood, FL 33022

Re: May 6, Agenda Item 17 - RFQ No. PR 19-018 re Hollywood Beach golf course renovation and clubhouse construction

Dear Director Bassar:

McCumber-Wright Venture, LLC ("McCumber") objects to the recommended award to Synalvolski Romanik Saye, LLC ("SRS"). Staff has inaccurately described the facts of this procurement, improperly terminated negotiations with McCumber, and SRS is ineligible for award.¹

I. Staff reached an agreement with McCumber.

On August 28, 2019, the City Commission passed Resolution R-2019-229, ranking McCumber as the highest-ranked offeror. **Ex. 3.** The resolution "authorizes the appropriate City officials to negotiate and execute the attached Professional Services Agreement with the highest ranked firm." It also provides "**if** the appropriate City officials are **unable to negotiate an agreement** with the highest ranked firm, **then** they are authorized to terminate negotiations with that firm and commence negotiations with the next highest ranked firm and execute an agreement." *Id.* at 3-4 (emphases added, pagination as per lower right corner). In other words, R-2019-229 only authorized Staff to negotiate with SRS in the event of an impasse with McCumber.

Staff successfully negotiated an agreement with McCumber that was scheduled for the Commission's consideration and approval on February 19, 2020. **Ex. 4,** Resolution R-2020-048 with Attachments. Without explanation, the item was withdrawn. More than a month later, Staff contended it had previously "overlooked" several matters that required the *post hoc* termination of the **already successful** negotiations. **Ex. 5,** April 7, 2020 Letter from Paul Bessar.

¹ McCumber's previous communications are incorporated by reference. See April 10, 2020 response to the termination letter (**Ex. 1**) and supplemental e-mail of April 16, 2020 (**Ex. 2**). Consistent with § 30.15(F)(4)(d), City Code of Ordinances, the City must include these items with the back-up materials for the agenda item.

Staff has now placed Resolution R-2020-096 on the agenda for the May 6, 2020 Meeting to approve a contract with SRS, and states “due to mitigating circumstances and information regarding the highest ranked firm, it was determined that it is in the best interest of the City to negotiate with the second highest ranked firm.” **Ex. 6**, at 2. This is inaccurate and improper.

The Commission never authorized Staff to negotiate with SRS if Staff “determined that it is in the best interest of the City” to negotiate with SRS “due to mitigating circumstances and information regarding” McCumber. Rather, the Commission only authorized Staff to negotiate with SRS if it was “unable to negotiate an agreement” with McCumber. **Ex. 3**, at 3-4. Staff and McCumber did successfully negotiate an agreement, and all of the purported circumstances to not bring such agreement to the Commission were obvious at the time McCumber submitted its proposal in **June 2019**.

II. The RFQ does not require offerors to be a licensed architect.

Staff claims McCumber is ineligible for award because it doesn’t hold an architect’s license. *See Ex. 5*. But, Staff’s contention is without merit. No licenses are required for “consultation, investigation, reconnaissance, research, design, preparation of drawings and specifications, and responsible supervision, where the predominant purpose of such service is the design of a golf course.” § 481.329(9), Fla. Stat. Moreover, since maximizing competition is a key goal of competitive bidding, a solicitation provision does not create a “pass/fail” requirement unless the solicitation unambiguously expresses such intent, meaning “all reasonable people” would read it that way.²

Here, the RFQ does not clearly require firms to hold any sort of license to be eligible for award. To the contrary, 6 out of the 8 firms who responded to the RFQ are unlicensed “golf course architects.” The Selection Committee and Staff initially agreed with this non-restrictive reading of the RFQ that allowed unlicensed “golf course architects” to compete. This is why 4 out of the 5 firms invited to oral presentations are unlicensed “golf course architects,” and is also why Staff began negotiating with McCumber as the highest-ranked responsive and responsible offeror.

III. The use of Mark McCumber and Associates is at most a minor irregularity.

Staff belatedly claims McCumber must be eliminated from the competition because the offer was submitted by Mark McCumber and Associates. Mark McCumber & Associates is a division of McCumber, but was not formally registered with the state as a fictitious name by McCumber until February 19, 2020, **Ex.1**, at 207. The submission by Mark McCumber & Associates binds McCumber as a matter of law under Florida’s fictitious name statute, regardless

² *Air Support Serv. Int’l, Inc. v. Metro. Dade Cnty.*, 614 So. 2d 583, 584 (Fla. 3d DCA 1993); *Hurst Awning, Inc. v. Dep’t of Transp.*, DOAH No. 94-2297BID, 1994 WL 1027696 (Fla. Div. Admin. Hrgs. June 24, 1994) (RO). *Hillcrest Country Club Ltd. P’ship v. Zyscovich, Inc.*, 288 So. 3d 1265, 1269 (Fla. 4th DCA 2020).

of the timing of such registration.³ This issue was obvious from the outset, and it is well established that a procurement decision “cannot be based upon “ignorance through lack of inquiry” and that irregularities in an offer regarding the offeror’s identity are minor, and hence waivable ones.⁴

IV. SRS does not meet the solicitation’s mandatory five-year experience requirement.

SRS does not comply with a true “pass/fail” requirement for this procurement. The RFQ’s Selection Criteria states “The **firm** must have minimum of **five years** of experience as a Golf Course Architectural Consultant.” **Ex. 1**, at 9 (emphasis added). SRS does not have such experience, but is apparently relying on its subcontractor Kipp Schulties, who itself, like McCumber, bid independently as an unlicensed golf course architect.⁵ **Ex. 6**, at 23.

When the government limits the competition to firms that have certain qualifications necessary to meet its needs, those requirements may not be waived after offers have been opened. Because “pass/fail” qualification requirements prevent those who do not meet them from bidding, an after-the-fact waiver confers an unfair competitive advantage on the beneficiary of the waiver.⁶ Moreover, a bidder cannot rely on its personnel or subcontractors to meet experience requirements unless the solicitation expressly allows it to.⁷

V. If necessary, McCumber and birse/thomas can “switch places”

McCumber’s proposal clearly delineated the roles that would be played by it and its proposed subconsultants, and this proposed approach was incorporated in the agreement negotiated with the City. To the extent that the City now believes it should only enter an agreement for this scope of work with a licensed architect, McCumber’s proposed architect subconsultant birse/thomas is willing to serve as the prime.

³ See *Bank of Am., N.A. v. Nash*, 200 So. 3d 131, 135 (Fla. 5th DCA 2016) (“Here, there is no evidence to suggest that Countrywide failed to register AWL as a fictitious name, but, even so, such a failure to register ‘does not impair the validity of any contract, deed, mortgage, security interest, lien, or act of such business and does not prevent such business from defending any action, suit, or proceeding in any court of this state.’ § 865.09(9)(b), Fla. Stat.”).

⁴ *Intercont’l Props., Inc. v. State, Dep’t of Health & Rehab. Servs.*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992); *Marriott Corp. v. Metro-Dade Cnty.*, 383 So. 2d 662, 667-68 (Fla. 3d DCA 1980).

⁵ It appears Staff has overlooked a potential bid rigging scheme between SRS and its subcontractor Kipp Schulties, who also submitted a bid as a prime, and was one of the five shortlisted offerors.

⁶ *City of Opa-Locka v. Trs. of the Plumbing Indus. Promotion Fund*, 193 So. 2d 29, 30-32 (Fla. 3d DCA 1966) (affirming order enjoining award to low bidder who did not hold certificate of competency at time of bid submittal as required by bidding rules).

⁷ *Phil’s Expert Tree Serv. v. Broward Cnty. Sch. Brd.*, DOAH No. 06-4499BID, -- WL -- (Fla. Div. Admin. Hrgs. Mar. 19, 2007) (RO).

At this time, McCumber must, reluctantly, pursue a circuit court action against the City to enjoin its termination, the proposed award to SRS, and with respect to its public records request. Although McCumber has made multiple attempts to schedule a meeting with Staff to discuss this matter, all such attempts have been rebuffed. Moreover, due to the unfortunate COVID-19 issues, our participation at the City's meeting will be extremely limited, and we feel that filing this pre-emptive lawsuit is the only way to adequately bring these issues to the attention of the City before an improper award is made.

Sincerely,

SHUTTS & BOWEN LLP

A handwritten signature in blue ink that reads "Joseph M. Goldstein". The signature is written in a cursive, flowing style.

Joseph M. Goldstein
Andrew E. Schwartz

cc: Patricia Cerney, City Clerk, pcerney@hollywoodfl.org
Wazir A. Ishmael, City Manager
Gus Zambrano, Asst. City Manager
Douglas R. Gonzalez, City Attorney

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