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November 12, 2021

**VIA HAND DELIVERY AND
ELECTRONIC TRANSMISSION**

Helena Alves
Financial Services Director
City of Palm Coast
160 Lake Avenue
Palm Coast, Florida 32164

Re: Formal Written Protest of Waste Pro of Florida, Inc.
City of Palm Coast Request for Proposal:
Residential Solid Waste Collection Services - RFP-CE-21-42

Dear Ms. Alves:

This law firm represents the interests of Waste Pro of Florida, Inc. (“Waste Pro”). By this correspondence, Waste Pro formally protests the Notice of Intent to Award (the “Notice of Intent”) by the City of Palm Coast, Florida (the “City”), for the City of Palm Coast Request for Proposal: Residential Solid Waste Collection Services - RFP-CE-21-42 (the “RFP”).

A. Introduction

This Protest focuses on a material omission by FCC Environmental Services, LLC (“FCC”), in its Proposal. Specifically, FCC failed to disclose the monthly performance-related assessments in excess of \$10,000 that have been imposed by Polk County, Florida, for 47 consecutive months.

Rather than provide the candor required by this procurement process, FCC misled the City into believing it had only *de minimus* monetary consequences from failing to meet performance standards. Indeed, that was a cornerstone of FCC’s presentation and material to its first place ranking, despite being the more expensive option compared to Waste Pro.

Waste Pro takes this material misrepresentation by FCC very seriously. As the incumbent hauler for the City, Waste Pro has a proven track record in servicing the City's residents for the past 16 years in earnest. In this partnership, Waste Pro has provided the City with quality service that its residents have come to expect and deserve.

Waste Pro knows the City and the importance of being local. Many of its employees and their extended families are residents of Palm Coast and Waste Pro's phones are answered locally to ensure a better understanding of service issues that inevitably arise. Waste Pro has invested approximately \$21 million into its facilities in the community, worked to educate the residents, and supported local charitable events. All of this Waste Pro proudly does because it is part of the Palm Coast community.

This long-standing relationship with, and commitment to, the City justified Waste Pro deciding to not sit idly by while FCC deceived the City and, in turn, its residents. As will be detailed below, FCC should be disqualified or its Proposal rejected due to its intentional omission regarding its past performance, a germane issue in the evaluation process.

B. Background and Procurement Documents

On August 4, 2021, the City issued the RFP, a true and correct copy of which is attached hereto as **Exhibit 1**. On August 20, 2021, the City issued Addendum Number No. 1 to the RFP, a true and correct copy of which is attached hereto as **Exhibit 2**. On August 25, 2021, the City issued Addendum No. 2 to the RFP, a true and correct copy of which is attached hereto as **Exhibit 3**. On September 2, 2021, the City issued Addendum No. 3 to the RFP, a true and correct copy of which is attached hereto as **Exhibit 4**.

Pursuant to Section 3.17 of the RFP, a proposer whose Proposal contains "information which is determined to be substantially inaccurate, misleading, exaggerated, or incorrect, shall be disqualified from consideration. Falsification of any entry made on the Proposal shall be deemed a material irregularity and will be grounds, at the City's option, for disqualification of the Proposer or rejection of the Proposal." *See*, RFP at p. 9.

Specific to this Protest, under Chapter 2 – Experience, Qualifications, and Prior Performance, the City required proposers to identify, for the past five (5) years, all "administrative fines, liquidated damages or other penalties [which] were assessed or were deducted from the Proposer's payments with a city, county or governmental entity for Collection Services and such fines exceeded ten thousand dollars (\$10,000) in one month." *See*, RFP at p. 14. Clearly, the existence of performance-related assessments was a material consideration for the City in evaluating the Proposals.

On September 30, 2021, FCC submitted a Proposal in response to the RFP, a true and correct copy of which is attached hereto as **Exhibit 5**. FCC included the requisite Certification to

Accuracy of Proposal, thereby certifying that “[n]o information that should have been included in such forms, affidavits and documents has been omitted.” *See* Exhibit 5 at p. 174.

Saliently, FCC did not disclose any information about performance-related assessments or deductions by Polk County, Florida. *See* Exhibit 5 at p. 35. FCC instead touted that it only had two (2) months of performance-related assessments in Orange County, Florida. *Id.* at p. 39.

Thereafter, FCC gave its presentation to the Evaluation Team, a true and correct copy of which is attached hereto as **Exhibit 6**. Liquidated damages (and similar fines, penalties and assessments related to performance) were highly pertinent to the procurement process, as revealed by the notations and scoring by the members of the Evaluation Team, a true and correct copy of the evaluations for FCC are attached hereto as **Composite Exhibit 7**. Again, FCC emphasized the lack of performance-related assessments, a significant factor to judging its past performance. *See*, Exhibit 6 at p. 24. As to Polk County, FCC specifically stated that it had “Zero Liquidated Damages.” *Id.*

At the time the Proposals were opened, Waste Pro became concerned that FCC had not disclosed all “administrative fines, liquidated damages or other penalties . . . assessed or . . . deducted” and exceeding \$10,000 a month over the past five (5) years. Thereafter, Waste Pro inquired of Polk County, Florida, as to any performance related assessments or deductions under its Residential Solid Waste and Recyclable Materials Collection Franchise Agreement with FCC, a true and correct copy of which is attached hereto as **Exhibit 8**.

In Polk County, haulers have monthly performance evaluations and their monthly payments are reduced in kind through retainage that is withheld if performance standards are not met. *See*, Exhibit 8 at p. 14. Each month since March of 2018, FCC has consistently had monthly reductions from the amounts it is paid by Polk County that far exceed \$10,000. A highlighted summary of the withheld retainage representing the monthly amounts deducted from FCC for failing to meet performance standards is attached hereto as **Exhibit 9**.

It cannot be suggested that this omission was an oversight by FCC or that the assessments were not material. Indeed, *for 43 consecutive months, FCC has been assessed sums that far exceed \$10,000:*

Month	Assessment	Averages and Totals
March 2018	\$37,408.93	
April 2018	\$37,408.93	
May 2018	\$29,927.14	
June 2018	\$29,927.14	
July 2018	\$22,445.36	
August 2018	\$22,445.36	
September 2018	\$29,927.14	Average for 7 consecutive months \$29,927.14

		Total for 7 consecutive months \$209,489.98 <i>See, Exhibit 9 at p. 4</i>
October 2018	\$37,614.64	
November 2018	\$37,614.64	
December 2018	\$22,568.78	
January 2019	\$30,091.71	
February 2019	\$20,688.05	
March 2019	\$20,688.05	
April 2019	\$20,688.05	
May 2019	\$20,688.05	
June 2019	\$20,688.05	
July 2019	\$22,568.78	
August 2019	\$22,568.78	
September 2019	\$28,210.98	Average for 12 Consecutive Months \$25,389.98 Total for 12 Consecutive Months \$304,678.56 <i>See, Exhibit 9 at p. 3</i>
October 2019	\$20,853.14	
November 2019	\$20,853.14	
December 2019	\$30,331.84	
January 2020	\$20,853.14	
February 2020	\$22,748.88	
March 2020	\$20,853.14	
April 2020	\$28,436.10	
May 2020	\$28,436.10	
June 2020	\$20,853.14	
July 2020	\$28,436.10	
August 2020	\$22,748.88	
September 2020	\$30,331.84	Average for 12 Consecutive Months \$24,644.62 Total for 12 Consecutive Months \$295,735.43 <i>See, Exhibit 9 at p. 2</i>
October 2020	\$38,365.78	
November 2020	\$28,774.34	
December 2020	\$36,447.49	
January 2021	\$36,447.49	
February 2021	\$30,692.63	
March 2021	\$36,447.49	
April 2021	\$28,774.34	
May 2021	\$38,365.78	
June 2021	\$30,692.63	
July 2021	\$30,692.63	
August 2021	\$30,692.63	

September 2021	\$30,692.63	Average for 12 Consecutive Months \$33,090.48
		Total for 12 consecutive Months \$397,085.85 See, Exhibit 9 at p. 1
		TOTAL FOR 43 CONSECUTIVE MONTHS
		\$1,206,989.80

FCC’s disqualifying lack of candor related to its past performance in Polk County was not evaluated because Waste Pro received the information from Polk County after Waste Pro’s presentation. A true and correct copy of the confirmation to Waste Pro that information regarding FCC’s failure to disclose the monthly reductions by Polk County for FCC failing to meet performance standards is attached hereto as **Exhibit 10**.

Despite this information that justified the disqualification of FCC or rejection of its Proposal, on November 8, 2021, the City issued its Notice of Intent to Award (the “Notice”). The Notice indicated that the City’s intent was to award the contract for residential solid waste collection services to FCC. This Protest under Section 3.20 of the RFP, and in accordance with City Code Ordinances 2017-8 Chapter 2, Article 1, Division 3, Section 2-29, timely follows.

C. Standard of Review

A public body is not entitled to omit or alter material provisions required by an RFP because, in doing so, the public body fails to “inspire public confidence in the fairness of the RFP process.” *Emerald Correctional Management v. Bay County Board of County Commissioners*, 955 So. 2d 647, 643 (Fla. 1st DCA 2007) (citing *State, Department of Lottery v. Gtech Corp.*, 816 So. 2d 648 (Fla. 1st DCA 2001)). Material deviations or omissions are those that provide a bidder with an unacceptable or material competitive advantage. *See Liberty City v. Asphalt & Concrete*, 421 So. 2d 505 (Fla. 1981).

In general, the test for measuring whether a deviation is sufficiently material is whether it affects the amount of the bid ***or gives the bidder an advantage not enjoyed by other bidders.*** *Harry Pepper and Associates, Inc. v. City of Cape Coral*, 352 So. 2d 1190 (Fla. 2d DCA 1977)(emphasis added). Failure to comply with mandatory requirements is a material error that renders a bid non-responsive. *See, e.g., City of Wildwood v. Gibbs & Register, Inc.*, 694 So. 2d 763 (Fla. 5th DCA 1997). Finally, although a public body has discretion in soliciting and accepting bids, this discretion “may not be exercised arbitrarily or capriciously but must be based on facts reasonably tending to support the conclusions reached by the agency.” *Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc.*, 354 So. 2d 446, 450 (Fla. 1st DCA 1978) (citing *City of Pensacola v. Kirby*, 47 So. 2d 533, 535-36 (Fla. 1950)); *see also* Section 120.57(3)(f), Florida Statutes (standard of proof for a bid protest involving the acceptance of a competitive bid is whether the public body’s action was “clearly erroneous, contrary to competition, arbitrary, or capricious”).

D. FCC Should be Disqualified or Its Proposal Rejected

FCC's material omission of the existence of 47 consecutive months of performance related assessments by Polk County is grounds for disqualification or, alternatively, rejection of its Proposal. Public confidence will not be inspired by FCC being awarded this contract through deception. The evaluations reveal the import of the past performance factor to the evaluation process. *See generally*, Composite Exhibit 7. FCC highlighted the misinformation it has provided to the City. *See*, Exhibit 5 at p, 39; Exhibit 6 at p. 24.

This information should have been considered because it was made available to the City prior to the issuance of the Notice of Intent. Because it went to the disqualification of FCC and not the scoring of Proposals, it should not have mattered that the information was made available after Waste Pro's presentation. To conclude otherwise would incentivize bidders to omit material facts in the hopes the expedited process will allow them to get away with it.

Failing to disclose that, month after month, FCC has been assessed amounts far in excess of \$10,000, gave FCC an unfair advantage in this process.¹ To be sure, FCC indicated that it had only been assessed liquidated damages on two (2) occasions in Orange County. *See*, Exhibit 5 at p, 39; Exhibit 6 at p. 24. To the extent FCC suggests that the Polk County deductions from the monthly amounts paid to FCC are not liquidated damages, that contention would be disingenuous under the plain language of the RFP. *See*, RFP at p. 14. Simply put, there is no possibility that Polk County assessments are directly related to FCC's performance failures and should've been disclosed. *See*, Exhibit 8 at pp. 29 and 65.

In addition to justifying disqualification or rejection, FCC's omission of this material information renders its Proposal non-responsive. Any decision by the City to award this contract to FCC, as a non-responsive bidder who should be disqualified and/or have its Proposal rejected, would exceed the discretion afforded to public bodies and cross over into an arbitrary and capricious decision. Consequently, the disqualification of FCC or rejection of its Proposal is warranted.

Respectfully,

Amy S. Tingley

Enclosures
AST/ct

¹ FCC also failed to disclose that, in 2019, it had been formally charged by Spain's National High Court with corruption and money laundering in connection with the payment of bribes for public contracts. *See*, **Exhibit 11**, attached hereto.