

March 10, 2022

Fernando Amuchastegui, Esq.  
Assistant County Attorney  
115 S. Andrews Ave., Suite 423  
Fort Lauderdale, FL 33301

Dear Mr. Amuchastegui,

Our firm represents Janitorial 5 Star Services, LLC ("5 Star"), a respondent to Solicitation BLD2121632P1, Janitorial Services for County Facilities ("RFP"). The RFP is for the award of janitorial contracts for fourteen (14) facilities in Broward County. Therefore, fourteen (14) contracts were to be awarded to responsive responsible bidders.

The Director of Purchasing issued a memorandum on November 19, 2021, in which he issued a determination of Responsiveness and a Determination of Responsibility for 5 Star, which complies with Procurement Code, Section 21.40. Additionally, the Purchasing Director determined that 5 Star's price sheet contained a waivable technicality or irregularity and in accordance with Section 21.37, of the Procurement Code waived that technicality or irregularity and corrected information was supplied to the purchasing division on November 15, 2021. Therefore, the evaluation committee ("Committee") ranked 5 Star utilizing the corrected pricing.

The Committee ranked the proposers for each of the fourteen (14) contracts. 5 Star was deemed the lowest bidder for eleven (11) of the fourteen (14) contracts. The Committee's recommendations were sent to the Broward Board of County Commissioners ("Board") for award at the commission hearing on February 22, 2022 ("Hearing"). At the Hearing the Board approved a motion to refer this item back to staff for a determination of responsiveness and responsibility of vendors, as well as waivability, in order to provide recommendations for the Board's consideration

Procurement Code, Section 21.42 requires the Committee to evaluate responses to the RFP that have been deemed responsive and responsible by the Director of Purchasing and to rank the responses based solely on the evaluation factors set forth in the solicitation. The Purchasing Division is required to post the Committee's ranking on the Purchasing Division's website and allow for objections to those rankings.

Objections must be based on information that was not presented or submitted to the Evaluation Committee when it made the ranking. If there is an objection or protest with respect to an Evaluation Committee's ranking, the ranking must be submitted to the Board for final approval.

The Board, by majority vote, may (1) accept the ranking as final; (2) reject all responses to the solicitation; or (3) direct the Evaluation Committee to reconvene to consider any new or additional information the Board directs the Evaluation Committee to consider. Although Purchasing received objections, those objections did not include new or additional information that was not previously considered by the Committee.

The Board is not authorized to remand the rankings to staff for the purpose of reconsidering the Procurement Director's determination as to responsiveness and responsibility of the vendors. If the Board desires the vendor's ranking to be reconsidered, they must reconvene the Evaluation Committee and present new information for their consideration.

Florida jurisprudence has consistently held that arbitrary and capricious actions within a procurement are fatal flaws. "A capricious action is one taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic." *Board of Clinical Laboratory Personnel v. Florida Ass'n of Blood Banks*, 721 So.2d 317, 318 (Fla. 1<sup>st</sup> DCA 1998). Arbitrary and capricious has also been defined to include acts taken with improper motive, without reason, or for a reason which is merely pretextual. *City of Sweetwater v. Solo Const. Corp.*, 823 So. 2d at 798, 802 (Fla. 3d DCA 2002); citing *Decarion v. Monroe County*, 853 F.Supp. 1415 (S.D. Fla. 1994). In *Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs*, 955 So. 2d 647, 652 (Fla. 1st DCA 2007) the Court found aspects of that procurement to be arbitrary and capricious and voided the procurement. Similarly, in *Hotel China & Glassware Co. v. Bd. of Public Constr. of Alachua Cnty.*, 130 So. 2d 78, 81 (Fla. 1st DCA 1961) the court held that the agency could not arbitrarily and capriciously discriminate between bidders, or make an award based on personal preference. 5 Star contends that there has been an arbitrary and capricious application of the procurement rules in the procurement process and the recommendation of award must stand.

Sincerely,

/s/ Lisa A. Reves

Lisa Reves, Esq.

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