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April 18, 2022

SENT VIA ELECTRONIC MAIL

Clerk, Board of Estimates
Room 204
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202
BOE.Clerk@baltimorecity.gov

**RE: BID PROTEST
Request for Proposals Solicitation #B50006315
Energy Consulting Services**

Dear Baltimore City Board of Estimates:

Maryland Energy Advisors (“MDEA”) protests the award of the above-referenced contract to any offeror other than Paramount Energy Services, LLC (“Paramount”). Paramount selected MDEA as its Minority Business Enterprise (“MBE”) partner. MDEA has a long and productive history with Baltimore City government entities providing energy consulting services for the Baltimore City Housing Authority and Baltimore City Public Schools. On November 12, 2021, Paramount, in partnership with MDEA, submitted its Proposal in response to Request for Proposals (“RFP”) #B50006315 Energy Consulting Services.

Paramount, in partnership with MDEA, is the highest ranked responsive and responsible offeror who submitted the most advantageous proposal. Enel X North America, Inc., the proposed awardee, was found non-compliant on the RFP’s MBE compliance requirements.

Pursuant to Baltimore City Code of Regulations Title 27, Subtitle 1, Chapter 4, MDEA submits this protest with the greatest respect and deference to the Baltimore City Department of Finance, Bureau of Procurement (“BOP”) and with the hope that a mutually beneficial relationship can continue with this RFP. In selecting someone other than Paramount, BOP acted arbitrarily, capriciously, unreasonably and in error of applicable laws and the RFP in various ways:

- First, the proposed awardee is a non-responsive offeror and, therefore, its proposal must be rejected and not given further consideration for award.
- Second, BOP failed to adhere to its own MBE compliance provisions in the RFP and, therefore, acted arbitrarily, capriciously, unreasonably and in error of applicable laws and the RFP in recommending award to a non-responsive offeror.
- Third, evidence has not been provided showing that the proposed awardee requested a waiver from the MBE compliance requirement and/or demonstrated a good faith effort to adhere to the MBE compliance requirement.
- Fourth, the RFP’s MBE compliance requirements do not conflict with the Baltimore Regional Cooperative Purchasing Committee (“BRPC”) cooperative contract and, therefore, is an unjustifiable reason for BOP to award the contract to a non-responsive offeror.

- Fifth, BOP gave an unfair advantage to the proposed awardee by allowing it to avoid RFP requirements while other offerors diligently adhered to all the RFP requirements.
- Sixth, BOP gave an unfair advantage to the proposed awardee by failing to communicate to all offerors that it was no longer requiring MBE participation for this RFP prior to proposal opening.
- Seventh, award of a potential 10-year contract with an aggregate value exceeding \$1 million without any MBE participation is against the public policy of Baltimore City, and contrary to the publicly stated goals and values of Baltimore City’s senior governing leadership.

BACKGROUND

Incorporated since 2010, MDEA is a federally certified Disadvantaged Business Enterprise, and nationally and locally certified Minority Business Enterprise, including in Baltimore City.¹ MDEA provides solutions that meet the energy management, efficiency, and renewable goals of utility, commercial, residential, and government clients. MDEA has won numerous competitively solicited energy consulting services projects, including for the Baltimore City Housing Authority, Baltimore City Public Schools, the State of Maryland Department of General Services, the Maryland Energy Administration, and Baltimore Gas & Electric (BGE), among many others.

On October 19, 2021, the Baltimore City Department of Finance, Bureau of Procurement issued Request for Proposals #B50006315 Energy Consulting Services. Under Section DS2.B.i. of the RFP, the intention of the solicitation is “that the Contractor shall furnish and Baltimore City, along with the other participating BRCPC entities, shall purchase energy consulting services for electricity and natural gas procurements covered by this contract which Baltimore City and the other BRCPC Entities may require during the period of time specified.” Proposals were due by November 17, 2021 at 11:00am.

On November 12, 2021, Paramount Energy Services, LLC, a boutique energy advisory and asset management firm, submitted a Proposal in response to RFP #B50006315 Energy Consulting Services, naming MDEA as its MBE partner. On Part D and Part E of its MBE & WBE Participation Forms, Paramount not only achieved the MBE participation goal of 6.75%, but, in fact, committed to exceeding the goal with 8.5% MBE participation. On March 29, 2022, the recommended awardee Enel X North America, Inc. was found non-compliant on the MBE compliance requirement.

Paramount, with MDEA as its MBE partner, submitted the highest ranked responsive proposal for RFP #B50006315 Energy Consulting Services.

LEGAL STANDARD & RFP REQUIREMENTS

Baltimore City Code

Baltimore City Code, Article 5, § 28-2 states that the Minority and Women Business Enterprises provisions in Subtitle 28 “are to be liberally construed to accomplish its policies and purposes.” Section 28-4(a) provides that Subtitle 28 “applies to all contracts awarded by the City.” Section 28-4(b) further states, “Every contract or other agreement between the City of Baltimore and any governmental agency, quasi-governmental agency, corporation, developer, or contractor, under which the agency...receives any fiscal assistance from or through the City for the purpose of contracting with businesses to perform...services must require the agency...to comply with this subtitle in awarding and administering that contract or agreement.”

Section 28-48(b) provides that RFPs for contracts over \$50,000 “must require each bidder to include in its bid a certified business enterprise participation affidavit in which the bidder commits to utilize certified business

¹ Maryland Energy Advisors, LLC is a registered Baltimore City MBE with the Baltimore City Minority and Women’s Business Opportunity Office under Cert#: 14-358563.

enterprises in a percentage that equals or exceeds the applicable contract goals. Any bid that does not include the certified business participation affidavit is non-responsive.”

Section 28-48(c) requires bidders to submit to the City whether its subcontractor is an MBE and the dollar value of each subcontract, among other requirements.

Section 28-50 requires, “All City agencies, commissions, and boards, in the deposit of funds and performance of their other official duties, must make every good faith effort to equitably utilize the services of minority and women’s business enterprises.”

Section 28-53 requires that, where a contract goal for an RFP is applicable, “the bidder must make good faith efforts before the opening of bids or submission of proposals to meet the contract goal.” Pursuant to Section 28-62, “If a bidder is unable to comply with the contract goals, the bidder may submit a request for a waiver at the time of bid opening.”

Section 28-61 provides that “[a] contracting agency may request that the [Minority and Women’s Business Opportunity] Office waive or reduce the contract goals by submitting the reasons for the request in writing before bids are solicited.”

RFP MBE Compliance Requirements

The third page of the RFP provides a chart with the first row stating that the Minority Participating Requirement for this solicitation is 6.75%. Section SW3 provides that award will only be made to a responsive offeror, who meets the minimum qualifications set forth in the RFP. Section SW3.G provides that MBE compliance is a Minimum Requirement. Section SW4 provides, “A Offeror is considered responsive if it has conformed and complied in all material aspects with all instructions herein, including form and substance, and has prepared, signed, assembled, and submitted all documents, forms, and other information required herein in the prescribed format (including electronic response if required). Proposals found to be nonresponsive may be recommended for rejection and not given further consideration for award.”

Section SW5.D.5 provides, “The City reserves the right to reject all proposals and to cancel this Solicitation requirement, or to revise the specifications and issue an addenda or a new solicitation if the City determines at its sole discretion for any reason that rejection, amending, cancellation, or resolicitation is in the City's best interest.”

Section SW-Program-1.A. states that the MBE participation goal is set at 6.75%. Section DS4.B.2 lists the technical criteria to be evaluated, which includes Proposal Quality, *i.e.* “content meets the requirements of the RFP.”

Section B4.C provides, “Failure to complete and submit any of the solicitation documents or other requests for information will be grounds for rejection of your proposal at the sole discretion of the City.” Section B4.E provides, “Failure to provide complete and concise responses to all questions and other requests for information according to the format prescribed shall risk making your proposal non-responsive and may result in rejection, at the City’s sole discretion, and/or may result in a significantly reduced evaluation score.”

On page 38 of the RFP, the “MBE and WBE Participation Commitment Forms” again states, “The MBE goal is 6.75%”. In capitalized bolded lettering, it states, “**THIS PACKAGE OF MBE AND WBE PARTICIPATION COMMITMENT FORMS IS DUE WITH THE BID.**” Under the bolded and capitalized header “**VERY IMPORTANT NOTIFICATION**”, the instructions on page 39 provides in bolded lettering, “**Any bid that does not include signed Statement of Intent Form(s) and the MBE/WBE Participation Affidavit is non-responsive and will be rejected. Any Statement of Intent Form(s) and the MBE/WBE Participation Affidavit that are not properly executed will result in non-responsive and will be rejected.**”

Under Part A.4 of the MBE/WBE Participation Instructions, it states, “If a bidder is unable to comply with a contract goal, the bidder may submit a waiver request with the bid. The waiver request must be made on the MBE/WBE Participation Waiver Request Form. A waiver will not be granted unless the waiver request includes documentation that demonstrates good faith efforts to meet the goals.”

On page 42, under bolded lettering “**Important Notice about the MBE/WBE Forms**” and bolded, capitalized, and underlined lettering “**PLEASE READ CAREFULLY**”, it states, “Failure to respond or properly execute the forms can result in disqualification and possible rejection.”

Part D: MBE/WBE PARTICIPATION AFFIDAVIT again restates the MBE goal at 6.75%. It requires the affiant to declare and affirm under penalty of perjury that its “firm has made good faith efforts to achieve the MBE and WBE participation goals for this contract.” Part E: MBE/WBE allows an offeror to request a waiver of the MBE goal, but also requires it to list the number and names of MBE firms contacted.

BASES FOR PROTEST

First, the proposed awardee is a non-responsive offeror and, therefore, its proposal must be rejected and not given further consideration for award.

BOP acted arbitrarily, capriciously, unreasonably and in error of applicable laws and the RFP when it recommended for award an offeror who did not adhere to the RFP MBE compliance requirements. In the April 20, 2022 Baltimore City Board of Estimates Agenda, BOP affirms, “On September 29, 2021, MWBOO set goals of 6.75% MBE...Enel X North America, Inc was found non-compliant on March 29, 2022. Paramount Energy Services, LLC was found compliant on March 29, 2022.”

As previously stated, the MBE subtitle of the Baltimore City Code explicitly requires MBE participation goals for contracts exceeding \$50,000. Moreover, it also requires that bidders comply with the participation goal or to request a waiver. It requires that City agencies, including BOP, to make every good faith effort to equitably utilize the services of MBEs, including for energy consulting services contracts. Moreover, BOP never requested the Minority and Women’s Business Opportunity Office (“MWBOO”) to waive or reduce the MBE participation goal.

The RFP stated that MBE compliance was a minimum requirement. It further stated that an offeror is considered responsive if it has conformed and complied in all material aspects with all instructions. It cautioned that proposals found to be nonresponsive may be recommended for rejection and not given further consideration for award. It warned all offerors that failure to include or properly execute an MBE Participation Affidavit would result in the bid being non-responsive and could be rejected.

In short, the RFP itself was replete with provisions emphasizing MBE participation and compliance, which the proposed awardee failed to adhere to. *See* RFP Sections SW3, SW4, SW5, SW-Program, DS4, and B4, and the MBE and WBE Participation Commitment Forms.

Second, BOP failed to adhere to its own MBE compliance provisions in the RFP and, therefore, acted arbitrarily, capriciously, unreasonably and in error of applicable laws and the RFP in recommending award to a non-responsive offeror.

BOP acted arbitrarily, capriciously, unreasonably and in error of applicable laws when it failed to enforce the MBE compliance requirements. If BOP wanted to remove the MBE compliance requirements, Baltimore City Code, Article 5, Section 28-61 provides the process. BOP could have requested MWBOO to waive or reduce the MBE participation goals by submitting the reasons for the request in writing before bids were solicited. BOP did

no such thing. Instead, it arbitrarily, capriciously, unreasonably and in error of applicable laws failed to enforce the MBE compliance requirements. Moreover, MWBOO did not independently reduce or eliminate the MBE participation goals. BOP's lack of enforcement of MBE compliance resulted in the recommendation of award to a non-responsive offeror.

Third, evidence has not been provided showing that the proposed awardee requested a waiver from the MBE compliance requirement and/or demonstrated a good faith effort to adhere to the MBE compliance requirement.

In the April 20, 2022 Board of Estimates Meeting Agenda, BOP simply stated that the recommended awardee was non-compliant with the MBE participation goals. An offeror is not deemed non-compliant simply by not having or having insufficient MBE participation. If an offeror appropriately requests a waiver and demonstrates it made good faith efforts toward meeting the MBE participation goals, it is compliant with the MBE compliance requirements. However, to be adjudged to be non-compliant means that BOP has recommended award to an offeror that, in violation of the Code and RFP requirements, did not meet the MBE participation goal and did not request a waiver or make a good faith effort toward compliance. BOP has not provided evidence to reach any other reasonable conclusion.

Fourth, the RFP's MBE compliance requirements do not conflict with the Baltimore Regional Cooperative Purchasing Committee ("BRCPC") cooperative contract and, therefore, is an unjustifiable reason for BOP to award the contract to a non-responsive offeror.

In its defense, BOP states that since this is a Baltimore Regional Cooperative Purchasing Committee ("BRCPC") cooperative contract, MBE-WBE monitoring is not required. This is belied by Baltimore City Code, Article 5, Section 28-4(b), which expressly states that every contract or agreement between the City of Baltimore and any governmental agency or quasi-governmental agency must require the agency to comply with Subtitle 28 governing Minority and Women Business Enterprises. BRCPC is a quasi-governmental agency. Section 28-4(a) further states without distinction that the MBE laws apply to all contracts awarded by the City. Moreover, the MBE laws must be liberally construed to accomplish its policies and purposes.

BRCPC is a purchasing consortium consisting of county and local government jurisdictions in the Central Maryland region to cooperatively purchase electricity and natural gas. Considering that the cooperative was formed in 1968, it is unsurprising that it may not itself have MBE compliance requirements. As the lead jurisdiction under BRCPC, Baltimore City is not restricted from attaching MBE compliance requirements. In fact, this solicitation has generally followed Baltimore City's procurement process. It would be extremely discouraging if the one divergence from the City's procurement process is adherence to its MBE laws, especially after the fact on the doorstep of award.

Furthermore, most of the jurisdictions participating in BRCPC themselves have a strong commitment to MBE compliance in government contracting. Baltimore County, Howard County, and Anne Arundel County may well be disturbed that Baltimore City would award a potentially 10-year energy consulting services contract with an aggregate value over \$1 million for the benefit of the cooperative with no MBE participation.

Fifth, BOP gave an unfair advantage to the proposed awardee by allowing it to avoid RFP requirements while other offerors diligently adhered to all the RFP requirements.

Section SW3 of the RFP explicitly states that award would be made to the responsive and responsible offeror meeting the minimum qualifications of the RFP. MBE/WBE will be evaluated for compliance and is a Minimum Requirement. Section SW4.A states that an offeror is considered responsive if it has conformed and complied in all material aspects with all instructions. Proposals not found to be responsive may be rejected and given no further consideration for award. Section B4.C again states that failure to complete and submit any of the

solicitation documents or other requests for information will be grounds for rejection. Section B4.E states that failure to provide complete responses to all questions and requests for information shall risk making a proposal non-responsive and result in rejection and/or significantly reduce evaluation score.

Reading the aforementioned provisions, Paramount worked diligently to submit a perfect proposal, adhering closely to every provision and requirement of the RFP, including reaching MBE and WBE participation far in excess of the stated goals. Presumably, offerors other than the proposed awardee also followed the RFP instructions. Yet, BOP allowed the proposed awardee to avoid MBE compliance requirements, which likely beneficially impacted their financial proposal and subsequent price score. If all other offerors had the opportunity to avoid the MBE requirements, their price proposals would likely be lower as well.

Sixth, BOP gave an unfair advantage to the proposed awardee by failing to communicate to all offerors that it was no longer requiring MBE participation for this RFP prior to proposal opening.

Section SW5.D.5 of the RFP provides that the City reserves the right to revise the specifications and issue an addenda or a new solicitation if the City determines that amending or resolicitation is in the City's best interest. In addition, Section SW11 provides a process for submitting questions to the Buyer and that any information resulting from questions that causes a change in the solicitation will be posted on CitiBuy as an Addendum. Therefore, there was a well delineated process by which BOP could have communicated to all offerors that it was no longer requiring MBE compliance. Instead, BOP failed to issue an addenda or otherwise communicate with interested vendors, and gave an unfair advantage to the proposed awardee to avoid the MBE compliance requirement, likely beneficially impacting their price proposal. If BOP communicated with the proposed awardee regarding avoiding MBE compliance but did not share that communication with the other offerors, it would be a grave violation of Baltimore City procurement policy, procedure, and law.

Seventh, award of a potential 10-year contract with an aggregate value exceeding \$1 million without any MBE participation is against the public policy of Baltimore City, and contrary to the publicly stated goals and values of Baltimore City's senior governing leadership.

RFP #B50006315 Energy Consulting Services is to be awarded for a 1-year period with nine additional one-year periods. The proposed awardee submitted a price proposal of \$180,000 per year. In short, this RFP can result in a 10-year contract including renewals at \$1.8 million for energy consulting services. There is no evidence whatsoever that MWBOO's MBE goal of 6.75% was excessive or inappropriate. In fact, MDEA was the MBE partner not only for Paramount, but also for Siemens, another offeror, on this RFP. Paramount exceeded the goal by committing 8.5% MBE participation.

The Mayor's Office of Minority and Women-Owned Business Development ("MWBD") is an entrepreneurially focused agency committed to aid, counsel, foster the growth and protect the interests of minority and women-owned businesses. Through government contracting, MWBD actively seeks to recruit and retain minority and women businesses seeking to do business with the City of Baltimore by expanding contracting opportunities.

The Office of the Baltimore City Council President has made reforming the City's procurement system a top priority by focusing on legislation that makes the procurement process more equitable, particularly for women and minority-owned business owners.

The Baltimore City Comptroller's Office promised to lead and support greater accountability for the City's minority and women business economic inclusion goals in its January 2021 Transition Report. Specifically, the Office of the Comptroller can require a public review through the non-routine agenda of the Board of Estimates to address non-compliant contracts and associated prime contractors, thereby holding the city to a higher level of accountability for achieving these important inclusion goals.

An award of a 10-year contract with an aggregate value exceeding \$1 million is clearly against Baltimore City public policy, as reflected by the Baltimore City Charter, Baltimore City Code, Baltimore City Code of Regulations, and the mission and values of the Offices of the Baltimore City Mayor, Council President, and Comptroller.

REQUESTED RELIEF

As the MBE partner to Paramount, MDEA will be harmed if the Board of Estimates authorizes this contract to an offeror other than Paramount. BOP should rescind its notice of recommendation for award and selection of a non-responsive offeror resulting from such an arbitrary, capricious, unreasonable, and unlawful evaluation. BOP should recommend award of the contract to Paramount (and its subcontracting partners), the highest ranked responsive and responsible offeror that submitted the most advantageous offer in response to the RFP.

If you have any questions or comments, please contact me.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Tabuteau', is centered on the page. The signature is fluid and cursive, with a horizontal line extending to the right.

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