

August 5, 2024

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VIA: EMAIL

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**Re: Bid Protest of Monumental Paving & Excavating, Inc.
In Connection With Project No. 1387 For Water Contract No. 1283**

**In supplement to prior March 1, 2024 and May 21, 2024 submissions and, in
light of information and material not yet provided, without prejudice to
further supplementation as appropriate or may be needed**

Dear Mr. President and Honorable Board Members:

This is a supplemental submission by Monumental Paving & Excavating, Inc. (“Monumental”) in its bid protest in connection with Project No. 1387 For Water Contract (WC) No. 1283 (Water Main Replacement Baltimore St./Smallwood St./Reisterstown Rd. and Vicinity). Prior submissions were made on March 1, 2024 and May 21, 2024 and are hereby incorporated. This supplemental submission includes some information recently learned and also highlights certain items, in advance of the Board meeting scheduled for later this week.¹

For reasons set forth previously by Monumental and reasons set forth herein, the prior and correct November 2023 decision and position of the Department of Public Works (“DPW”), which was:

“... to reject the proposals and re-advertise WC 1283”

should be implemented, directed, and followed. *See* November 29, 2023 correspondence by DPW to all bidders, copy included herewith as **Exhibit 1** (noting error in RFP and advising that “the

¹ Due to schedules of other counsel and their unavailability on August 7, undersigned counsel is added as co-counsel for Monumental in this matter.

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City has decided to reject the proposals and re-advertise WC 1283.”). *See also* December 6, 2023 Agenda Item, noting among other things the proposed rejection of bids and re-advertisement: “SB-23-14430 - Dept. of Public Works Rejection of Bids for Project 1387 Water Contract No. 1293 ...”). To have a correct procurement here and to promote sound procurement practice, as well as in fairness to and benefit for the citizens of Baltimore, the contractors that did bid, and other contractors that might have bid had there been an RFP with correct information, **the Board of Estimates should direct and vote that the bid proposals be rejected and the project be re-advertised.**

Not intending to be exclusive of reasons, Monumental notes the following supplemental points to its previous submissions:

- **The RFP was flawed at inception, with an incorrect and inaccurate not-to-exceed price requirement.** As noted in prior submission, it was unusual that the RFP contained an express cap on price. Prospective bidders even questioned the validity of the not-to-exceed price during the question-and-answer period, but, per Addendum No. 1, DPW reaffirmed that the cap was valid heading into the bid. As has proven out, that express price cap of \$18 million was analytically wrong and resulted in both a problem in getting bid proposals and resulted in NO conforming bid proposals. As only recently indicated by DPW in the agenda description for the upcoming meeting, the engineer’s estimate associated with the project appears to have been \$19,956,987.11 – which itself is 11% above the express cap contained in the RFP of \$18,000,000. An RFP that errs by containing an express cap materially below the City engineer’s own estimate is flawed. It chills contractors from even submitting a bid and that works to the detriment of the citizens of Baltimore City.²
- **DPW allowed meaningful technical revisions and subcontractor adjustments more than three months after the initial bid submission, but did not allow commensurate price revisions.** This further undermined the procurement process by essentially locking in the non-conforming bid

² The recent description by DPW also stated that, in connection with the RFP that was published in August 2023, the engineer’s estimate was completed prior to the COVID-19 pandemic—that is, *more than three years earlier*. Using three-or-four-year old data for an August 2023 RFP is another flaw in the erroneous not-to-exceed cap, which likely discouraged other bidders from participating.

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- prices and relative ranking of bids, which only benefited R.E. Harrington Plumbing & Heating Co., Inc. (“Harrington”), who was the lowest bidder but had non-conformance with technical component requirements. Indeed, the indication in the recent August 7, 2024 agenda information emphasizes the extent of the technical revisions made by Harrington from its original bid. The technical revisions reflect 11 instances of revised contract allocations, 2 new subcontractors added, and 1 subcontractor removed.
- **With numerous irregularities and discrepancies involved, the procurement process for WC 1283 continues to lack an acceptable threshold for transparency for a \$26 million award.** When Monumental inquired about reviewing the new qualitative submissions and subsequent evaluations completed this Spring, review was not then permitted. Monumental was directed to submit a Public Information Act (“PIA”) request, which was filed on July 9, 2024, but then denied on July 30, 2024. That evasiveness where there exist procurement irregularities, ranging from *missing and amended bid documentation*³ to unexplained decision reversals, continues to raise concerns about the soundness and integrity of the procurement process for WC 1283, which also runs counter to the transparency and ethics improvements announced earlier this year as part of the Procurement Transformation Plan.

³ Because of volume, Monumental has not included the photographs reflecting differences between certain bid documents reviewed in the Comptroller’s Office in November 2023 and certain bid documents subsequently made available months later by the agency. Copies of those photographs will be available at the hearing if those are desired.

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Proceeding forward with the Award of WC 1283 erodes the integrity of the City's broader procurement system, and it undermines the objectives for the historic Unbundling Initiative Pilot through procedures that conflict with the terms of the RFP and an opaque Best Value determination. Monumental requests that the Board reject all three non-conforming bidders, as DPW initially recommended, and readvertise WC 1283 with refreshed guidelines so that it can be open to all bidders and deliver upon the objectives of the Unbundling Initiative, consistent with sound procurement practices and in a manner that is above reproach.

Respectfully,



John T. Prisbe

JTP/wrt

cc: Mr. Patrick Mahoney
Enclosure

Exhibit 1 to the August 5, 2024 Supplemental Submission
by Monumental Paving & Excavating, Inc. in connection
with protest of action now being proposed regarding
Project No. 1387 for Water Contract No. 1283

(Copy of the prior November 29, 2023 Written Notification by Department of
Public Works announcing error in RFP and announcing decision by City to reject
proposals and re-advertise corrected RFP)

CITY OF BALTIMORE

BRANDON M. SCOTT, Mayor



DEPARTMENT OF PUBLIC WORKS

Richard J. Luna, Interim Director
Abel Wolman Municipal Building, 6th Floor
200 N. Holliday Street
Baltimore, Maryland 21202

November 29, 2023

Water Contract No. 1283 Bidders:

RE: Project 1387/ W.C. 1283 – Water Main Replacement and Rehabilitation at Baltimore Street/
Smallwood Street/and Reisterstown Road Vicinity

Project 1387/WC 1283 - Water Main Replacement and Rehabilitation at Baltimore St / Smallwood St and Reisterstown Rd Vicinity was advertised on August 04, 2023, and bids were received on November 01, 2023.

WC 1283 is unique in nature because it is part of the unbundling initiative that aims to train minority and women-owned contractors to become prime contractors. This contract delivery method is considered a best-value approach involving price and qualifications, with evaluation criteria scores defined as 50% cost proposal, 25% mentoring and building capacity plan, 15% technical proposal, and 10% MBE/WBE commitment.

Upon review, the City inadvertently included language on page 3 of the RFP indicating that the estimated fee should not exceed \$18,000,000. This statement did not reflect the City's intent to seek a best-value contractor.

In light of the nature of this unique contract, the City has decided to reject the proposals and re-advertise WC 1283. In lieu of a not-to-exceed amount, the City will include an estimated construction cost range in the readvertisement documents. In addition, the changes from Addendum 01 will be incorporated into the revised contract documents.

The City encourages all qualified contractors to submit proposals.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Luna".

Richard J. Luna
Interim Director

Cc: Ms. Deena Joyce, Office of Boards and Commissions
Mr. Darnell Ingram, Esq. , Office of General Counsel
Mr. Azzam Ahmed, Office of Engineering and Construction
Mr. Timothy Wolfe, P.E., BCEE, Office of Engineering and Construction
Mrs. Tonorah Houston- Burgee, Office of Contract Administration

May 31, 2024

James Y. Boland

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**Re: Bid Protest of Monumental Paving & Excavating, Inc.
In Connection With Project No. 1387 For Water Contract No. 1283**

Dear Mr. President and Honorable Board Members:

Monumental Paving & Excavating, Inc. (Monumental) submitted a bid protest in connection with Project No. 1387 For Water Contract (WC) No. 1283 (Water Main Replacement Baltimore St./Smallwood St./Reisterstown Rd. and Vicinity) on March 1, 2024. On March 22, Monumental completed its interview for the project and was told by the Panel that the Office of Boards and Commissions would be in contact with Monumental and other bidders on next steps. Despite repeated inquiries on the status of our protest, there have been no communications from the City regarding its decision on the contract or its intent to investigate the serious discrepancies in the procurement process for this contract.

Three months later, the agenda for the June 5, 2024 Board of Estimates offers the first update on the status of WC 1283 since Monumental filed its protest. Item SB-24-11806 is a transfer and allocation of funds to, “*cover the cost associated with the award of project WC 1283 (BD 24683) Water Main Replacement Rehabilitation at Baltimore Street/Smallwood Street/Reisterstown Road and Vicinity with R.E. Harrington Plumbing & Heating Co., Inc.*” Since the Board of Estimates has not approved any award, much less considered the pending protest, it is unclear why the City has identified R.E. Harrington as the apparent awardee of WC 1283.

It is disappointing and concerning that the award of the contract appears to be moving forward without consideration or resolution of the protest. Presumably, Monumental will still be offered the opportunity to publicly present its case for the protest when the formal award is on the Board of Estimates agenda, but the June 5 agenda item is another indication of the City’s determination to move forward with the award without fair or transparent consideration of the

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protest, even in the face of serious questions regarding the integrity of the procurement process for a \$26.7 million Baltimore City contract.

Respectfully submitted,

VENABLE LLP



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cc:

Patrick Mahoney, Director
Monumental Paving & Excavating, Inc.

March 1, 2024

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In Connection With Project No. 1387 For Water Contract No. 1283**

Dear Mr. President and Honorable Board Members:

In accordance with Section II, Protest Regulations, of the Board of Estimates Rules & Regulations, Monumental Paving & Excavating, Inc. (Monumental), through counsel, respectfully submits this bid protest in connection with Project No. 1387 For Water Contract (WC) No. 1283 (Water Main Replacement Baltimore St./Smallwood St./Reisterstown Rd. and Vicinity). As one of the three original bidders for WC-1283, Monumental is “directly and specifically affected by” an upcoming decision of the Board.

The WC-1283 contract is part of the City’s unbundling initiative to mentor and grow Baltimore-based Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) into Future General Contractors (FGCs). Monumental is extremely supportive of the spirit of the City’s unbundling initiative and recognizes that the current number of MBE/WBE general and subcontractors is not reflective of the City’s rich diversity. Due to its strong support of this initiative, Monumental invested significant energy into preparing a competitive proposal for the WC-1283 contract. Monumental expended extensive time, effort, and resources to form a competitive bid proposal on the non-price qualitative aspects of the solicitation—including partnering with local and national advisors to support its M/WBE Capacity Building Plan—while proposing realistic and achievable pricing necessary to meaningfully mentor the FGCs and accomplish one of the major objectives of the initiative.

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Unfortunately, while Monumental supports the initiative and goals of WC-1283, the procurement process has been flawed. DPW initially recommended that the Board of Estimates reject all bids on the basis that they were non-compliant and the RFP contained inadvertent guidance regarding the bid ceiling, but rescinded that recommendation and now seeks revisions only to Part A – Response to RFP and Technical Proposal (SF 255). Monumental objects for the following reasons:

1. It is unfair and irregular to allow bidders a chance to fix errors in their non-price proposals, but not re-bid their price. The Board should permit all offerors to fully re-bid the project.
2. The lack of transparency regarding the bid review process and reason for the Department of Public Works (DPW) withdrawing its initial recommendation to reject all bids, which unfairly favors one bidder, and other procurement irregularities suggests that the decision-making was not impartial.

The current administration has made admirable commitments recently to improve the procurement system not only so that it is more efficient, transparent, and ethical, but to provide meaningful opportunities for Baltimore’s MBEs and WBEs. A fair procurement is necessary to determine which offeror will truly provide the “best value” for the City based on the RFP’s criteria. Unfortunately, the decision to proceed with the current course of action for WC-1283 is inconsistent with that objective. To preserve the integrity of the procurement and accomplish the goals of this procurement, the Board should review and address irregularities and re-bid the project as DPW initially recommended.

BACKGROUND

On March 9, 2023, Mayor Scott held a press conference announcing the City of Baltimore’s admirable “Unbundling Initiative” to invest in small MBEs and WBEs in the City. In attendance with the mayor was Robert Harrington, owner of R.E. Harrington Plumbing and Heating Company, Inc. (Harrington), who later became one of the three bidders on WC-1283.

On August 4, 2023, DPW issued Request for Proposals No. 1387 (RFP) for WC-1283, which is a pilot for the Unbundling Initiative and will require the general contractor to mentor MBEs and WBEs so that they can become FGCs in addition to providing the actual construction services. The RFP provided for award on a “best value basis” rather than the lowest bid, and the evaluation criteria and weighting reflected the initiative’s MBE/WBE priorities. A bidder’s mentoring plan and MBE/WBE commitment would account for 35% of its score, price would receive 50%, and technical 15%. In addition, the RFP provided for a 10% bonus for a bidder who proposes 100% MBE/WBE participation. As the only MBE bidder, and thus the only bidder able

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to propose 100% MBE/WBE participation, this provision ensures that Harrington will receive a 10-point advantage in the competition.

Proposals were initially due on September 20, 2023, but DPW extended the due date until November 1, 2023 following the submission of solicitation questions. One question expressed concern that the City's ceiling of \$18 million for the two-year project is inadequate due to the requirement to mentor and train FGCs, which requires additional resources, as well as recent inflationary pressures; while the City acknowledged receipt of the question, the City did not resolve the concern regarding the not-to-exceed threshold.

On November 1, 2023, Monumental submitted its bid at a price of \$30,611,000.00 along with two other bidders: Harrington at a price of \$26,772,835.00; and Spiniello Companies (Spiniello) at a price of \$28,893,300.00. Thus, all three bids exceeded the RFP's \$18 million ceiling.

On November 3, 2023, Monumental examined copies of the bids at the Comptroller's office and determined that Harrington's bid was missing its required SF 255s for Harrington itself and its prequalification documentation for subcontractors. Two representatives for Harrington also signed in that day to review the bids. On November 8, 2023, Monumental again examined the bids at the Comptroller's office and confirmed its determination that Harrington's bid was deficient relative to other bidders based on the bid copies available at the Comptroller's office.

On November 17, 2023, Harrington made a maximum donation to "Friends of Nick Mosby," the President of the City Council and Chair of the Board of Estimates. Harrington had previously donated to "Friends of Bill Henry" and "People for Brandon M. Scott" in June 2023 and October 2023, respectively. The Mayor and Comptroller are also members of the Board of Estimates.

On November 29, 2023, DPW notified all three bidders that the "City has decided to reject the proposals and re-advertise WC 1283." The notice explained that "[u]pon review, the City inadvertently included language on page 3 of the RFP indicating that the estimated fee should not exceed \$18,000,000. This statement did not reflect the City's intent to seek a best-value contractor."

On December 6, 2023, the Board of Estimates held a meeting and the WC-1283 contract was on the agenda. DPW recommended that the Board reject all bids and re-bid. However, Harrington filed a Statement of Opposition. In response, President Mosby deferred the recommendation to December 20, 2023.

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In the meantime, Monumental made an appointment with Contract Administration on December 6, 2023 to review the original bid documents and determine if they had copies of documents that were missing from those at the Comptroller's office. These bid packages, however, were also incomplete. In fact, the City's records were missing the Part A volumes for all three bids.

On December 15, 2023, Deena Joyce, Chief of the Office of Boards and Commissions, corresponded with Monumental regarding its request to review the complete, original bid submissions, and stated that the City should not have made the technical volumes of the bids (Part A) available for other bidders to review. Joyce stated that she would determine why there was a discrepancy between the documents available in the Comptroller's office and Contract Administration.

During the next Board of Estimates meeting on December 20, 2023, DPW withdrew its previous recommendation to reject all bids. It is not apparent why DPW reversed its position.

On February 12, 2024, Monumental received a letter from DPW stating that the agency deemed all bids non-compliant, but that "all firms are being afforded the opportunity to remedy all inadequacies and must come into compliance" Among other things, the letter identified various inaccuracies in the Monumental proposal that will require Monumental to add new subcontractors to its bid. This, in turn, will require Monumental to negotiate new pricing.

On February 13, 2024, Monumental renewed its correspondence with Joyce in an effort to review Harrington's bid and understand the reason for the discrepancy in documentation. On February 14, 2024, Monumental visited Contract Administration and confirmed that all three bids were less complete than the versions present at the Comptroller's office. When pressed via phone to explain why Harrington's Part A was not available, Joyce took the position that Part A was not intended to be part of the original November 1, 2023 submission, even though Harrington was the only bidder of the three whose Part A, notably its SF 255, was not available for review at the Comptroller's office in November. Joyce then requested that Monumental return a few hours later to review the complete bids for all bidders at the Office of Boards and Commissions.

That afternoon, Monumental reviewed bid packages for the three bidders, once again with discrepancies. Most significantly, for the first time, a complete SF 255 for Harrington was present along with other previously reviewed components of Harrington's bid. But the version that appeared on February 14, 2024 was also inconsistent with the incomplete copy that Monumental first observed in early November 2023. The November copy had an SF 255 for A and A Plumbing, but that SF 255 was no longer part of the complete package that was reviewed in February 2024. In addition, the documents in November 2023 included only print-outs of MBE/WBE certification

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website profiles, whereas the documents in February 2024 now also contained the actual prequalification certificates themselves.

On February 13, 2024, Contract Administration forwarded an email to Monumental, apparently in error, that the City had previously sent to Harrington with an attached letter addressed to Harrington specifically. Among other things, the email and letter to Harrington directs Harrington to submit a revised SF 255 and prequalification certificates for subcontractors, and invites the firm to include additional subcontractors. The email concludes by stating that the City will rely on the original price proposals submitted on November 1, 2023.

Updated proposals are currently due on March 8, 2024.

GROUND OF PROTEST

Monumental respectfully protests the WC-1283 procurement and requests that the Board of Estimates take appropriate action to review multiple procurement irregularities and preserve the integrity of the procurement.

First, the Board should require DPW to reject all bids, as originally recommended, and fully re-bid the project. It is not fair to permit bidders to revise their technical volumes, including SF 255s and the composition of their teams, without making any corresponding changes to their prices. Monumental, for example, must update its subcontractors based on feedback received and this will require new price negotiations.

In addition, many prospective bidders likely declined to participate in this project due to the initial \$18 million ceiling. Since DPW has removed that ceiling, re-bidding the project is necessary to provide a fair opportunity for all prospective bidders to compete as the best value.

Finally, allowing only technical revisions and subcontractor adjustments would undermine the competitive process by essentially locking in the current bid prices and relative ranking of bids. This would serve only to benefit Harrington, who was the lowest bidder and only bidder capable of achieving the 10% bonus. Allowing only these changes would give Harrington an unfair opportunity to resolve instances of noncompliance and strengthen the deficient portions of its bid, while preventing Monumental and other bidders from strengthening their price proposals.

Second, the Board should carefully consider the need to address irregularities in the procurement process. There is a lack of transparency surrounding DPW's decision to withdraw its initial recommendation that the Board reject all bids. Without any abstentions, the President initially deferred consideration of DPW's recommendation to reject the bids. This decision came just weeks after the President received a maximum campaign donation from Harrington. It is

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unclear what communications took place in the weeks that followed, but DPW then withdrew its recommendation to reject the bids and the Board accepted that course of action, again without any abstentions from any member who had received campaign donations from Harrington.

DPW then proceeded to seek revised Part A proposals and subcontractor submissions without new price bids, a decision that only benefits Harrington. Monumental also observed multiple discrepancies in the bid documentation, raising serious questions about the bidding process. The City's evasiveness when Monumental sought an explanation for the discrepancies raises more questions.

These concerns, coupled with the fact that the decision to permit only technical revisions benefits only Harrington, undermine the integrity of the competition. At a minimum, the City's close association with Harrington—from his appearance at the Unbundling Initiative press conference implying City endorsement or preference for Harrington to win, to the timing of campaign donations and unexplained decisions in favor of Harrington—creates an appearance of a significant conflict of interest associated with the Board's and DPW's actions.

CONCLUSION

Monumental strongly supports the Unbundling Initiative and urges the Board of Estimates to proceed with implementation of this vital program for the City's MBE and WBE contractors. However, it is also essential that the Board implement this program consistent with the highest ethical standards and in a manner that is above reproach.

Under the current course of action, Monumental and other bidders will not have a fair opportunity to compete for the project. This, in turn, will deprive the City of an opportunity to obtain the "best value" bid. Once DPW determined that all bids exceeded the \$18 million ceiling, the appropriate action was to reject all bids and seek new proposals. DPW's decision to reverse course and limit proposal revisions harms Monumental's competitive position and undermines core objectives of this procurement.

Implementing steps to ensure that the City obtains the best value bid is in the best interest of the City's MBEs and WBEs and will ensure the continued success of the Unbundling Initiative. To that end, Monumental requests that the Board review the procurement irregularities identified above and take appropriate steps to avoid the appearance of any unfair treatment or other improprieties. Monumental further requests that the Board reject all bidders, as DPW initially recommended, and rebid the contract with refreshed guidelines so that it can be open to all bidders.

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March 1, 2024
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Respectfully submitted,

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