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April 25, 2024

Board of Estimates of Baltimore City
204 City Hall
100 N. Holliday Street
Baltimore, MD 21202

Re: **Protest- WC 1326/ American Contracting & Environmental Services, Inc.**

To the President and Members
Baltimore City Board of Estimates:

Please accept this protest on behalf of my client, American Contracting & Environmental Services, Inc. (ACE) to the recommendation for award of the above referenced contract to Allen Myers MD, Inc. (Myers). The bid submitted by Myers included a bid bond in the amount of 2% of the bid price, rather than 5% as required in the bid documents, meaning that if the city had to enforce the bond it would be entitled to collect only \$309,100, rather than \$772,750.

Bidders were advised further on page SC -34 of the bid documents that the contract requires a five percent (5%) bid bond for federally funded contracts. In the Notice of Letting bidders were advised that funding for the contract included Us Environmental Protection Agency Water Infrastructure Finance and Innovation Act Loan Funding.¹ At the pre-bid conference when questioned about the amount of the required bid bond the question the city confirmed that a 5% bid bond was required. Contrary to the express terms of the solicitation and the city's unambiguous response to the question raised during the pre-bid conference, Myers submitted a 2% bid bond.

Art. VI Section 11(h) of the Baltimore City Charter states:

¹ In the agenda for the Board's May 1, 2024 meeting, it is stated that project funding is "anticipated from Baltimore City Revenue Bonds and Baltimore County Grants, in the amount of \$8,954,374.00 and \$6,580,626.00, respectively. However, the city did not publish an addendum that notified bidders of the anticipated change in funding sources and the corresponding change in the amount of he required bid bond. Such a material change cannot be made after the fact without notice to all bidders.

(2) (i) All bids for construction contracts let for the Department of Public Works, the Department of General Services, and the Department of Transportation and any other contracts for public works shall be accompanied by a check or bid bond. For all other contracts, the Director of Finance shall implement policies and procedures to determine whether a bid bond is required for a contract, the term and face value of the bond, and the manner in which the bond shall be provided and refunded.

(ii) Except as otherwise provided in this paragraph (2), the check shall be a certified check of the bidder, a bank cashier's check, or a bank treasurer's check, drawn on a clearing house bank. The check shall be in an amount provided by ordinance, by the bid specifications, or by an order or regulation of the using agency. In the case of bid checks of \$5,000 or less, the check may be of any type drawn on any banking institution of the United States.

(iii) The bid bond shall be in the form and amount provided by the rules and regulations of the Board of Estimates, and shall be filed by the bidder with the Department of Finance.

City Procurement Regulations, Section 10, adopted by the Board of Estimates in 2019 states:

b. (i) All responses for construction contracts let for the Department of Public Works, the Department of General Services, the Department of Transportation, and the Department of Recreation & Parks and any other contracts for public works shall include a check or bid bond.

(ii) If a check, the check shall be a certified check of the responder, a bank cashier's check, or a bank treasurer's check, drawn on a clearinghouse bank. The check shall be in an amount provided by the bid specifications or by an order or regulation of the Procuring Agency. In the case of bid checks of \$5,000 or less, the check may be of any type drawn on any banking institution of the United States.

(iii). The bid bond shall be for an amount which is determined by the Green Book or solicitation.

(iv). Failure to comply with bid security requirements shall be grounds for rejection.

Just as under the above City Procurement Regulation, under Maryland law a procurement officer is required to reject a bid or proposal that is not accompanied by proper security. State Finance and Procurement Article 13-208 (a). To be compliant, the bid bond "must evidence that the surety is obligated to pay the appropriate penal sum if a bidder fails to perform on the bid". A bid bond that does not entitle the owner to collect the required penal sum upon the bidder's failure or refusal to execute the contract is improper and renders the bid materially defective and, therefore, non-responsive. **American Paving Corp, MSBCA 2498 (2005); and In The Matter of Southern Improvement Company, MSBCA 2904 (2015)**. Similarly, the Comptroller General has held that to be compliant the bid bond must: (1) correctly identify the bid opening date; (2) accurately describe the type of services sought; and (3) **designate a maximum penal**

sum which correlates with the amount of the bid (emphasis added). **R.P. Richards Construction Co., 95-2 CPD Par.128 (B-26065, July 17, 1995)**. A defect in either one of these factors invalidates the bid bond, resulting in a non-responsive bid.

Myers bid bond would not entitle the city to recover 5% of its bid in the event it failed or refused to execute the contract. Accordingly, Myers' bid, as required by the terms of the solicitation, city procurement regulations and applicable law, must be rejected as non-responsive.

Very truly yours

A handwritten signature in blue ink, appearing to read 'R. Dashiell', with a long horizontal flourish extending to the left.

Robert Fulton Dashiell, Esq.