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Via Email (list below) and Hand-Delivery (Dec. 29, 2022)

Phung Loman
Chief Procurement Officer
General Services Department
Purchasing Division
County of Santa Barbara
260 North San Antonio Road
Santa Barbara, California 93110
Ploman@countyofsb.org

Re: American Medical Response West’s Response to Santa Barbara County Fire Protection District’s Appeal Submitted December 21, 2022 (RFP #8010001)

Dear Ms. Loman:

On December 14, 2022, the Procurement Officer issued a decision denying County Fire’s Protest (“Decision”). On December 21, 2022, County Fire submitted its Notice of Appeal (“Appeal”) from the Decision. American Medical Response West (“AMR”) now submits this timely¹ response to County Fire’s Appeal. Please transmit this response by AMR (“Appeal Response”) to the Protest Resolution Committee (“PRC”) to assist them in resolving the Appeal submitted by County Fire.

Under Section 2.10(I) of RFP #8010001, County Fire appealed the Decision on five grounds. The five grounds are largely the same grounds argued by County Fire in its November 4th Protest. AMR will address each in turn in addition to discussing the standard of review a court would likely apply to the PRC’s decision here.

I. Standard of Review

A standard of review provides the lens through which a reviewing body considers the legal and factual arguments relied upon by the appealing party. The RFP indicated at Section 2.10(I) that the PRC’s “written decision shall constitute the final decision of the County and LEMSA on the Protest, and shall not be subject to further administrative appeal.” Case law provides that if a court later reviews the PRC’s decision here, that court will likely apply a standard of review similar to that set forth in *McGill v. Regents of University of California* (1996) 44 Cal.App.4th 1776, 1786:

¹ Although the RFP does not clarify that AMR is permitted an Appeal Response, AMR submits this Appeal Response within five (5) business days which was the same time period allowed to file a response to the Protest.

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In ordinary mandamus proceedings courts exercise very limited review ‘out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority.’ ” (*Shapell Industries, Inc. v. Governing Board*, *supra*, 1 Cal.App.4th at p. 230, 1 Cal.Rptr.2d 818, quoting *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212, 157 Cal.Rptr. 840, 599 P.2d 31.) The court may not reweigh the evidence or substitute its judgment for that of the agency. (*Ibid.*) The appropriate standard was articulated by the Supreme Court in California *Hotel & Motel Assn. v. Industrial Welfare Com.*, *supra*, 25 Cal.3d 200, 157 Cal.Rptr. 840, 599 P.2d 31. “A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.” (*Id.* at p. 212, 157 Cal.Rptr. 840, 599 P.2d 31, *fn. omitted.*)

Thus, a reviewing court will largely defer to the PRC’s decision here. However, it would be advisable for the PRC to make its factual findings clear. If it does, any reviewing court will likely examine the PRC’s factual findings only to determine if there was substantial evidence to support such factual findings. When reviewing the Procurement Officer’s Decision, the PRC is required by RFP Section 2.10(G)iii to defer to the scoring conducted by the panel of experts employed here. Such deference is appropriate and contemplated by the structure of the RFP. The PRC’s role here is to ensure that no corruption or malfeasance infected the process. County Fire has not established that any such corruption or malfeasance infected the process. Instead, as discussed in detail below, County Fire is simply trying to substitute its own judgment for the panel of experts to try to obtain a different outcome on the facts presented in the proposals. Such an approach should not prevail.

II. Substantive Arguments

A. Reasons 1, 2 and 6: RFP Section 2.10(G)iii Prohibits County Fire from Challenging the Judgments of the Review Panel

County Fire argues that the Procurement Officer erred in her analysis of Reason 1, 2 and 6 when she found that RFP Section 2.10(G)iii prohibits challenges to the judgments of the review panel. In fact, Section 2.10(G)iii provides that “Protests that only challenge the judgment of the Review Panel shall not be considered valid Protests.” In other words, a protesting party cannot attack the scoring and how the panel of experts judged the proposals. That intensely factual determination cannot be second guessed. What can a protestor challenge? The same part of the RFP answers that question, and states



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“[t]he grounds for a Protest may include any challenge to the LEMSA’s process in soliciting and reviewing the Proposals, including but not limited to a Protest on the grounds that a Proposal was not evaluated in accordance with the Proposal Evaluation Criteria.” In other words, a protester may challenge the process followed to ensure that the panel of experts followed the RFP and used the Proposed Evaluation Criteria in judging the proposals.

In Reason 1, County Fire argues that AMR failed to identify recent noncompliance and, thus, the panel should have scored this requirement with a “fail” and discontinued consideration of AMR’s proposal citing to RFP section 2.9.B for support of this argument. Section 2.9B provides in pertinent part:

[The] LEMSA shall entertain proposals only from organizations demonstrating fiscal stability and prudence, as well as a stable track record of rendering emergency, non-emergency, and urgent ambulance services at levels of clinical quality and response time reliability substantially equivalent to the services required under this procurement. Therefore, all interested Proposers are required to meet minimum qualifications as a part of their RFP response. Proposers’ credentials will be evaluated based upon objective criteria designed to demonstrate each Proposer’s ability to perform if awarded the Contract. Credentials shall be submitted as Tab I and will be scored on a pass/fail basis. Only proposals that meet the minimum experience requirements as described herein will receive further consideration.

This is a simple pass/fail test for “minimum” experience that is “substantially equivalent to the services required under this procurement.” AMR is the current provider and clearly passed this minimal test. County Fire’s challenge on this ground is unsupported and undercuts County Fire’s credibility here. The Procurement Officer addressed County Fire’s Reason 1 by finding that “[n]othing in RFP section 2.9, including subsection 2.9.B, required proposers to disclose non-compliance issues.” Separately, the Procurement Officer also found that this argument is “per RFP section 2.10.G.iii. statements challenging the judgment of the Review Panel and shall not be considered as valid protests.”

In Reason 2, County Fire argues that AMR’s Proposal was nonresponsive to Sections 4.2 and 4.10 of the RFP and thus the entire AMR Proposal should be considered non-responsive (RFP page 30), and the contract awarded to County Fire. The Procurement Officer correctly responded by finding:

The Agreement is not a level-of-effort agreement. The successful Proposer must employ whatever level of effort is necessary to achieve the clinical, response time, customer satisfaction, quality improvement, and other performance results required by the EMS System Specifications. Nothing required proposers to link all information to

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RFP section 2.1, nor does the section indicate it is the definition of “fully outlined.” Appendix 10 is titled “Sample”. Nothing in the RFP required proposers to specifically respond to the questions in Appendix 10.

This analysis tracks the wording of the RFP. The Procurement Officer then made two separate findings: “The Proposal Review Panel scored both proposals for sections 4.2 and 4.10 in accordance with Proposal Evaluation Criteria set forth in RFP section 2.11. Per RFP section 2.10.G.iii. statements challenging the judgment of the Review Panel shall not be considered as valid protests.” The PRC can simply defer to this correct analysis. County Fire’s Reason 2 was correctly denied.

In Reason 6, County Fire argues that “AMR’s Proposal did not comply with the RFP rigorous proposal instructions (RFP 2.8 Proposal Instruction, Pg 19); therefore, the AMR Proposal should be considered nonresponsive, rejected, and the contract awarded to the District.” The Procurement Officer’s two points in response are correct. She stated that

RFP section 2.11.A states “[t]his section includes the criteria that will be considered in scoring the Proposals ... [and] The matrix that will be used in the Proposal review process is outlined below. The total points that can be awarded for each area are identified.” The Proposal Review Panel scored both proposals as a “pass” for Section 2.8 in accordance with Proposal Evaluation Criteria set forth in RFP section 2.11. Per RFP section 2.10.G.iii statements challenging the judgment of the Review Panel shall not be considered as valid protests.

These two decisions by the Procurement Officer are supported by the record. Both proposals passed this portion of the RFP. County Fire is simply trying to impermissibly substitute its judgment for the panel of experts’ judgments.

B. New Argument Regarding Lack of Factual Findings

County Fire asserts that the “Purchasing Agent did not evaluate or make any determinations on the District’s allegations, and thus made no findings that: (1) AMR’s proposal did not contain false and misleading statements; (2) AMR’s proposal was responsive, and (3) AMR is a responsible proposer eligible for contract award.” The Procurement Officer addressed these arguments in a manner different than that framed by County Fire. She looked at the wording of the RFP and found that County Fire’s arguments that AMR made false and misleading statements (such as the one about non-compliance) missed the mark because the RFP did not require a proposer to report non-compliance with response time reporting. Thus, the factual allegations by County Fire were irrelevant here. This ground should be rejected by the PRC.

C. Reason 3: AMR Did Not Offer an Illegal Kickback in its Proposal

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In Reason 3, County Fire argued that the County must reject AMR's proposal because it offered payment of an illegal kickback in connection with some theoretical federal funding ("PPIGT") for the EMS system. In AMR's Response, AMR rebutted this specious argument as follows:

AMR has not offered a kickback to the County. AMR indicated that if some possible federal funding PPIGT were to become available at some undefined point during the life of the contract, AMR would explore with the LEMSA a potential method for accessing the funds. AMR did not offer to pay any remuneration to the County in violation of the Anti-Kickback Statute ("AKS"). Instead, AMR – as the County's anticipated partner in providing ambulance services – indicated its willingness to have a **conversation** about the funding to see if the EMS system could secure it in the future. AMR expressly noted in its Proposal that any potential funding **was subject to all legal requirements and approvals**, i.e., "[i]n accordance with applicable federal and state laws and necessary approvals." See AMR proposal at pp. 95-96. This negates the principal element of intent under the Anti-Kickback Statute. Additionally, if funding were secured, the monies would benefit the EMS system. County Fire does not appear to understand the legal aspects of the federal AKS. The author's lay opinion should be disregarded because it lacks any legal validity

The Procurement Officer properly accepted this argument as valid. County Fire did not point to any cases or legal analysis to support its unsound argument. It still has not done so. AMR's point about exploring a possible additional funding source from the federal government if it might become available is not an illegal inducement. AMR's position is still valid and should be affirmed on this record. The PRC should reject this ground.

D. Reason 4: Vague Claim of False Statements

In Reason 4, County Fire repeats, without any detail, an argument about false and misleading statements citing to RFP Section 2.11.A. This argument should be rejected because it is unclear and fails to discuss any facts. Additionally, the Procurement Officer rejected this argument, accepted AMR's response as a valid rebuttal, and quotes directly from Section 2.11.A which provides: "Responses which contain false or misleading statements, or which provide references which do not support an attribute or condition claimed by the Proposer, must be rejected, subject to the County's ability to waive minor irregularities." In its Response, AMR admitted to a small clerical error regarding the color coding on an attached map; this is the type of minor irregularity that the County can disregard, which it did.



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E. Reason 5: Consideration of Financial Benefits to the County

In Reason 5, County Fire argued that the “Santa Barbara County Code of Ordinances, Article VI, Section 2-40(d) for competitive bidding requires fiscal statements. Cost is always a factor when the County purchases on behalf of the taxpayer and failure to require this information in soliciting and evaluating bids harms the County and is inconsistent with the County Code.” The Procurement Officer disagreed with County Fire’s reading of County Code Section 2-40(d) and 2-41(a). Chapter 2, Article VI, Section 2-40(d) provides that “[i]f any prospective bidder fails, neglects or refuses to furnish the purchasing agent with such financial statements and other information as may be required to determine his responsibility as a bidder, the bid shall not be considered and shall be deemed non-responsive.” The Procurement Officer found the Proposal Review Panel scored both proposals as a “pass” for the financial assessment in accordance with the specific requirements in the RFP at Section 2.11. As discussed in greater detail in AMR’s Response, the Proposal Review Panel had the financial information reviewed by a CPA, Kevin Harper, who found that both proposals met the four criteria required by the RFP. This argument is not supported by any facts. It should be summarily rejected.

AMR is prepared to move forward with the County contract. AMR reserves the right to be heard at any oral hearing held by the PRC.

Very truly yours,

/s/ Pamela L. Johnston

Pamela Johnston

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