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April 2, 2018

Vincent Bobot, Chair
Administrative Review Appeals Board
Office of the City Clerk
200 E. Wells Street, Room 205
Milwaukee, WI 53202-3551

Re: Appeal of Emery K. Harlan on behalf of MWH Law Group LLP and Quarles & Brady LLP
relating to proposal scoring of RFP No. 14749, Disclosure Counsel Services

Dear Mr. Bobot:

I am representing City Purchasing Director Rhonda Kelsey, and am providing this letter brief in response to your request for written briefing on the Administrative Review Appeals Board's ("Board's") authority to exercise jurisdiction over the above-referenced appeal. It is the Purchasing Department's position that jurisdiction is not proper in this case.

As you are aware, appellant is challenging the award of a contract by the City's Purchasing Department after a Request for Proposal ("RFP") process. When a City department lets a contract in this manner, the evaluation of the proposals submitted is driven by various criteria, (such as cost, experience, status as a Local Business Enterprise). Each criteria are given a weight (by percentage or possible points). The proposals are evaluated by a committee and ranked to determine the "best-ranked" proposer. The department then enters into negotiations with that proposer, and if an agreement is not reached, the department may open negotiations with the second-ranked proposer, or re-let the contract.

For Purchasing, there is a process set forth by which certain specification and award decisions may be appealed. "Spec appeals" may be filed prior to bid or proposal submittal by the Purchasing Appeals Board. Milwaukee Code of Ordinances ("MCO") 310-19-3. (Contrast the RFP process with the letting of a contract by bid. In the latter case, the specifications are set, and the contract award is made solely on the basis of the lowest price, assuming the low bidder is otherwise responsive and responsible.) Award appeals may only be filed by a disappointed bidder. MCO 310-19-4. There is no appeal process for award decisions made from the award of a contract from an RFP.



For the Department of Public Works, appeal rights are even more stringent. No Spec appeals are allowed, and award appeals may only be made to the Public Works Contract Appeals Committee on the grounds that DPW failed to properly follow the Resident Preference Program, Local Business Enterprise Program, or Small Business Enterprise Program ordinances. MCO 7-14-2-b.

With that background in mind, the statutory basis for the Board to exercise its jurisdiction can be found in Chapter 68. Section 68.02 provides that the following decisions are reviewable:

- (1) The grant or denial in whole or in part after application of an initial permit, license, right, privilege, or authority, except an alcohol beverage license.
- (2) The suspension, revocation or nonrenewal of an existing permit, license, right, privilege, or authority, except as provided in s. 68.03 (5).
- (3) The denial of a grant of money or other thing of substantial value under a statute or ordinance prescribing conditions of eligibility for such grant.
- (4) The imposition of a penalty or sanction upon any person except a municipal employee or officer, other than by a court.

Clearly, the award of a contract does not fall within any of these subsections. Perhaps the subsection that comes closest is sub (3), however, an ordinance does not prescribe the conditions of eligibility for an award of a contract let by RFP. As explained above, a department is free to select their own criteria to evaluate proposals. Once they do so, they are legally obliged to follow it, but that directive comes from the courts, not a City of Milwaukee ordinance. *See, Waste Management v. Wisconsin Solid Waste Recycling Authority*, 84 Wis. 2d 462, 477 (1978).

Additionally, section 68.03(8) provides that “action[s] which [are] subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16” are not subject to review by the Board. Section 68.16, in turn, provides: “The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations.” The Milwaukee Common Council did that when it enacted MCO 320-5, which provides: “This section [governing the Board] shall not be deemed to repeal or supersede any other ordinance or resolution in conflict herewith which specifically provide other procedures for review of administrative determinations within the city.

The Council acted in accordance with MCO 320-5 when it established the Purchasing Appeals Board and the Public Works Contract Appeals Committee. That these entities are not able to hear every possible award appeal is not evidence that the Council intended for these appeals to be heard by a Board of general applicability, rather than a more specialized entity with experience handling these appeals; rather, it is evidence that the Council intended to limit award appeals. Although some contract awards may be challenged under the ordinances, there is a

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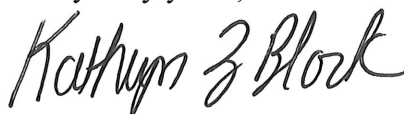
recognition that there is a human element in the application of the criteria and weight by individuals on a committee, and therefore that award appeals from an RFP are unlikely to be fruitful, as any review of such a determination must acknowledge the discretion inherent in making review decisions.

There are also practical considerations involved if the Board were to exercise jurisdiction over this appeal. Award appeals to either DPW or Purchasing are to be commenced within 5 days after award. MCO 7-14-b-2 and 310-19-4-a. There are also provisions that require the appeal be heard and decided quickly. Appeals to the Board, by contrast, need only be filed within 30 days and may take a cycle or two to hear. Timeliness is important in these sorts of appeals given we are talking about the award of a contract which may implicate important work.

This interpretation also comports with the general theory behind the letting of public contracts: To get the best value for the best price for taxpayers. *Waste Management* at 470. A disappointed bidder or proposer may go to court and obtain an injunction to halt the award of a contract, but once a contract is awarded, the courts are clear that monetary damages are limited to the cost of preparing a bid/proposal, (i.e., they do not include lost profits, specific performance). See e.g., *PRN Associates, LLC v. DOA*, 2009 WI 53, ¶ 40; *North Twin Builders, LLC v. Town of Phelps*, 2011 WI App 77, ¶ 21. The Board is a poor forum to vindicate the sort of rights appellant is seeking to vindicate here. It does not typically determine the amount of monetary damages that may be due to an appellant. It cannot enter injunctive relief.

The Board is not the forum for an award dispute after the evaluation of proposals submitted after a RFP. The Board does not have jurisdiction per Chapter 68 of the Wisconsin statutes. This comports with sound policy considerations relating to the award of public contracts generally. Therefore, the Purchasing Department requests that this appeal be dismissed.

Very truly yours,

A handwritten signature in black ink that reads "Kathryn Z. Block". The signature is written in a cursive, flowing style.

KATHRYN Z. BLOCK
Assistant City Attorney
KZB:kzb
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