

**CITY OF MADISON  
OFFICE OF THE CITY ATTORNEY  
Room 401, CCB  
266-4511**

Date: January 8, 2008

**MEMORANDUM**

TO: Matthew Mikolajewski, Office of Business Resources  
Randy Whitehead, Purchasing

FROM: Michael P. May, City Attorney

RE: NES Protest of Southeast Madison Marketing RFP Award

I received a copy of the "Official Request for Rehearing and Review of Selection Process" filed by New Economic Strategies (NES) on January 7, 2008. I advised that this document should go to the Economic Development Commission (EDC) and the Board of Estimates (BOE) when they consider the resolution to award the contract.

I write this memo only to provide some basic legal principles that apply to the award of this contract.

My understanding is that, contrary to some of the statements in the NES protest, the simple fact is that City staff transposed two numbers in calculating who was to get the award. A discrepancy was originally identified by the Purchasing Department, and the Office of Business Resources thoroughly reviewed all scores and arithmetic to insure that the correct figures were used. When the correct figures were used (including the City's 5% rule for local purchasing), the local vendor (Hiebing/Vandewalle) scored slightly higher than NES. Unfortunately, NES was told it had been selected before the mistake was discovered.

Unlike public works contracts awarded under sec. 62.15, Wis. Stats., there is no rule that an RFP award must go to the lowest bidder. Indeed, the RFP itself makes clear that:

At any phase, the City reserves the right to terminate, suspend or modify this selection process; reject any or all submittals at any time; and waive any informalities, irregularities or omissions in submittals, all as the best interests of the City may appear. (Par. 7.a.8.)

The City reserves the right to accept or reject any or all statements of Proposals submitted, in whole or in part, and to waive any informalities or technicalities which at the City's discretion is determined to be in the best interests of the City. Further, the City makes no representations that a contract will be awarded to any Proposer responding to this request. The City expressly reserves the right to

January 8, 2008

Page 2

reject any and all bids responding to this invitation without indicating any reasons for such rejection(s). (Par. 9.a.)

Unlike public works contracts, responses to a RFP are judged using several criteria. In this case, when the scores for the various criteria were correctly added, NES was in second place.

The scores suggest that the award of the contract be given to Hiebing/Vandewalle. The City is within its legal rights to do so.

The City also could take alternative approaches. The Selection Committee could be reconvened, conduct interviews again, and do an additional ranking. The City could decide to void the entire process and start at the beginning with an additional RFP. Both of these alternatives would take significant time. Given the nature of the mistake (incorrectly telling NES that it had the highest score and would be given the contract when in fact it was the second place finisher), City staff recommends that the City should respect the actual scores of the Selection Committee.

I do not believe there is any basis for some other accommodation, such as splitting the contract between NES and Hiebing/Vandewalle.

CC: Mark Olinger  
Dean Brasser