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AC Transit
General Manager
1600 Franklin Street,
6th Floor
Oakland, CA 94612
Delivered via Courier and email

Re: Appeal: Temporary Personnel Services RFP 2023-1585

Dear Purchasing Manager

Pursuant to AC Transit's (ACT) bid protest procedures this is a request to overturn Frederick Wall's denial of HR Management's bid protest of "Recommended Vendors" as recipients of ACT's temporary staffing services contracts. The "Recommended Vendors" are collectively referenced herein as "Advantaged Vendors".

Mandatory Grounds for Granting Appeal

HR Management filed a timely bid protest. AC Transit's bid protest policy mandates informal resolution of claims. AC Transit's bid protest policy requires ACT to contact the protesting party to meet and confer to clarify issues and negotiate good faith resolutions of disputes. Frederick Walls, ACT Procurement Director failed to contact HR Management to schedule a meeting to attempt informal resolution of disputes. Mr. Wall's cavalier and reckless procurement management approach to ACT's African-American small businesses is disgraceful. ACT must informally contact HR Management to schedule a meeting to resolve disputes.

Additional Grounds for Granting Appeal

Mr. Wall's violated ACT's protest procurement rules through his failure to attempt informal resolution. Mr. Walls ACT made several false assumptions in his denial of HRM's protest including but not limited to evaluation panel members are "people of color". Not sure what Mr. Walls was trying to say by that statement. Mr. Walls fail to realize that "people of color" can and often discriminate against African-American male owned small businesses.

Moreover, Mr. Walls attempts to support his tortured reasons for denying HRM's protest by stating that "4-6 recommended vendors are SWDBEs". What's the relevance of that statement if according to Mr. Walls ACT used a "blind" scoring system. How can the evaluation panel scoring system engage in "blind" scoring when the RFP allows points for various types of racial or other vendor demographics?

Furthermore, Mr. Walls acknowledged that ACT utilized an arbitrary and subjective scoring system that conveniently eliminated HR Management. HR Management allegedly received a “raw score of 67%, according to Mr. Walls. The threshold vendor “passing” level was subjectively set at 70%. HR Management asserts that ACT’s failure to include HRM as a recommended vendor was arbitrary and capricious. HR Management further contends that the ACT procurement panel acted in bad faith in the review of HR Management’s proposal thus giving HRM lower scores than the “Recommended Vendors” based upon race, gender, and size.

Mr. Walls falsely reasoned that the subject matter procurement should not be considered for a small business set-aside because of an alleged ACT report in January 2022 that falsely stated that there is an insufficient “pool” of SBE’s in Alameda County. Mr. Walls is woefully incorrect regarding the pool of available SBE’s. For example, according to Alameda County’s Auditor-Controller SLEB reports there are over 17,000 certified SLEB’s in Alameda County. Furthermore, the City of Oakland has over 2500 certified SBE’s registered with its Contract Compliance departments.

Sadly Mr. Walls is doing a grave disservice to ACT and the taxpayers of Alameda County when stating that there is an insufficient pool of SBE’s. Mr. Walls and ACT is using a classic approach when intentional discrimination in procurement is actively part of the procurement culture. Accordingly, the General Manager should contact both Alameda County Auditor Controller and City of Oakland Contract Compliance Director for assistance in the correcting ACT’s false and misleading description of the ACT’s SBE vendor pool for purposes of establishing procurement SBE and DBE set-asides.

Accordingly, the General Manager should meet with HR Management to discuss in good faith the scope and merit of HR Management’s protest.

This appeal is based upon the following factual, procedural, procurement practices, vendor responses, legal, and evidentiary grounds.

Alameda County’s African-American owned small businesses have been devastated by the combined impact of Covid 1619 and systemic procurement racism. ACT Purchasing and related entities are ignoring the impact of both racism and the Covid pandemic on African-American small businesses while providing preferential treatment to businesses that are not owned by African-Americans. Accordingly, targeting for exclusion, small businesses owned by local African-American men. The RFP intentionally did not include SBE or DBE goals.

The exclusion of SBE and DBE goals were designed to assure that African-American locally owned small businesses would be excluded from contract award based upon a vendor selection process that was based totally on subjective criteria.

The intent of ACT’s SBE and DBE Program is to build capacity of small, local, and disadvantage businesses. Part of building capacity is to award prime contracts to qualified SBE and DBE firms.

ACT Procurement Director is restrained from using federal funds on projects including temporary staffing services without required DBE and SBE goals. The subject matter RFP does not include SBE or DBE goals or set-asides for transportation contracts using federal funds. Therefore, ACT must cancel and re-bid the RFP and include SBE and DBE requirements.

Awarding contracts to African-American SBEs and DBEs must be part of ACT's plan to address systemic procurement racism against African-American small businesses.

Rather than ACT developing procurement plans and goals to redress systemic racism in ACT contracts, it's disappointing that ACT Procurement Director has not taken steps to assist and support African-American DBEs and SBEs in the award of ACT contracts. HR Management is a SBE and DBE with a proven track record that was denied contract recommendations for reasons other than competitiveness.

The "Advantaged Vendors" do not have credible track records with respect to diversity and partnering with African-American small businesses. As a result, ACT must cancel the RFP and re-bid requiring DBE and SBE goals.

- 1. ACT General Manager and ACT Board of Directors should mandate that this RFP is parceled with specific DBE and SBE goals and set-asides to allow African-American DBEs and SBEs to become prime vendors through contract awards.***

Contract recommendation of the "Advantaged Vendors" violate the intent of federal contract compliance DBE guidelines. ACT has no discretion to violate federal procurement policy with respect to DBE inclusion in federally funded contracts.

ACT should not waive or abandon its goal of maximizing contract opportunities to legitimate DBEs and SBEs. Awarding contracts to privileged "Advantaged Vendors" would abandon the objectives of ACT's SBE program through denying contracts to African-American SBEs.

The ACT Evaluation Panel did not take into consideration the adverse impact of systemic racism and Covid 1619 on African-American DBEs and SBEs in this procurement. The Evaluation Panel's decisions ***were not based upon objective criteria but were guided by subjective and implicit biases against African-American owned small businesses.***

- 2. Upon information and belief, the intended contract awards to privileged "Recommended Vendors" violate the California Unruh Act, Civil Code Section 51, et. seq.***

Clarence Hunt, the owner and president of HRM, is an African-American male.

Race and implicit bias were substantial motivating factors in ACT's preferential treatment of the "Advantaged Vendors" over HRM and Clarence Hunt; thus scoring the "Advantaged Vendors" proposals higher than HRM's proposal.

Sections 51(a), 51.5(a), and 52(a) of the Civil Code, the Unruh Civil Rights Act, provide:

Section 51 {a} All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Section 51.5{a} no business establishment of any kind whatsoever shall discriminate against, boycott or blacklist, or refuse to buy from, contract with, sell to, or trade with any person in this state on account of an characteristics listed or defined in subdivision (b) or (e) of Section 51, or of the person's partners, members, directors, . . . because the person is perceived to have one or more of those characteristics, or because the person is associated with a person who has, or is perceived to have, any of those characteristics.

Section 52{a} Whoever denies, aids or incites a denial, or makes any discrimination or distinction contrary to Section 51, 51.5, or 51.6, is liable for each and every offense for the actual damages, and any amount that may be determined by a jury, or a court sitting without a jury, up to a maximum of three times the actual damage but in no case less than four thousand dollars (\$4,000), and any attorney's fees that may be determined by the court in addition thereto, suffered by any person denied the rights provided in Sections 51, 51.5, or 51.6.

As a result of ACT's preferential treatment of "Recommended Vendors" and their owners, HRM and Clarence Hunt will suffer damages in according to proof, including, but not limited to, the cost to submit a proposal in response to the RFP, cost to protest and reconsider contract awards, cost of appeal to the ACT Board of Directors, lost profits, lost compensation, attorney's fees, and other costs.

3. Upon information and belief, the intended award to "Advantaged Vendors" violate Article I, Section 31 of the California Constitution prohibiting preferential treatment in public contracting based on gender or race.

Race and gender were motivating factors in ACT's preferential treatment of "Advantaged Vendors" over HRM and Clarence Hunt, including but not limited to scoring proposals higher than HRM.

Subsections (a) and (g) of Section 31 of Article I of the California Constitution (passed by the voters in 1996 as Proposition 209) provide: The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

As a direct result of ACT's preferential treatment provided to "Advantaged Vendors" and its owners, in violation of Article I Section 31 of the California Constitution, "Advantaged Vendors" are recommended for contract awards for temporary personnel.

As a result, HRM and Clarence Hunt have suffered and will suffer recoverable damages including but not limited to the cost to submit a proposal in response to the RFP, the cost to protest contract awards, lost profits, lost compensation, and other unforeseen costs. The evaluation panel's decision not to recommend a contract award to HR Management are based upon reasons other than competitiveness. Accordingly, actionable claims exist with legal remedies available to HRM to protect its rights.

Proposed Resolution of this Protest: HRM is requesting ACT General Manager to meet and confer according to ACT's bid protest policy to evaluate the disproportionate adverse impact of Covid on African-American SBEs in Alameda County. Break-apart the temporary personnel services contracts and include African-American SBE's and DBEs substantially impacted by the Covid pandemic based upon verification of decreased revenue from April 1, 2019 through December 31, 2020. We recommend a contract award to HRM as a Covid pandemic impacted SBE and DBE provider. Contract value not to exceed \$500,000 annually- three year term with option to extend for two years.

Based upon the foregoing, HR Management respectfully request the ACT General Manager to thoroughly review and investigate all claims and overrule Mr. Frederick Walls denial of HRM's initial protest.

Respectfully,

Clarence Hunt

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