



January 18, 2018

Keith A. McLean
Corporate Counsel
L. D'Agostini & Sons, Inc.
5801 23 Mile Road
Macomb Township, Michigan 48042

RE: Appeal from Denial of Bid Protest on GLWA WS-695C

Dear Mr. McLean:

On December 18, 2017, L. D'Agostini & Sons, Inc. (L. D'Agostini) filed a protest of the revised Notice of Intent to Award the above-referenced solicitation. (A copy of this protest is attached as Exhibit "A.") On January 4, 2018, GLWA denied that protest. (A copy of that denial is attached as Exhibit "B.") On Sunday January 7, 2018, L. D'Agostini e-mailed an appeal of GLWA's denial of its earlier protest. (A copy of this Appeal is attached as Exhibit "C.") Given that this Office was closed on January 7, 2018, for purposes of time computation, this appeal is deemed received on the next business day, January 8, 2018¹. The Chief Administrative Officer's review and determination of this protest are governed by Section 6.2(d) of the GLWA's Procurement Policy. Section 6.2 (d) provides in part that; "[t]he Chief Administrative Officer's determination shall be final."

Background

GLWA WS-695C was a Request for Bids (RFB) related to GLWA's proposed "valve exercising" project (the Project). This RFB had been issued on multiple occasions to clarify the requirements for the solicitation and ensure a level playing field for all vendors.² Of the vendors responding to the RFB, the low bid of approximately \$3.7 million dollars was submitted by a Project Team consisting of Tooles Contracting Group, LLC and Wachs Water (collectively Tooles). The second low bid of approximately \$4.7 million dollars was submitted by L. D'Agostini.

On November 9, 2017, GLWA issued a Notice of Intent to Award Letter to L. D'Agostini. (A copy of this Notice of Intent is attached as Exhibit "D".) On November 14, 2017, GLWA received a letter from Tooles styled as a bid protest³ (A copy of the Tooles letter is attached as Exhibit "E.") After reviewing

¹ The certified copy of the letter arrived on January 12, 2018.

² The prior version of this RFB was rebid because certain assumptions regarding the project schedule were not included in the solicitation. In order to assure that all respondents had the same information, GLWA rebid and included greater detail on this issue.

³ Although GLWA determined that the letter would not qualify as a "bid protest" under its Procurement Policy, it

an investigation and determined that the initial Notice of Intent to Award, (Exhibit D), had been sent in error before the evaluative process was complete and that Tooles' bid was excluded from consideration in error. After completing this investigation, on December 15, 2017, GLWA issued a revised Notice of Intent to award the contract for the Project to Tooles. (A copy of this revised Notice of Intent to Award is attached as Exhibit "F".)

On December 18, 2017, L. D'Agostini submitted a bid protest letter protesting the decision to award the Project to Tooles reflected in the revised Notice of Intent to Award. (Exhibit A.⁴) In its letter, L. D'Agostini alleged that: 1) Tooles bid did not conform in all material respects to the RFB because Tooles' "unit prices are heavily unbalanced." In addition, L. D'Agostini alleged that "because the bid evaluation for the project was completed and subsequently re-opened at [Tooles'] request without L. D'Agostini's involvement, GLWA failed to provide L. D'Agostini adequate due process."

On January 4, 2018, GLWA responded to L. D'Agostini's by denying the Bid Protest. (A copy of GLWA's response is attached as Exhibit "F".) In its response, GLWA noted *inter alia* that a Notice of Intent to Award letter was not a contract and that therefore L. D'Agostini did not have a "valid business expectancy." In addition, GLWA indicated that based upon its investigation it did not agree with L. D'Agostini's assertion that Tooles' bid was unbalanced and noted that, assuming a successful conclusion of contract negotiations between GLWA and Tooles, Tooles "will be bound by terms and conditions of the contract, including the pricing that it quoted in its bid schedule without any modifications."

As earlier indicated, L. D'Agostini has appealed this determination, (Exhibit "A"), repeating its earlier grounds for protest and adding a fairness argument.

Questions Presented, Responses and Rationale

L. D'Agostini's bid protest appeal raises the following issues:

1) Was Tooles' pricing so unbalanced that it did not meet the requirements of the RFB?

At the outset, it should be noted that Section 6.2(e)(iv) of GLWA's Procurement Policy appears to be dispositive of this claim. The Section indicates that amongst the items excluded from Bid Protests and Appeals are; "Failure of a potential vendor to meet minimum or mandatory requirements." While this writer believes the intent was to prevent a vendor from challenging GLWA's determination that it did not meet minimum or mandatory requirements, the policy rationale is still applicable here where one bidder challenges the determination by GLWA that a second bidder met GLWA's minimum requirements. Consistent with the rationale expressed in response to the initial bid protest, GLWA has reserved onto itself the right to determine which bidders meet and which bidders do not meet its requirements and, having done so, GLWA holds the responsibility to manage any resulting contract. Put simply, it is GLWA's responsibility to hold a selected vendor to the terms of its bid. Further, it should be noted that in its November 14th letter, (Exhibit "E"), Tooles asserts that its pricing is not unbalanced but is based on "proprietary technology and approach." GLWA's Procurement Team has already determined that Tooles pricing met the terms of the RFB. Here, where

⁴ Despite the fact that L. D'Agostini's letter was submitted prematurely to qualify as a "bid protest" under GLWA's Procurement Policy because GLWA had not yet made "an award" on the RFB, GLWA still investigated the allegations contained therein and treated the letter as a Bid Protest for purposes of its Procurement Policy's

Procurement Team having made a determination that both responses to the RFB should be considered, this writer sees no need to reverse Procurement's determination.

2) Did GLWA's conduct in reviewing the claims raised in Tooles November 14, 2017, letter deprive L. D'Agostini of a right of due process?

A) *Due Process Generally*

Both the United States and Michigan Constitution guarantee that individuals not be deprived of property without due process of law. See for example, *Cleveland Board of Education v Loudermill*, 470 US 532; 105 SCt 1487, 84 Led2d 494 (1985). In *Shoemaker v City of Howell*, 795 F2d 553 (2015), the court explained the right of due process as follows: "At its essence, due process can be summarized as "the requirement that a person ... be given notice of the case against him and [an] opportunity to meet it. *Mathews v. Eldridge*, 424 U.S. 319, 348-49, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-172, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring)) (internal quotation marks and alteration omitted)."

On November 9, 2017, GLWA sent a Notice of Intent to Award to L. D'Agostini (Exhibit "D"). Copies of this Notice of Intent to Award were sent to all bidders. When Tooles, the low bidder on the RFB, received this Notice of Intent to Award to L. D'Agostini, Tooles sent a letter to GLWA asking, amongst other things, why its bid was not considered the lowest responsive bid. (Exhibit "E.") Upon review of this letter and the process, GLWA determined that the Notice of Intent to Award the contract to L. D'Agostini was in error and posted a revised Notice of Intent to award the contract resulting from the RFB to Tooles. (Exhibit "F.")

B) *Due Process Requires a Property Right*

The first question, is whether L. D'Agostini has a property interest that would give rise to a due process claim. Michigan law is very clear that a disappointed bidder does not have a right to sue a public body over its award decision⁵. *Cedroni Associates v Tomblinson*, 492 Mich 40(2012).

While *Cedroni* initially appears to be dispositive of L. D'Agostini's due process claim, the bid protest can be construed to assert that L. D'Agostini acquired a property right when it received a Notice of Intent to Award from GLWA. (Exhibit "D.") For this argument to succeed, the language of that Notice would have to be construed as a final determination of an award. Two factors prevent such a conclusion: 1) The RFB was conducted pursuant to GLWA's Procurement Policy which indicates that a contract of this value requires approval of GLWA's Board of Directors; and 2) the following language from the Notice of Intent to Award, (Exhibit "D") makes clear that it is not a contract or even a final determination: "

This notice is subject to successful contract formation which may include negotiations resulting in execution of a written contract. As a result, this notice does NOT constitute the execution of a contract between GLWA and the written contractor. GLWA reserves the right to cancel this notice of intent to finalize a contract at any

⁵ Ironically in *Cedroni Associates* the Michigan Supreme Court indicated that there was no right of recovery for the

conditional upon final approval by GLWA Board.

The language of the Notice makes clear that it is conditional. As such, it does not constitute a contract nor does it create a property right necessary to support a right of due process. In *EBI-Detroit, Inc. v City of Detroit, et al*, 476 F Supp2d 651 (2007), the court considered whether the City of Detroit's Water and Sewerage Department's issuance of a notice of intent to award a contract, which was subsequently withdrawn, gave rise to a cause of action. The court concluded that it did not.

Because the Notice of Intent to Award issued by GLWA does not create a contractual relationship, L. D'Agostini does not have a property interest sufficient to require due process.

C) Even if not Required, the Due Process Standard was Met

As indicated in the earlier citation to *Shoemaker v City of Howell*, at its core a right of due process requires notice and an opportunity to be heard. Here, both criteria are met. L. D'Agostini clearly had notice of the revised Intent to Award (Exhibit "F") as that Notice caused it to file a bid protest. Similarly, L. D'Agostini has been given an opportunity to be heard,⁶ its bid protest was first considered and reviewed by GLWA's Chief Procurement Officer and now by this writer. Regardless of whether L. D'Agostini was entitled to due process, it has received it with respect to this RFB.

3) Was GLWA's decision to review the claims raised in Tooles November 14 letter (Exhibit E) and its subsequent decision to issue a revised Notice of Intent to Award (Exhibit F) inconsistent with the promotion of fairness and integrity in the procurement process?

This RFB has been re-issued by GLWA in an attempt to ensure that all potential vendors had access to similar information. These actions reflect the effort that GLWA and its Procurement Team have taken to safeguard the integrity of the process. In the last and current issuances of the RFB, Tooles has been the low bidder by a margin of approximately \$1 million dollars. In this case, it appears that the initial Notice of Intent to Award (Exhibit "D") was sent in error before the evaluative process for the RFB was completed. When GLWA discovered this error, it was corrected.

In its bid protest appeal letter, L. D'Agostini also asserts the process was not fair because it did not have the opportunity to meet with GLWA staff prior to the revised Notice of Intent to Award (Exhibit "F") to demonstrate why Tooles' bid was "unbalanced" and therefore did not meet minimum requirements of the RFB. Earlier, it has been indicated that where two entities are responding to a single solicitation, one proposer does not have a right to review and advise on the other proposer's response. Moreover, from a process integrity perspective, such a practice would not be acceptable. It is hard to posit a situation where one vendor would not find their own proposal superior to the others' and would point out "concerns" with those other responses. This is precisely the reason that GLWA utilizes procurement professionals who can balance the needs and expectations of all involved in order to protect the process integrity. GLWA staff's action to correct an error in the process for this RFB is consistent with the fairness standards of GLWA's Procurement Policy.

L. D'Agostini's Bid Protest Appeal is denied. The GLWA Chief Procurement Officer may resume the contract award process and implementation. Pursuant to Section 6.2(d) of the GLWA Procurement Policy, this determination is final for the GLWA.

Sincerely,

A handwritten signature in black ink, appearing to read "William M. Wolfson". The signature is fluid and cursive, with the first name "William" and last name "Wolfson" being the most prominent parts.

William M. Wolfson
Chief Administrative and Compliance Officer

Exhibit A

L. D'Agostini & Sons, Inc.

December 18, 2017

Gaylor "Butch" Johnson
Chief Procurement Officer
Financial Services Group, Procurement
Great Lakes Water Authority
735 Randolph Room 1510
Detroit, Michigan 48226

VIA E-MAIL and CERTIFIED MAIL, RRR

RE: RFB GLWA-WS-695C ("project")
Protest of REVISED Notice of Intent to Award

Dear Mr. Johnson:

On November 9, 2017, GLWA published its Notice of Intent to Award for the project. The notice indicated that the "*evaluation has been completed*" and GLWA is hereby announcing its intent to award a contract" to L. D'Agostini & Sons, Inc ("LDS") (emphasis supplied). Based on this notice, LDS had a valid business expectancy. However, more than a month later on December 15, GLWA published a "REVISED Notice of Intent to Award," which now indicates that GLWA intends to award the project to Toolles Contracting Group ("TCG").

LDS protests this REVISED Notice of Intent to Award on two separate grounds. First, GLWA's bidding instructions indicate that unbalanced bids are grounds for rejection. See Instructions to Vendors, Article 7.1.8. Further, Article 6.1 mandates that GLWA notify the bidder that submits the "lowest bid *conforming in all material respects* with the requirements of the RFB that it is the bidder under consideration for award" (emphasis supplied). Upon review of TCG's bid, TCG's unit prices are heavily unbalanced. Although TCG has over \$4,000 per valve for inspection and reporting, its unit prices for valve exercising range from \$295 to \$640 per valve. It is readily apparent that TCG's valve exercising bid items do not account for the amount of work involved in exercising each valve. Therefore, TCG's unit prices are unbalanced and TCG's bid fails to conform in all material respects with the RFB requirements. If GLWA awards this project to TCG, GLWA is effectively authorizing its vendors to ignore GLWA's bid instructions and submit unbalanced bids.

Second, because the bid evaluation for the project was completed and subsequently re-opened at TCG's request without LDS's involvement, GLWA failed to provide LDS adequate due process and violated its own procurement policy by failing to adhere to its chief goal of promoting open and fair competition. It is our understanding that upon TCG's request, representatives from GLWA met with representatives from TCG and based upon that meeting, GLWA re-opened its evaluation and revised its notice of intent to award the project to TCG. LDS was not notified that the evaluation had been re-opened or that GLWA was scheduled to meet with TCG. These private

December 18, 2017

negotiations between bidders and GLWA is the exact type of behavior GLWA's procurement policy intends to prohibit.

Based upon the foregoing grounds,¹ LDS requests that GLWA rescind the REVISED Notice of Intent to Award and re-publish its initial notice intending to award the project to LDS.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

L. D'AGOSTINI & SONS, INC.



Michael D'Agostini
Secretary/Treasurer

Cc: Daniel Edwards, Construction & Contract Services Manager (VIA E-MAIL ONLY)
Ian Thompson, P.E., Owners Representative Engineer (VIA E-MAIL ONLY)
Sonya Collins, Procurement Specialist (VIA E-MAIL ONLY)
Randal Brown, Esq., General Counsel (VIA E-MAIL ONLY)
Robert D'Agostini, President of L. D'Agostini & Sons, Inc. (VIA E-MAIL ONLY)

¹ The above-referenced grounds that LDS bases its protest on are not meant to be exhaustive. Therefore, LDS reserves its right to supplement this notice of protest at a later date.

Exhibit B



Detroit, Michigan 48226
Phone: 313-964-9157

January 4, 2018

Mr. Michael D'Agostini
Secretary/Treasurer
L. D'Agostini and Sons, Inc.
15801 23 Mile Rd
Macomb Township, MI 48042

RE: WS-695C "Valve Exercising" Bid Protest

Dear Mr. D'Agostini:

The Great Lakes Water Authority (GLWA) is in receipt of L. D'Agostini and Sons, Inc.'s December 18, 2017 letter regarding RFB GLWA-WS-695C. After reviewing of L. D'Agostini and Sons, Inc.'s correspondence and investigating this bid protest, L. D'Agostini and Sons, Inc.'s bid protest is rejected. Pursuant to the RFB, GLWA must select the lowest responsive and responsible bid, confirming in all material respects with the requested RFB. Here, Tooloes Contracting Group was the lowest bidder.

Similar to L. D'Agostini and Sons, Inc.'s current protest, Tooloes Contracting Group challenged the November 9, 2017 Notice of Intent to Award to L. D'Agostini and Sons, Inc.'s. GLWA investigated the matter and determined that Tooloes Contracting Group was the lowest most responsive and responsible bidder. GLWA's investigation included a thorough review of Tooloes Contracting Group's Bid Schedule, including whether it was unbalanced. GLWA determined that Tooloes Contracting Group's bid was not unbalanced. Further, Tooloes Contracting Group bears the risk if its bid is unbalanced. If the contract is (1) approved by GLWA's Board and (2) fully executed by both parties, Tooloes Contracting Group will be bound by terms and conditions of the contract, including the pricing that it quoted in its Bid Schedule without any modifications.

L. D'Agostini and Sons, Inc.'s letter suggests that it should have participated in GLWA's investigation into whether Tooloes Contracting Group's bid was the lowest responsive and responsible bid. Neither GLWA Procurement Policy nor this RFB requires GLWA to engage other bidders in its bid investigations.

L. D'Agostini and Sons, Inc.'s letter also suggests that it had a valid business expectancy based on a Notice of Intent to Award. This claim fails for several reasons. First, GLWA's Board did not approve a valve exercising contract with L. D'Agostini and Sons, Inc. Second, L. D'Agostini and Sons, Inc. does not have a fully executed and enforceable contract with GLWA for valve exercising. Certainly, a Notice

of Intent to Award did not create an enforceable contract. Third, this RFB would have resulted in a task order contract, meaning work is only completed at the request of GLWA. GLWA never requested that L. D'Agostini and Sons, Inc. complete any portion of the proposed Scope of Work.

GLWA believes that its actions related to this RFB were appropriate and consistent with the Procurement Policy and this RFB. As noted in the Procurement Policy, L. D'Agostini and Sons, Inc. has the right to appeal my determination to Mr. William Wolfson, GLWA's Chief Compliance and Administrative Officer. Although L. D'Agostini and Sons, Inc. may disagree with GLWA's decision related to this RFB, GLWA sincerely hopes that L. D'Agostini and Sons, Inc. considers submitting responses to future competitive bids.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gaylor Johnson".

Gaylor Johnson
Chief Procurement Officer

Gj/dte/rb

Exhibit C

that is fair and open and it is therefore strongly implied that especially under these circumstances, GLWA engage both TCG and LDS prior to making its decision.

Second, Mr. Johnson has concluded without any discussion that TCG's bid is balanced. However, based upon the valve exercising unit pricing, TCG's bid is unquestionably heavily unbalanced. How can TCG exercise a 24" valve for \$295.00? If TCG planned on including the appropriate level of labor and time associated with exercising each valve, then this unit price is materially understated. TCG also materially understates its unit pricing for item nos. 3 through 6 for the same reason. LDS engaged expertise in valve exercising specifically with experience in the Detroit water system in order to come to this conclusion. As such, TCG's bid has failed to conform in all material respects with the RFB requirements and TCG is therefore not a responsive vendor pursuant to Section 1.9(s) of the GLWA procurement policy and the Project's RFB.

Because LDS was notified of GLWA's intent to award the Project to LDS and LDS is the lowest responsive and responsible bidder for the Project, LDS has a valid business expectancy.¹ As such, LDS seeks rescission of GLWA's REVISED notice of intent to award the Project to TCG and award the Project to LDS. If GLWA is not inclined to award the Project, then LDS requests GLWA to at least re-bid the Project to safeguard the integrity of the bidding process.

Very truly yours,

L. D'AGOSTINI & SONS, INC.



Keith A. McLean
Corporate Counsel

Enclosure

Cc:	Gerald Moore	(VIA E-MAIL ONLY)
	Michael D'Agostini	(VIA E-MAIL ONLY)
	Robert D'Agostini	(VIA E-MAIL ONLY)
	Daniel Edwards	(VIA E-MAIL ONLY)
	Sonya Collins	(VIA E-MAIL ONLY)
	Randal Brown, Esq.	(VIA E-MAIL ONLY)
	Nicolette Bateson	(VIA E-MAIL ONLY)

¹ Although GLWA downplays the importance of issuing a notice of intent to award a contract, it is worth noting that, in practice, once a notice of intent is issued, a contractor does not expect to lose a contract unless it cannot provide adequate bonds and insurance. Because LDS can provide adequate bonds and insurance, it expected to receive the Project contract. Further, regardless of whether WS-695C is a task order contract, GLWA would not go through all the preparation work for letting a contract for bid if it did not intend on authorizing work to be performed by its vendor.

December 18, 2017

Gaylor "Butch" Johnson
Chief Procurement Officer
Financial Services Group, Procurement
Great Lakes Water Authority
735 Randolph Room 1510
Detroit, Michigan 48226

VIA E-MAIL and CERTIFIED MAIL, RRR

RE: RFB GLWA-WS-695C ("project")
Protest of REVISED Notice of Intent to Award

Dear Mr. Johnson:

On November 9, 2017, GLWA published its Notice of Intent to Award for the project. The notice indicated that the "*evaluation has been completed* and GLWA is hereby announcing its intent to award a contract" to L. D'Agostini & Sons, Inc ("LDS") (emphasis supplied). Based on this notice, LDS had a valid business expectancy. However, more than a month later on December 15, GLWA published a "REVISED Notice of Intent to Award," which now indicates that GLWA intends to award the project to Tooles Contracting Group ("TCG").

LDS protests this REVISED Notice of Intent to Award on two separate grounds. First, GLWA's bidding instructions indicate that unbalanced bids are grounds for rejection. See Instructions to Vendors, Article 7.1.8. Further, Article 6.1 mandates that GLWA notify the bidder that submits the "lowest bid *conforming in all material respects* with the requirements of the RFB that it is the bidder under consideration for award" (emphasis supplied). Upon review of TCG's bid, TCG's unit prices are heavily unbalanced. Although TCG has over \$4,000 per valve for inspection and reporting, its unit prices for valve exercising range from \$295 to \$640 per valve. It is readily apparent that TCG's valve exercising bid items do not account for the amount of work involved in exercising each valve. Therefore, TCG's unit prices are unbalanced and TCG's bid fails to conform in all material respects with the RFB requirements. If GLWA awards this project to TCG, GLWA is effectively authorizing its vendors to ignore GLWA's bid instructions and submit unbalanced bids.

Second, because the bid evaluation for the project was completed and subsequently re-opened at TCG's request without LDS's involvement, GLWA failed to provide LDS adequate due process and violated its own procurement policy by failing to adhere to its chief goal of promoting open and fair competition. It is our understanding that upon TCG's request, representatives from GLWA met with representatives from TCG and based upon that meeting, GLWA re-opened its evaluation and revised its notice of intent to award the project to TCG. LDS was not notified that the evaluation had been re-opened or that GLWA was scheduled to meet with TCG. These private

negotiations between bidders and GLWA is the exact type of behavior GLWA's procurement policy intends to prohibit.

Based upon the foregoing grounds,¹ LDS requests that GLWA rescind the REVISED Notice of Intent to Award and re-publish its initial notice intending to award the project to LDS.

If you have any questions, please do not hesitate to contact the undersigned.

Very truly yours,

L. D'AGOSTINI & SONS, INC.



Michael D'Agostini
Secretary/Treasurer

Cc: Daniel Edwards, Construction & Contract Services Manager (VIA E-MAIL ONLY)
Ian Thompson, P.E., Owners Representative Engineer (VIA E-MAIL ONLY)
Sonya Collins, Procurement Specialist (VIA E-MAIL ONLY)
Randal Brown, Esq., General Counsel (VIA E-MAIL ONLY)
Robert D'Agostini, President of L. D'Agostini & Sons, Inc. (VIA E-MAIL ONLY)

¹ The above-referenced grounds that LDS bases its protest on are not meant to be exhaustive. Therefore, LDS reserves its right to supplement this notice of protest at a later date.

Exhibit D



Date: November 9, 2017

From: Gerald Moore, Procurement Administrative Analyst

**Reference: RFB GLWA-WS-695C
Valve Exercising Water System Transmission Main**

Subject: Notice of Intent to Award

Dear Bidders:

This letter is in regard to the subject Request for Bid (RFB), issued by the Great Lakes Water Authority (GLWA).

The evaluation has been completed and GLWA is hereby announcing its intent to award a contract award to the following contractor:

- L. D'Agostini and Sons, Inc.

This notice is subject to successful contract formation which may include negotiations resulting in execution of a written contract. As a result, this notice does NOT constitute the execution of a contract between GLWA and the recommended contractor. GLWA reserves the right to cancel this notice of intent to finalize a contract at any time prior to the execution of a written contract. This award decision may be conditional upon final approval by GLWA Board.

If at any time GLWA determines contract formation efforts are unproductive or unfavorable, GLWA reserves the right to cease further efforts and enter into contract formation with another qualified contractor.

The selected contractor is instructed not to begin work, purchase materials, or enter into any contracts with subcontractors relating to the project until a contract is fully executed (signed by both the contractor and GLWA).

GLWA extends its sincere appreciation to all efforts made in responding to this solicitation.

Exhibit E

535 GRISWOLD
SUITE 2550
DETROIT, MI 48226
T: 313.221.8500 | F: 313.221.8502
WWW.TOOLESGROUP.COM

November 14, 2017

Mr. Gaylor Butch Johnson
Chief Procurement Officer
Great Lakes Water Authority
735 Randolph
Detroit, MI 48226

RE: Bid Protest of Contract WS-695C – Valve Exercising

Dear Mr. Johnson:

Pursuant to Section 6.2 of the Great Lakes Water Authority (“GLWA”) Procurement Policy, I am writing to formally protest the GLWA Recommendation of Award Letter to L. D’Agostini and Sons, Inc. I received the November 9, 2017 letter indicating the Authority’s notice of intent to award despite Tooles Contracting Group (“Tooles”) being the low bidder on this Request for Bids by a wide margin.

By way of background, this is the fourth re-bid of the Valve Exercising RFB. The first time around, the RFB was issued by the DWSD and subsequently canceled as the GLWA assumed responsibility of the work. In the second re-bid, the RFB was rescinded by the GLWA because of a lack of clarity and identification of quantities to be considered by the prospective bidders, as well as a missing quantification of the provisional allowance necessary to address unforeseen conditions and alleviate contractors’ risk. In the third bid, Tooles was the low bidder by a substantial margin. In our discussion of the specifics of our unit prices during the June 7, 2017 pre-award meeting with the GLWA Project Team, we noted that our bid was based on certain assumptions regarding the schedule. During the course of the meeting, the GLWA indicated that there would be a four-month mandatory annual shutdown period where no valve exercising work could occur (May 15th through September 15th). Nevertheless, despite the fact that Tooles’ revised bid (taking into account the desired schedule) was still the low bid, the GLWA decided to re-bid the RFB a fourth time.

In this fourth attempt to solicit a vendor for the valve exercising project, there were a total of five bidders. Tooles was again the low bidder, and again by a wide margin. The Tooles bid was approximately \$3.7 million, while D’Agostini was \$4.7 million, OHM was \$4.9 million, Bricco was just under \$5 million, and DCI was just under \$5.5 million.

The Tooles bid includes Wachs Water Services (“Wachs”) as its subcontractor and Wachs is the preeminent subcontractor in the valve exercising space. Its proprietary technology and approach allowed Tooles to submit a vastly superior bid to the other vendors and it is quite surprising that the GLWA procurement staff would bypass our bid in favor of a vendor who is more than 25% more expensive at an increased cost of more than \$1 million. Given that this is the fourth re-bid of the same

project, it should have been clear to all involved that Tooles has consistently been able to propose at a lower cost than the other vendors for this work. Considering the strong history of positive performance by Tooles as a GLWA vendor, I would respectfully suggest that there is no reason to summarily reject Tooles' bid in favor of a substantially more expensive vendor.

It is worth noting that the Tooles bid, in this fourth re-bid, is consistent with the Tooles revised bid in the third re-bid (after we were advised of the proposed GLWA schedule). The fact that the bids are consistent and that GLWA did not previously raise any concerns with the Tooles approach and/or pricing makes it even more puzzling that the GLWA would by-pass the low bid in favor of a significantly more expensive vendor.

We are prepared to offer GLWA a tour of this successful valve exercising approach at other sites where Wachs is currently operating so that you become fully comfortable with our approach. We appreciate your prompt attention to this protest and stand ready to offer any other information that you may need during your deliberations.

Very Truly Yours,
Tooles Contracting Group, LLC

A handwritten signature in blue ink, appearing to read "Damon Tooles", with a long, sweeping underline that extends to the right and then curves downwards.

Damon Tooles,
President

Exhibit F



Date: December 15, 2017

From: Gerald Moore, Procurement Administrative Analyst

**Reference: RFB GLWA-WS-695C
Valve Exercising Water System Transmission Main**

Subject: REVISED Notice of Intent to Award

Dear Bidders:

This letter is in regard to the subject Request for Bid (RFB), issued by the Great Lakes Water Authority (GLWA).

The evaluation has been completed and GLWA is hereby announcing its intent to award a contract award to the following contractor:

- Tooles Contracting Group

This notice is subject to successful contract formation which may include negotiations resulting in execution of a written contract. As a result, this notice does NOT constitute the execution of a contract between GLWA and the recommended contractor. GLWA reserves the right to cancel this notice of intent to finalize a contract at any time prior to the execution of a written contract. This award decision may be conditional upon final approval by GLWA Board.

If at any time GLWA determines contract formation efforts are unproductive or unfavorable, GLWA reserves the right to cease further efforts and enter into contract formation with another qualified contractor.

The selected contractor is instructed not to begin work, purchase materials, or enter into any contracts with subcontractors relating to the project until a contract is fully executed (signed by both the contractor and GLWA).

GLWA extends its sincere appreciation to all efforts made in responding to this solicitation.