



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

Charles W. Thompson, Jr.  
County Attorney

CONFIDENTIAL AND PRIVILEGED-ATTORNEY/CLIENT COMMUNICATION

MEMORANDUM

TO: Beatrice P. Tignor, Director  
Office of Procurement

Pamela A. Jones  
Office of Procurement

FROM: Richard H. Melnick *RHM*  
Associate County Attorney

DATE: June 14, 2005

RE: *IFB #5721101002- Notification Per Section 11B-50 of County Code*

This memorandum concerns the following items in the above-reference matter: (1) the Office of Procurement's memorandum of notification; (2) Pam Jones's follow-up e-mail stating the factual basis for the memorandum; (3) the letters this Office sent to the two vendors at issue; (4) the response to those letters on behalf of both vendors, received from George Rose, Vice-President, Customer Relations, Fitzgerald Auto Malls, on May 27, 2005, as well as a telephone conversation I had with Mr. Rose on May 24, 2005; and, (5) the subsequent discussion between Pam Jones and me, on June 3, 2005.

During our conversation, Pam and I discussed the circumstances that led to the Office of Procurement's suspicion of collusion, this Office's letter, and George Rose's letter, on behalf of both All Car Leasing, Inc. (All Car), and DMF Leasing, Inc. (DMF). We discussed the factual background provided in Mr. Rose's letter. In particular, Mr. Rose pointed out that All Car and DMF, as well as the Fitzgerald Auto Malls, are subsidiaries of the parent corporation known as JJF Management Services, Inc. (JJF). He explained that DMF is doing business as a franchisee of Budget Rent-A-Car (Budget), and that Budget is presently attempting to terminate that franchise. As a result, JJF has been having both All Car and DMF submit bids, for this and other solicitations, in the name of both companies, in case Budget ultimately terminates DMF's franchise. Furthermore, Mr. Rose explained that All Car submitted a slightly higher bid than DMF, because All Car has less of a presence and brand recognition in this County.

Regarding Mr. Rose's letter at paragraph 2, sentences 3 and 4, Mr. Rose asked if a company submitting multiple bids violates IFB Section A., paragraph 8, "Alternate Offers,"

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which states, "Bidders must bid only one (1) product and one (1) price per bid item even though they feel they can offer more than one item that will meet the specifications . . . [, and a violation of this may be] cause for the item or items bid upon to be considered non-responsive and rejected." Mr. Rose apologized if the vendors in this matter violated this provision. I told Mr. Rose that one vendor ordinarily submits one bid regarding the same solicitation; but, I noted that the two vendors in this matter are separate corporations (albeit, subsidiaries of the same parent corporation), and each may submit a separate bid without implicating this provision. I explained that the issue in this case is not whether one bidder is non-responsive because it submitted multiple bids. Instead, the factual circumstances surrounding the two bids created a suspicion of collusion that may impact, among other things, the responsibility determination regarding one or both vendors. And Mr. Rose acknowledged that such a suspicion was reasonable, given the limited facts known by Procurement at the time.

Pam considered the explanation provided in Mr. Rose's letter, and we discussed the concept of collusion. The County law and applicable regulation do not define "collusion." The Maryland Court of Appeals has addressed the need to prevent collusion in numerous settings, including divorce, estate, insurance, and evidentiary contexts. *See, e.g. Maranto v. Maranto*, 192 Md. 214, 64 A.2d 144 (1949) (upholding a divorce, finding no collusion, and noting the importance of the statutory corroboration of evidence requirement to prevent collusion). Also, the Maryland Procurement Law includes a provision similar to County Code, §11B-50, prohibiting collusive bidding in State solicitations. The State provision is somewhat more specific as to the statutory violation and remedy, but also does not define the term "collusion". *See Md. Fin. & Proc. Code Ann., §11-205(b)* (2001 Repl Vol.) ("A person who, for the purpose of defrauding the State, acts in collusion with another person in connection with the procurement process is liable for damages equal to 3 times the value of the loss to the State that is attributable to the collusion").

Courts have defined the term "collusion," in various settings, as "[a]n agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It implies the existence of fraud of some kind, the employment of fraudulent means, or of lawful means for the accomplishment of an unlawful purpose." *See, e.g., Dynamic Marine Consortium, S.A. v. Latini MV*, 179 F. 3d 278 (5<sup>th</sup> Cir. 1999) (citations omitted) (setting aside an auction sale based on collusion); *Carlson v. Zellaha*, 482 N.W.2d 281 (Neb. 1992) (citations omitted) (setting aside a consent judgment obtained by collusion); *Black's Law Dictionary*, p. 264 (6<sup>th</sup> ed. 1990). Collusion has also been defined as "a secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law in order to defraud a third person, or to obtain that which justice would not give them. *See, e.g., Higgins v. Trauger*, 656 N.W.2d 9 (N.D. 2003) (citations omitted) (finding collusion by parties to acquire property free of other party's interest, in violation of law). Furthermore, that which constitutes collusion will differ with each fact

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situation. And, while collusion does not necessarily require a showing of fraudulent conduct, the burden of proof rests with the party asserting that collusion has occurred. *See, e.g., id.* at 10. Pam noted that the two vendors, who appeared to be competing against one another, may have communicated with one another regarding their bids. However, the facts show no intent to defraud, commit a lawful act for an unlawful purpose, or commit an unlawful act, to support a finding of collusion.

Courts have held that the effect of collusive bidding is usually an increase in the price paid by the government under the resulting contract. *See United States v. Tieger*, 234 F.2d 589 (3<sup>rd</sup> Cir. 1956), cert denied 352 U.S. 941 (1956) (relating to a payment dispute under the False Claims Act). Conversely, in the instant case, both of the bids from All Car and DMF were at least \$30,000 lower than the other bid submitted. Consequently, any communication by or between All Car and DMF, or similarities in their bids, do not appear to have increased the cost to be paid by the County under a resulting contract. Moreover, for the same reason, the County does not appear to have been hurt financially by the bidders' behavior in this instance. *See United States v. Farina*, 153 F.Supp. 819 (D.N.J. 1957). Also, absent further information that would be both wholly inconsistent with Mr. Rose's explanation, and beyond any implication suggested by the facts that originated the suspicion of collusion, the Office of Procurement presently has no reason to believe the bidders are engaged in fraud or illegal anti-competitive behavior, or that the County is being deceived into entering into a contract. *See United States ex rel. Weinstein v. Bressler*, 60 F.Supp. 676 (S.D. N.Y. 1945).

After discussions with this Office, and after considering all events and correspondence in this matter, Pam Jones, on behalf of the Office of Procurement, stated that: (a) Mr. Rose's letter, on behalf of All Car and DMF, provided the factual background necessary to explain the circumstances upon which the suspicion of collusion originally arose; (b) Mr. Rose's explanation appears to be reasonable; (c) the Office of Procurement no longer suspects collusion; (d) All Car and DMF appear to be responsible bidders; (e) the solicitation process should proceed based on the results of the bid scoring; and (f) accordingly, the Office of Procurement plans to post All Car as the proposed awardee in this matter.

On a final note, in accordance with the Procurement Regulations and other applicable law, including that related to limitations periods for a cause of action, I advise that you retain all documents related to this solicitation for a period of no less than four (4) years from the date of contract award.

cc: Marc P. Hansen, Chief, Division of General Counsel