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**VIA ELECTRONIC MAIL richard.riebeling@nashville.gov
AND HAND DELIVERY**

Richard M. Riebeling
Finance Director
Metropolitan Government of Nashville and
Davidson County
106 Metro Courthouse
Nashville, TN 37201

**RE: Appeal of Nashville Metro Purchasing Agent's November 7, 2014 Decision on
Insituform Technologies, LLC Bid Protest of RFQ 629873
Shelby Park Rehabilitation - Area 3 – Greenland Avenue**

Dear Mr. Riebeling:

In accordance with Title 4, section 4.36.110 of the Nashville and Davidson County Procurement Code ("Procurement Code") and the Rules of the Procurement Appeals Board, as amended, Insituform Technologies, LLC ("Insituform") hereby submits its appeal of the Metro Government of Nashville and Davidson County ("Nashville Metro") Purchasing Agent's ("Purchasing Agent") November 7, 2014 Protest Decision ("Decision") to dismiss Insituform's October 16, 2014 Bid Protest¹ ("Bid Protest"). (A copy of the Decision is attached hereto as Exhibit 1 and incorporated herein by this reference). Insituform received a pdf copy of the Decision on November 7, 2014 via an email from the Purchasing Agent to the undersigned. In the Decision the Purchasing Agent made two Findings:

1. That Layne's failure to list all of Layne's subcontractors on the Subcontractor Report submitted on the September 25, 2014 Bid Date was not a basis for finding Layne's Bid non-responsive.
2. That Layne's alleged Small Business Enterprise ("SBE") Participation amount of \$3,749,188 was "valid" even though the amount (a) contained \$225,000 in Allowance items; and (b) a substantial portion of the subcontract amount attributed to CraftCo,

¹ The first page of the October 16th Bid Protest was erroneously dated 2013.

LLC (“CraftCo”) would actually be performed by an unnamed subcontractor to CraftCo.

As set forth in more detail below, both of the Findings were in error and must be overturned because both Findings are not supported by the clear and unambiguous language in the August 26, 2014 Request for Quotation 629873 (the “Solicitation”) which had set forth all of the requirements for the Solicitation for Shelby Park Area 3 Construction (the “Project”):

1. Finding No. 1 must be overturned because the Solicitation clearly and unambiguously required that all subcontractors were to be listed on the appropriate form and were to be attached to the Offeror’s solicitation on a “Subcontractor Form²” submitted with the Offeror’s Bid on the Bid Date. It is important to understand that the Solicitation does not make any distinction between what is commonly referred to as a “first tier” subcontractor, i.e. one with a direct subcontract with the Prime Contractor (Layne) and what is commonly referred to as a “second tier” subcontractor, i.e. a subcontractor (2nd tier) to a first tier subcontractor (1st tier) which has a direct subcontract with the Prime Contractor (Layne). At the October 31st Hearing, the Purchasing Agent acknowledged that MWS’ use of the term “Subcontractor” would encompass subcontractors at any tier.
2. Finding No. 2 must be overturned because the Solicitation clearly stated that an SBE entity should only be given SBE credit for work the SBE entity would “self-perform” itself – this requirement appears to have been ignored or overlooked by the Purchasing Agent. The Purchasing Agent devotes a considerable portion of the Decision voicing concern that the “expansion” of an SBE’s services as a “growth strategy,” which the Purchasing Agent has approved for Layne, should be somehow prohibited by the Business Assistance Office (“BAO”) at some undefined time in the future. We believe this focus failed to account for the requirement of self-performance which had already been clearly set forth in the Solicitation.
3. Having reached both incorrect Findings, the Decision then failed to address the need to recalculate, per the clear and unambiguous language in the Solicitation, the SBE Participation amount for Layne, which would have resulted in Insituform being determined to be the lowest responsive and responsible bidder. As such, the Award to Layne should have been vacated and the Project Contract Awarded to Insituform as the lowest responsive and responsible bidder.

² Although the RFQ uses the term “Subcontractor Form,” Nashville Metro used the term “Subcontractor Report” when it provided copies of the Offerors’ bid documents. For clarity, this letter will continue to use the term “Subcontractor Report.”

Background of Insituform's Bid Protest

Pursuant to MWS' August 26, 2014 Solicitation, on September 25, 2014 (the "Bid Date") three (3) Offerors, Insituform, SAK Construction, LLC ("SAK") and Layne Inliner, LLC ("Layne") submitted their bids. SAK submitted the lowest bid at \$5,633,925, however, MWS did not consider SAK's bid because it was determined that SAK failed to meet the minimum requirement for SBE participation. Insituform submitted the next lowest bid at \$5,636,195, however MWS erroneously determined that Layne's \$5,718,975 bid, although \$82,780 higher than Insituform's, was the "apparent low bidder" based upon MWS' incorrect calculation of Layne's SBE participation.

Upon reviewing the bid documents submitted by Layne, Insituform filed its October 16, 2014 Bid Protest. (A copy of Insituform's 10/16/14 Bid Protest, and enclosures, is attached hereto as Exhibit 2 and incorporated herein by reference). One of the major issues outlined in Insituform's Bid Protest was the fact that Layne had only listed two (2) subcontractors on its Subcontractor Report, a document that the Solicitation had required list all of Layne's subcontractors on the Bid Date. Since the lateral lining work on the Project represented forty-two percent (42%) of Layne's bid (\$2,429,750/\$5,718,750) it was important to determine what company would be performing that work. Indeed, the Solicitation had unambiguously required that:

Subcontractors Offeror **must** enter **all subcontractors** on the appropriate form provided as part of the solicitation. The file should be attached to your response in Excel format and named 'Subcontractor Form'. Include any SBE/SDV and MWBE suppliers on this form. (See page 9 of 41 of the Solicitation). (Emphasis added). (A full copy of the Solicitation is attached hereto as Exhibit 3 and incorporated herein by this reference).

On October 17, 2014, the Purchasing Agent emailed Insituform (and presumably Layne) a Notice of Hearing to be conducted on October 31, 2014 regarding Insituform's Bid Protest. A representative from Layne, as well as representatives from Insituform, the BAO, and the Nashville Metro Procurement and Legal Departments attended the Hearing. At the Hearing, for the first time, Insituform learned from the Layne representative that Layne would NOT be self-performing the \$2,429,750 in lateral lining³. Instead, the Layne representative stated that an "unnamed" subcontractor to one of the two subcontractors Layne had listed on its Subcontractor Report, CraftCo, would be doing that work. In the Decision, the Purchasing Agent acknowledges that "While Layne did not identify the subcontractor's identity, Insituform concluded that if it

³ Insituform calculated the amount of lateral lining work in Layne's bid by totaling Bid Items B-10 thru B-15 plus Bid Item B-48 in the CraftCo quote.

were not being self-performed by Layne, it was being provided by Underground Eyes.” (Emphasis added).

When Layne made this admission about a subcontractor that Layne had not included on its Subcontractor Report submitted on the Bid Date, the Purchasing Agent should have immediately determined that Layne’s September 25th Bid had been non-responsive because of Layne’s failure to follow the clear directive in the Solicitation to list all subcontractors. We believe this is a determinative point in this appeal.

In addition, the Purchasing Agent had also allowed Layne to “correct” or “clarify” or “change” its Subcontractor Report/Bid Documents after September 25, 2014 without the grounds to do so. This new information, inappropriately allowed post-bid, however, created an even larger issue. It now appeared beyond a doubt that Layne’s SBE participation had been grossly overstated, which incorrectly resulted in MWS considering Layne to be the “apparent” low bidder.

Based on this “new” subcontractor information learned at the October 31st Hearing, Insituform submitted its Post Hearing Brief to the Purchasing Agent on November 5, 2014. (A copy of Insituform’s Post Hearing Brief is attached hereto as Exhibit 4 and incorporated herein by this reference). In its Post Hearing Brief, Insituform raised the issue that Layne’s SBE participation amount had been incorrectly calculated because that amount had inappropriately included the dollar value of the lateral lining work, to be performed by an unnamed 2nd tier subcontractor to CraftCo, that CraftCo was now unequivocally not going to self-perform. As stated in its Post Hearing Brief, the question as to how SBE participation should be counted when an SBE company is not self-performing the work had already been answered in the Solicitation itself which states, in pertinent part:

Assistance to Small (SBE) and/or Service Disabled Veteran-owned (SDV) Businesses The Metro Procurement Code (§ 4.44) and Regulations (§§ R4.44.020.04) provide options for the Purchasing Agent to include a cost incentive to maximize the participation and performance of approved SBE/SDV businesses. **If the Offeror is an SBE/SDV business, Metro considers [only] the work it [theSBE entity] commits to self-perform.** SBE/SDV businesses included in offers, must be registered online with Metro and approved by the Business Assistance Office prior to the solicitation closing date. (See page 9 of 41 of the Solicitation). (Emphasis added).

Pursuant to the highlighted language above, by logical extension MWS should have only considered the work that CraftCo, an SBE subcontractor, would actually “self-perform.” Thus, it would stand to reason that MWS should not have given Layne 100% SBE participation

for any work that CraftCo would not self-perform, i.e. work that would actually be performed by CraftCo's "unnamed" 2nd tier lateral lining subcontractor. In erroneously determining that Layne was the "apparent" low bidder, MWS had given full SBE credit to Layne for work which Layne admitted at the Hearing CraftCo would not be self-performing. Those facts are clearly established by the Bid Tab that MWS had provided to SAK, Layne and Insituform on October 6th. (See Exhibit 5 attached hereto and incorporated herein by this reference).

On November 3rd the Purchasing Agent, in response to a request from Insituform immediately after the Hearing, provided copies of the subcontractor quotes that CK Masonry and CraftCo had allegedly submitted to Layne prior to the Bid Date⁴. As Insituform stated in much more detail in its Post Hearing Brief, those two subcontract quotes total the \$3,749,188.00 amount shown above in the Original Bid Tab for Layne's SBE Participation amount: \$228,450 for CK Masonry and \$3,520,738 for CraftCo. (Copies of the CK Masonry and CraftCo quotes are included with Insituform's Post Hearing Brief, which has been attached hereto as Exhibit 4).

In Insituform's review of the CraftCo quote, it is clear that under the language on page 9 of the Solicitation that Layne should not have been given full credit of the \$3,520,738 amount because CraftCo will clearly not self-perform both the \$2,429,750 in lateral lining work, Items B-10 thru B-15, and B-48 of CraftCo's quote and the \$225,000 in Allowance Items C-1 thru C-5 therein. As such, MWS should have only given Layne \$1,094,438 in SBE Participation, comprised of \$228,450 for CK Masonry's self-performed work and \$865,988 for CraftCo's self-performed work.

1. Finding No. 1 must be overturned because the Solicitation clearly and unambiguously required that all subcontractors were to be listed on the appropriate form and were to be attached to the Offeror's solicitation on a "Subcontractor Form"⁵ submitted with the Offeror's Bid on the Bid Date.

As set forth above, Layne had clearly failed to list all of its subcontractors on its Subcontractor Report that Layne submitted to MWS on the Bid Date. In addition to the information provided by Layne at the Hearing, through its Public Records Request Insituform has also now learned that MWS had questioned Layne regarding whether Layne's Subcontractor Report was accurate, beginning on September 26th, one day after the Bid Date. (See page 5 of

⁴ Insituform has no way to determine whether the CraftCo quote that was provided to Insituform by the Purchasing Agent had, in fact, been the quote CraftCo submitted to Layne prior to September 25, 2014. It could be that, after Insituform submitted its October 16th Bid Protest, Layne requested that CraftCo provide a "revised" quote to Layne.

⁵ Although the RFQ uses the term "Subcontractor Form," Nashville Metro used the term "Subcontractor Report" when it provided copies of the Offerors' bid documents. For clarity, this letter will continue to use the term "Subcontractor Report."

Exhibit 6, attached hereto and incorporated herein by this reference). Moreover, the email chain between Layne and MWS in Exhibit 6 further establishes that Layne was less than forthcoming about its “true” subcontractors for the Project:

On Page 5 of Exhibit 6, on September 26th Layne “assures” MWS that “Yes, the numbers and that total from the subcontractor form represents the **true amount** of SBE subcontracting we intended to utilize for this project”. (Emphasis added).

On page 4 of Exhibit 6, in a second September 26th email Layne again states that “This should match what our bid reflects after the adjustment is made to input the correct SBE total which we agree should read \$3,749,187.50 and could be found on our Subcontractor form.” (Emphasis added). It is important to note that apparently MWS permitted Layne to “make adjustments” to Layne’s SBE totals after the Bid Date.

On page 3 of Exhibit 6, in an October 9th email MWS appears to still be questioning the SBE participation amount that Layne is claiming and asks “Will you provide a detailed breakdown (include dollar amount in breakdown) of the proposed work being performed by the subcontractors for RFQ# 629873 . . . ? In addition, if there are any additional subcontractors that were not listed on the subcontractor form, but are scheduled to work on the project, I ask that you list those subcontractors and their proposed involvement in the project as well.” (Emphasis added).

On page 3 of Exhibit 6, in its October 10th response to MWS, Layne is purposely vague and says only that “Attached please find the subcontractor quotes we incorporated into our Shelby Park Area 3 bid. The work falling under their scopes is described by the bid items they identified in their quotes.” (Emphasis added).

As already discussed in earlier sections, Layne purposely did not reveal to MWS that CraftCo would not be self-performing the lateral lining work, valued at \$2,429,750, in the “bid items [CraftCo] identified in [its] quote.” Instead, only after MWS had recommended Award of the Project Contract to Layne and not until the October 31st Hearing, did Layne finally provide truthful information, that the “unnamed” 2nd tier subcontractor to CraftCo would actually be performing the \$2.4MM in lateral lining work.

On page 2 of Exhibit 6, in an October 10th email, MWS informed Layne that the Allowance portion of Layne’s Bid, “Items C-1 to C-5 are not allowable items for the 20% threshold for SBE/SDV business participation. It is stated in the solicitation. The total allowance amount of \$250,000.00 must be removed from the SBE participation.” (Emphasis added). It is interesting to note that apparently neither Layne nor MWS ever removed the

\$225,000 from Layne's SBE participation amount – at least Insituform has never been provided with an “updated” Bid Tab from MWS with any adjustment.

At the October 31st Hearing, the Purchasing Agent was informed by Layne's representative that an “unnamed” 2nd tier subcontractor to CraftCo would be performing the lateral lining work. With that information, the Purchasing Agent should have made a Finding that Layne's Bid was non-responsive because Layne had failed to comply with the Subcontractor Listing requirement in the Solicitation. Indeed, at the October 31st Hearing the Purchasing Agent stated that NWS does not make any distinction between 1st tier, and lower tier, “Subcontractors.” Given the clear and unambiguous language in the Solicitation and Layne's admitted failure to list the “unnamed” 2nd tier lateral lining Subcontractor, Finding No.1 of the Decision must be overturned. After overturning Finding No. 1, the Appeals Board must also deem Layne's bid as non-responsive and award the Project Contract to Insituform as the lowest responsive and responsible bidder.

2. Finding No. 2 must be overturned because the Solicitation clearly stated that an SBE entity should only be given SBE credit for work the SBE entity would “self-perform” itself.

Insituform, in its Post Hearing Brief, had established that the Solicitation clearly only allowed work to be “self-performed” by an SBE entity to be counted towards the SBE Participation amount. In fact, MWS had already gone on record with Layne that the \$225,000 in Allowance Items could not be counted towards the SBE participation. In the Decision, the Purchasing Agent makes reference to the Solicitation, although it would appear that in reaching his Determination, the Purchasing Agent has failed to follow the clear and unambiguous language that only work “self-performed” by an SBE entity could be considered. Instead, the Purchasing Agent introduces a novel concept of CraftCo being “responsible” for the lateral lining work, and that therefore somehow Layne should be given 100% SBE Participation credit for the lateral lining work that will be performed by a 2nd tier subcontractor to CraftCo. The Purchasing Agent's interpretation should be rejected. Under the same concept, an SBE Offeror would, of course, be “responsible” for all work on a Project by any of its subcontractors, without regard for whether those subcontractors qualified as an SBE or not. As clearly established in the Solicitation, MWS had rejected that approach for SBE Offerers. We do not believe there is any justification or rationale as to why an idea that would not be accepted for an SBE Offeror, should somehow be accepted for an SBE subcontractor.

Thus, under the clear directive in the Solicitation (and MWS' October 10th email), MWS failed to follow its own Solicitation when it gave SBE Participation credit to Layne for the \$225,000 in Allowance Items and the \$2,429,750 in lateral lining work that will not be self-performed by CraftCo. Because the Solicitation would not allow SBE Participation credit for

work that an SBE entity was not self-performing, without regard for whether the SBE was “responsible” for the work, Finding No.2 must be overturned. After overturning Finding No. 2, the Appeals Board should direct that MWS recalculate Layne’s SBE Participation by reducing the previously determined \$3,749,188 amount by \$2,654,750 and credit Layne with only \$1,094,438 in SBE Participation. In addition to correcting the erroneous MWS calculation, the Appeals Board will also clearly establish, for all future MWS solicitations, that MWS may only give SBE Participation credit for work an SBE entity will actually self-perform. As such, there would be no need for the BAO to establish any guidelines regarding this issue. Indeed, MWS had already established this protocol in the Solicitation.

We would like to point out that the “erroneous” miscalculation of Layne’s SBE Participation amount was not the fault of MWS personnel. Rather, it was Layne’s deceptive Subcontractor Report and post-Bid emails to MWS that hid the truth as to what entity would be self-performing the lateral lining work. If Layne had been completely truthful in the email exchanges Layne had with MWS in the days following the Bid Date, MWS could have correctly determined that (a) Layne’s Subcontractor Report had failed to list all of Layne’s subcontractors; and (b) Layne should not receive SBE Participation credit for the lateral lining work that Layne had always planned on having the “unnamed” subcontractor perform. It will, of course, be entirely up to the Appeals Board and MWS to determine whether there should be any consequences for Layne’s less than truthful emails.

- 3. After overturning both incorrect Findings, the Appeals Board should then direct MWS to either (a) deem Layne’s Bid as non-responsive for failing to list all of its subcontractors or (b) recalculate, per the clear and unambiguous language in the Solicitation, the SBE Participation amount for Layne and deduct the \$2,654,750 that should not have been included.***

As detailed in the discussions of Findings 1 and 2 above, the Appeals Board should direct MWS to correct its Notice of Award to Layne because Layne’s bid should have been deemed non-responsive for failing to list all of its subcontractors as required in the Solicitation. In the alternative, if the Appeals Board does not deem that Layne’s failure to either list all of its subcontractors or answer the MWS’ questions regarding subcontractors fully and honestly warrants a finding of non-responsiveness, the Appeals Board should then direct that MWS recalculate Layne’s SBE participation per the clear Solicitation language. Based on the Solicitation provision, Layne’s SBE participation should be reduced from the \$3,749,188 amount in the original Bid Tab to \$1,094,428 (\$3,749,188 minus \$2,654,750). As Insituform demonstrated in its Post Hearing Brief, a reduction in SBE Participation for Layne to \$1,094,428 would result in a Revised Bid Tab showing that Layne’s Bid did not meet the minimum SBE Participation for the Bid and that Insituform is the lowest responsive and responsible bidder:

Revised

Enter Solicitation Title & Number Below						
Shelby Park Area 3 Constructon; RFQ# 629873	Min. SBE/SDV Participation	Incentive Percentage	Incentive Calculator	Lowest Bid	MACP	Winning Bid
	20.0%	5.00%	95.00%	\$5,633,925	\$5,915,621	\$5,636,195
Offeror's Name	Bids	SBE	Participation Requirement	Participation Incentive	Incentive Evaluation Amount	Status of IFB Award
SAK Construction LLC	\$5,633,925	\$917,450	\$1,126,785	\$871,578	\$4,762,348	Min. SBE not met
Layne Inliner LLC	\$5,718,975	\$1,094,438	\$1,143,795	\$1,039,716	\$4,679,259	Min. SBE not met
Insituform Technologies LLC	\$5,636,195	\$1,477,665	\$1,127,239	\$1,403,782	\$4,232,413	Awarded

(A copy of a Revised Bid Tab prepared by Insituform is attached hereto as Exhibit 7 and incorporated herein by this reference.)

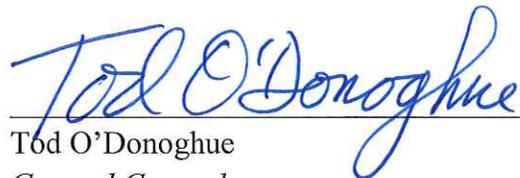
Conclusion

Based on the facts, the clear and unambiguous language in the Solicitation and the Purchasing Agent's Determination, Insituform felt that it had no choice but to file this Appeal. It appears that the requirements and guidelines in the Solicitation have not been followed, and the Intent to Award the Project Contract to Layne should be withdrawn and a new Intent to Award the Project Contract to Insituform, as the lowest responsive and responsible Bidder, should immediately be issued by MWS.

Insituform reserves all rights.

Very truly yours,

INSITUFORM TECHNOLOGIES, LLC



Tod O'Donoghue
General Counsel

Enclosures

cc: Mr. Jeff Gossage, via email jeff.gossage@nashville.gov and Hand Delivery