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## **RFP 17-182 GENERAL POLICE TOWING SERVICES REPORT**

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DATE: February 20, 2018

TO: Mayor and City Council  
Ed Zuercher, City Manager

FROM: Brad Holm, City Attorney  
Julie Kriegh, Assistant Chief  
Counsel

CC: Denise Olson, Chief Financial Officer  
Jim Campion, Deputy Finance Director

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### **BACKGROUND**

On May 1, 2017, the City of Phoenix Finance Department issued a Police Department procurement for General Police Towing Services - Request for Proposals (RFP 17-182), to award a three-year contract with one two-year option to extend. This RFP followed the Public Safety and Veterans Subcommittee and full City council direction on procurement method and evaluation points.

The Police Department requires general towing services to aid residents involved in accidents, towing abandoned vehicles, vehicles left in the roadways, illegally parked vehicles, and other law enforcement impoundments. The Police Department also requires auctioning services when vehicles have been lawfully impounded and determined to be abandoned by the Arizona Department of Transportation Motor Vehicle Division (MVD)

RFP 17-182 provides for general police towing services, vehicle storage and auctioning services for four zones to establish four contracts.

| <b>Zone</b> | <b>Precincts per Zone</b>                    |
|-------------|--|
| Zone A      | (Black Mountain and Cactus Park Precincts)   |
| Zone B      | (Desert Horizon and Mountain View Precincts) |
| Zone C      | (Estrella Mountain and Maryvale Precinct)    |
| Zone D      | (South Mountain and Central City Precincts)  |

On July 7, 2017, the following four companies submitted proposals, which were deemed responsive and responsible: All City Towing (ACT), LLC, DV Towing, LLC, First Class Auto Transport, LLC and Western Towing of Phoenix Inc.

### **EVALUATION COMMITTEE RECOMMENDATION**

The final scoring and ranking for each Proposer is shown below:

**ZONE A**

| Proposer         | Ranking    | Points     | 3-Year Contract Total |
|------------------|------------|------------|-----------------------|
| <b>DV Towing</b> | <b>(1)</b> | <b>929</b> | <b>\$569,835.00</b>   |
| All City Towing  | (2)        | 813        | \$3,371,769.00        |

Price difference of \$2,801,934.00 over a 3-year contract term.

**ZONE B**

|                  |            |            |                     |
|------------------|------------|------------|---------------------|
| <b>DV Towing</b> | <b>(1)</b> | <b>940</b> | <b>\$591,570.00</b> |
| Western Towing   | (2)        | 918        | \$724,026.00        |
| All City Towing  | (3)        | 893        | \$1,126,753.50      |

Price difference of \$132,456.00 from Western Towing over a 3-year contract term.

Price difference of \$535,183.50 from All City Towing over a 3-year contract term.

**ZONE C**

|                       |            |             |                     |
|-----------------------|------------|-------------|---------------------|
| <b>Western Towing</b> | <b>(1)</b> | <b>1000</b> | <b>\$729,750.00</b> |
|-----------------------|------------|-------------|---------------------|

**ZONE D**

|                       |            |            |                     |
|-----------------------|------------|------------|---------------------|
| <b>Western Towing</b> | <b>(1)</b> | <b>901</b> | <b>\$652,500.00</b> |
| All City Towing       | (2)        | 884        | \$994,527.00        |

Price difference of \$342,027.00 from All City Towing over a 3-year contract term.

**PROTEST AND APPEAL**

The City posted its award recommendation on October 11, 2017. On October 19, 2017, ACT Towing timely protested the award recommendation. Procurement staff reviewed the protest and denied it. ACT timely appealed in November. In December, an Administrative Law Judge (ALJ) at the Office of Administrative Hearings reviewed the record and issued a decision on January 9, 2018, see attached *ALJ Decision, Exhibit 1*. The ALJ recommended that the City dismiss ACT's protest and appeal.<sup>1</sup> The City Manager's office issued a January 24, 2018 letter agreeing with the ALJ's recommendation and recommending award of four agreements as proposed. ACT then requested public meetings with City Council under the solicitation transparency clause. Those meetings have raised issues as follows.

<sup>1</sup> *ALJ Decision, Recommended Order, page 14.*

**ISSUES:**

| Table of Contents   | Page |
|---|------|
| 1. Requirement in the RFP to Verify Reporting of the Anti-Car Theft Act ..... | 3    |
| 2. City Experience with the Anti-Car Theft Act.....                           | 3    |
| 3. Compliance with the Anti-Car Theft Act.....                                | 4    |
| 4. Inclusion of Federal Law Compliance and Solicitation Disqualification..... | 4    |
| 5. Incomplete Submittals .....  | 4    |
| 6. Vendor Capabilities (age of fleet, status of fleet) .....                  | 5    |
| 7. Retention Rates.....   | 5    |
| 8. Criteria and Point Scoring – Performance Over Price .....                  | 5    |
| 9. Scoring Regarding Points from One Bidder to Another .....                  | 6    |

1. Requirement in the RFP to Verify Reporting of the Anti-Car Theft Act

ACT alleges the City allowed DV and Western post-submittal compliance with Anti-Car Theft Act law. Yet, verification of the federal Anti-Car Theft Act reporting was not an RFP requirement. Therefore, the evaluation panel did not consider compliance with this law. The contract standard terms and conditions, in paragraph 3.10, requires conformance with all federal, state and local laws. But, as the ALJ found, paragraph 3.10 covers contract compliance requirements.<sup>2</sup> The City requires compliance with all laws before contract award and during the term of the contract. If non-compliance of any law is alleged, the City investigates local compliance, and reports state or federal noncompliance to the appropriate agency. The City does not have authority to determine compliance with state or federal law.

2. City Experience with the Anti-Car Theft Act

In response to concerns that staff were not aware of the Anti-Car Theft Act - Police was aware of state and federal laws requiring reporting of salvage or junk vehicles. Deterring stolen vehicle trafficking is important to the City. Police relies on state and federal agencies for interpretation and enforcement of these

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<sup>2</sup> *ALJ Decision*, Compliance with the Anti-Car Theft Act of 1992, paragraphs 14 & 15: "Section II, Article 3.10 requires compliance with all applicable "laws, regulations, standards, codes and ordinances when performing under this Contract ...." (Underscore added.). By its plain language, Article 3.10 applies only after the contracts have been awarded. Consequently, even if DV or Western Towing has been in violation of the Act, All City Towing has not shown that they must be disqualified."

laws. The City promptly reported ACT's allegations of violations of the federal law to the Department of Justice (DOJ) and asked DOJ to investigate.

3. Compliance with the Anti-Car Theft Act

Staff is not recommending award to vendors who are non-compliant with federal law, as alleged by ACT. Both DV and Western have consistently reported their acquisition and sale of junk or salvage automobiles to the state; see Western and DV responses as *Exhibit 2*. After the City contacted DOJ, DOJ issued letters to both companies to comply with the Anti-Car Theft Act. Both DV and Western then promptly complied with DOJ's request. DOJ is now satisfied that the law's requirements have been met, see emails from Todd Brighton, DOJ, *Exhibit 3*.<sup>3</sup> The ALJ noted that there is no evidence to demonstrate that either DV or Western are in violation of the Anti-Car Theft Act and DOJ is not pursuing any action against DV or Western.<sup>4</sup>

4. Inclusion of Federal Law Compliance and Solicitation Disqualification

ACT alleged the City failed to perform due diligence by not requiring proof of compliance with Anti-Car Theft Act in the solicitation. However, the City does not include solicitation requirements for verification of all local, state or federal law compliance since this requirement puts an undue burden on vendors. Additionally, many compliance documents may contain confidential information (OSHA, equal employment, ADA) the vendors cannot release. Finally, the City cannot make a determination of compliance if the state or federal law preempts. However, the City diligently responds to allegations of non-compliance as a contract enforcement issue and requires vendors' compliance prior to contract award and during the contract term. Here the City did exactly that and reported the allegations to the DOJ to enforce.

5. Incomplete Submittals

ACT alleged that Western did not sign their offer to the City based on receiving an electronic copy, which was unsigned. Western did sign their hard

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<sup>3</sup> *ALJ Decision, Compliance with the Anti-Car Theft Act of 1992, paragraphs 16 & 17*: "The City's determination that DV's and Western Towing's alleged noncompliance with the Anti-Car Theft Act does not provide a basis on which to vacate the recommended awards is not arbitrary because the City considered the facts and circumstances of this matter in making its determination. Of particular import are: that although the City has been awarding towing contracts for a number of years, this was the first time anyone has raised the issue that towing companies are required to report under the Act; that DV and Western Towing have both agreed to fully comply with the Act (as directed to by DOJ) and that the award recommendations will not be forwarded to the City Council unless there is proof from DOJ that they are in compliance;<sup>7</sup> and that compliance with the Act was not a requirement during the solicitation and none of the offerors were asked to prove that they were in compliance.<sup>8</sup> All City Towing has not shown by a preponderance of the evidence that the alleged non-compliance with the Anti-Car Theft Act provides a sufficient basis on which to overturn the award recommendations."

<sup>4</sup> *ALJ Decision, Compliance with the Anti-Car Theft Act of 1992, paragraph 11*: "The evidence of record does not demonstrate that either DV or Western Towing are in violation of the Anti-Car Theft Act."

copy submittal/offer, please see attached *Exhibit 4*. Therefore, Western followed submittal requirements.

6. Vendor Capabilities (age of fleet, status of fleet)

ACT questioned the City's evaluation of the vendor capabilities. Vendor proposals had to address in their submittals "the ability to meet the number and type of vehicles required . . . during the contract term." Western included a comprehensive list with years of vehicles. DV stated they had a vehicle list available upon request. Vendor responses were considered by the panel.<sup>5</sup> Performance depends on many variables, including use of subcontractors, types of trucks and the size of the zone, and which zones are awarded. The City's priority is the appropriate number of vehicles for each zone, and response time, see *Exhibit 5*. DV and Western have asked for 30 days from City Council contract approval to start their new contracts to ensure the appropriate fleet is in place. The City will evaluate performance, including the fleet capabilities, for contract compliance prior to, and throughout the term of the contract.

7. Retention Rates

ACT questioned whether the companies supplied retention information in the narrative portion of the submittal. Both DV and Western included comments regarding their employees. The evaluation panel considered all information in their scoring and the panel's decision was neither arbitrary or capricious.<sup>6</sup>

8. Criteria and Point Scoring – Performance Over Price

ACT alleged the City's scoring reflected an evaluation favoring price over performance and method of approach. The Public Safety and Veterans Subcommittee approved issuing RFP 17-182 on October 12, 2016. ACT, DV and Western all spoke at the subcommittee meeting advising the City to value performance over price. The subcommittee considered that the contract costs will be passed on to users of towing services, and the revenue portion funds the Police towing program. In response to public input, the scoring criteria were revised as follows:

|   | <u>Prior</u> | <u>New</u> |
|---|--------------|------------|
| Performance/ Capacity / Experience of Offeror             | 250          | 350        |
| Cost (Includes Line Item Pricing and % of Sales Proceeds) | 400          | 350        |
| <u>350 Cost points were divided by:</u>                   |              |            |
| Contract Line items/price for types of tows               | 225          |            |
| Sales Proceeds/Revenue sharing                            | 125          |            |
| Method of Approach / Scope of Work                        | 300          | 300        |

<sup>5</sup> From the *ALJ Decision*, Conclusions of Law, paragraph 10: "An arbitrary action is an "unreasonable action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." *Maricopa County v. Gottspomer*, 150 Ariz. 367, 372, 723 P.2d 716, 721 (App. 1986) (quoting *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 631 P.2d 1107 (App. 1981))."

<sup>6</sup> See *ALJ Decision*, cited in endnote #5.

On November 30, 2016, the City Council affirmed and approved the issuance of RFP 17-182 with the revised criteria. The City Council reports and agendas for the meetings are attached as *Exhibit 6*.

As instructed by the City Council, cost and performance were equally weighted. Cost was objectively scored based on lowest price and distance from the lowest price. However, ACT's cost was so high, it generated less points in that weighted category as shown below:

| ZONES  | CURRENT PRICE | ACT PROPOSED PRICE  | AWARDED PRICE |
|--------|---------------|---------------------|---------------|
| Zone A | \$18          | \$129               | DV \$15       |
| Zone B | \$29          | \$39.50             | DV \$15       |
| Zone C | \$60          | ACT did not propose | WESTERN \$18  |
| Zone D | \$15          | \$39.5              | WESTERN \$18  |

#### 9. Scoring Regarding Points from One Bidder to Another

ACT alleged that its policy of deducting costs for damage claims from their employees' paychecks was noted by the panel for DV providing DV more points. However, this policy was not erroneously listed as belonging to DV since DV also provided submittal information about a policy to deduct damage claims from their employees.<sup>7</sup> The fact that a similar note was not included as a comment for ACT does not indicate that the panel did not consider ACT's program in awarding points since ACT received the most points in this category.

### **CONCLUSION**

Staff recommends that the City award the four contracts, zones A & B to DV and zones C & D to Western, for the following reasons:

<sup>7</sup> Under Capacity/Experience Tab, Page 4, paragraph 4, DV states:

"Our drivers undergo extensive training to provide "damage free" towing services. On the rare occasion driver error does occur, drivers are held accountable and justified charges are deducted from their damage fund. Drivers contribute to their damage fund weekly through payroll and all deductions are reviewed, discussed and understood to prevent a re-occurrence."

- An Administrative Judge reviewed ACT's arguments and offered a Decision to the City recommending the City dismiss ACT's protest and appeal.
- DV and Western are in compliance with the Anti-Car Theft Act requirements.
- ACT's proposal scored the lowest and ACT's cost to the consumers was the highest.