

REPLY TO:

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February 22, 2022

VIA Email: purchasing@bouldercounty.org

Boulder County Purchasing
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VIA Email: ca@bouldercounty.org

Ben Pearlman, County Attorney
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1325 Pearl Street
Boulder, Colorado 80302

RE: Boulder County Purchasing
RFP # 7301-22
Private Property Structural Debris and Hazard Tree
Removal Operations

CERES ENVIRONMENTAL SERVICES, INC. NOTICE OF PROTEST

Dear Purchasing Personnel and Mr. Pearlman:

This letter serves as a protest notice of appeal by Ceres Environmental Services, Inc. of the award to DRC Emergency Services for RFP #7301-22. In support of this protest appeal, Ceres cites the following grounds: (1) Boulder County improperly considered DRC's and ECC Constructors' dramatically reduced period of performance as revised during the interviews that Ceres was excluded from; (2) DRC claimed prior experience attributable to other companies, including both Ceres and ECC; (3) Boulder County improperly opened negotiations with only two contractors after the Best and Final Offers and allowed negotiations with these two contractors to occur that resulted in substantial proposal revisions, thereby prejudicing Ceres

from providing additional information or otherwise fairly competing; and (4) Boulder County erred in evaluating pricing for DRC by scoring DRC's pricing for less than a 100% award and then awarding DRC 100% of the contract. Based on these critical failings, Boulder County's award to DRC was improper under Section 9.1 of Boulder County's purchasing and procurement requirements and should be set aside. Ceres has standing to bring this appeal because, but for the above-described errors, Ceres would have been a potential awardee under the present scoring system. At minimum, Ceres would have qualified for interviews as was provided to DRC and ECC.

I. Boulder County Improperly Allowed ECC and DRC to Modify their Proposals During Interviews

After the initial proposals were submitted, Boulder County requested Best and Final Offers ("BAFOs") from all potential bidders on the ash and debris pricing removal. Ceres and others provided BAFOs on the limited requested grounds. After the BAFOs were provided, Boulder County interviewed two different contractors, DRC and ECC. During the interviews DRC was allowed to reduce its performance time from 266 days to 120 days and was then rescored based on this shortened schedule. ECC similarly reduced its proposed contract time by 1.3 months. Boulder County accepted the reduced schedule without providing other offerors the opportunity to similarly revise their schedules.

Section 9.1(G)(4)(i) of Boulder County's purchasing manual and requirements bars this favoritism. Specifically, it states that "[n]o additional information will be accepted that materially alters the submitted bid after the deadline for submission. There will be no

negotiation with a bidder before an award is made by the BOCC.” Section 9.1(G)(4)(i). Despite such conduct being barred, Boulder County allowed both DRC and ECC to revise their proposals to shorten the overall time. This allowance was specifically noted in the RFP debris Notes copied below.

DRC Emergency Services	4 months (adjusted from 7.5 months per interview)	CalRecycle, CA Wildfires response in 2020, removed and mitigated over 11,800 fire damaged hazard and danger trees, cleanup of 627 properties with over 40k tons of burned debris and ash. Towns of Malden and Pine City in WA, utilized by a stand-by contract and provided a turn-key clean-up, remediation and monitoring services. Woolsey Fire in CA, 2018, cleanup of over 145 properties, disposing or recycling 38.5k tons of burned debris of ash, 18k tons of concrete, 17k tons of excess soil contaminated with ash. Paradise Camp Fire, hauled 15k- tons of concrete, contaminated soil, and metal including 6,000 CY of asbestos. Removed 16m CY of debris in response to Hurricane Ida in 2021 and managed 82 debris management sites. HQ in Galveston, TX. Sister company Forgen is headquartered in Centennial, CO.		The review committee unanimously voted to recommend DRC.
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These notes acknowledged the violation of Section 9.1 noting the schedule was “4 months (adjusted from 7.5 months per interview).”

This procurement violation alone warrants excluding DRC and ECC’s proposals as each were provided with additional opportunities to revise their proposals that were not given to any other contractor. Such negotiation and substantive proposal revisions as were conducted and made with DRC and ECC are expressly barred.

The bar on such practices stems from the desire for open and fair competition and to avoid any show of favoritism. That interest was violated here as both DRC and ECC obtained an unfair competitive advantage denied to every bidder – a chance to revise their respective schedules during interviews and to negotiate on points of interest as requested by Boulder County through its questioning. Such conduct also violates the requirements of Section 9.1(A)(5), which requires the fair and equal treatment of potential proposers. Ceres did not

receive fair and equal treatment as it was denied the opportunity to make comparable revisions as to what ECC and DRC made during the interviews.

Additionally, allowing the modification of DRC's and ECC's bids without specifically inviting such similar modifications from other bidders amounts to a bid modification that is expressly prohibited by Section 9.1(G)(4)(c), which precludes bidders from making revisions to bids outside of "signing a forgotten document or correcting similar clerical errors." Adjusting for schedule duration alone based on the scored offerors would have reduced DRC's schedule score from 17 to a 7. This adjustment alone would reduce DRC to a total score of 81. So even were DRC's proposal worthy of consideration following the procurement violation, its score is already dramatically reduced.

Finally, allowing DRC to simply verbally amend its performance period without providing a detailed analysis or explanation for how it plans to accomplish the shortened timeline undermines any evaluation of other bidders and their workplans and schedules. DRC's submitted schedule shows a performance period of approximately 9 months. Yet DRC's evaluation was based on an unsupported assertion that "DRC could perform the work in 4 months." This cursory explanation precludes any fair and reasonable evaluation of scheduling proposals and provides yet another ground for rejecting DRC's proposal. At the very least, discussions shall be conducted with others like Ceres who had a reasonable chance of award.

II. DRC Intentionally Misrepresented Past Experience Misappropriated from ECC and Ceres

DRC claims experience as its own for companies that it purchased after the work was performed. Even worse, this stolen experience was not only not performed by DRC but was

actually performed by two of the bidders here, ECC and Ceres. Each of these projects were prominently featured in DRC's proposal, and both related to fire cleanup. Without this experience (experience DRC claims for work it never performed), DRC has virtually no fire cleanup experience, as even its 2020 CalRecycle work was performed as a joint venture with Forgen¹ and not by DRC as a stand-alone entity. DRC provided no explanation of its role, as compared to Forgen.

Further, its cited experience in Washington was for significantly smaller jobs that was not fully funded by FEMA. While the fire consumed over 20,000 acres, DRC's work scope involved limited work in the city of Malden and not the surrounding acreage or work in Pine City. The work in Malden involved cleanup of less than 70 homes for a town of less than 225 people. The cleanup efforts were so small for this work that DRC did not even report cubic yardage. Rather, DRC simply listed a contract value of \$8,500,000 for the totality of this work.

As detailed below, this intentional and material misrepresentation about experience was intended to circumvent DRC's lack of experience, which had prevented it from receiving prior jobs. Consideration of these projects was inappropriate because they were not DRC's "past performance" as required by Section 9.1. Rather, each was the performance of a former subcontractor to either Ceres or ECC. The first project DRC misappropriated is for CalRecycle, Woolsey Fire. This work was performed by Forgen under the direction of ECC. Only after the work was completed did DRC purchase Forgen. Thus, none of the Woolsey fire debris removal experience was performed by, or under, DRC's supervision or management.

¹ Forgen is the new name for Great Lakes Environmental & Infrastructure, LLC following its purchase by DRC. Forgen was named Great Lakes Environmental & Infrastructure, LLC when it performed the work under ECC and Ceres that DRC has misappropriated.

Similarly, DRC misappropriated experience for the CalRecycle, Paradise Camp Fire work. Here, Ceres was the general contractor performing the work under CalRecycle. Ceres contracted with Great Lakes Environmental & Infrastructure, LLC to perform certain elements of work. Halfway through performance DRC bought Great Lakes and its sister company Forgen. Ceres completed performance, removing over 768,000 tons of material as part of the Paradise Camp Fire project. Great Lakes' total removal (both before and after its purchase by DRC) was approximately 15,000 tons. Yet DRC implicitly claims credit for the entirety of the Paradise Camp Fire Debris removal, ignoring that Ceres was the prime contractor and that half of DRC's claimed removal was performed before purchase by DRC. Ironically, the entirety of Great Lakes' work amounted to less than 2% of the total removal performed under Ceres' management.

DRC should not receive credit for work performed under the supervision and management of Ceres and ECC. DRC had no role in managing or supervising either the Woolsey or Paradise Camp Fire project, yet both were included in its proposal and both received significant weight in the evaluation. Removing these projects from DRC's experience reduces the number of wildfire debris removal projects to 4, which is less than Ceres. Accordingly, such would reduce the scoring from 15 to 10 in order to account for the misappropriated experience. Removing five points from DRC's evaluation on experience is appropriate because DRC has earned far less experience than Ceres and should be scored lower.

Aside from the scoring reduction, DRC's material misrepresentation about its experience (apparently to mislead Boulder County) mandates disqualifying DRC's bid, particularly where federal money in the form of FEMA reimbursement is at issue. Every FEMA reimbursement is

governed by 2 C.F.R. 200.317 through 200.326. The solicitation repeatedly reflects Boulder County's right to withdraw or cancel the solicitation or award if FEMA funding is not obtained. To that end, the solicitation requires compliance with FEMA requirements and all federal, state, and local laws. DRC's material misrepresentation places FEMA reimbursement and funding at issue should Boulder County proceed with the award to DRC.

Federal law bars offerors from consideration for award where there is a material and intentional misrepresentation during the bidding process. A material and intentional misrepresentation that taints the award process prevents a determination of the best value to the government and impedes the competitive bidding process. *Alaska Structures, Inc. v. United States*, 144 Fed. Cl. 80, 84 (2019). An offeror "found to have made such a misrepresentation will lose its right to execute the solicited work or bid on the reprourement of the contract." *Id.* The representation is material where the incorrect statement is relied on in awarding the contract. *Id.*

The admitted facts show that DRC provided a material and intentional misrepresentation to Boulder County related to its experience that Boulder County relied on when making the award. The County relied upon untrue and misleading information provided by DRC puffing its past performance of wildfire debris cleanup experience. DRC did not work under the direction of CalRecycle for the Paradise Camp Fire Project. In fact, the DRC "family of companies" proposed for the Camp Fire Project was rejected for failing to meet the solicitation express wildfire debris cleanup experience requirements. *See* CalRecycle Bid Protest Decision at Exhibit No. 1 denying DRC-ERRG, JV ("DRC") protest due to DRC's lack of required wildfire cleanup experience and failure to comply with the State of California licensing laws. Ceres

Environmental Services, Inc. contracted with CalRecycle and performed the Paradise Camp Fire Cleanup work and successfully removed 768,000 tons of fire damaged debris. DRC, through a Joint Venture denominated as DRC-ERRG JV, submitted an unsuccessful bid and protested when their proposal was rejected for lack of experience. For the Camp Fire Project, Ceres never included DRC in its proposal. Only later, midway through performance, did Ceres learn that DRC had secretly purchased a subcontractor (Great Lakes) to Ceres who was performing a minor (2%) portion of the work.

Ceres never dealt with DRC management as part of the work. Ceres provided 100% payment and performance bonds to Calrecycle for the work. DRC did not. Ceres financed the work by paying progress payments to subcontractors (including Great Lakes). DRC did not. Ceres developed all the performance plans, schedules and documentation for the work². DRC did not. Ceres administered the contract with CalRecycle and worked under the direction with CalRecycle. DRC did not. Ceres managed all the subcontractors and overall performance of the work. DRC did not.

In fact, the Great Lakes subcontract (DRC secretly bought out the contractor while Ceres was performing the work), specifically states as follows:

This Subcontract does not create, nor does any course of conduct
between the Contractor and Subcontractor pursuant to this

² Ceres scheduled all the crews through Ceres Planning Section, including debris removal, rescrapes, and asbestos removal. Great Lakes was generally paid weekly provided that all their certified payrolls were verified by Ceres and properly submitted to the CA Dept of Industrial Relations. Ceres created numerous plans including Health and Safety Plan, Spill Prevention Plans, permitting, mobilization/demobilization plans, truck routing plans, bridge design and installation plans, ROE agreements/temp use permits for bridging, etc. Internally, Ceres had a number of processes that resulted in an outstanding performance recommendation from CalRecycle including safety reports, QC reports, progress reports, rock requests, delay requests, etc all using ArcGIS and Survey123. Great Lakes (and DRC) did not participate in these critical work requirements as Ceres implemented these plans and provided direction to Great Lakes pursuant to Ceres' plans. DRC never developed any such plans for this work. Neither did Great Lakes

Subcontract create, any contractual relationship between any parties other than the Contractor and Subcontractor. The Subcontractor is in all respects an independent contractor. Subcontractor shall have no authority to bind the Contractor by any statement, representation, or promise of any kind. The Subcontractor shall not interfere with the Contractor's relationship with the Owner nor any other entity or person, and the Subcontractor shall not deal directly with the Owner without prior authorization, in each instance in writing, from the Contractor. The Subcontractor agrees not to enter into any other contract relating to the Project without the Contractor's prior written consent.

See Ceres Environmental Services Subcontract with Great Lakes Environmental & Infrastructure, LLC at ¶1.4 attached at Exhibit No. 2.

Great Lakes never received permission from Ceres to deal directly with CalRecycle.

Great Lakes never provided notice or consent to sell the company to DRC during the subcontract and hid that fact from Ceres which Ceres only learned through the rumor mill.

Ceres was not the agent of CalRecycle during the performance of this work. Great Lakes only performed subcontract work directly for Ceres and had no contract with CalRecycle. Misleading by stating that "DRC's family of companies, under the direction of CalRecycle, worked closely with individual property owners and the surrounding communities to perform the work in an expedited manner in full compliance with Butte County, Cal OES and Federal Emergency Management Agency (FEMA) project requirements, while protecting public health and safety and the environment" is untrue and misappropriates Ceres performance record on this project. DRC never once mentions that its purchased company was only a minor (2%) subcontractor with a limited scope of work with no contract with CalRecycle. In fact, for the asbestos work, Great Lakes merely brokered the subcontractors and was not involved in the actual performance of the work. Ceres understands that DRC used the same misleading tactics

by misappropriating the credit for ECC's performance of the CalRecycle Woolsey Fire cleanup contract.

Given these intentional material representations, any award to DRC would jeopardize FEMA reimbursement, particularly since Boulder County is aware of the representations prior to the beginning of work. Any competition was undermined and the County failed to obtain competition as required by FEMA grant regulations.

III. DRC's Price Scoring was Incorrect and Premised on a Partial Award

DRC's original pricing was substantially higher than its BAFO pricing. Yet DRC noted that that reduction was for less than 100% award during its February 7, 2022, interview.³ DRC noted that a 100% award of all three areas would escalate the proposal to "default to original number" which was more than \$10,000 more per parcel. Yet DRC's scoring reveals that it received the benefit of its reduced pricing, even though the full award was made to DRC. Had DRC's price been properly evaluated at the "original number," DRC would have received a nine-point reduction on this item alone based on scores for comparable pricing as DRC would go from a 50 to a 41.

IV. Boulder County Improperly Conducted Interviews and Negotiations Prior to Award

Ceres appeals the award based on its exclusion from interviews post-BAFO but pre-award for two reasons. First, the applicable procurement regulations do not provide for discriminatory interviews pre-award, much less interviews that result in bid revisions and negotiations. Sharing procurement information with only two offerors after the initial review of

³ It is unclear whether DRC was provided any pricing information related to the other offerors.

all offers is highly suspect. While Boulder County may conduct interviews such interviews must either take place with all responsive contractors or be after the award as part of finalizing the scope. Section 9.1 provides an express prohibition on pre-award negotiation, stating unequivocally “[t]here will be no negotiation with a bidder before an award is made by the BOCC.” Here, the interviews and negotiations were completed pre-award and with only two contractors. In each interview, Boulder County was negotiating with the potential bidder on price, scope, and schedule. These negotiations are barred by Section 9.1. Second, had Ceres been afforded the same opportunities as DRC and ECC on revising its schedule and were experience properly measured, Ceres would have been one of the top two scored contractor and would have been interviewed.

These interviews were critical because they solicited additional information and proposals to accomplish the work by July 1, thereby allowing the contractors to propose alternative means of accomplishing thereto unknown goals of Boulder County. If Boulder County desired the work completed by July 1, 2022, it should have disclosed such desires in the solicitation (or by amendment) and not secretly raised the issue with only two offerors while excluding all others. The interviews also discussed pricing and pricing discounts based on the amount of the award. Again, this type of “interview” is barred by Section 9.1 as an unallowed pre-award negotiation. It is not competitive.

While Ceres was unable to challenge the reference scoring as it was entirely redacted, the presence of objectionable items on virtually all other areas raises the likelihood that similar scoring disparities and issues existed on the references provided by DRC. Ceres requests that such references and associated documentation be provided to its counsel under a protective order

or confidentiality agreement. Ceres also requests that its counsel receive unredacted copies of all procurement and award related material subject to a protective order or confidentiality agreement.

V. Rejection of DRC's Proposal was Warranted under the Established Facts

Even without challenging DRC's references, the above demonstrated errors in evaluation reduce DRC's score to below that of Ceres. To recap, a ten-point reduction is needed due to the improper consideration of the reduced schedule, a five point reduction is owed for the misappropriated experience, and a nine point reduction is owed for its higher pricing for receiving the full award. The amounts to a total reduction of 24 points. Even without crediting Ceres additional points for the experience DRC misappropriated, or considering the references issue or potential issues, DRC's appropriate score would be 67, placing it below Ceres. Thus, at minimum, Ceres was entitled to interview with Boulder County for the work as it would have been one of the top two scored entities.

CONCLUSION

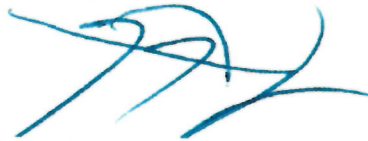
The undisputed facts show that Boulder County violated procurement law by engaging in negotiations with two favored contractors and allowing modifications of their proposals, that DRC intentionally misrepresented its prior experience by stealing experience from Ceres and ECC, and that DRC's pricing score was substantively flawed due to its award of all regions. When DRC's experience is rectified and improper bid revisions are removed, it is apparent that DRC lacks the substantive experience to perform this work and failed to meet the desired timeline from Boulder County. Given the vast extent of issues surrounding DRC, Boulder County should disqualify DRC and re-solicit the work.

Boulder County should terminate its award to DRC and reopen discussions with offerors, allowing each to submit a revised BAFO. DRC was provided with unfair opportunities to change and revise its proposal (apparently with inside information not offered to other offerors and potentially based on their proposals). DRC misappropriated and materially misrepresented its experience by claiming performance experience that it did not possess that it was not involved in and had little to no role in managing. These misrepresentations alone justify setting aside DRC's award and disqualifying DRC from this procurement. When added to the pricing issues and improper schedule revision, DRC should be excluded from consideration. Given Ceres' experience, schedule, and pricing, Ceres should have been interviewed in lieu of DRC. In the alternative, the solicitation should be rebid and the appropriate procurement regulations followed.

Given the issues raised in this appeal, Ceres requests the ability to address its appeal in a business meeting before the Boulder County Board of County Commissioners pursuant to Section 9.1. Ceres remains willing to address any concerns or issues that may remain outstanding related to this procurement or this appeal.

Sincerely,

SMITH, CURRIE & HANCOCK LLP

A handwritten signature in blue ink, appearing to read 'Karl Dix, Jr.', with a stylized flourish at the end.

Karl Dix, Jr.
Lochlin B. Samples
Attorneys for Ceres Environmental Services, Inc.

Boulder County Purchasing
February 22, 2022
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cc: Bernie Buescher, Esq.
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Mr. John Ulschmid
Mr. Karl A. Dix