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February 22, 2022

Ms. Courtney Gabriel  
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cc: purchasing@bouldercounty.org

**Subject: ECC Constructors, LLC - Appeal of Award Decision Under Request for Proposals No. 7301-22**

Dear Ms. Gabriel:

Pursuant to Boulder County Procedure Manual 9.1(G)(9), ECC Constructors, LLC (“ECC”), a wholly owned subsidiary of Environmental Chemical Corporation, appeals the Boulder County (“County”) Board of County Commissioners (“BOCC”) evaluation and award decision to DRC Emergency Services, LLC (“DRC”) under Request For Proposals #7301-22, Private Property Structural Debris and Hazard Tree Removal Operations (“RFP”). This important RFP requires timely and cost-effective removal of debris from the Middle Fork and Marshall fires that damaged and impacted thousands of properties in Boulder County. Unfortunately, relying on the recommendations of the selection committee (the “Committee”), the BOCC improperly departed from the RFP’s stated evaluation criteria and unreasonably, arbitrarily, and capriciously awarded to DRC. Specifically, the award decision is flawed for: (1) improperly assigning a higher schedule rating based on DRC’s unenforceable claims without consideration of the impact on project cost and technical risk; (2) evaluating the wrong project timeline when evaluating DRC’s proposal; and (3) assigning an inappropriately high score to DRC’s past experience factor based on unsubstantiated projects and, at worst, DRC’s mischaracterizations of their role on the referenced projects.

These errors materially impacted the award decision, will undermine the County’s timely removal of debris and, consequently, will prolong the impact of these fires on its residents. When the errors, discussed in more detail below, are corrected, the result is that ECC is the highest rated offeror and, therefore, BOCC should terminate its award to DRC and properly award the contract to ECC.

**A. Administrative Matters**

**Appellant’s Contact Information:** ECC is located at 1746 Cole Blvd., Bldg 21, Suite 350, Lakewood, CO 80401.

**Timeliness:** This appeal is filed “within ten (10) calendar days of official notification of bid/RFP award” and is therefore timely filed under Boulder County Procedure Manual 9.1(G)(9).<sup>1</sup>

**Stay of Award:** ECC requests that BOCC stay execution or performance of the contract until this appeal is resolved.

## **B. Background**

On January 18, 2022, Boulder County issued RFP # 7301-22. The RFP seeks a contractor to timely facilitate the Boulder County Resource Conservation Division’s (“RCD”) Private Property Structural Debris and Hazard Tree Removal Operations in Unincorporated Boulder County, the Town of Superior, and the City of Louisville. Ex. 1, RFP, at 7.<sup>2</sup> Specifically, the contractor will be responsible for “the cost-effective removal of debris accumulated on all residential, and potentially commercial properties, streets, roads, public school properties, and any other locally-owned facility or site as may be directed by the County,” resulting from the Middle Fork and Marshall fires. *Id.* Time is of the essence in performing this work. *Id.* at 2. The detailed Specifications section included in the RFP describes the particular requirements. *Id.* at 7-20.

In relevant part, the RFP instructs offerors to submit, via email, proposals containing: (i) a detailed project schedule; (ii) a completed rate sheet; and (iii) information on the relevant experience of key personnel and the company. *Id.* at 23. Once submitted, the proposals were to be evaluated by a selection committee on the basis of the following criteria, in descending order of importance: (1) project cost; (2) timeline for project schedule; (3) past experience with similar projects; and (4) references from similar project customers. *Id.* at 24. Project cost accounted for 50 of the total possible 100 evaluation points, timeline and past experience with similar projects each accounted for 20 points, and customer references accounted for the remaining 10 points. *Id.*

In relation to project cost, the County further informed offerors that “[p]roject cost will be evaluated for cost reasonableness and overall value to the County. The County will consider the cost reasonableness of individual line items and the total project. The County will also consider the quality, availability, and adaptability of the goods and services bid when determining best value.” Ex. 2, Adden. 1 to RFP, Question 7, at 4. The County further explained that project costs accounts for 50 percent of the scoring criteria and that it “will evaluate [offerors’] per parcel cost which will include all of the sub-items to calculate the total per parcel and total project cost. The County will choose a multiplier for its calculations based on the most up-to-date property enrollment data at such time.” *Id.*, Question 8 at 5.

Additionally, in relation to the timeline, the County further emphasized:

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<sup>1</sup> Pursuant to a February 17, 2022 email from Ms. Courtney Gabriel, Purchasing Manager for the Boulder County Office of Financial Management, the deadline for filing a letter of appeal with the Purchasing Agent is February 22, 2022.

<sup>2</sup> To the extent that documents relevant to this correspondence are available on the Boulder County website, they are included in an Online Exhibits List attached to this correspondence with their respective URLs. If a relevant document was not available on the Boulder County website, it is attached in full as an exhibit.

Time is of the essence in completing this project. The County will consider the amount of resources dedicated to the project, the length of time it takes to mobilize resources, and the amount of time it takes for the contractor to complete all the work. The County will consider a bidder's available resources, capabilities, efficiency, and adaptability to minimize project duration and avoid delays.

*Id.*, Question 35 at 10.

Under the terms and conditions of the RFP, the contract is to be awarded to "that responsible proposer whose submittal...will be most advantageous to the County of Boulder, price and other factors considered." Ex. 1, RFP, at 5. Pursuant to the Boulder County Procedure Manual, all evaluations must be conducted with fairness and integrity and "the same level of effort shall be extended to the evaluation of each vendor's proposal." Ex. 3, Boulder Cnty. Proc. Manual, 9.1(G)(5)(a). Further, evaluators must select "the lowest, most responsible bid, or best bid" by considering, among other factors, "[t]he ability of the bidder to perform the contract or provide the goods and services within the time specified." *Id.* at 9.1(G)(4)(h).

On February 1, 2022, 11 offerors submitted proposals in response to the RFP and the County sought additional information from each offeror through its issuance of a Best and Final Offer ("BAFO") request and a subsequent Written Interview request. Ex. 4, RFP Analysis and Recommendation, at 3. The proposals were reviewed individually by the members of the Committee and then were evaluated as a group based on a single Score Sheet and Rate Sheet developed by the Committee. *Id.* In the process of its evaluation, the Committee identified two finalists, DRC and ECC. *Id.*

Of note, ECC's project costs, including its per parcel costs, and number of crews included in its written proposal were based on completing the debris removal by July 1, 2022.<sup>3</sup> See Ex. 5, ECC Proposal, Sec. 3.2, at 1-11. In contrast, DRC's project costs and number of crews included in its written proposal were based on an approximate December 13, 2022 completion date with a 266 day performance timeline (including an additional 35 days for weather delays) using 30 crews. See Ex. 6, DRC Proposal, at 11.

On February 7, 2022, the Committee conducted interviews with each finalist. The Boulder County Procedure Manual expressly permits selection committees to conduct interviews with bidders "for clarification of their proposals." Ex. 3, Boulder Cnty. Proc. Manual, at 9.1(G)(4)(j) (emphasis added). Once the committee has ranked the offerors, the top-ranked firm and the "authorized representative of the user(s) office/department" may meet or confer to "agree to finalize the scope of work and the contract amount for the proposed services...If an agreement cannot be reached...discussions are opened with the firm considered next best qualified." *Id.* (emphasis added). The Committee's interview notes are published online. See Ex. 7, RFP Notes.

On February 10, 2022, BOCC, relying on the work and recommendation of the Committee, awarded the contract to DRC. Ex. 9, Boulder Cnty. Purchasing RFP #7301-22 Award Letter (Feb. 10, 2022). The evaluation and decision documents indicate that DRC's proposal was determined to be "the most competitive in terms of project cost" and was "the most cost reasonable on a per parcel basis." Ex. 4, RFP Analysis and Recommendation, at 4. Further the Committee, in its recommendation narrative, stated that DRC's proposal was "highly competitive based on timeline for project schedule." *Id.* DRC received 91 out

<sup>3</sup> ECC's proposal estimated that project closeout would occur from July 1 to July 15, 2022.

of 100, and ECC received 84 out of 100 points. Ex. 8, Final Total Score and Bid Tab, at 5. Critically, in assigning DRC its score, the Committee placed heavy emphasis on a shortened timeline with increased crew mobilization that DRC apparently indicated it could provide during its interview. Importantly, there is nothing in the written record indicating DRC revised its proposal to memorialize these commitments nor was its proposed price adjusted to reflect the impact of (at least) doubling its number of crews. Indeed, the only evidence in the record that corroborates these apparent changes to DRC's proposal are reflected in interviewees' notes related to DRC's February 7, 2022 interview. See Ex. 7, RFP Notes. Again, there was no modified written proposal to substantiate a significantly shortened (apparently reduced to 4 months) period of performance. Moreover, there is no clear indication of if or how (at least) doubling DRC's crews would impact its proposed price. Compare Ex. 4, RFP Analysis and Recommendation, at 4 (stating "During its interview, DRC confirmed that it has sufficient resources to mobilize additional crews to complete the project by July 1, 2022") with Ex. 6, DRC Emergency Proposal, at 11 (indicating that the total project duration would be 266 days including an additional 35 days for weather delays and would require 30 crews to meet an anticipated completion date of December 13, 2022).

Despite the absence of any written offer containing an abbreviated period of performance and adjusted project cost for increased crews to meet that performance,<sup>4</sup> "[t]he Committee unanimously agreed to give DRC a favorable score based on project schedule and to ultimately award the project to DRC in light of a July 1, 2022 project completion target date." Ex. 4, RFP Analysis and Recommendation, at 5. According to its evaluation score matrix, the Committee assigned DRC a 50 out of 50 score for its project costs, which were presumably calculated based on its original completion date of December 13, 2022.<sup>5</sup> See Ex. 8, Final Total Score and Bid Tab, at 5. In contrast, the Committee assigned ECC a 41 out of 50 score for its project costs that were calculated based on its original debris removal completion date of July 1, 2022. *Id.* Additionally, the timelines of both companies were assessed based on a July 1, 2022 completion date and the companies were each given a 17 out of 20 score. *Id.*

Finally, in its recommendation narrative, the Committee highlighted its appreciation of DRC's past experience with similar projects, describing DRC's experience as "extensive," emphasizing DRC's "experience on FEMA-declared disaster projects, including debris removal for numerous large wildfires," and noting that "a number of other bidders lacked sufficient relevant experience." Ex. 4, Analysis and Recommendation, at 5. Of particular note, DRC's proposal suggests that it had a significant role in the initial mobilization and direct coordination of the Woolsey Fire and Paradise Camp Fire debris removal with

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<sup>4</sup> The extensive redactions made to the offerors' proposals (seemingly contrary to the Colorado Open Records Act) prevent us from assessing whether DRC's evaluated price reflects its doubled crews and accelerated timeline. The RFP states "[p]roposals submitted in response to this 'Request for Proposals' and any resulting contract are subject to the Colorado Open Records Act...Any restrictions on the use or inspection of material contained within the proposal or resulting contract will be clearly stated in the proposal and contract itself. Confidential/proprietary information must be readily identified, marked, and separated/packaged from the rest of the proposal. Co-mingling of confidential/proprietary and other information is NOT acceptable. Proposals that do not properly identify confidential/proprietary information may be released in their entirety. Pricing totals contained in a proposal are not considered confidential." Ex. 1, RFP, at 5-6. ECC is concerned that the County has withheld from public scrutiny material that was not marked as confidential by the offerors and that this withholding prevents critical assessment of the potential cost increase at issue.

<sup>5</sup> We are prevented from determining whether the per parcel and total project costs included in the committee's evaluation matrix differ from the per parcel and total project costs originally cited in DRC's proposal due to significant redactions of the pricing elements in the proposals and the Final Total Score and Bid Tab document.

agency partners. See Ex. 6, DRC Emergency Proposal, at 24-25 (stating “[a]n initial mobilization of five crews was required within the first 48 hours...DRC’s family of companies coordinated with CalRecycle to ensure that all impacted soil materials were removed from each lot.”). In addition, DRC’s proposal describes its involvement in the post-fire clean up response in the Southern Branch of California wildfire debris removal effort and the Town of Malden Fire clean-up and remediation. *Id.* at 23-25.

In its proposal, DRC does not make clear on which projects it operated as a prime contractor and on which projects it (or a predecessor in interest or affiliate) served as a subcontractor. DRC scored 15 out of 20, which presumably included points based on DRC’s narratives outlining its level of involvement in the Woolsey Fire and Paradise Camp Fire debris removal projects. See Ex. 8, Final Total Score and Bid Tab, at 5. In contrast, ECC’s past performance section was scored only three points higher, scoring 18 out of 20. See Ex. 8, Final Total Score and Bid Tab, at 5. In its proposal, ECC highlights its debris removal efforts in the Caldor Fire, Camp Fire, Woolsey Fire, CarrFire, Northern California Wildfires, and Sonoma County Fire. Ex. 5, ECC Proposal, Sec. 1.0, at 1-11. Of specific note, ECC operated as a prime contractor in the Woolsey Fire debris removal effort and Great Lakes Environmental & Infrastructure, LLC (which DRC later acquired) was a subcontractor to ECC and only performed less than nine percent of the work based on billings. Similarly, Great Lakes (again, which DRC later acquired) was a subcontractor on the Camp Fire debris removal effort to another prime contractor. The duties of a prime contractor are significantly greater than those of a subcontractor. For example, as a subcontractor to ECC on the Woolsey fire, DRC (really, Great Lakes) was not responsible for asbestos management, an issue that is critical on the Boulder cleanup.

ECC places emphasis on the above, which relates to its protest appeal grounds. Indeed, it was not until after February 10, 2022, when these materials became available to ECC, that the Committee’s errors became apparent. ECC, understanding that time is of the essence in this project and in an effort to cause as little disruption as possible to the County, then immediately prepared this protest appeal. The grounds for the protest appeal are discussed further below. ECC believes the County and its residents deserve a fair award that is in full compliance with the RFP and ensures the timely and cost-efficient remediation activities from the devastating fires.

### **C. Grounds for Appeal**

BOCC sought a contractor that would provide the most timely and cost-effective wildfire debris removal service to the County and its impacted residents. Relying on the Committee’s recommendations, BOCC chose DRC. The recommendation to award to DRC, however, was flawed for three reasons.

1. The Committee erred when it reduced DRC’s proposed project schedule by half (based on DRC’s verbal statements made during its interview), but the Committee did not likewise adjust or otherwise assess how that expedited schedule and at least doubling of crews would impact DRC’s proposed project costs (which were based on a longer schedule with reduced crews) and technical risk. DRC provided no written documentation on how they would manage what is essentially a radically different project (4 months vs 8 months) with twice the crews. Without performing an updated analysis on DRC’s supposed accelerated schedule, the Committee’s evaluation was inconsistent with the stated evaluation criteria and did not provide ECC with a level playing field. Additionally, the evaluation means that BOCC could be susceptible to claims for increased cost or price that would negatively impact the County and its residents.

2. The Committee based its recommendation on DRC's verbal, vague, and non-committal statements that it could potentially shorten its schedule. The Committee needed to request DRC to put its shortened schedule into writing by providing an amended proposal increasing its crews and a revised rate sheet that considered the increase in labor and technical risk, and should likewise have permitted ECC to make any proposal adjustments based on the interviews so that all offerors were evaluated on the same basis. The Committee's decision to assign DRC's project schedule a high score without a written revised proposal means DRC's award is inadequately supported and the procurement process laid out in the RFP was not followed.
3. The Committee's final score of DRC's past experience with similar projects included a mistake. In the Committee's score sheets, it indicates that DRC performed six wildfire debris removal projects in the past. DRC's proposal does not support this assessment and there are no indications that DRC made this clarification during the follow-up interviews. DRC's proposal only contains four examples of wildfire debris removal projects and none of these projects are of similar size or scope to this RFP. Therefore, the Committee's final score is based on a mistake that would result in ECC receiving the highest score.

The combination of the above errors, discussed in detail below, establish that the Committee's recommendation was unreasonable, arbitrary, and capricious. The award to DRC should be rescinded. Additionally, the County should release a more-fulsome record (i.e., unredacted proposals) consistent with the Colorado Open Records Act ("CORA") to allow for a meaningful analysis of the reasonableness of the evaluation of the proposals under the RFP.

1. **The Evaluation of DRC Improperly Was Based on Understated Project Costs Given the Committee's Adjustment to DRC's Project Timeline**

DRC's BAFO submitted on February 3, 2022, proposed a total project cost of \$53,041,116.89, which was based on DRC's proposed 7.5 month (231 days<sup>6</sup>) project schedule and the use of 30 crews across the three operations. See Ex. 7, RFP Notes, at 7<sup>7</sup>; see also Ex. 6, DRC Proposal, at 11. However, the Committee's final bid score sheet that assigns DRC the highest score evaluates DRC based on having a 4 month project schedule, at the same project cost that DRC proposed for its 7.5 month project schedule.

The reason for this change from 7.5 months to 4 months appears to come from the February 7, 2022 interviews the Committee conducted with the two finalists, DRC and ECC. Indeed, the Committee's notes expressly stated that DRC's timeline for the project was "adjusted from 7.5 months per interview" to result in a 4 month schedule. Ex. 7, RFP Notes, at 45. This adjustment appears to have been made based on DRC's vague and non-committal claims that it could "ramp up" and "double" (or, perhaps, more than double) its crews in order to attempt completed performance by July 1, 2022. *Id.* at 82-83. (In responding

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<sup>6</sup> DRC's proposal estimates 266 days including 35 weather delays. Due to the fact not every proposal included weather days, BOCC stated that it removed weather days from those estimates that included them to place all offerors on an even playing field. Ex. 7, RFP Notes, at 5 ("Review committee removed weather delays from the project schedule to normalize the schedules across the board.")

<sup>7</sup> DRC's price assumed that DRC would be "awarded all 3 operational zone." Ex. 6, DRC Proposal at 10. ECC's price was not based on the assumption that it would be awarded all three operational zones, but that if ECC were awarded all three, it "[c]ould provide some efficiencies." See Ex. 7, RFP Notes, at 43.

to the question about how DRC could complete performance by July 1, 2022, DRC responded “[w]e can probably double the crews. We can do 50% in house and have company in Colorado, have easier path to ramp up. 240 days and put in 60 crews could be 120 days – more weather days in the beginning of schedule. To do that schedule it may be a little more than double crews.... Equipment is a challenge and good qualified labor and trained.” (emphasis added); *id.* at 41 (“Can probably double the crews.”) (emphasis added); *id.* at 78 (can “[r]amp up with additional crews to improve finish date”) (emphasis added).

The interview notes are silent on whether and how these schedule changes and increased crews would affect the project costs. It is clear, however, that the adjustment would affect DRC’s project cost. The first line of DRC’s project cost evaluation identifies that DRC’s \$49,336 total parcel cost is premised on a unit price of 30 crews; not 60 crews or more. Ex. 8, Final Total Score and Bid Tab, at 8-9. The change to 60 or more crews would likely result in a cost increase that does not appear to be represented in DRC’s final score. The interview notes are also silent on the technical risk created by DRC verbally attempting to cut its schedule in half by doubling its crews. There is no information on how DRC would manage what is essentially a radically different project and how the doubling of crews would impact overall efficiency, logistics for access to the project site, and whether sufficient equipment and other resources are available to DRC for such an increase.

The Committee unreasonably evaluated DRC’s cost proposal based on an expedited 4 month schedule at DRC’s BAFO price that was based on the original 7.5 month schedule. See *id.* at 5. This is unreasonable, arbitrary, and capricious. It is unreasonable to believe that DRC’s project costs remained the same despite significantly accelerating its project schedule by at least 3.5 months. As discussed in Section C.5 below, due to the fact that all offerors’ rate sheets were redacted, it is impossible to estimate how much of a cost impact the 3.5 month acceleration would cost the County. It is highly unlikely DRC’s amended costs would be more cost-efficient to the County than ECC’s project costs, which were based on a schedule completion date of July 1, 2022.

Moreover, it is clear that BOCC failed to consider the pricing implications when deciding between DRC and ECC, which is improper. By looking at the comparison of the changes made to the two finalists’ offers based on the February 7, 2022 interview side-by-side, it is clear that BOCC failed to make a reasonable inquiry into how DRC’s project costs would be affected:

	DRC	ECC
Written Proposal: Cost	\$53,041,116.89	\$64,912,924.11
February 7, 2022 Interview Adjustments	No adjustments. Current price already based on receiving all three operation areas.	No adjustments. ECC would accept award of one or all the operation areas.
Written Proposal: Schedule	Estimated completion date: Dec. 13, 2022	Debris removal work estimated completion date: July 1, 2022 (full completion by July 15, 2022)
February 7, 2022 Interview Adjustments	Claimed it can probably “double crews” or more to meet July 1, 2022 deadline.	None.

The Committee's reliance on the original price and expedited schedule fails to meet the County's standard that "evaluations be conducted with fairness and integrity." Ex. 3, Boulder Cnty. Proc. Manual, at 9.1(G)(5)(a). The Committee also, in contrast to what it informed offerors, failed to "consider the cost reasonableness of individual line items and the total project" and failed to "consider the quality, availability, and adaptability of the goods and services bid when determining best value." Ex. 2, Adden. 1 to RFP, Questions 7 and 8, at 4-5. BOCC's resulting award, that was based on the Committee's unfair evaluation, was arbitrary and capricious and should be withdrawn. Based on ECC's written proposal, ECC's price and schedule will best serve the County and its residents in the effort to quickly and cost-effectively clean up the areas affected by these devastating fires.

## **2. The Evaluation of DRC Was Based On the Wrong Project Timeline**

BOCC must choose "the lowest, most responsible bid, or best bid" that is in compliance with the RFP and do so by considering, among other things, "[t]he ability of the bidder to perform the contract or provide the goods and services within the time specified." Ex. 3, Boulder Cnty. Proc. Manual, at 9.1(G)(4)(h). The second most important factor in evaluating offerors' bids under the RFP was the Timeline for Project Schedule. Ex. 1, RFP, at 24. The RFP did not provide a suggested deadline for the debris removal project to be completed, but instead provided a preliminary estimate of parcels and hazard trees that may be removed in the three areas and stated that offerors must provide a "detailed project schedule with a completed rate sheet." *Id.* at 7-8; 23. The County also informed offerors that "[t]ime is of the essence in completing this project. The County will consider the amount of resources dedicated to the project, the length of time it takes to mobilize resources, and the amount of time it takes for the contractor to complete all the work." Ex. 2, Adden. 1 to RFP, Question 35 at 10.

In assigning the final scores, the Committee improperly evaluated DRC's "Timeline for Project Schedule." DRC's written proposal contains an estimated schedule of 231 days<sup>8</sup> based on the use of 30 debris removal crews, dispersed across the three operations. Ex. 6, DRC Proposal, at 11. This estimate was based on DRC taking four days per parcel to remove debris and foundation. *Id.* Based on the RFP submission of February 1, 2022, DRC's estimated completion date would be November 8, 2022,<sup>9</sup> an estimated 7.5 months. ECC's written proposal estimated a debris removal completion date of July 1, 2022. See Ex. 5, ECC Proposal, Sec. 3.2, at 1-11.

In the final total score and bid sheet, the Committee assigned DRC and ECC each 17 out of 20 points based on a timeline of 4 months. These adjusted project schedule timelines appear to be based on verbal statements provided in the Committee interviews with both DRC and ECC on February 7, 2022. DRC and ECC both explained how they could meet a potential July 1, 2022 deadline. In order for DRC to meet the deadline, it would need to at least double crews to shorten its schedule by about half (3.5 months). ECC proposed debris removal completion by July 1, 2022 with administrative closeout through July 15,

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<sup>8</sup> DRC's proposal estimates 266 days including 35 weather delays. Due to the fact not every proposal included weather days, BOCC stated that it removed weather days from those estimates that included them to place all offerors on an even playing field. Ex. 8, Final Total Score and Bid Tab, at 5 ("Review committee removed weather delays from the project schedule to normalize the schedules across the board.")

<sup>9</sup> This date is using DRC's proposal's estimated completion date of December 13, 2022, minus 35 weather delay days. Ex. 6, DRC Proposal, at 11.



2022. DRC's significantly adjusted schedule was not committed to in writing, and it is not contained in any written proposal to the County.

Equally concerning, DRC verbally did not commit to meeting a four month schedule. The Committee notes consistently reflect, in response to a question about whether DRC could perform by July 1, 2022, that DRC did not commit to meeting the July 1, 2022 schedule. Ms. Emily Clapper's and Ms. Allison James's notes reflect that DRC informed them that DRC "can probably double the crews." Ex. 7, RFP Notes, at 41 and 82 (emphasis added). Ms. James' notes further add that, in fact, "to do that schedule, it may be a little more than double crews" and also that "equipment is a challenge." *Id.* at 83. Mr. Craig Duffin's notes similarly reflect that DRC said they could "[r]amp up with additional crews to improve finish date," but not expressly committing to the amount of that improvement. *Id.* at 78.

The Committee relied on DRC's interview to adjust its written proposal. This is improper. Interviews only are intended to clarify, and not materially amend, proposals. Ex. 3, Boulder Cnty. Proc. Manual, at 9.1(G)(4)(j). Had the Committee used the project timeline provided in DRC's written proposal, ECC would have received the higher schedule score (the second most important factor). Ex. 1, RFP, at 24. The instructions for assigning points for the timeline stated that the "[p]roject schedule will be assigned a preliminary score proportional to the shortest schedule in which shortest duration will receive maximum points and longest duration receives minimum points." Ex. 8, Final Total Score and Bid Tab, at 5.

BOCC and the Committee should reevaluate DRC's schedule based on the proposal which was never amended, and assign a lower rating to DRC for this evaluation criterion.

### **3. The Evaluation of DRC's Past Experience Was Based on Unsubstantiated Projects and Mischaracterizations**

In the final score sheet, the Committee gave DRC a score of 15 out of 20 based on DRC experience with allegedly six other "wildfire debris removal projects." See Ex. 8, Final Total Score and Bid Tab, at 5. However, DRC's proposal only discusses four wildfire projects: (1) Washing BABB Fire; (2) 2020 California Wildfire Debris and Hazardous Tree Removal; (3) Woolsey Fire Debris Removal; and (4) Paradise Camp Fire Debris Removal. Ex. 6, DRC Proposal, at 26-29; 36. The score was also to be based on wildfire projects "of similar size and scope." Ex. 8, Final Total Score and Bid Tab, at 5. None of these projects come close to the size of this RFP,<sup>10</sup> and DRC acted as only a subcontractor under the Woolsey Fire and Paradise Camp Fire projects.

In fact, ECC was the prime contractor on the Woolsey Fire project and removed debris from 929 parcels, while DRC (really, Great Lakes, which DRC later acquired), as ECC's subcontractor, only removed debris from 145 parcels. DRC performed less than nine percent of the work based on billings. Importantly, DRC's proposal provides misleading information about its role in the Woolsey Fire project when it says that it worked "under the direction of CalRecycle" and that "Forgen<sup>11</sup> coordinated with CalRecycle." Ex. 6, DRC

<sup>10</sup> Based on DRC's proposal, the 2020 California Wildfire Debris and Hazardous Tree Removal project serviced 627 parcels; Woolsey Fire Debris Removal serviced 145 properties; and Paradise Camp Fire Debris Removal removed only 15,000 tons of debris, which was less than the Woolsey Fire Debris Removal. DRC Proposal, at 26-29.

<sup>11</sup> Forgen is DRC's sister company and is headquartered in Centennial, Colorado.

Proposal, at 28. DRC did not work directly with CalRecycle, but instead received all direction from ECC while ECC coordinated with CalRecycle. DRC's description also makes it seem as though DRC was part of the initial mobilization required within 48 hours. *Id.* DRC was not part of the initial mobilization. *Id.* ("An initial mobilization of five crews was required within the first 48 hours and up to 10 crews were used at any given time."). ECC, as prime contractor, was part of the initial mobilization; DRC however, did not send any crews to the fire until weeks later. In addition, DRC's scope as a subcontractor was limited to removing ash and debris, while ECC coordinated all landfill disposal, concrete recycling, metal recycling, and asbestos abatement. These work scopes are critically important on the Boulder cleanup and DRC has limited experience in this area. Indeed, this lack of experience may explain DRC's longer schedule reflected in its proposal.

For the Paradise Camp Fire project, ECC was one of the three prime contractors, whereas DRC was a subcontractor for one of the other prime contractors, Ceres Environmental Services, Inc. ("Ceres"). As with the Woolsey Fire description, DRC's proposal appears to suggest that DRC was a prime contractor on this project when it mischaracterizes its experience by saying that "Forgen, under the direction of CalRecycle Incident Management Team, worked closely with individual property owners and employees in the surrounding communities" to perform the cleanup. *Id.* at 29. Again, as a subcontractor, DRC did not work directly with CalRecycle. It is ECC's understanding that DRC worked under the direction of Ceres.

DRC's experiences on these projects are, at worst, mischaracterized in DRC's proposal and, at best, not "similar projects" to the Marshall Fire RFP. Even without the mischaracterizations, DRC only listed four wildfire related projects in its proposal, while the Committee gave DRC a score based on six wildfire debris removal projects. It is unclear where the Committee found a total of six DRC "wildfire debris removal projects" that it listed in the final total score. The Committee's decision to award DRC a high score for past experience because DRC supported six wildfire debris removal projects is unsupported in DRC's proposal or any interview notes.

Arbitrarily assigning a higher score without support violates the Boulder County Procedure Manual that requires that "evaluations be conducted with fairness and *integrity*." Ex. 3, Boulder Cnty. Proc. Manual, at 9.1(G)(5)(a) (emphasis added). Thus, BOCC's decision to award DRC the RFP should be rescinded. With ECC's extensive relevant experience on at least eleven identified projects,<sup>12</sup> BOCC should award ECC the contract.

#### **4. BOCC's Overall Award Determination Was Unreasonable, Arbitrary, and Capricious**

Under the terms and conditions of the RFP, the contract is to be awarded to "that responsible proposer whose submittal...will be most advantageous to the County of Boulder, price and other factors considered." Ex. 1, RFP, at 5. In this case, BOCC selected an offeror with a longer schedule and less past experience with similar projects, and other than price, no other advantageous grounds in other evaluation factors. Even if BOCC can reasonably rely on DRC's verbal, unenforceable claims that it can "ramp up" its crews to accelerate its schedule to meet a July 1, 2022 completion date, there is no explanation of how that increase will impact DRC's project costs or its technical ability to execute on its alleged promises. Without

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<sup>12</sup> ECC performed structural debris and hazard tree removal work on a total of eleven fire debris removal projects, seven of which were FEMA-governed projects within the past 5 years. See Ex. 5, ECC Proposal, Sec. 1.0, at 1-1, -2. It is unclear why the committee scored ECC based on only seven wildfire debris projects.

access to DRC's proposed rate sheet, it is unclear how much DRC's project costs would increase based on doubling its crews. The record does not adequately support a conclusion that DRC presented the "most advantageous" proposal in comparison with ECC.

It was unreasonable, arbitrary, and capricious to conclude that DRC's proposal was most advantageous to Boulder County. BOCC, accordingly, should cancel the award to DRC.

**5. BOCC's Redactions of Proposals and Section Committee Notes Is Contrary to Colorado Law**

Finally, the Colorado Open Records Act ("CORA") states "[a]ll public records shall be open for inspection by any person at reasonable times" with limited exceptions allowed as provided by law. Colorado Open Records Act, C.R.S. § 24-72-203. CORA itself outlines limited exceptions to the open inspection of public records including an instruction that records custodians deny inspection of "confidential commercial, financial, geological, or geophysical data." C.R.S. § 24-72-204(3)(a)(IV). Notably, this exception is not a blanket prohibition on the release of commercial or financial information and only applies to information that is deemed confidential. See *id.* The purpose of CORA is to ensure that the internal workings of the government are not unreasonably hidden from the public and it is insufficient to merely classify information as confidential. *Int'l Bhd. of Elec. Workers Loc. 68 v. Denver Metro. Major League Baseball Stadium Dist.*, 880 P.2d 160, 165, 167 (Colo. App. 1994). As a result, commercial or financial information is considered confidential only if its release would be likely either to impair government's future ability to gain necessary information or to cause substantial harm to competitive position of the original provider of the information. See *Zubeck v. El Paso County Retirement Plan*, 961 P.2d 597 (Colo. App. 1998); *Freedom Newspapers, Inc. v. Denver & Rio Grande Western R.R. Co.*, 731 P.2d 740, 743 (Colo. App. 1986). Further, the burden of proving that the information should be deemed confidential is placed on the party opposing disclosure because "that party is likely to possess superior knowledge as to the nature of the information" and "common sense and the presumption in favor of disclosure suggest that the burden ought to rest upon it to overcome that presumption and not upon the citizen to demonstrate disclosure is warranted." *Int'l Bhd. of Elec. Workers Loc. 68*, 880 P.2d 168.

A comprehensive analysis of the reasonableness of the evaluation of the offeror's proposals and the award under the RFP requires a detailed review of the cost elements outlined in the proposals and the evaluation report. A comparison of DRC's costs claimed in its original proposal to the costs actually considered by the Committee is central to determining whether BOCC's ultimate award of the contract under the RFP was unreasonable, arbitrary, or capricious given the circumstances. The proposal documents released to the public by the County are heavily redacted and effectively conceal the internal decision-making process of the government from the public in conflict with the purpose of CORA. Accordingly, the County should make available unredacted versions of the proposals and the evaluation report to allow for a meaningful analysis of the reasonableness of the evaluation of the proposals under the RFP. Any additional protest grounds that arise from the redacted materials should not begin to run until those unredacted materials are made available.

**D. Conclusion**

For the reasons stated above, ECC requests that the BOCC sustain this appeal and provide the following relief:

(a) Correct the scoring of the DRC proposal in the evaluation sheet to properly reflect the points that would have been awarded if the proposal were evaluated against the RFP criteria;

(b) The adjusted requested in (a) would properly result in ECC being the highest scoring offeror and, therefore, BOCC should award the contract to ECC based on its compliant proposal, which had the quickest completion date and should receive the highest evaluated score;

(c) Alternately, award one or two operational areas to ECC. This provides BOCC with effectively double the crews right from the start of the project and provides BOCC the ability to expedite the project even further. This is what the original RFP contemplated and ECC's pricing allows for this action without any price adjustments.

Sincerely,

/s/ Phillip R. Seckman

Phillip R. Seckman  
K. Tyler Thomas

*Attorneys for Environmental Chemical Corporation*

**Online Exhibits List**

<b>Exhibit No.</b>	<b>Description</b>	<b>Link</b>
1	Request for Proposals #7301-22	<a href="https://assets.bouldercounty.org/wp-content/uploads/2022/01/RFP-7301-22.pdf">https://assets.bouldercounty.org/wp-content/uploads/2022/01/RFP-7301-22.pdf</a>
2	Addendum 1 to Request for Proposals #7301-22	<a href="https://assets.bouldercounty.org/wp-content/uploads/2022/01/RFP-7301-22-Addendum-1.pdf">https://assets.bouldercounty.org/wp-content/uploads/2022/01/RFP-7301-22-Addendum-1.pdf</a>
3	Boulder County Procedure Manual Section 9.1	<a href="https://assets.bouldercounty.org/wp-content/uploads/2022/02/personnel-policy-and-procedures-manual-section-9.1-purchasing-and-procurement.pdf">https://assets.bouldercounty.org/wp-content/uploads/2022/02/personnel-policy-and-procedures-manual-section-9.1-purchasing-and-procurement.pdf</a>
4	RFP Analysis and Recommendation	<a href="https://pub-bouldercounty.escribemeetings.com/filestream.aspx?DocumentId=11852">https://pub-bouldercounty.escribemeetings.com/filestream.aspx?DocumentId=11852</a>
5	Environmental Chemical Corporation Proposal	<a href="https://assets.bouldercounty.org/wp-content/uploads/2022/02/Environmental-Chemical-Corp.pdf">https://assets.bouldercounty.org/wp-content/uploads/2022/02/Environmental-Chemical-Corp.pdf</a>
6	DRC Emergency Services Proposal	<a href="https://assets.bouldercounty.org/wp-content/uploads/2022/02/DRC-Emergency.pdf">https://assets.bouldercounty.org/wp-content/uploads/2022/02/DRC-Emergency.pdf</a>
7	RFP Notes	<a href="https://assets.bouldercounty.org/wp-content/uploads/2022/02/marshall-debris-rfp-Notes.pdf">https://assets.bouldercounty.org/wp-content/uploads/2022/02/marshall-debris-rfp-Notes.pdf</a>
8	Final Total Score and Bid Tab	<a href="https://assets.bouldercounty.org/wp-content/uploads/2022/02/marshall-fire-rfp-Final-Total-Score-and-Bid-Tab.pdf">https://assets.bouldercounty.org/wp-content/uploads/2022/02/marshall-fire-rfp-Final-Total-Score-and-Bid-Tab.pdf</a>

# Exhibit 9



## Boulder County Purchasing

Downtown Courthouse • 1325 Pearl Street • Boulder, Colorado 80302 • 303.441.3525  
Mailing Address: P.O. Box 471 • Boulder, Colorado 80306 • [www.bouldercounty.org](http://www.bouldercounty.org)

February 10, 2022

Dear Vendors:

Please be advised that on February 10, 2022 the Boulder County Commissioners awarded RFP #7301-22, Private Property Structural Debris and Hazard Tree Removal Operations, to DRC Emergency Services, LLC.

If you have any questions, please email [purchasing@bouldercounty.org](mailto:purchasing@bouldercounty.org).

Thank you for participating in our RFP process.

Sincerely,

Boulder County Purchasing