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COUNTY OF ERIE

MARK C. POLONCARZ

COUNTY EXECUTIVE

July 11, 2016

Honorable Members
Erie County Legislature
92 Franklin Street, Fourth Floor
Buffalo, New York 14202

RE: Erie Community College STEM Building

Dear Honorable Legislators:

As you are aware, presently pending before your Honorable Body is Communication 11E-6 (the "Communication") which is a resolution requesting authorization for the undersigned to enter into contracts with the lowest responsible bidders for seven (7) bid packages related to construction of the Erie Community College ("ECC") – Science, Technology, Engineering, and Math ("STEM") Building. This Communication was unfortunately rejected by the members of the Community Enrichment Committee based on the veiled threats of a lawsuit being filed by a disgruntled losing bidder, and is presently part of the Community Enrichment Committee's Report to the full body which is pending before your Honorable Body.

Based on the Community Enrichment Committee's action in rejecting the Communication, which in turn rejected all construction bids for the STEM project, the project was placed in jeopardy due to the potential threat of all of the lowest responsible bidders suing the County if we attempt to re-bid the project for no other reason than a veiled threat of a lawsuit from one disgruntled losing bidder. I was forced to act and I immediately ordered a stop to all work on the project until such time as this matter is resolved in such a way as to not expose the County and ECC to lawsuits from multiple parties.

As I have stated to some of your members individually, there was no legal reason for the Community Enrichment Committee to reject the Communication under the premise that failure of one bidder to include its minority business enterprises ("MBE") and women business enterprises ("WBE") subcontractor report in the original bid package thereby rendered the bid to be non-responsive. In fact, pursuant to Erie County Local Law No. 6 of the year 1987, Erie County Law gives the three lowest bidders to any solicitation for bids three (3) business days from the bid's opening to provide said report. The pertinent provision of the law states as follows:

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(B) The three (3) lowest bidders on each contract subject to this law shall submit to the County MBE/WBE office, with the bid (or within 3 business days of the bid opening), a list of all MBE's and WBE's from whom the Contractor has solicited bids or with whom the Contractor has signed a binding contractual agreement or with whom the Contractor is presently negotiating an agreement, for the purposes of meeting the MBE and WBE utilization goals provided for in subdivision (A) (5) above.

Please be advised the sponsors of the above referenced Local Law were Legislators Mary Lou Rath and Joan Bozer, and the law was signed into effect by County Executive Ed Rutkowski. A copy of the Local Law as filed with the New York Secretary of State's Office is enclosed for your review.

It is quite clear there is no merit to the claim of the disgruntled losing bidder that the lowest responsible bidder's bid should be rejected as being non-responsive and it, the next highest though disgruntled losing bidder, should be awarded the contract. The lowest responsible bidder provided its MBE/WBE utilization report to the county within twenty-four (24) hours of the bid being opened, clearly within the three (3) business day timeline provided by County law. In fact, any attempt to award the contract to the disgruntled losing bidder would be in contravention of our own laws and certainly subject the County and ECC to a lawsuit from the lowest responsible bidder.

There is no justifiable reason to re-bid all the contracts for the project because every action taken in regard to the solicitation and awarding of bids was done in compliance with the law. Presently the entire project is in jeopardy. I will not move forward with the project if the County and ECC are going to be subject to multiple lawsuits. However, your Honorable Body can rectify this matter by separating Communication 11E-6 from the Community Enrichment Committee's Report and voting for the Communication in the affirmative. This will ensure the project moves forward, the lowest responsible bidders for all seven (7) bid packages are awarded contracts, and the disgruntled losing bidder will have no legal basis in which to commence a lawsuit against the County and ECC.

If you have any questions, please do not hesitate to contact my office.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Mark Poloncarz", with a long, sweeping horizontal line extending to the right.

Mark C. Poloncarz, Esq.
Erie County Executive

MCP/mt
Enclosure

Poloncarz Letter to Legislature on STEM Building Contracts

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cc: Jack Quinn, ECC President
Steven Boyd, Chairman, ECC Board of Trustees
Robert W. Keating, Director of Budget and Management

(Please Use this Form for Filing your Local Law with the Secretary of State)

Text of law should be given as amended. Do not include matter being eliminated and do not use italics or underlining to indicate new matter.

County
~~City~~ of ERIE
~~Town~~
~~Village~~

Local Law No. 6 of the year 19 87

A local law requiring a minority business utilization and women-owned business utilization commitment by persons or firms contracting with the County of Erie.

Be it enacted by the Legislature of the
(Name of Legislative Body)

County
~~City~~ of ERIE as follows:
~~Town~~
~~Village~~

SECTION 1; The following provisions shall be inserted in and made a condition of all bid specifications prepared by the Erie County Department of Planning and Environment and/or the Erie County Department of Public Works and advertised after the effective date of the local law which was estimated by County to result in a contract exceeding \$100,000.00.

Minority Business Utilization Commitment

(A) The Contractor shall take affirmative action to utilize bona fide minority business enterprises/women business enterprises for subcontracts on this project. Affirmative action shall include, but not be limited to: (1) Utilizing a source list of minority business enterprises (MBE) and women-owned business enterprises (WBE), (2) Solicitation of bids from MBE's and WBE's, particularly those located in Erie, Niagara, Cattaraugus and Chautauqua Counties, (3) Giving MBE's and WBE's sufficient time to submit proposals in response to solicitations, (4) maintaining records showing MBE's and WBE's and specific efforts to identify and award contracts to these companies, and (5) a goal of awarding at least ten percent (10%) of the total dollar value of the contract to MBE's and at least two percent (2%) of the total dollar value of the contract to WBE's or, for those contracts governed by federal or state regulations with respect to MBE and/or WBE hiring, the prevailing percentage set forth therein, whichever is higher, subject to waiver as provided for below.

(B) The three (3) lowest bidders on each contract subject to this law shall submit to the County MBE/WBE office, with the bid (or within 3 business days of the bid opening), a list of all MBE's and WBE's from whom the Contractor has solicited bids or with whom the Contractor has signed a binding contractual agreement or with whom the Contractor is presently negotiating an agreement, for the purposes of meeting the MBE and WBE utilization goals provided for in subdivision (A) (5) above. A contractor's bid shall not be considered where the Contractor fails to submit such a list as provided for herein. A Contractor's bid shall not be considered where examination of said list of MBE's and WBE's evidences failure by the Contractor to comply with the affirmative action requirements provided for herein, except that the County may, upon written request by the Contractor, grant a complete or partial waiver of the provisions of Subdivision (A) (5), where the availability of MBE's and/or WBE's in the market area of the project is less than the ten percent (10%) and two percent (2%) goals above.

(C) As evidence of compliance with the goals set forth in subdivision (A) (5) above, the Contractor shall submit to the County MBE/WBE office, within fifteen (15) business days of the bid opening, a schedule for MBE and WBE participation, listing the MBE's and WBE's with whom the Contractor intends to subcontract, specifying the agreed price to be paid for such work, and identifying in detail the contract item(s) or parts to be performed by each MBE and each WBE. A letter of intent to enter into a subcontract or purchase agreement, contingent upon contract award, indicating the agreed upon price and scope of work, shall be provided, signed by both the Contractor and the MBE or WBE. The prime Contractor shall not substitute or delete the listed MBE's or WBE's without the written consent of Erie County.

(D) As evidence of compliance with the goals set forth in Subdivision (A) (5) above, the Contractor shall provide to Erie County MBE/WBE office, copies of all subcontracts and/or purchase agreements with MBE's and WBE's within fifteen (15) days of contract award. A motion to proceed with construction shall not be issued until such documentation is received.

(E) As evidence of compliance with the goal set forth in Subdivision (A) (5) above, the Contractor shall submit to the County MBE/WBE office, when the project is thirty percent (30%) complete, a list of MBE's and WBE's on the project, the dollar amounts paid to that date and the estimate amount remaining to be spent. This same information is required at seventy-five percent (75%) completion and a final accounting must accompany the final payment request.

(F) Failure to comply with the provisions set forth herein shall constitute a breach of this contract subject to all remedies available to the County.

(G) For the purposes of this section, the term "minority business enterprise (MBE)" shall mean a business which performs a commercially useful function, at least fifty-one percent (51%) of which is owned by minority group members or, in the case of a publicly owned business, at least fifty-one percent (51%) of all stock is owned by minority group members. Such ownership shall be certified by the Erie County Equal Employment Opportunity Office. For the purposes of this paragraph, "minority group members" are citizens of the United States who are Black, Hispanic, Asian-American, American Indian, Eskimo or Aluet. (For purposes of this section, the term "subcontract" includes all construction, modification, supplies and material, and service work contracted for by the Contractor in the prosecution of this work.)

(H) For the purposes of this Section, the term "women-owned business enterprise (WBE)" shall mean a business which performs a commercially useful function, at least fifty-one percent (51%) of which is owned by a woman or women or, in the case of a publicly owned business, at least fifty-one percent (51%) of all stock is owned by a woman or women. Such ownership shall be certified by the Erie County Equal Employment Opportunity Office.

(I) Where the MBE or WBE is a supplier, a credit of one hundred percent (100%) of the dollar value of the subcontract between the MBE or WBE and the Contractor shall be awarded toward the fulfillment of the appropriate goal, as set forth in Section 1 (A) (5) above.

1) For purposes of this Section, an MBE or a WBE will be considered a supplier when it:

- a. assumes actual and contractual responsibility to furnish supplies and/or materials and is the manufacturer of those supplies and/or materials; or
- b. is recognized by the manufacturer involved as a distributor of its supplies and/or materials; and
- c. owns or leases a warehouse, yard, building or other facility which is necessary and customary to carry out the proported function of the business; and
- d. distributes, delivers and services the supplies and/or materials with its own staff.

(J) Where an MBE or WBE performs a sales function, which is customarily performed as a distinct and necessary part of the supply process, a credit of twenty-five percent (25%) of the dollar value of the subcontract between the MBE or WBE the Contractor will be awarded toward the fulfillment of the appropriate goal, as set forth in Section 1 (A) (5) above.

(K) Where the MBE or WBE performs a function or service which is commercially unnecessary, such as acting as a passive conduit in the supply process or duplicating a service provided by others in the same chain of supply from manufacturer to purchaser, no credit will be granted toward

the appropriate goal, as set forth in Section 1 (A) (5) above.

(L) The qualifications set forth in subsections (I), (J) and (K), above, of this Action shall be certified by the Erie County Equal Employment Opportunity Office.

(M) For purposes of this Section, the term "subcontract" includes all construction, modification, service work, supplies and material contracted for by the Contractor in the prosecution of this work.

SECTION 2. The County Executive shall appoint a minority business enterprise and women-owned business enterprise utilization advisory board of nine (9) members consisting of County personnel, legislators, minority contractors, female contractors and community and business representatives, which shall review program administration and implementation on a regular basis and shall submit an annual report to the County Executive and the County Legislature. This committee shall be empowered to promulgate regulations to provide for the administration of this local law.

SECTION 3. The legislature shall conduct hearings annually to assess the impact of the local law.

SECTION 4. This local law shall take effect immediately.

(Complete the certification in the paragraph which applies to the filing of this local law and strike out the matter therein which is not applicable.)

1. (Final adoption by local legislative body only.)
I hereby certify that the local law annexed hereto, designated as local law No. of 19.....
County
City of was duly passed by the (Name of Legislative Body)
Town
Village
on 19..... in accordance with the applicable provisions of law.

2. (Passage by local legislative body with approval or no disapproval by Elective Chief Executive Officer * or repassage after disapproval.)
I hereby certify that the local law annexed hereto, designated as local law No. of 19.....
County
City of was duly passed by the (Name of Legislative Body)
Town
Village
on 19..... not disapproved and was approved by the
repassed after disapproval Elective Chief Executive Officer *
and was deemed duly adopted on 19....., in accordance with the applicable provisions of law.

3. (Final adoption by referendum.)
I hereby certify that the local law annexed hereto, designated as local law No. of 19.....
County
City of was duly passed by the (Name of Legislative Body)
Town
Village
on 19..... not disapproved and was approved by the
repassed after disapproval Elective Chief Executive Officer *
on 19..... Such local law was submitted to the people by reason of a
mandatory referendum, and received the affirmative vote of a majority of the qualified electors voting
permissive general
thereon at the special election held on 19....., in accordance with the appli-
annual
cable provisions of law.

4. (Subject to permissive referendum, and final adoption because no valid petition filed requesting referendum.)

I hereby certify that the local law annexed hereto, designated as local law No. 6 of 19 87.
County
of the ~~City~~ of Erie was duly passed by the Erie County Legislature on
~~Town~~
~~Village~~
October 15th 19 87 and was approved by the Erie Co. Executive on
~~repassed after disapproval~~ Elective Chief Executive Officer *
November 9th 19 87. Such local law being subject to a permissive referendum and no
valid petition requesting such referendum having been filed, said local law was deemed duly adopted on
December 24th 19 87, in accordance with the applicable provisions of law.

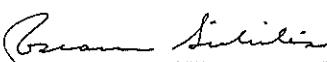
*Elective Chief Executive Officer means or includes the chief executive officer of a county elected on a county-wide basis or, if there be none, the chairman of the county legislative body, the mayor of a city or village or the supervisor of a town, where such officer is vested with power to approve or veto local laws or ordinances.

5. (City local law concerning Charter revision proposed by petition.)
 I hereby certify that the local law annexed hereto, designated as local law No. of 19 of the City of having been submitted to referendum pursuant to the provisions of § 36 of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of such city voting thereon at the ^{special} ~~general~~ election held on 19 became operative.

6. (County local law concerning adoption of Charter.)
 I hereby certify that the local law annexed hereto, designated as Local Law No. of 19 of the County of, State of New York, having been submitted to the Electors at the General Election of November, 19, pursuant to subdivisions 5 and 7 of Section 33 of the Municipal Home Rule Law, and having received the affirmative vote of a majority of the qualified electors of the cities of said county as a unit and of a majority of the qualified electors of the towns of said county considered as a unit voting at said general election, became operative.

(If any other authorized form of final adoption has been followed, please provide an appropriate certification.)

7. I further certify that I have compared the preceding local law with the original on file in this office and that the same is a correct transcript therefrom and of the whole of such original local law, and was finally adopted in the manner indicated in paragraph 4 above.


 XXX
 XXX
 Clerk of the Erie County Legislature

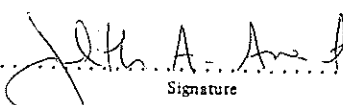
Date: December 28, 1987

(Seal)

(Certification to be executed by County Attorney, Corporation Counsel, Town Attorney, Village Attorney or other authorized Attorney of locality.)

STATE OF NEW YORK
 COUNTY OF ERIE

I, the undersigned, hereby certify that the foregoing local law contains the correct text and that all proper proceedings have been had or taken for the enactment of the local law annexed hereto.


 Signature
 .. County Attorney ..
 Title

Date: December 28, 1987

County
 XXX of Erie
 XXX
 XXX

Comm. 13E-6
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