June 21, 2021

The Honorable President

Members of the City Council

c/o Natawna Austin, Executive Secretary

409 City Hall

Baltimore, MD 21202

RE: City Council Bill 21-0068 – Curing Mistakes in Bids

Dear President and Members:

You have requested that the Law Department review City Council Bill 21-0068 for form and legal sufficiency. This bill permits the City Purchasing Agent to waive minor irregularities in bids, allows bidders to cure mistakes in a bid under certain circumstances and to withdraw a bid under certain circumstances. The bill also empowers the City Solicitor and the Purchasing Agent to make determinations regarding mistakes in bids and to allow for corrections to or withdrawals of bids.

The law in Maryland provides that “[u]nless additional powers are conferred by statute or by the state constitution, a municipal corporation created by charter derives all its powers from the charter.” 2A McQuillin Mun. Corp. § 9:3. “In the event of an inconsistency between the provisions in the Charter and any contrary [ordinance], the provision in the Charter would control….” *Swarthmore Co. v. Kaestner*, 266 258 Md. 517, 526–27 (Md. 1970). The Baltimore City Charter itself recognizes the supremacy of the City Charter over all municipal ordinances. Article III, § 11 provides, “The Mayor and City Council of Baltimore shall have power to pass all ordinances, not inconsistent with the Charter….”. The charter, therefore, supersedes all municipal laws, ordinances, rules or regulations that are inconsistent.”

Procurement powers are specifically reserved in the Charter for the Board of Estimates unless provided otherwise in the Charter or State law. While the Charter gives the Director of Finance a role in the purchasing process, it is limited to ensuring that the agencies comply with the centralized purchasing system, setting standards for procurement of routine goods and services and prescribing the

process for submission of estimates of procurement needs by the agencies. It does not extend to the determining which bids are compliant with the bid documents and waiving or correcting of bid irregularities. Many of the provisions in this bill are inconsistent with the Charter’s grant of authority over contracting and procurement to the Board of Estimates. The extent of the inconsistencies in Bill 21-0068 is explained below.

First, Sec, 47-3 of the bill defines “minor irregularity.” It allows the purchasing agent to waive a minor irregularity if advantageous to the City or to allow a bidder to cure any deficiency resulting for the minor irregularity. Sec 47-3 impinges on the Art VI, Sec.(a) authority of the Board to make the decisions regarding the award of contracts by proposing to vest the purchasing agent with the power, via a subjective definition of “minor irregularity,” to waive or cure the irregularity thus determining whether the bid will move forward in the award process. In addition, this section is void for vagueness as there is no indication whether this authority is applicable to all bids or just some bids. A statute must be “sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties,” otherwise, the enactment is void-for-vagueness. Galloway, 365 Md. at 614, 781 A.2d at 860 (quoting Williams v. State, 329 Md. 1, 8, 616 A.2d 1275, 1278 (1992)). Persons of ordinary intelligence and experience must be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly. Id.

 Not only is this a clear impingement on the Board’s Charter authority to award contracts and supervise procurement, it is an attempt to illegally delegate authority of the Board to the purchasing agent. The City has no right under the law to delegate its governing power to any agency. The power of the City is prescribed in its charter, and the City Charter constitutes the measure of power that is possessed by any of its officials. To delegate such power to an independent agency would be a serious violation of the law. To recognize such delegation of power in any City department might lead to the delegation of such power in all departments, and would result in the City government being administered regardless of its charter. *Andy's Ice Cream v. City of Salisbury*, 125 Md. App. 125, 160-163 (Md. Ct. Spec. App. 1999). In either case, taking a bid decision out of the hands of the Board inspite of the clear Charter language placing such decisions in the hands of the Board is an illegal delegation and an impingement on the Charter powers of the Board.

Second, Sec. 47-4 (A) applies to mistakes discovered before opening. Since the bids have not been opened, it is unclear how these mistakes are discovered. Presumably, the bidder brings the matter to purchasing agent’s attention. This

section allows the bidder, after giving notice to the Purchasing Agent, to withdraw or correct a bid. The bill does not define “mistake” but this section gives a bidder complete discretion to withdraw a bid or correct a bid for any type of mistake, no matter how significant, without the Board ever knowing of the change. This takes the decision completely out of the Board’s hands as to whether the bidder would have been the lowest responsive or responsible bidder resulting in a usurping of the Board’s Charter authority. Furthermore, Article VI, Sec, 11(h)(iv), which makes bid irrevocable once submitted, is violated by allowing withdrawal by the bidder after submission.

The Procurement Regulations promulgated by the Board pursuant to Art. VI, Sec.11 define responsive and responsible. Procur. Regs Sec. I.G.8.a.ii. Factors to consider include whether the forms are fully and accurately completed; is the required information included; are the signatures affixed as required. The regulations allow the Board in its discretion to cure or waive minor irregularities related to responsiveness. Responsibility factors are more substantive and include ability, capacity, skill etc. to perform the contract; ability to perform within the prescribed time; reputation, experience and integrity of the key personnel; performance on other contracts and sufficiency of financial resources. There are no regulations allowing for cure of deficiencies in satisfying the “responsibility” factors. Sec. 47-4(A), therefore, impinges on the Charter powers of the Board directly by allowing the bidder to makes decisions about a bid already submitted but not opened and by making determinations about responsibility and responsiveness before the Board even sees the bid. In addition, this section directly conflicts with the regulations, that the Charter give the Board the right to enact, by allowing the bidder, instead of the Board, to make the call regarding waiver or curing of “minor irregularities.” Clearly, this violates the Charter Art.VI, Sec. 11 and the regulations implementing that section.

Third, Sec. 47-4(B) applies to mistakes discovered during bid opening. At the outset, it should be noted that there is a strained choice of wording in this section. The language refers to “open bidding period” which sounds different and could be interpreted differently from “bid opening period.” The later would be consistent with current practice and the bill should be amended to reflect the appropriate terminology. This section allows mistakes discovered during the bid opening period to be cured or withdrawn if the purchasing agent knows the bidder made a mistake, the mistake is obvious on the bid’s face or the bid is unreasonably lower than other bids. It allows the purchasing agent to confer with the bidder about mistakes during this time. This section then allows the bidder to claim mistake and if approved by the City Solicitor, correct the mistake or withdraw a low bid with

proof demonstrating that there was a mistake. The bill mandates that the Solicitor provide an approval or disapproval within one business day.

 This section creates a conflict for the City Solicitor who will have to defend the City if a lawsuit is filed related to approving or disapproving a cure or withdrawal under this section. Such decisions being made by the Solicitor could also be construed as providing legal counsel to the bidder which is not within the scope of the Solicitor’s powers, which are limited to representing the City.

Similar to the previously discussed sections, Sec. 47-4(B) impinges on the Charter authority of the Board to award contracts. It puts the decision on whether to award a contract with mistakes in the hands of only one member of the Board, the City Solicitor, by requiring that the Solicitor approve or disapprove the curing of a mistake or the withdrawal of a unreasonably low bid. This impinges on the authority of the Board as a whole to award contracts. Furthermore, Article VI, Sec, 11(h)(iv), which makes bide irrevocable once submitted, is violated by allowing withdrawal by the bidder after submission.

Finally, Sec .47-4(C) applies to mistakes discovered after award of the contract. This section allows the purchasing agent to correct a mistake that does not result in a price change if the purchasing agent determines that it would be unconscionable not to allow the mistake to be corrected, the agent submits the correction to the City Solicitor and the City Solicitor approves the correction. This section violates the Charter for reasons similar to those in previous paragraphs. It creates a potential conflict for the City Solicitor. It requires the Solicitor to overstep his Charter authority. It impinges on the Boards authority as it would allow the agent to make decisions regarding the award of contracts. In addition, it impinges on the requirements of the Procurement Regs Sec.I.M. which require changes to be proposed by the procuring agency with Law Department approval and final Board approval. In addition, it violates the Charter provisions requiring contracts to be awarded to the lowest responsive and responsible bidder by allowing changes after the award determination had been made by the Board.

Based on the foregoing legal analysis, the bill is in conflict with the Charter authority granted to the Board of Estimates with respect to procurement. The Law Department, therefore, cannot approve this bill for form and legal sufficiency.

Sincerely,

 

 Elena R. DiPietro

 Chief Solicitor

cc: James L. Shea, City Solicitor

 Darnell Ingram, Deputy Solicitor

 Stephen Salsbury , Chief of Staff

 Natasha Mehu, Director, MOGR

 Nina Themelis, Mayor’s Legislative Liaison, MOGR

 Nikki Thompson, President’s Legislative Director

 Matthew Stegman, President’s Office

 Natawna Austin

 Hilary Ruley, Chief Solicitor

 Ashlea Brown, Special Solicitor

 Victor Tervala, Chief Solicitor

 Dereka Bolden, Assistant Solicitor

 Avery Aisenstark