



DATE: August 24, 2010
TO: Mayor Linda D. Thompson
FROM: Philip Harper
Acting City Solicitor
SUBJECT: Legal opinion

This opinion addresses recent questions regarding the Mayor of the City of Harrisburg's decision to award a contract to the firm of Scott Balice Strategies for the purpose of providing financial advisory services to the City of Harrisburg (City) in connection with the City's debt restructuring efforts aimed at alleviating its current financial crisis and providing future financial stability.

BACKGROUND

The City acquired debt obligations in excess of \$288,000,000 from its guaranty of bonds and notes issued by The Harrisburg Authority (THA) to fund the retrofit of THA's Resource Recovery Facility (RRF). The RRF is a waste-to-energy facility which, by incineration, processes all permitted municipal solid waste generated in the City, Dauphin County and other surrounding municipalities. In addition, the RRF processes waste from outside sources on a contractual basis.

In late 2008, THA requested a tipping fee rate increase to Dauphin County of approximately \$100 per ton, which would have placed the County's rate at about \$165 per ton. THA sought this rate increase in an effort to increase its revenues so that THA could meet its operating expense and debt service obligations. THA had previously increased the City's tipping fee rate to \$200 per ton, reportedly the second highest fee charged for trash disposal in the nation. The increased fee to the City was also prompted by the need to increase revenues to pay debt service. Dauphin County challenged THA's rate increase and THA was only awarded an increase of about \$1.58. Purportedly, this outcome left THA with insufficient revenues to meet its debt service obligations for the year 2009.¹

In early 2009, the City was called upon to make good on its guaranties of the bonds and notes due to THA's inability to pay its debt service obligations. The City paid upwards of \$4,884,000 throughout the year. Towards the end of 2009, the City ran out of reserves and other funds to continue to pay on its guaranties and Dauphin County, as secondary guarantor on certain of the bonds and notes, was called upon to make debt service payments. Dauphin County made the required payments and subsequently sued THA and the City primarily seeking reimbursements and assurances that the City would budget and allocate sufficient funds to make future payments on its guaranties. Dauphin County then filed an additional law suit against the City anticipating that the City would default on future payments due in December of 2010. The City and THA have been somewhat successful in staving off Dauphin County's lawsuits, but, nevertheless, the threat of current and potential future litigation remains.

In addition to the debt related to the RRF retrofit, the City guarantied a \$25,000,000 construction loan from Covanta Harrisburg, Inc. (Covanta) to THA to fund final construction on

¹ There are other factors that contribute to the City's current financial distress, but undoubtedly, the debt on the RRF is by far the greatest contributing factor.

the RRF in order for Covanta to complete the retrofit and assume operations. The City made two quarterly payments of \$637,500 each on the construction loan in accordance with its guaranty in 2009 and one in January of 2010. Neither THA nor the City has been able to make any additional quarterly payments in the current year.

In late 2009, former Mayor Stephen R. Reed submitted a proposed 2010 Budget to the Harrisburg City Council (City Council). In the budget, the former Mayor included an allocation of \$67,752,463 in the Debt Service Fund to cover the entire 2010 debt service for the RRF bonds and notes should the City have to pay on its guaranties. The requirement to budget for guaranty payments is mandated under the Local Government Unit Debt Act (Debt Act). The funding to meet the City's obligations was planned to be derived from the sale or lease of assets. City Council rejected the debt service expenditure budget line-item associated with the City's guaranties of THA/RRF debt and cut it from the budget despite advice from the Solicitor that it was required to be funded under the Debt Act. City Council also cut a water rate increase from the budget leaving the budget in an unbalanced, beginning deficit in the amount of approximately \$3,818,000.

Upon taking office on January 4, 2010, Mayor Thompson inherited a budget with a gaping General Fund deficit and no allocation of funds to pay on the City's THA/RRF debt guaranty obligations along with pending and looming lawsuits arising from the City's inability to make debt payments in accordance with its guaranties. In accordance with an allowance under the Third Class City Code, Mayor Thompson submitted a new 2010 Budget for Council's consideration in January of 2010. Mayor Thompson's budget included an allocation for funds to pay the THA/RRF debt guaranties, which allocation was also cut by City Council. After several additional amendments by City Council to Mayor Thompson's proposed budget, City Council

approved the budget and submitted it for the Mayor's signature. The Mayor, knowing that the budget, as amended by City Council, was unbalanced and in contravention of the Debt Act and the City's own Debt Act ordinances, vetoed the amended, proposed budget. Without challenge from City Council to override the Mayor's veto, the amended version of former Mayor Reed's budget became law, despite its lack of compliance with the Debt Act and despite being out of balance.

Since taking office, the Mayor has recruited experts from the community and the Commonwealth, who have acted voluntarily to assist the City in combating its financial challenges. The Mayor has reached out to various stakeholders including Assured Guaranty Municipal Corporation (AGM), the insurer of the bonds and notes for the RRF. AGM, as well as Covanta, have agreed to entertain a period of forbearance in order for the City to develop a comprehensive plan to manage its debt obligations.

In order to develop such a plan, the Mayor requires the assistance of experts in the fields of finance and law, typical of the assistance requested by other cities and companies facing similar restructuring efforts. In order to obtain forbearance, the City's creditors insist that such experts assist the City in its financial recovery. In response to what is necessary and imperative, the Mayor has solicited the assistance of such professionals. This action was taken by the Mayor in accordance with the Mayor's authority under the Third Class Optional Plan A, Mayor -- Council form of government, to manage the day to day functions and financial operations of the City and to see that the City's obligations, whether financial or operational, are met. Despite having taken these necessary measures to address the City's restructuring needs and having acted in accordance with the law, the Mayor's actions are now being challenged by the City Controller and certain City Council members. The crux of the challenge seems to be that a contract with

the selected financial advisor, Scott Balice Strategies, would be invalid without obtaining City Council's approval based on the belief that the selection process did not comport with public bidding requirements.

WHETHER THE ADMINISTRATION FOLLOWED PROPER PUBLIC BIDDING PROCEDURES TO OBTAIN THE SERVICES OF A FINANCIAL ADVISOR?

The public bid requirements for obtaining goods and services in Cities of the Third Class are put forth in section 36901 of the Third Class City Code (Code). 53 P.S. § 36901, *et seq.* This section establishes that services required by a city, the cost of which will exceed \$10,000, shall be awarded to the lowest responsible bidder. 53 P.S. § 36901(b). The notice announcing the need for services must be advertised two times on different days in not more than two newspapers in accordance with advertising requirements set forth in section 35109 of the Code. *Id.* Section 35109 requires that advertisements inviting proposals for public contracts be published only in newspapers of general circulation in the City. 53 P.S. § 35109. Finally, the notice of the advertisement for a public contract must be posted in City Hall. § 36901(b) *supra*.

In accordance with the above listed requirements, the City's Purchasing Manager published notice that the City was seeking the services of a financial advisor in the Patriot News newspaper, a newspaper of general circulation in the City. The advertisement was published twice on different days. (See Proof of Publication, dated June 3, 2010, attached hereto as Exhibit "A"). Finally, the advertisement was posted in City Hall in plain view outside of the Purchasing Office. In addition to the minimum requirements set forth in the Code, the City published notice of its advertisement on its official web site along with the entire Request for Qualifications document. In all, the City not only met the requirements for public bidding, but exceeded them. I find that the City properly publicly noticed the bid for Financial Advisory services.

**WHETHER THE CITY'S PUBLIC BID AWARD TO SCOTT BALICE STRATEGIES
WAS IN ACCORDANCE WITH THE REQUIREMENTS FOR AWARDED PUBLICLY
BID PROFESSIONAL SERVICES CONTRACTS?**

As stated earlier, services required by the City which will exceed \$10,000 must be awarded to the "lowest responsible bidder." § 36901(b) *supra*. The Pennsylvania Supreme Court in the case of *Kratz v. City of Allentown* defined what is meant by the statutory requirement that municipalities must award public contracts to the lowest responsible bidder. The *Kratz* Court noted that courts in general have consistently held that determining the lowest responsible bidder is a function left to the discretion of municipal officials charged with making purchases on behalf of the municipality. *Kratz v. City of Allentown*, 155 A. 116, 117 (Pa. 1931). The Court emphasized that the lowest responsible bidder is not necessarily the lowest bidder in dollars, and that discretionary determinations may be made to include, "financial responsibility, integrity, efficiency, industry, experience, promptness and ability to successfully carry out the particular undertaking." *Id.* Once, after careful investigation, the determination has been made as to which bid represents the best bid, the officials' discretion ceases and the contract must be awarded to the lowest responsible bidder, "regardless of the difference in the bids, whether it is more or less." *Id.*

Professional and personal services contracts are exempt from the public bid requirement. 53 P.S. § 36901(d)(5). Nevertheless, as explained above, in this instance, the City in fact publicly bid for the professional services of a financial advisor to assist the City in managing its current and future financial challenges. Under an exception to the Mayor's authority to manage contract administration provided by ordinance, City Council requires that professional services contracts that are not publicly bid, i.e. if the Mayor opts to employ the exception to public

bidding permitted under the Code, those contracts must be coordinated with and awarded by City Council. The exact language of the City's ordinance is as follows:

"2-307.5 CONTRACTS

(a) Contract administration for the City, heretofore vested in Council, shall be vested in the Mayor and Department of Administration, to be exercised in accordance with the procedures adopted by the Mayor. The exception shall be the award of no-bid contracts for professional services. Due to the sensitive and controversial nature of these contracts, coordination with and approval by the City Council is required." (Ord. 1-1985).

The first sentence of the above provision is in harmony with the grant of authority to the executive branch of government formed under the Third Class Optional Charter Law, Mayor-Council Plan A form of government adopted by the City by referendum of the voters which became effective in January 1970 (Charter). 53 P.S. § 41101 *et seq.* Part D of the Mayor-Council Plan A, which addresses the powers of a mayor, states, in relevant part, "Where a department of administration is established, it shall be headed by a director who shall be known and designated as business administrator He shall have, exercise and discharge the functions, powers and duties of the department. The department, under the direction and supervision of the mayor, shall: . . . (2) Administer a centralized purchasing system." 53 P.S. § 41416. Consistent with the Charter and section 2-307.5, the Department of Business Administration of the City has within it a Purchasing Office which is responsible for all contracts, whether for goods or services, professional or non-professional services or bid or no-bid. This Office functions under the direction of the Business Administrator and ultimately the Mayor. The Purchasing Office operates in accordance with guidelines established by the Mayor.

In section 2-307.5, the term "contract administration" is not defined, nor is it defined elsewhere in the Codified Ordinances. Regardless, section 41416 of the charter clearly puts all aspects of purchasing in the hands of the executive. The exception to section 2-307.5 singles out

only no-bid professional services contracts as requiring City Council approval.² Publicly bid professional services contracts, however, do not fall within the exception and therefore do not require City Council approval. Decisions regarding the selection criteria and the awarding of these contracts are exclusively the province of the Executive branch of City government. Accordingly, neither the legislative branch of government, nor any other elected office for that matter, determines how contracts will be awarded, under what procedures or ultimately to whom.

City Controller, Daniel C. Miller, by letter dated August 18, 2010 and copied to City Council Members and Robert F. Kroboth, Interim Chief of Staff/Business Administrator, challenged the Mayor's authority to select Scott Balice Strategies to act as the City's Financial Advisor. (See Controller letter attached hereto as Exhibit "B"). Mr. Miller's objection characterized Scott Balice Strategies' selection as a no-bid professional services contract, which must be approved by City Council under section 2-307.5, because the criteria used to make the selection were arbitrary. Specifically, his objection notes that Section 6 of the RFP states that the Mayor will make the final decision and that cost will only amount to 15% of the total evaluation criterion. It further alleges that at the time the selection was made, the price for the services was not known. No case law or other authority is cited in support of this interpretation of the law.

First, it is clear that the price of the professional services sought was known at the time the selection was made. All proposers submitted their cost requirements as required in the bid instructions. The selection committee, comprised of various City officials including the City Council President, was perfectly aware of what the City would be expected to pay and could

² Ordinance 1-1985 which provided for the no-bid professional services exception has been determined to be of no force or effect and in contravention of the powers and authorities granted to the executive branch of government under the Charter. This determination was made by the solicitor at the time when the ordinance was put before City Council. The ordinance has also been determined to be contrary to the Charter by a later solicitor. I also agree that the ordinance violates state law. The exception, to my knowledge, has rarely if ever been enforced probably due to its questionable legal validity. Nevertheless, City Council has made it a point to enforce this provision against the current Administration.

compare proposed prices between bidders. As is typical with professional services, unknown variables do not permit a municipality to know the total cost at the time of the selection; however, this does not mean that the information provided in the RFP did not permit a price comparison of the proposers' services. For example, a contract for legal services could include an hourly, weekly, monthly or other pricing arrangement. Although the total cost would not be determinable until the matter for which the firm was chosen is settled, the municipal officials making a determination as to the lowest responsible bidder would be able to, with confidence, compare the various bidders' proposed prices and make an informed decision as to which would be the lowest responsible bid. Therefore, this allegation is wholly unfounded.

Second, selecting the lowest responsible bidder to whom a contract will be awarded where cost will only account for 15% of the evaluation criteria is proper. Indeed, the City, in its recent selection of Management Partners, Inc. (MPI) to provide professional services under contract to the City, assigned the same 15% weight to cost. In that instance, as in the case of Scott Balice Strategies, the emphasis was properly placed on overall qualifications of the vendor to serve the City.

As the Supreme Court emphasized in *Kratz, supra*, municipalities are not beholden to lowest price as the single determining factor, or even the overriding factor, when deciding on the lowest responsible bidder. The Court noted that many factors must be considered besides price when choosing the best bid. This is particularly true when deciding on professional services aimed at attaining fiscal recovery through financial restructuring.

The case of *Malloy v. Boyerstown Area School Board*, 657 A.2d 915 (Pa. 1995) further justifies this position. In *Malloy*, the Pennsylvania Supreme Court referred to its earlier decision in *In re 1983 Audit Report of Belcastro*, 595 A2d 15 (Pa. 1991), in which the Court defined the

factors that distinguish a professional services contract from one for non-professional services. The *Malloy* Court quoted *Belcastro*, defining professional services as those "which involve quality as the paramount concern and require a recognized professional and special expertise." *Malloy* at 919, quoting *Belcastro*, 595 A2d at 21. The *Belcastro* Court added that where quality of service is the highest concern, public bidding should not be required. *Id.* When quality of service is the highest concern a special relationship exists between the parties. *Id.* The contractor owes the municipality a duty of loyalty because the contractor becomes, in effect, the municipality's agent for the purpose of accomplishing the goals of the contract. *Id.* Therefore, it would be logically inconsistent to statutorily force the municipality to choose a contractor that owes the municipality such a high duty of care based primarily, if not wholly, on the basis of price. *Id.*

The Pennsylvania Governor's Center for Local Government Services Purchasing Handbook, Eleventh Edition, February 2003 (Handbook) explains that professional services are exempt from public bidding because "professional qualifications, capabilities, and experience differ." Handbook at 38. However, when bidding for professional services and reviewing the submitted proposals, the municipal officials should select the entity that gives the best combination of qualifications, experience and low cost. *Id.* The Handbook cautions that factors other than price must be considered "because obtaining services from a professional who submits the lowest price proposal but is not qualified in the field can create expensive problems for the government."³ *Id.*

In the matter at hand, the Scott Balice Strategies firm will be supplying the City with the highest level of professional services. The firm will provide complex financial management

³ It may be that this very mistake by the former City administration resulted in the hiring of Barlow Industries to perform the RRF retrofit which has ultimately resulted in the City's current financial crisis.

consulting and negotiation support, and through the firm of Bracewell & Giuliani, complex legal representation. In addition, the firm will provide government management and best practices procedures through Government Finance Officers Association and commercial real estate expertise in the Harrisburg market through Jones Lang LaSalle. The firm will act as the City's agent in negotiations with the City's creditors and any number of additional stakeholders. Given this level of representation and the level of expertise necessary to accomplish the tasks at hand, it must be that a very special relationship will exist between the Scott Balice Strategies firm and the City. Price should not be the determining factor when engaging a financial advisor that will have such an important relationship with the City as it attempts to regain a solid and responsible financial footing and regain its position of compliance with state law.

Finally, any objection that because the Mayor made the final determination, the award represents a no-bid contract is likewise without merit. As purchasing procedures fall within the authority of the Executive branch of government allowing the Mayor to make the final determination is not inconsistent with the City's Charter, or its Codified Ordinances and is provided for under state law. Every publicly bid purchase necessarily involves a final determination, and that reality does not convert a publicly bid contract into a no-bid contract.

CONCLUSION

For the reasons stated above, I find that the selection of Scott Balice Strategies to provide financial advisory services resulted from a proper public bid solicitation and the award of a contract to Scott Balice Strategies does not require any further action on behalf of City Council.

Exhibit "A"

The Patriot-News Co.

2020 Technology Pkwy
Suite 300

Mechanicsburg, PA 17050
Inquiries - 717-255-8213

RECEIVED
JUN 08 2010
BY:

The Patriot-News
Now you know

CITY OF HARRISBURG
ATTN: MATTEA D. FERA
10 N. 2ND STREET, SUITE 302

HARRISBURG PA 17101

THE PATRIOT NEWS
THE SUNDAY PATRIOT NEWS

Proof of Publication

Under Act No. 587, Approved May 16, 1929
Commonwealth of Pennsylvania, County of Dauphin} ss

Holly Blain, being duly sworn according to law, deposes and says:

That she is a Staff Accountant of The Patriot News Co., a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at 812 to 818 Market Street, in the City of Harrisburg, County of Dauphin, State of Pennsylvania, owner and publisher of The Patriot-News and The Sunday Patriot-News newspapers of general circulation, printed and published at 812 to 818 Market Street, in the City, County and State aforesaid; that The Patriot-News and The Sunday Patriot-News were established March 4th, 1854, and September 18th, 1949, respectively, and all have been continuously published ever since;

That the printed notice or publication which is securely attached hereto is exactly as printed and published in their regular daily and/or Sunday/ Metro editions which appeared on the date(s) indicated below. That neither she nor said Company is interested in the subject matter of said printed notice or advertising, and that all of the allegations of this statement as to the time, place and character of publication are true; and

That she has personal knowledge of the facts aforesaid and is duly authorized and empowered to verify this statement on behalf of The Patriot-News Co. aforesaid by virtue and pursuant to a resolution unanimously passed and adopted severally by the stockholders and board of directors of the said Company and subsequently duly recorded in the office for the Recording of Deeds in and for said County of Dauphin in Miscellaneous Book "M", Volume 14, Page 317.

PUBLICATION COPY

This ad # 0002069931 ran on the dates shown below:

June 01, 2010
June 02, 2010

REQUEST FOR PROPOSALS

CITY OF HARRISBURG
The City of Harrisburg will accept sealed proposals for a Request for Qualifications for Professional Services for Restructuring and Fiscal Recovery Advisory Services. Proposals must be received by the City of Harrisburg, The Rev. Dr. Martin Luther King, Jr. City Government Center, Office of Purchasing, 10 North Second Street, Suite 322A, Harrisburg, Pennsylvania, 17101, until 3:00 P.M., Tuesday - June 15, 2010. Proposals may be obtained by calling the Office of Purchasing at (717) 255-6472 or by visiting the City's web site at www.harrisburgpa.gov.
The City reserves the right to reject any or all proposals and also reserves the right to waive irregularities in any proposals.

The City of Harrisburg is committed to providing employment opportunity in all aspects of employment without regard to race, color, sex, religion, sexual orientation, national origin, citizenship, age or physical/mental disability.

CITY OF HARRISBURG
LINDA D. THOMPSON, MAYOR
www.harrisburgpa.gov

Holly Blain

Sworn to and subscribed before me this 03 day of June, 2010 A.D.

[Signature]
Notary Public

E x h i b i t " B "

Daniel C. Miller, Harrisburg City Controller
Office of the City Controller
10 N 2nd Street, Suite 403
Harrisburg, Pennsylvania 17101

August 18, 2010

To: Linda Thompson, Mayor
From: Dan Miller, Controller
Re: Scott Balice Strategies Contract

It is my position that the above referenced contract is a no-bid professional services contract and as per city code 2.307.5(a) must be approved by city council.

I recognize and applaud the administration for seeking proposals via the bidding process. The selection of the vendor however, was based upon arbitrary measures and not in accordance with the bidding procedures of selecting the, "lowest responsible respondent with the primary objective of obtaining the best product at the lowest price." In fact at the time of the announcement of the selected vender, August 17, 2010, the price had not even been determined.

The criterion used in the RFP for the award of the contract was stated as arbitrary:

2.1 Award of Contract

The City shall award a contract to the responsible and responsive proposer whose proposal is determined to provide the best overall value to the City in accordance with the criteria factors set forth in Section 6 herein.

In addition, Section 6 stated that, "the Mayor... will make the final decision" and that when evaluating the proposals, cost will account for only 15% of the total evaluation criteria.

Based upon these facts I am of the opinion that although this may be a reasonable method of selecting a financial advisor, it is clearly not a selection made based upon the standard bid process or intent. As such I determine this to be a no-bid contract that must be approved by City Council before it can be executed as a valid contract for the City of Harrisburg.

Thank you.

cc: City Council Members
Robert F. Kroboth, CGFM, Interim Chief of Staff/Business Administrator