

## RESOLUTION

WHEREAS, the Board of Light, Gas and Water Commissioners in their meeting of June 2, 2011, awarded Contract No. 11455, Comprehensive Disparity Study and Policy Formulation, to MGT of America, Inc., in the funded amount of \$288,210.00, and is now recommending to the Council of the City of Memphis that it approve said award as approved in the MLGW 2011 fiscal year budget and 2012 budget year as proposed; and

WHEREAS, the project scope is to conduct a comprehensive disparity study of the procurement practices of MLGW; to recommend changes to the current Supplier Diversity Program; and draft policies and applicable Supplier Diversity implementation plans; and

WHEREAS, nine (9) proposals were solicited on September 10, 2010; MLGW received three (3) proposals on November 5, 2010, with the most responsive proposal being from MGT of America, Inc. The term of this contract is from the date of the Notice to Proceed until December 31, 2012; and

NOW THEREFORE BE IT RESOLVED by the Council of the City of Memphis, that there be and is hereby approved an award of Contract No. 11455, Comprehensive Disparity Study and Policy Formulation, to MGT of America, Inc., in the funded amount of \$288,210.00, chargeable to the MLGW fiscal year 2011 budget and 2012 budget year as proposed.

**E X C E R P T**  
**from**  
**MINUTES OF MEETING**  
**of**  
**BOARD OF LIGHT, GAS AND WATER COMMISSIONERS**  
**CITY OF MEMPHIS**  
**held**  
**June 2, 2011**

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The Manager of Procurement and Contracts recommended to the Board of Light, Gas & Water Commissioners that it award Contract No. 11455, Comprehensive Disparity Study and Policy Formulation, to MGT of America, Inc. in the funded amount of \$288,210.00. It was noted that this recommendation is made following reconsideration of the award of Contract 11455 which was mandated by the Board, acting as a committee of the whole, in hearing the protest and appeal brought by Mason Tillman Associates, Ltd. and the request for reconsideration of the grant in part of that appeal by MGT of America, Inc. A copy of the report summarizing the issues addressed on reconsideration is attached hereto and made a part of the Board's permanent records.

The project scope is to conduct a comprehensive disparity study of the procurement practices of MLGW, to recommend changes to the current supplier diversity program, and to draft policies and applicable Supplier Diversity implementation plan based on findings of the study.

Nine (9) proposals were solicited on September 10, 2010; MLGW received three (3) proposals on November 5, 2010, with the most responsive proposal being from MGT of America, Inc. The term of this contract is from the date of the Notice to Proceed until December 31, 2012.

The 2011 budgeted amount for Supplier Diversity General Expense is \$301,248.00; the amount spent to date is \$1,721.07; leaving a balance of \$299,526.93; of which \$108,930.00 will be spent in 2011 for this contract; and the remaining \$179,280.00 will be spent in 2012 for this contract as proposed.

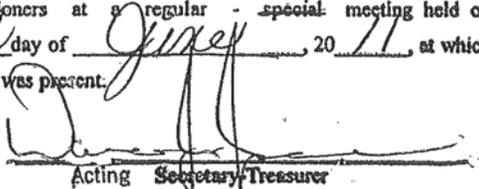
NOW, THEREFORE, BE IT RESOLVED by the Board of Light, Gas and Water

Commissioners:

THAT, Subject to the approval of the Council of the City of Memphis, award of Contract No. 11455, Comprehensive Disparity Study and Policy Formulation, to MGT of America, Inc., in the funded amount of \$288,210.00, as outlined in the foregoing preamble, is approved; and further

THAT, the President, or his designated representative, is authorized to execute the Contract and Award.

I hereby certify that the foregoing is a true copy of a resolution adopted by the Board of Light, Gas and Water Commissioners at a regular - special meeting held on 2nd day of June, 2011, at which a quorum was present.

  
Acting Secretary-Treasurer

## EXHIBIT "A"

### Report Regarding Reconsideration of the Award of Contract 11455

#### **Background and Claims Process History**

A Notice of Intent to Award Contract 11455, Comprehensive Disparity Study and Policy Formulation, to MGT of America, Inc. was issued by staff in December, 2010. A protest and appeal was filed by Mason Tillman Associates, Ltd. on December 16, 2010 (and supplemented by letter dated January 12, 2011) asking MLGW to reconsider the award to MGT and overturn its decision to award Contract No. 11455 to MGT and award the Contract to Mason Tillman.

The protest and appeal alleged that MLGW staff did not adhere to the standards set forth in the RFP in its review of Mason Tillman's proposal as the evaluation process for this award was flawed for the following reasons:

- 1) MGT was incorrectly given full credit for not having an M/WBE program successfully challenged by the Courts;
- 2) The scores for supplier diversity were evaluated in an arbitrary manner since Mason Tillman received the same score as MGT although Mason Tillman is 100 percent minority owned; and
- 3) Scores of the cost proposals did not consider the fair and reasonable cost to perform this labor intensive study.

The protest was reviewed and denied by the Manager of Procurement and Contracts on February 11, 2011. Mason Tillman appealed the decision of the Manager of Procurement and Contracts on February 18, 2011. That appeal was reviewed and denied by the President on March 4, 2011. Following Mason Tillman's appeal of the President's denial, a protest hearing was held by the Board, acting as a committee of the whole, pursuant to the Board's Procurement Complaint and Appeals Process.

At the conclusion of the hearing the Board voted 3 to 1 to uphold the protest and appeal and reconsider the award to MGT but noted specifically that in so doing "there was no guarantee that Mason Tillman would be awarded the contract". At a subsequent hearing the Board heard a request by MGT to reconsider its approval of Mason Tillman's appeal.

MGT's request for reconsideration was based on the following:

- 1) Under a reasonable interpretation of the meaning of Criterion #7 "programs implemented by the Respondent have been successfully challenged by the courts," MGT should not lose points for either the Phillips and Jordan case or the H.B. Rowe case (see attached legal

opinion for citations to this and all other cases noted in this summary report) and, moreover, there are at least four cases under which Mason Tillman would lose 20 points.

- 2) Since both MGT and Mason Tillman submitted fixed cost proposals the costs under each proposal should be compared to the expected output to be delivered by each firm.
- 3) While it is true that Mason Tillman does not receive extra points for being an M/WBE, it is also true that MGT did not receive additional points for the diversity of its firm's composition and business practices.

At the conclusion of the hearing on MGT's request for reconsideration of the approval of the appeal of Mason Tillman, the Board took no formal action, made no recommendation for award of the contract and advised staff to review the decision to award Contract 11455 in light of the issues raised by Mason Tillman. Staff was asked to forward the matter to the Board either with or without a recommendation for award. Subsequent to the conclusion of the protest hearing Chairman Darrell Cobbins requested that the Legal Department provide a written memorandum as to its interpretation of Item #7 in the original RFP and whether points should have been deducted from MGT's score as a result of the cases cited by Mason Tillman.

### **Conclusions of Staff on Reconsideration**

Staff has reviewed the issues raised by Mason Tillman and reaffirms its recommendation of award to MGT of America, Inc. based on the following conclusions:

1. The Memorandum from the Legal Department, prepared at the request of Chairman Darrell Cobbins, as to the interpretation of Item #7 in the RFP to "programs implemented by the Respondent that have been successfully challenged by the courts," a copy of which is appended hereto as Attachment "1"
2. MLGW's Supplier Diversity Policy provides that all vendors meeting the goal or providing a Letter of Non-Attainment Justification that is deemed valid receive the same score of 10 points. There are no provisions in the current policy pursuant to which additional points are granted to vendors who are 100% minority-owned or to vendors who have other evidence of commitment to supplier diversity.
3. Staff has again reviewed the cost proposal submitted by MGT and reconfirmed the conclusion by the evaluation committee that based upon the current format in which MLGW's information is stored no change orders will be needed in order for MGT to complete the scope of work currently included in Contract 11455.

4. Even though commencement of the work under this RFP is not likely to be completed in this fiscal year, the budget for this contract that will be needed in fiscal year 2011 will not be sufficient to pay the anticipated cost for Mason Tillman's services to complete that portion of the work which Mason Tillman's proposed work plan would indicate will be completed in 2011. Under Tennessee law and MLGW policy no further negotiation of Mason Tillman's price for the work proposed is permitted.

#### **Conclusions of the Board**

Comments of the Board in discussing and reviewing the issues raised and the award of Contract No. 11455 at the Meeting of the Board held on June 2, 2011 are attached hereto as Attachment "2" and made a part of the record.

Attachment "1"  
Legal Memorandum regarding Item #7 of the RFP

Attachment "2"  
Board Conclusions in Awarding Contract No. 11455  
*(To be Completed at the Meeting of the Board dated June 2, 2011).*

No comments were made by the Board.



**INTERDEPARTMENTAL  
MEMORANDUM**

Legal Department – AB/01-529

**To:** Commissioners of the Board of Memphis Light, Gas & Water  
Division  
**From:** Yvonne Chatman-Hendree  
**Date:** June 1, 2011  
**Subject:** Analysis of Criteria Number 7 Case Law from Contract 11455  
Appeals

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**Issue:** Whether case law has been discovered that warrants the deduction of 20 points from Mason and Tillman Associates (“Mason Tillman”) or MGT of America, Inc. (“MGT”) based on Proposal Evaluation Criterion Number 7 for the Request for Proposal for Contract Number 11455, “Programs implemented by the Respondent have been successfully challenged by the courts.”

**Answer:** No, after a careful review of relevant sources no case law was found regarding Mason and Tillman Associates or MGT involving programs implemented by either respondent that had been successfully challenged by a court.

**Analysis:**

The Proposal Evaluation Criterion Number 7 (Criterion 7) in the Request for Proposal (RFP) for Contract Number 11455, Comprehensive Disparity Study (Study) and Policy Formulation (Contract 11455), was designed to evaluate the likelihood of a respondent’s success as it relates to Policy Formulation for Memphis Light, Gas and Water Division’s (MLGW) Supplier Diversity Program (Program). Along with conducting a comprehensive disparity study, the successful respondent would also be required to implement a Supplier Diversity Program based on the results of the Study. Consequently, Criterion Number 7 required the deduction of 20 points if “[p]rograms implemented by the Respondent have been successfully challenged by the courts”. Accordingly, in order to have 20 points deducted from a respondent’s proposal as stated in the criterion, a respondent’s program would have been ruled defective by a court and by extension been discontinued.

Three respondents submitted RFPs for Contract 11455, Griffin & Strong, Mason Tillman and MGT. At the end of the evaluation process it was determined that none of the respondents had implemented a Supplier Diversity Program that had been successfully challenged by the courts. Hence, no deductions were made during the scoring for Criterion 7. Ultimately, Contracts Management recommended that the Board of Light, Gas and Water Commissioners (Board) award Contract 11455 to MGT and Mason Tillman filed an appeal. One of the issues of Mason Tillman’s appeal was MLGW’s

failure to deduct 20 points from MGT based on Criterion 7. According to Mason Tillman, MGT had implemented two programs that had been successfully challenged by the courts *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308 (N.D. Fla. 1998) (Phillips & Jordan) and *H.B. Rowe, Inc. v. Tippett*, 589 F. Supp. 2d 587 (2008) (Rowe). At the conclusion of the hearing the Contracts Appeals Committee (Committee) upheld Mason Tillman's appeal but withheld any ruling on the issue of the contract award. In making its ruling the Committee noted a lack of clarity on the issue of the case law cited by Mason Tillman.

Thereafter MGT filed an appeal that among other things challenged Mason Tillman's allegation that 20 points should be deducted from MGT scores. Additionally, MGT claimed that Criterion 7 was ambiguous and cited several instances where Mason Tillman's programs could be interpreted to have been overturned by the courts. *Hi-Voltage Wire Works, Inc. et al. v City of San Jose*, No. S080318, Supreme Court of California, (Nov. 30, 2000) (Hi-Voltage); *C & C Construction, Inc. v Sacramento Municipal Utility District*, No. C040761, Court of Appeal, Third District California, Sept 14, 2004 (SMUD); *Coral Construction, Inc. v. City and County of San Francisco*, No. S152934, Supreme Court of California, (Aug. 2, 2010) (Coral Construction); and *Rothe Dev. Corp. v. DOD*, 545 F.3d 1023 (2008).

### **Ambiguities**

Contrary to MGT's assertions, there is no ambiguity in Criterion 7. As previously stated Criterion 7 was designed to evaluate a respondent's probability for success in Phase II of the Disparity Study process, the implementation of a Supplier Diversity program. MLGW's present Supplier Diversity Program has never been legally challenged, let alone overturned by a court. Accordingly, any new program would be required to mirror those high standards. In order to select the respondent with the highest probability of meeting that goal, Criterion 7 was designed to identify respondents whose programs had been overturned after implementation. Thus the words *successfully challenged by a court* are plain on their face as it relates to the question of program implementation. While the cases offered by MGT and Mason Tillman are probative as it relates to the issues of methodology, they provide little insight into the question of implementation as none of the cases involved programs that had been implemented by Mason Tillman or MGT. Certainly Mason Tillman and MGT were aware of the program implementation portion of the Contract as each provided a section on program implementation in their proposal (Mason Tillman: Section VI. Firm Experience & Capacity, C. Policy Formulation Experience, p. 52, MGT: Section VI, Experience and Capacity of Firm, VI.5 Past Study Efforts Resulting in Policy Formulation, P. VI-27). Thus, both Mason Tillman and MGT knew of the program implementation requirement and both Mason Tillman and MGT had previously implemented Supplier Diversity Programs. Additionally, MGT knew the difference between programs that had been challenged and programs that had been implemented because MGT listed them separately in their proposal (MGT: VI.4 Programs Challenged and Upheld, p. VI-25). For these reasons, Criterion 7 should be interpreted by a plain meaning of the words which means that a program implemented by a respondent that has been challenged by the court should receive a deduction of 20 points from their score rather than a program that was challenged by the courts based on the use of the results of a respondent's disparity study.

## None of the Cases Involved Programs Implemented by the Respondents

As previously stated although the cases cited by Mason Tillman and MGT may be probative in evaluating their competitor's mythology, the cases had no probative value on the issue of program implementation since none of the cases cited involved programs that had been implemented by the Respondents. The cases cited by Mason Tillman and MGT involved programs implemented by agencies that used the respondents' disparity studies.

## Hi-Voltage

The court clearly states that the City of San Jose implemented a program in an attempt to comply the Proposition 209 through use of Mason Tillman's 1990 disparity study results.

Following *Crosen*, in 1990 the City suspended its MBE/WBE program and commissioned a study to identify any statistically significant disparity in the number and dollar value of contracts and subcontracts awarded to MBE's and WBE's. After the passage of Proposition 209, the City's Office of Affirmative Action/Contract Compliance became the Office of Equality Assurance. The City also adopted the Nondiscrimination/Nonpreferential Program Applicable to Construction Contracts in Excess of \$50,000 (Program) at issue here. The Program reaffirms the findings of the 1990 disparity study and attempts to clarify the City's policy of nondiscrimination and no preference in the subcontracting of its construction projects to "ensure that the historical discrimination does not continue."

Accordingly, it was the City of San Jose's implementation of a program that was challenged. Hence, points would not be deducted from Mason Tillman under Criterion 7 for Hi-Voltage.

## SMUD

The wording in this case is unambiguous. It was SMUD's actions and not the actions of Mason Tillman that caused the program in question to be overturned.

For some period of time until more than a decade ago, SMUD employed some form of race-neutral affirmative action. The 1993 disparity study showed that disparities existed (raising an inference of discrimination, despite the race-neutral affirmative action program. At that point, SMUD could have determined whether there were other race-neutral remedies it could employ. (SMUD has never contended it utilized all permissible race-neutral remedies before the 1993 study). Instead, SMUD told the consultant not to propose or recommend race-neutral remedies. This is because the 1993 disparity study was undertaken to determine whether race-based remedies could be justified under *Croson*. Therefore, SMUD abandoned race-neutral remedies, explicitly precluding consideration of new or additional race-neutral remedies. The 1993 disparity study was not a determination that the disparity could not be eliminated with race-neutral remedies. It was merely a determination that past discrimination justified race-based remedies under Croson.

In fact, the court made special efforts to clear up any question of whether the Disparity Study was at fault in Footnote 11.

We do not question the validity of the disparity studies. Indeed, for the purpose of this appeal, we accept them for what they purport to be: justification for race-based affirmative action for the purpose of complying with *Croson*. Nothing more. They make no attempt to evaluate the ability of SMUD to maintain federal funding using only race-neutral remedies.

Consequently, by a plain reading of the language SMUD's program was not overturned based on a program implemented by Mason Tillman and as such no points should be deducted under Criterion 7.

### **Coral Construction**

Once again it was the agency's implementation of a program, in this case an ordinance that caused the court challenge.

At the time the voters adopted section 31, the MBE/WBE ordinance in effect was set to expire on October 31, 1998. Before the ordinance expired, the City's Board and its Human Rights Commission (HRC) conducted investigations for the stated purpose of "gaug[ing] the effectiveness of the prior [MBE/WBE] Ordinances...and to access the need for further and continuing action."...Based on these findings, the Board in 1998 adopted a new ordinance preserving bid discounts for MBE's and WBE's, and requiring prime contractors either to use MBE and WBE subcontractors at levels set by the HRC or to make good faith efforts to do so through preferential outreach efforts targeted at such business.

Here as in the previous cases the Ordinance was overturned based on the actions of the agency or stated more plainly, the agency's use of the data. In fact, the arguments asserted by the agency in defense of the Ordinance had nothing to do with the disparity study (Political Structure Doctrine, Federal Funding Exception, and Federal Compulsion Argument). So, once again by interpreting the words in accordance with their plain meaning, no program implemented by Mason Tillman was successfully challenged and by extension no points should be deducted from Mason Tillman's score based on

## Criterion 7.

### Rothe

Rothe had the distinct privilege of involving all three of the respondents, Griffin and Strong, Mason Tillman and MGT. And while the issues are complex and provide valuable insight into the methodologies and experience of the respondents, they do not relate to programs implemented by the respondents. Naturally, the Federal programs are enacted by Congress.

Congress first enacted Section 1207 (the Small Business Act) in 1986, for a three-year period...In 1989, before Section 1207 was set to expire, Congress reenacted the statute for another three years...In 1998, Congress amended the statute without yet reenacting it. Congress reenacted Section 1207 in 1999, again in 2002, and most recently in 2006...The present Section 1207, i.e., as reenacted in 2006, and relevant regulations differ from the original enactment and regulations to some degree, as the district court discussed...The core issue in this appeal [is] whether the 2006 reauthorization of section 1207 is facially constitutional.

Of course questions regarding the constitutionality of a program enacted by Congress are beyond the scope of Criterion 7. Although the respondent's disparity studies are discussed at length, Rothe has nothing to do with programs implemented by the respondents. And for that reason no points should be deducted from any of the respondents based on Criterion 7.

### Rowe

As in the previous cases Rowe involves a program enacted by the government.

Thus, the North Carolina General Assembly has crafted legislation that withstands constitutional scrutiny. In light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace...the State's application of the statute to these groups is certainly constitutional...However, because the State has failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, we cannot find those applications constitutional.

If Criterion 7 involved questions of methodology the fact that Rowe upheld one part of the program and overturned the other might create issues of ambiguity. Fortunately, Criterion 7 only applies to programs implemented by the respondents. So no ambiguity exists as MGT did not implement the program. Therefore no points should be deducted from MGT's score based on Criterion 7.

## **Phillips & Jordan**

In Phillips & Jordan questions were raised as to whether the questioned program implemented by the agency was actually based on MGT's disparity study results. The operative words are programs implemented by the agency.

Under Florida law, upon a showing of past and/or continued discrimination in state-funded highway projects, FDOT [the Florida Department of Transportation] is authorized to implement programs designed to remedy disparities based upon race, national origin, or gender...In 1991, pursuant to section 339.0805, FDOT hired MGT of America, Inc. ("MGT"), to conduct a disparity study, one purpose of which was to document the existence of any past and/or continuing discrimination involving contracts for state-funded road maintenance projects.

As stated in the previous cases the question of the proper application of the disparity study results by an agency do not relate to Criterion 7. Criterion 7's sole goal is to evaluate programs implemented by a respondent. Hence, while the issues surrounding Phillips & Jordan may warrant consideration, they do not warrant a deduction of points based on Criterion 7.

## **Conclusion**

The cases discussed above did not involve programs implemented by the respondents and no other cases were offered by the respondents to support such a challenge. Also, the respondents made no indications at the oral presentations, the hearings, or in their proposals or correspondence that they had participated in the actual implementation of the programs questioned in the cases discussed above. Further research done by MLGW's Legal Department during the review of the proposals received in response to the first Disparity Program RFP, Contract 11397, in the early part of calendar year 2010; the second and current RFP, Contract 11455, the Mason Tillman appeal; and MGT appeal failed to uncover cases regarding programs implemented by the respondents Mason Tillman and MGT that had been successfully challenged by the courts. Therefore no points should be deducted from Mason Tillman or MGT based on Criterion 7. Additionally Criterion 7 is not ambiguous if plain meaning is given to the phrase "programs implemented by the Respondent have been successfully challenged by the courts." The Proposal Evaluation Criterion Number 7 in the Request for Proposal for Contract 11455 was designed to evaluate the likelihood of a respondent's success as it relates to program implementation for MLGW's Supplier Diversity Program. To date no evidence has been discovered that would warrant a deduction of 20 points from Mason Tillman or MGT due to their implementation of a Supplier Diversity Program that has been successfully challenged by a court.