

DIANA H. WHEELER
COMMONWEALTH'S ATTORNEY

THERESA W. CARTER
ASSISTANT COMMONWEALTH'S ATTORNEY

RICHARD E. MOORE
ASSISTANT COMMONWEALTH'S ATTORNEY

RYAN J. RAKNESS
ASSISTANT COMMONWEALTH'S ATTORNEY



COMMONWEALTH'S ATTORNEY

COUNTY OF ORANGE
110 NORTH MADISON ROAD, SUITE 220
P.O. BOX 310
ORANGE, VIRGINIA 22960
March 16, 2012

OFFICE
(540) 672-4848

FACSIMILE
(540) 672-9095

Edward L. Hogshire, Judge
Charlottesville Circuit Court
315 East High Street
Charlottesville, Va. 22902
By Fax 434-970-3038

Re: Investigation in the Matter of Ric Barrick—declination to charge

Dear Judge Hogshire:

This is to report on my actions, findings, and conclusions as a Special Prosecutor for the City of Charlottesville appointed by you in the above-styled matter.

My Assistant Commonwealth's Attorney Richard E. Moore and I have reviewed this entire case. Mr. Moore met on February 24, 2012, with Assistant Commonwealth's Attorney Joseph Platania, to be briefed on the matter, and then met further that day with Mr. Platania, Mr. Rob Schilling, and Det. Lisa Reeves of the Charlottesville Police Department. Mr. Moore has had several conversations and other communications with Det. Reeves and with Capt. Gary Pleasants. We have received Det. Reeves' reports or summaries of interviews/meetings with the complainant Rob Schilling, Mr. Ric Barrick (the subject of the investigation), Jennifer Luchard, Maurice Jones, Craig Brown, and Eric Levy, as well as various emails, proposals, and other documents, including her final report which we received this past Monday, March 12.

The allegations concerned possible violations of the Virginia Procurement Act and/or the Virginia "bid rigging" statute, in that it appeared that a bid for services to be provided to the City of Charlottesville was accepted beyond the established end date to receive bids, and further that such bid was reduced from the original amount submitted after the bidder learned what a competing bid was and altered his proposal as a result. Furthermore, the bid ultimately accepted was represented by Mr. Barrick as having been the lowest responsive bid from a responsible bidder, which it appears not to have been.

This all came to light when, pursuant to a Freedom of Information Act (FOIA) request filed by Mr. Schilling in December 2010, Mr. Barrick furnished certain emails

The Hon. Edward L. Hogshire, Judge
March 16, 2012
Page Two

relating to these bids--some of which Mr. Schilling found to be of some concern--and then such emails were omitted from a subsequent FOIA request response in December 2011, resulting in closer scrutiny by Mr. Schilling. It was then discovered that there were two bids from one company (Weather Metrics), one of them being submitted after the close date of the bid period, and this late bid is the one that was ultimately accepted.

We have considered all of Det. Reeves' reports, including those of an initial interview with Rob Schilling, and interviews with Jennifer Luchard (procurement officer for the City of Charlottesville), Maurice Jones (City Manager for Charlottesville and Mr. Barrick's direct supervisor) and Craig Brown (City Attorney for the City of Charlottesville), Eric Levy (by phone) who is the agent of Weather Metrics, and two interviews with Ric Barrick (one before and one after the interview with Mr. Levy). In addition, we have reviewed all of the various emails submitted showing communication between Mr. Barrick and other city employees (including Ms. Luchard and Mr. Jones), and with Mr. Levy, as well as some between Mr. Schilling and various city employees.

The main potential offenses we looked at were violations of the procurement act (Va. Code § 2.2-4300 et seq.) and violations of the bid rigging statute (§59.1-68.7).

After a full review of the evidence and the statutes involved, I am of the opinion that no criminal charges should be brought against Mr. Ric Barrick or anyone else for actions relating to the negotiation and award of this contract. Furthermore, although there were some questionable actions, some less than satisfactory answers to certain questions asked, and some apparent violations of rules and policies, I do not believe that there is probable cause to believe that a crime occurred, and have determined that there is no criminal offense that should be prosecuted based on the facts and evidence before me.

The main concerns that we looked into were 1) that Mr. Barrick accepted a bid after the closing date for the bid process contained in the Request for Quotation (RFQ), 2) that he disclosed information about a competing bid to (and "negotiated" with) this "preferred" bidder, and 3) that he submitted this late bid (which had been revised from the bid submitted within the bid period) as the lowest bid, and it was the one accepted.

The purposes of Virginia's Procurement Act are 1) to get the public the best products and services as the lowest cost, 2) to protect the public from collusion, kickbacks, or other costs and prevent such personal gain at public expense, and 3) to promote fair competition among potential suppliers of goods and services. Va. Code § 2.2 -4300. Some of Mr. Barrick's actions appear to be contrary to the statutory policy in the Code. However, given the detective's investigative findings we have determined that there was no personal gain or benefit to Mr. Barrick, and no pre-existing relationship or connection with the winning bidder; it appears that Mr. Barrick's actions, though in error and improper, were simply an effort to try to obtain the best product or service for the

The Hon. Edward L. Hogshire, Judge
March 16, 2012
Page Three

City at the best price (which is one of the stated purposes of the act). Thus, it is my conclusion that Mr. Barrick had no selfish or criminal intent or guilty knowledge. It is my belief that most if not all of his errors were the result of ignorance and not any bad, malicious, or devious intent, or collusion.

Specifically, it is my conclusion that Mr. Barrick's actions do not constitute a "proscribed participation" in violation of §2.2-4369, as there was no prohibited relationship of employment or other business or financial relationship, and no family relationship. In addition, it did not involve any prohibited "gift", under §2.2-4371, or any "kickback" under §2.2-4372. Similarly, for the same reasons I do not find anything in the case constituting a violation of the conflict of interest rules (2.2-3100 et seq.). Nor was any of this willful behavior as required by §2.2-4377.

I also have determined that it is not a "bid rigging conspiracy", which was the primary statute (Va. Code §59.1-68.7) that we were initially considering, as there is no proof that Mr. Levy understood that resubmitting the second proposal after the close date—when instructed by Mr. Barrick to do so--was improper, or that he believed he was doing anything wrong. Furthermore, there is no clear evidence that Mr. Barrick himself realized that this was not proper, and as such it is not willful conduct.

It also appeared that Mr. Barrick's actions might have been a violation of the prohibition of a public employee participating in the bid preparation by disclosing non-public information (§2.2-4373), but the only disclosure of bid information occurred after the original bid period was over, so it technically was public information or at least could be disclosed to other bidders, though no subsequent bid based on such information should have been made. Also, while the winning bid here may not have fit the definition of the "lowest responsive/responsible bidder" under the statute, as it should have been under the RFQ, it is not clear to me that Mr. Barrick understood this. In fact, I find to the contrary, that Mr. Barrick believed (wrongly) that he was putting forth the "lowest bid".

I believe that he was operating under the assumption or understanding, albeit mistaken, that he could "bargain down" to get the required lowest bid, and that he did not have a clear or accurate view of the effect of the end of the bid period (as he should have had). I believe that when he negotiated the lower price from Weather Metrics, he felt that if they did not come down in their price, he would have to award the contract to Weather Central, even though he felt that Weather Metrics had the better product. I think his efforts to have them reduce the bid were misguided, but showed his belief that if they did come down (which they did), they would then be the "lowest bid", as required by the rules and statute.

And I further have reason to believe that he was either not thinking of or not even aware of the closing date for bids, which had passed. (Jennifer Luchard's statement

The Hon. Edward L. Hogshire, Judge
March 16, 2012
Page Four

corroborates this, as she was not aware of that either.) There is no evidence to the contrary, and Mr. Barrick admits that he did not read the RFQ (which contains the bid closing date). But his neglect to do this does not convert his actions to criminal conduct.

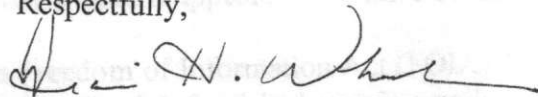
I find that there is credible evidence, when viewed as a whole, to lead one to believe that Mr. Barrick 1) did not adequately understand the difference between an RFP and an RFQ, 2) did not adequately understand the rules and procedures for an RFQ, 3) did not read the entire RFQ that he had posted, and 4) did not realize that the bid period was over when he accepted a modified bid from the original bidder.

For all of these reasons, though his actions may constitute breaches of policy or other employment issues, I find that his mistakes or errors were the result of inattention to detail and his not making a proper effort to understand the rules, but do not rise to the level of criminal conduct. I find no criminal intent; no *mens rea*. I do not feel that the evidence justifies the charging or prosecution of any criminal offense. In fact, it is my view that Mr. Barrick's actions which violated the policy, though wrong, were well-motivated and were actually taken for the benefit of the citizens. He simply wanted what he viewed as a superior product at the best price.

This did not end our inquiry, however, because there was an additional matter related to the FOIA request responses. Mr. Barrick fully complied with the initial FOIA request in December 2010 for a week's worth of emails. In the months following, as Mr. Schilling was seeking additional information on the Weather Metrics contract, probably during or after July 2011, Mr. Barrick found emails that made him realize that since he had allowed Weather Metrics to come down from their original bid, he should have given Weather Central the same opportunity, but he did not. He thought this did not "look good" because he was not fair to Weather Central. He deleted some emails at that point. Then, in December 2011, when the second more specific FOIA request was filed, those deleted emails were no longer available. Therefore, while he admitted that he deleted such emails intentionally, he did so before the second FOIA request was made and not in intentional frustration of that request, and not in violation of that statute. There also is the question of whether it would be a violation at all since he had already provided the missing emails earlier, and even if it were, it would be a civil matter and not a criminal offense.

If additional evidence were to come to light, I will consider it at that time. Please let me know if you have any questions or need for me to do anything else in this regard.

Respectfully,


Diana H. Wheeler, Special Prosecutor