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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

NTN+ LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 19-579-III**
	)	
THE PROCUREMENT BOARD OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE and THE CHIEF PROCUREMENT OFFICER AND PURCHASING AGENT MICHELLE A. HERNANDEZ-LANE (ONLY IN HER OFFICIAL CAPACITY),	)	
	)	
Respondents.	)	

MEMORANDUM AND FINAL ORDER[1] GRANTING WRIT OF CERTIORARI AND REVERSING DISQUALIFICATION OF PETITIONER IN ON-STREET METER PARKING SELECTION PROCESS

This case concerns the Petitioner's Competitive Sealed Proposal to be selected as the contractor to manage Metro's[2] on-street meter parking for 30 years. In submitting its Proposal, the Petitioner checked the box that a Pricing Worksheet requested in the financial section of Metro's Request for Quotation was attached to the Petitioner's submission. Nevertheless, by human or computer glitch, the Worksheet did not upload in the original

[1] In hearings before this Court prior to the mayoral election, Counsel provided an update that the then Mayor had paused in seeking a Metro Council vote and approval of the contract in issue in this case. The parties, however, stated that the issues before this Court should proceed and a final ruling should be entered.

[2] This is the well-known short form reference to the Metropolitan Government of Nashville and Davidson County used throughout this *Memorandum and Order*.

submission. Within a day and a half of the Petitioner's submission of its Proposal, Metro identified the missing attachment, and the Petitioner re-sent the Worksheet. Three days later Metro disqualified the Petitioner from consideration, citing to the missing Worksheet in the original submission. A letter of intent was subsequently issued to award the contract to the only other party who submitted a proposal. The Petitioner appealed to the Metro Procurement Appeals Board who affirmed the decision of Metro's Purchasing Agent to disqualify the Petitioner from the selection process. The Petitioner then filed an appeal with this Court.

Metro's position is that its "procurement ordinances require that complete proposals be submitted and that deadlines be followed. This allows for fair consideration of all proposers." *Brief of the Metropolitan Government Procurement Board*, August 16, 2019, at 1. This assertion, however, glosses over explicit regulations to the Metro Code for not disqualifying a proposal due to a mistake and allowing corrections of mistakes after proposals have been submitted and before selection of a contractor has been awarded.

The Petitioner argues that under Metro law the glitch transmitting the Pricing Worksheet in the original submission was such a mistake, not a disqualifying event. The Petitioner asserts that the Metro Code and applicable regulations contain provisions to process mistakes and allow for the re-sent Pricing Worksheet to be considered and the Petitioner's proposal to be evaluated in the selection process.

After studying the law and the record, and considering the arguments of Counsel the Court concludes the Petitioner is correct. The evidence is clear: a mistake occurred, Metro should have processed the events in this case through the applicable Metro law:

Regulations to the Procurement Code, R4.12.040.15, "Mistakes in Proposals," and should not have eliminated the Petitioner from the selection process. It is therefore ORDERED that the Petition for Writ of Certiorari is granted, and the decision of the Board disqualifying the Petitioner's Proposal is reversed.

It is further ORDERED that the matter is remanded for Metro to cancel the on-street meter parking 2019 Request for Quotation 1207658 in issue in this case. That RFQ can no longer be pursued by Metro because the confidential quotations of the contractors, required by law, have been disclosed as part of this litigation. To proceed with the contractor selection process, a new Request for Quotation must be issued.

It is additionally ORDERED that court costs are taxed to the Respondents.

The law and facts of record on which this decision is based are provided below.

Facts of Record

The record in this case establishes the following facts. References below to "AR" are to the Administrative Record developed in the proceedings with the Metro Purchasing Agent and the Procurement Appeals Board (the "Board").

On March 21, 2019, Metro through its Purchasing Agent issued RFQ 1207658 (the "2019 RFQ") to select a contractor for a 30-year agreement to assist in operation of on-street metered parking. Under the Metro Code and the related *Regulations to the Procurement Code* (the "Regulations"), there are two methods provided for selection of a contractor: (1) Competitive Sealed Bidding or (2) the Competitive Sealed Proposal Selection method ("Proposed Selection method").

The 2019 RFQ states that it is the latter method, the Proposal Selection method, which was to be used to select the on-street meter parking contractor.

The 2019 RFQ is approximately thirty pages. It lists various requirements and requests various responsive documents for the party submitting a proposal (the "offeror") to provide. (AR, pp. 3041-71). After each requirement or request for responsive document, there is a blank to either acknowledge that no response is required, that a response is attached, or that a response is required and not attached (AR, pp. 3041-71). The major categories in the 2019 RFQ are,

1. Solicitation Objective (AR, pp. 3041-45);
2. Solicitation Scope (AR, pp. 3045-52);
3. Standard Solicitation requirements (AR, pp. 3052-59);
4. Technical Expertise (AR, pp. 3060-63);
5. Capacity and Approach (AR, pp. 3063-66);
6. Financial Proposal (AR, pp. 3066-67); and
7. Diversity Plan (AR, p. 3068).

The deadline to submit proposals was Friday, April 12, 2019, at 4:00 p.m. On that date, only two proposals were submitted by: LAZ Parking Georgia, LLC and the Petitioner.

At issue in this Writ is the Petitioner's response to the sixth major 2019 RFQ category listed above: the Financial Proposal section. In that section, offerors are requested to provide a Financial Proposal and a Pricing Worksheet (AR, p. 3067). In this section, the 2019 RFQ allows for two "acceptable values"/responses: 1) "Yes, Attached Financial Proposal[;]" or 2) "No, Offeror has not attached Financial Proposal and May Be Deemed Non-Responsive" (AR, p. 3067).

In its response, the Petitioner marked "Yes, Attached Financial Proposal" (AR, p. 3068). The Petitioner also listed the Pricing Worksheet in the list the Petitioner filed of all the documents submitted when it uploaded its original submission to the 2019 RFQ on Friday, April 12, 2019 (AR, p. 3071).

Over that weekend, on Sunday, April 14, at 11:06 a.m., Metro Senior Procurement Officer Terri Troup emailed Petitioner that Ms. Troup was unable to locate the Pricing Worksheet as an attachment to the Petitioner's response which the Petitioner had listed as having been submitted (AR, p. 3546). Ms. Troup asked for a response by 8:30 a.m. on Monday, April 15 and asked whether the omission "was in error" (AR, p. 3546). On that same day, Sunday, April 14 at 3:43 p.m., the Petitioner responded by emailing the Pricing Worksheet and requesting confirmation of its receipt (AR, p. 3546). Later that same day, at 9:44 p.m., Ms. Troup responded to Petitioner, asking, "Can you please provide a response to my question as to whether you failed to attach the document in error to your quote?" (AR, p. 3545). The Petitioner responded that, "whether due to human error or a software error apparently it didn't upload" (AR, p. 3545).

Thereafter, five days later, on April 17, the Purchasing Agent sent Petitioner a letter stating that its Proposal had been disqualified as "nonresponsive" for failure to comply with the Financial Proposal section. Nothing was stated by Metro about the Regulations on processing mistakes.

> The Metropolitan Government of Nashville and Davidson County has completed its evaluation of submitted responses to the above solicitation and unfortunately has determined that your submission was non-responsive. Specifically, the submitted proposal was non-responsive due to a failure to comply with the Financial Proposal section of the evaluation criteria within

> the solicitation. Thank you for participating in Metro's competitive procurement process.

(AR, p. 3899). That same day Metro sent LAZ Parking Georgia, LLC ("LAZ") an email stating that its proposal had been "reviewed and deemed acceptable or potentially acceptable" and that discussions about that proposal would begin immediately (AR, pp. 3529-30). On April 25, the Petitioner filed a protest of the Purchasing Agent's decision (AR, p. 3918), and the Purchasing Agent maintained the position that the Petitioner's bid was disqualified.

The Petitioner filed an appeal with the Procurement Appeals Board who conducted a hearing on May 14, 2019, and unanimously adopted a motion to affirm the decision of the Purchasing Agent disqualifying the Petitioner's Proposal as nonresponsive (AR, pp. 4121-4214). In its deliberations, motion and vote, the Board did not analyze or apply the section of the Regulations—R4.12.040.15—applicable to processing mistakes when the Proposal Selection method is being used to select a contractor.

Pertinent Law

As noted at the outset, the 2019 RFQ is not a Competitive Sealed Bid selection process. The RFQ was issued under the Proposal Selection method. As was explained to the Court during oral argument and as is found in the Metro Code and Regulations, there is a significant difference between the two methods. The Competitive Sealed Bid method requires strict compliance to the solicitation and does not allow for communication

between Metro and the bidder until after the award. In contrast, the Competitive Sealed Proposal has flexibility built into the process.

With the Proposal Selection method alterations in proposals and prices may be made after the proposals are opened. With the Proposal Selection method, Metro can have discussions with an offeror about its proposal, and proposals may be revised prior to the award. This method is used when Metro does not necessarily know from the outset the industry or the parameters and needs to obtain information before awarding the contract. Such changes are not allowed with Competitive Sealed Bidding, where bids are submitted, opened and can only be accepted based upon the criteria in the invitation to bid. With Competitive Sealed Bids, the initial offers are final.

The Regulations at R4.12.040.02 explain the premise of the Proposal Selection method used with the 2019 RFQ.

> R4.12.040.02.2 *General Discussion*. Competitive sealed bidding is the preferred method of procurement; however, if it is not practicable, competitive sealed proposals should be used. If competitive sealed bidding is practicable, it may then be considered whether competitive sealed bidding is advantageous. If competitive sealed bidding is determined not to be advantageous, competitive sealed proposals may be used when authorized as provided in Subsection R4.12.040.02.5 of this Section.
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> The key element in determining advantageousness is the need for flexibility. The competitive sealed proposals method differs from competitive sealed bidding in two important ways:
>
> > a) it permits discussions with competing offerors and changes in their proposals including price; and
> >
> > b) it allows comparative judgmental evaluations to be made when selecting among acceptable proposals for award of the contract.

> An important difference between competitive sealed proposals and competitive sealed bidding is the finality of initial offers. Under competitive sealed proposals, alterations in the nature of a proposal, and in prices, may be made after proposals are opened. Such changes are not allowed, however, under competitive sealed bidding (except to the extent allowed in the first phase of multi-step sealed bidding). Therefore, unless it is anticipated that a contract can be awarded solely on the basis of information submitted by bidders at the time of opening, competitive sealed bidding is not practicable or advantageous.

In addition, both parties cite to section 4.12.040(F) of the Metro Code as the law to apply in this case. It allows, as just noted, for discussions between offerors and Metro to clarify to assure full understanding and responsiveness to solicitation requirements after submissions of proposals and prior to awards. The Code states that these measures are provided for fair and equal treatment of offerors, and to obtain best and final offers.

> F. Discussion with Responsible Offerors and Revisions to Proposals. As provided in the request for proposals and under regulations promulgated by the standards board, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award for the purpose of clarification to assure full understanding of, and responsiveness to, the solicitation requirements. Offerors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers. In conducting discussions, there shall be no disclosure of any information derived from proposals submitted by competing offerors.

Within the framework of the Competitive Sealed Proposal method is a section in the Regulations on "Mistakes in Proposals." Section R4.12.040.15.3 provides four alternatives for "Mistakes Discovered After Receipt of Proposals but Before Award."

> R4.12.040.15.3 *Mistakes Discovered After Receipt of Proposals but Before Award*. This Subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.

a) During Discussions; Prior to Best and Final Offers. Once discussions are commenced with any offeror or after best and final offers are requested, any offeror may freely correct any mistake by modifying or withdrawing the proposal until the time and date set for receipt of best and final offers.

b) Minor Informalities. Minor informalities, unless otherwise corrected by an offeror as provided in this Section, shall be treated as they are under competitive sealed bidding. See Section R4.12.030.13.4 (a) (Mistakes in Bids, Mistakes Discovered After Opening but Before Award).

c) Correction of Mistakes. If discussions are not held, best and final offers are not solicited, or the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:

> i) the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn; or
>
> ii) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value that clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.

d) Withdrawal of Proposals. If discussions are not held, best and final offers are not solicited, or the best and final offers upon which award will be made have been received, the offeror may be permitted to withdraw the proposal if:

> i) the mistake is clearly evident on the face of the proposal and the intended correct offer is not;
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> ii) the offeror submits proof of evidentiary value which clearly and convincingly demonstrates that a mistake was made but does not demonstrate the intended correct offer; or
>
> iii) the offeror submits proof of evidentiary value that clearly and convincingly demonstrates the intended correct offer, but

> to allow correction would be contrary to the fair and equal treatment of the other offerors.

There also is R4.12.030.11.2 which provides that a late modification to a proposal shall not be considered in the selection process.

In addition R4.040.13.3 provides that for the purpose of conducting discussions with an offeror, proposals shall be classified. Under R4.040.14.1 discussions shall not be conducted with those who submit proposals classified as unacceptable, quoting as follows.

> R4.12.040.13.3 *Classifying Proposals*. For the purpose of conducting discussions under Section R4.12.040.14 (Proposal discussions with Individual Offerors), proposals shall be initially classified as:
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> a) acceptable;
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> b) potentially acceptable, that is, reasonably susceptible of being made acceptable; or
>
> c) unacceptable.
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> Offerors whose proposals are unacceptable shall be so notified promptly.
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> **R4.12.040.14 Proposal discussions with Individual Offerors.**
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> R4.12.040.14.1 *"Offerors" Defined*. For the purposes of Section 4.12.040.F Proposals, Discussion with Responsible Offerors and Revisions to Proposals) of the Metro Procurement Code and this Section, the term "offerors" includes only those businesses submitting proposals that are acceptable or potentially acceptable. The term shall not include businesses who submitted unacceptable proposals.

Application of the Law to the Facts—The Board's Decision is Unsupported by Material Evidence and, Therefore, Was Based Upon Unlawful Procedure

The sole method for review of a procurement decision is the common law writ of certiorari. *H Group Construction, LLC v. City of Lafollette*, 2019 WL 354973 (Tenn. Ct.

App.). The Court's review under the writ is limited to determining whether the Board exceeded its jurisdiction, followed an unlawful procedure, acted illegally, arbitrarily, or fraudulently, or acted without material evidence to support its decision. *Harding Academy v. Metropolitan Government*, 222 S.W.3d 359, 363 (Tenn. 2007).

The facts of record clearly establish that the Petitioner's failure to attach its Pricing Worksheet when it first submitted its Proposal was a mistake. These facts are as follows.

— When the Petitioner submitted its original Proposal it certified that it had attached the Pricing Worksheet: first, on the actual blank to do so on the RFQ itself and second in the list of documents attached to the RFQ. The Petitioner did not check the box that there was "No" attachment of the Pricing Worksheet. In addition, there was no finding by the Purchasing Agent or the Board of the Petitioner not being truthful or this response being a falsehood. The evidence is that the Petitioner intended and thought it had submitted the Pricing Worksheet.

— The Petitioner was able to provide the completed Pricing Worksheet within hours of being told it had not been submitted which corroborates an uploading glitch. The Pricing Worksheet is a huge, complex spreadsheet. It can not be put together in several hours. The complexity and detail of the Pricing Worksheet make it impossible to have created and to have provided it in less than 5 hours after Metro inquired about the missing Pricing Worksheet. Moreover, the Petitioner would have no motivation to have deliberately not attached the Worksheet. Because the Proposals are sealed there was no advantage to the Petitioner waiting to submit its Pricing Worksheet.

— The Petitioner was candid with and identified for the Purchasing Agent in another section, the technical qualifications section, that the Petitioner wanted to provide in a week or so additional information about the experience of the subcontractors it would use on the contract. (AR, p. 4180-81.) Although not pertaining to the Financial Proposal section in issue, nevertheless these actions are indicative of the Petitioner's transparency.

— After being contacted by Metro, the Petitioner explained that what had occurred was a human or computer glitch in uploading the original submission. At page 4149 of the Administrative Record, the Petitioner explained to the Board that the original submission was made by an employee in a satellite office before she went on vacation. These facts are indicative of haste or distraction, consistent with a mistake.

Thus, the evidence establishes that the Petitioner intended to and thought it had submitted the Pricing Worksheet with its original submission, but through a glitch the Worksheet was not uploaded. Upon being notified, the Petitioner promptly corrected the glitch by resending the document.

Metro offers no countervailing evidence. These are the facts.

Metro's position is that it characterizes the re-sent Pricing Worksheet as an R4.12.030.11.2 late modification, and/or an R4.12.040.13(c) unacceptable or nonresponsive proposal. R4.12.040.14.1 only permits discussions with proposers who submit acceptable or potentially acceptable proposals. Discussions may not be had with proposers of an unacceptable proposal.

Beginning with the assertion of late modification, the consequence of this under R4.12.030.112 is that a late modification can not be considered. To fit within this disqualifier, Metro argues that the resending of the Pricing Worksheet after the proposal deadline changed the terms of the proposal. This is not supported by the evidence in the record. The Pricing Worksheet was not a variant or change. The Pricing Worksheet was not inconsistent with or contrary to the Petitioner's initial submission. The Pricing Worksheet simply was not transmitted with the initial submission. There is, then, no

material evidence in the record to support Metro's claim of a late modification, and that argument in support of disqualification must be denied.

As to Metro's claim that the Petitioner's Proposal was correctly disqualified as unacceptable and/or nonresponsive, Metro focuses on the "severity," i.e. materiality of the missing Pricing Worksheet in the initial submission by the Petitioner. This is the explanation of the Purchasing Agent and emphasis in her testimony before the Board, quoting as follows, "Insomuch as the information that was submitted by NTN+ had a severe omission that was beyond just a clerical error, it was the omission of specific pricing information, it disabled us from determining whether or not we could identify them or classify them as being acceptable or potentially acceptable" (AR, p. 4194). It appears that Metro viewed the scope of a correctable mistake to be limited to two circumstances: (1) a clerical error or (2) if Metro had evaluated the Proposal as acceptable or potentially acceptable and had commenced discussions with the Petitioner.

Turning to the section of the Regulations on mistakes—R4.12.040.15.3—the Court sees that this Regulation does not limit a correction of a mistake to only minor mistakes or where the proposal is acceptable or potentially acceptable. As to gradations of a mistake, *de minimus* is relevant only to one subsection: R4.12.040.15.3(b) "Minor Informalities." As to the acceptable or potentially acceptable evaluation of the Petitioner's Proposal to have been made by Metro and for discussions between the two to have commenced, those conditions are contained only in one subsection: R4.12.040.15.3(a).

The remaining subsection in the Regulation on mistakes is R4.12.040.15.3(c). It provides as follows.

> R4.12.040.15.3 *Mistakes Discovered After Receipt of Proposals but Before Award*. This Subsection sets forth procedures to be applied in four situations in which mistakes in proposals are discovered after receipt of proposals but before award.
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> * * *
>
> c) Correction of Mistakes. If discussions are not held, best and final offers are not solicited, or the best and final offers upon which award will be made have been received, mistakes may be corrected and the intended correct offer considered only if:
>
> > i) the mistake and the intended correct offer are clearly evident on the face of the proposal, in which event the proposal may not be withdrawn; or
> >
> > ii) the mistake is not clearly evident on the face of the proposal, but the offeror submits proof of evidentiary value that clearly and convincingly demonstrates both the existence of a mistake and the intended correct offer, and such correction would not be contrary to the fair and equal treatment of other offerors.

As the above text states, subsection (c) does not include an analysis of the severity/materiality of a mistake, and it does not require discussions with the Petitioner to have commenced. Subsection (c)'s requirements are that: (1) the mistake was not evident on the face of the proposal, (2) but the offeror/Petitioner submitted proof that clearly and convincingly demonstrated the evidence of a mistake and intended correct offer, and (3) correction of the mistake was not contrary to equal treatment of all. All of these are established by the evidence in this case.

That the mistake of the uploading glitch of the Pricing Worksheet was not evident is proved by Ms. Troup's email to the Petitioner on Sunday morning, April 14, inquiring

about the missing attachment. The fact of the prompt resending of the Worksheet by the Petitioner constitutes then, and remains, clear and convincing evidence of the intended correct offer. Last, there was no articulation by LAZ, the Purchasing Agent or the Procurement Appeals Board on: how Metro accepting the resending of Petitioner's Pricing Worksheet on April 14 to correct a transmission mistake is unfair to LAZ; there was no finding or determination by the Board that allowing consideration of the Pricing Worksheet constituted unequal treatment of all; and there was no evidence of unfairness. In fact, the contrary is demonstrated by the record.

In terms of fairness, the goal of the proposal selection process stated in section 4.12.040 of the Metro Code is to make an award "to the responsible offeror whose proposal is determined to be the most advantageous to the metropolitan government taking into consideration price and the evaluation factors set forth in the request for proposals." The evidence presented to the Board was that the Petitioner's proposal from a financial standpoint was $30 million better for Metro quantitatively over the 30 years of the contract (AR, pp. 4152-4153; 4187-4188), and yet it was not considered because of an error in the initial transmission of an attachment.

Finally, to the extent that the Board's decision to uphold the disqualification was based upon the statement in the RFQ that an answer of "No" attachment of the Pricing Worksheet "might deem the proposal nonresponsive," the answer of "No" attachment of the Pricing Worksheet was not checked. The Petitioner checked the "Yes" that the Worksheet was attached because the Petitioner intended to be responsive, and which evidences that a mistake had occurred. Metro then was required by R4.12.040.15.3 to

check the criteria of the subsections of R4.12.040.15.3 to see if they applied and, if so, not disqualify the Petitioner based upon an unacceptable or nonresponsive proposal but allow for the correction of the mistake so the proposal could be evaluated.

There also is the citation by Metro to federal case law for the proposition that proposals are considered nonresponsive when pricing information is omitted. This case law, however, is not analogous because federal law gives the federal government's contracting officer complete discretion in deciding whether to allow the correction of mistakes. 48 C.F.R. § 15.306. As quoted and analyzed above, the Metro Code and Regulations do not vest complete discretion in the Purchasing Agent. Metro law carefully regulates the Purchasing Agent when a mistake is made. The steps the Metro Purchasing Agent must follow when a mistake is made are explicitly listed in R4.12.040.15.3. In this case those steps were not followed with the result that the Petitioner was wrongfully disqualified from the selection process for the contract on Metro's 30-year on-street meter parking. Under these circumstances, Metro law requires that the disqualification of the Petitioner must be reversed.

In addition, it follows that the remedy for reversal is cancellation of the 2019 RFQ and reissuing an RFQ for the process to be begin anew. This remedy is appropriate because awarding the Petitioner damages for the wrongful disqualification would be cost-prohibitive. The remedy of remanding this matter to simply reinstate the Petitioner in the selection process and resuming the process is not an alternative because the confidentiality of the Proposals was lifted as part of the evidence and record for this litigation.

The Court therefore concludes that the evidence of record shows that a mistake occurred in uploading the Petitioner's Pricing Worksheet in its original submission and that this was promptly corrected by resending the Worksheet. These events, under Metro law, did not authorize the Metro Purchasing Agent to disqualify the Petitioner's Proposal as unacceptable and/or nonresponsive, and that decision must be reversed.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, fax, or efiling as applicable to:
William N. Helou
Lora Barkenbus Fox
Catherine Pham
Paul S. Davidson
Keith W. Randall

Rule 58 Certification

A copy of this order has been served upon all parties or their Counsel named above.

s/Phyllis D. Hobson October 4, 2019
Deputy Clerk
Chancery Court