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October 19, 2015

The Hon. Phil Mendelson
Chairman, Council of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 504
Washington, D.C. 20004

Dear Chairman Mendelson:

Based on documents signed by District officials between 2007 and 2015 – spanning the Fenty, Gray, and Bowser administrations – the District has had a plan to develop and revitalize the McMillan Reservoir Slow Sand Filtration Site (McMillan Site). Although in its early stages that plan included a competitive process that resulted in the selection of Vision McMillan Partners, LLC (VMP) as the land development team, it ultimately resulted in a greatly expanded role and exclusive rights for VMP, all without the benefit of a competitive process.

As explained in a letter from the Office of the Deputy Mayor for Economic Development (DMPED) to the Office of the District of Columbia Auditor (ODCA), dated October 2, 2015, (hereinafter, October 2, 2015, letter), in July 2006, “the National Capital Revitalization Corporation (NCRC) issued a solicitation for a land development partner for the McMillan Site.” (p.1). NCRC was to be the master developer and through a competitive process, in July 2007, chose VMP to be the land development team. In late 2007, DMPED “determined that VMP should undertake the land development and vertical development and serve as master developer for the McMillan Site.” (October 2, 2015, letter, p. 2). No explanation was provided in the October 2, 2015, letter or in the accompanying documents as to how DMPED “determined” that VMP should take on a more extensive role in the project. In fact, the Letter of Commitment, dated December 10, 2007, between VMP, the District government by and through DMPED, and the McMillan Advisory Group (“MAG”) states:

In the Solicitation, NCRC planned to be the Master Developer for the Project. The Project is now controlled by the District and as a matter of business policy, the District will not play the Master Developer role. The District and VMP both agree that VMP is a highly-qualified development team and has the experience to lead the Project as Master Developer. More specifically, the key revisions to VMP’s role are as follows:

- 1) Assuming accountability for project completion per the agreed upon development plans – from inception to vertical completion.
- 2) Assuming the full burden to provide the private financing necessary for the project.
- 3) Having the opportunity to develop certain vertical parcels in VMP’s areas of expertise.

Subsequently, in late 2009, DMPED re-evaluated the plan and “DMPED and VMP agreed that the District would undertake the land development and VMP would have the opportunity to negotiate to purchase the development pads¹ within Phase 1 of the McMillan Site.” (October 2, 2015, letter, p. 2). This resulted in a series of Exclusive Rights Agreements in which DMPED initially “granted VMP the exclusive right to negotiate for the purchase of development pads within Phase 1 of the McMillan Site” and, on June 4, 2014, resulted in expanded exclusive rights to include the development pads within Phases 2 and 3. (October 2, 2015, letter, p. 2).

Although the documents provided to me indicate that the District of Columbia Office of the Attorney General reviewed and approved for legal sufficiency many of the pertinent documents, including the Exclusive Rights Agreement dated April 23, 2010, and the six subsequent amendments to the Exclusive Rights Agreement that were executed between April 13, 2011, and July 28, 2015, this office has concerns about the expansion of VMP’s role and exclusive rights without following a competitive process. The importance of competition in government process has been highlighted repeatedly by reports of the Government Accountability Office (GAO) and other national, state, and local oversight entities. For example, in a 2014 report to the U.S. Congress, the GAO wrote:

Competition in contracting is a critical tool for achieving the best return on investment for taxpayers and can help save the taxpayer money, improve contractor performance, and promote accountability for results. While federal statute and acquisition regulations generally require that contracts be awarded on the basis of full and open competition, they also allow agencies to award noncompetitive contracts in certain circumstances. For example, when the agency’s need for good and services is of an unusual and compelling urgency that precludes full and open competition, agencies may be permitted to award noncompetitive contracts where a delay in award would result in serious financial or other injury to the government.² (p. 1)

GAO further notes that even in such instances where urgency is claimed, an agency should nonetheless secure additional proposals (p.1).

¹ A pad site is a free-standing parcel of commercial real estate located outside a retail center.

² United States Government Accountability Office Report to Congressional Committees. March 2014. *Federal Contracting: Noncompetitive Contracts Based on Urgency Need Additional Oversight*, GAO-14-304. Retrieved from <http://www.gao.gov/assets/670/661983.pdf>.

Just as it is common knowledge in the construction industry that government practice is to re-bid a project if there is a material change to the scope of work, certainly, the change to VMP's role and giving it exclusive rights are materials changes that warrant a new competitive process.

I share this information with you in light of the upcoming hearing on the McMillan site. I also share this information with Inspector General Daniel Lucas in case he sees merit in his own additional review and with Attorney General Karl Racine given that his office performed the legal sufficiency review mentioned above. Enclosed with the electronic versions of this letter (as indicated below) are the DMPED letter dated October 2, 2015, and enclosed materials, which I received electronically.

Please let me know if you have any questions on these matters and I appreciate the opportunity to share these concerns.

Sincerely yours,



Kathleen Patterson
District of Columbia Auditor

Enclosures: As indicated.

cc: Councilmember Kenyan McDuffie (without enclosures)
Karl Racine, Attorney General (with enclosures)
Daniel Lucas, Inspector General (with enclosures)