



OFFICE OF INSPECTOR GENERAL
PALM BEACH COUNTY

CONTRACT OVERSIGHT NOTIFICATION
(2014-N-0007)

John A. Carey
Inspector General

ISSUE DATE: JULY 22, 2014

"Enhancing Public Trust in Government"

**Ion Exchange Resin Plant and East Water Treatment Plant Improvements Request
for Proposals 006-2821-14/DLJ**

SUMMARY

In September 2013, the City of Boynton Beach ("City") published a Request For Proposals (RFP) for a design/build firm¹ to provide services and expertise in the delivery of water/sewer utility design and construction. At the time, the City had various ongoing capital improvement projects including improving its existing underground utilities and expansions to its water treatment facilities. Qualified firms were to be selected pursuant to section 287.055, Florida Statutes – the Consultants' Competitive Negotiations Act (CCNA).

On October 17, 2013, City staff supplied the Office of Inspector General (OIG) with a copy of the RFP and multiple design packages for our review. After reviewing the design packages, the OIG informed City staff that they did not meet the requirements of a "design criteria package"² as defined in the CCNA.

On October 30, 2013, the City received proposals from six design/build firms. On December 9, 2013, after evaluating and scoring the proposals, the City's selection committee shortlisted three firms. On December 18, 2013, the three shortlisted firms were required to make oral presentations to the selection committee. After evaluating and scoring the oral presentations, the selection committee made an award recommendation to the City Commission. In January 2014, one of the design/build firms protested the selection committee's award recommendation, first to City staff and then to City Council. City staff denied the bid protest on March 27, 2014, and the City Council denied the bid protest on May 6, 2014.

Although the design/build contract was awarded to the design/build firm that would have been awarded the contract utilizing the correct procedures, the OIG identified that the selection process was fundamentally flawed in that the City: (1) did not follow the requirements of its own policy manual or the evaluation process in its RFP; and, (2) failed to follow the requirements of section 287.055, Florida Statutes-Consultants'

¹ The City's RFP defines "Design-Build firm" as: "A partnership, corporation, or other legal entity that: 1. Is certified under s. 489.119 to engage in contracting through a certified or registered general contractor or a certified or registered building contractor as the qualifying agent; or 2. Is certified under s. 471.023 to practice or to offer to practice engineering; under s. 481.219 to practice or to offer to practice architecture; or certified under s. 481.319 to practice or to offer to practice landscape architecture."

² "Design Criteria Package" is defined as "concise, performance-oriented drawings or specifications of the public construction project. The purpose of the design criteria package is to furnish sufficient information to permit design-build firms to prepare a bid or a response to an agency's request for proposal, or to permit an agency to enter into a negotiated design-build contract. The design criteria package must specify performance-based criteria for the public construction project, including the legal description of the site, survey information concerning the site, interior space requirements, material quality standards, schematic layouts and conceptual design criteria of the project, cost or budget estimates, design and construction schedules, site development requirements, provisions for utilities, stormwater retention and disposal, and parking requirements applicable to the project."

Competitive Negotiation Act-when evaluating proposals from qualified design/build firms.

BACKGROUND

In September 2013, the City published a RFP soliciting sealed proposals from design/build firms for two projects: (1) installation of the Ion Exchange Resin Plant at the West Water Treatment Plant site for pre-treatment of the water supply to the East Water Treatment Plant; and, (2) upgrading of the East Water Treatment Plant to a capacity of 24 million gallons per day. The RFP states that the selection of the design/build firm “shall be based on ‘Competitive Proposal Selection’ in accordance with Florida Statutes §287.055, ‘Consultants Competitive Negotiation Act’.”

The CCNA requires that municipalities award design-build contracts either through a “competitive proposal” selection process or through a “qualifications-based” selection process. In a “competitive proposal” selection process the primary comparison is among the proposals, and the RFP must include a “design criteria package,” which is defined in section 287.055(2)(j), Florida Statutes. In addition, the “design criteria package” must be prepared and sealed³ by a design criteria professional. In the City’s procurement neither of these requirements were met.

Instead, the City’s procurement focused on the qualifications of the competing firms, and was a “qualifications-based” selection, for which section 287.055(4), Florida Statutes prescribes a two-step process. First, the municipality “shall select in order of preference no fewer than three firms deemed to be the most highly qualified to perform the required services.” Second, the municipality “may request, accept and consider proposals for the compensation to be paid under the contract **only** [emphasis added] during competitive negotiations under subsection (5).” Therefore, when using the “qualifications-based” selection process, municipalities cannot consider compensation (price) when evaluating a firm’s qualifications.

The City’s RFP contained the following language; “[t]his is a two (2) step process whereby the respondent will be required to submit two envelopes. The first sealed envelope shall contain qualifications requirements all in accordance with Florida Statutes §287.055 and second envelope for price proposal as further detailed in this solicitation.”

FINDINGS

FINDING (1):

The City of Boynton Beach did not follow the requirements of its Administrative Policy Manual or the evaluation process described in its Request for Proposals.

RFP Solicitation Language

Section 6.I. of the RFP outlines the following evaluation criteria and the points assigned thereto:

³ “Sealed” documents include the preparation, review and approval by a design professional, either an architect or landscape architect, who has a current certificate of registration given under Chapter 481, Florida Statutes; or a registered engineer with a current certificate of registration under Chapter 471, Florida Statutes, and who is employed by or under contract to the agency (City) for the providing of professional architect services, landscape architect services or engineering services.

Criteria	Points
Firm Qualifications and Experience (including Reference results)	20
Assigned Staff Qualifications & Experience	25
Current Workload	10
Project Approach	30
Price Proposal	15
Total	100

Section 6.1.E. of the solicitation document contains the following language: “Shortlisted firms may be asked to make an oral presentation of their **qualifications** [emphasis added] and methodology to staff and/or the City Commission.” However, the RFP provided no indication that additional points would be attributed to the oral presentations.

In the City’s Administrative Policy Manual⁴, Chapter 10, Section 7, under the subject Procedures for Requests for Proposals (RFP), Subsection 6 is titled. “Evaluation Factors”, and states:

“The RFP shall state the relative importance of price, if appropriate, and other evaluation factors such as: quality, delivery and service, as well as past supplier performance, and conformance to specification and/or quotation requirements. **Only criteria disclosed on the solicitation for bid may be used to evaluate the items or services proposed** [emphasis added].”

OIG Review:

On December 9, 2013, after conducting the qualifications-based selection process and ranking the bidders based on the criteria and point system set out in the RFP, City staff stated that the three shortlisted firms would make oral presentations to the selection committee on December 18, 2013, and announced to the firms, for the first time, that an additional 100 points would be awarded during the oral presentation phase. This decision had the effect of reducing the “qualifications-based” scoring system set out in the RFP to 50% of the total score.

Within the next day or two the shortlisted firms were advised of the two oral presentation evaluation criteria; “Understanding of Program and Project Requirements” and “Approach and Method.” However, the weightings of each of these criteria were not disclosed at that time.

It should be noted that the criteria “Understanding of Program and Project Requirements” is inconsistent with the solicitation language, which states; “Shortlisted firms may be asked to make an oral presentation of their **qualifications** [emphasis added] and methodology to staff and / or the City Commission.”

Florida’s courts have repeatedly explained that:

“While a public authority has wide discretion in award of contracts for public works on competitive bids, **such discretion must be exercised based upon**

⁴ Standard Operating Guidelines, last revision: November 11, 2008.

clearly defined criteria, and may not be exercised arbitrarily or capriciously. Liberty County v. Baxter's Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982), Miami-Dade County, supra, at 1088, City of Miami Beach, supra."

City of Sweetwater v. Solo Constr. Corp., 823 So. 2d 798 (Fla. 3rd DCA 2002)
[Bold added]

The National Association of State Procurement Officials (NASPO) provides guidance concerning RFP evaluation criteria. According to NASPO, "[o]nce the RFP announces those criteria, the evaluation may only measure proposals against those and any subcriteria that logically fall within them. Otherwise, the evaluation diverges from what the offerors were told is important, and the process becomes an unfair one." Moreover, NASPO recommends, "... that each solicitation set forth the criteria to be considered in the evaluation of bids or proposals for award, and that ***no factor shall be considered that is not included in the solicitation*** [emphasis added]." ⁵

Additionally, according to the National Institute of Governmental Purchasing, "the evaluation factors and procedures must be completed prior to issuing the proposals. Should the evaluation process not be clearly established prior to the receipts of proposals, disgruntled offerors may (and probably will) argue that the evaluation committee acted improperly. Thus, it is important to make it known how the RFP evaluation committee is going to conduct the evaluation and include the process as part of the RFP documentation before the evaluation committee reviews submitted proposals." ⁶

To summarize, the City's process for awarding points for the oral presentation improperly reversed the initial rankings for the first and second place firms, and failed to comply with the requirements of its own policy manual. However, as explained in the next section, the City had also committed a fundamental error in the first phase of the evaluation process.

FINDING (2):

The City of Boynton Beach did not follow the requirements of Chapter 287.055, Florida Statutes—Consultants' Competitive Negotiation Act—when evaluating proposals from qualified design/build firms.

Section 287.055, Florida Statutes outlines the requirements to be followed when procuring professional services⁷ of architectural, engineering, landscape architectural or surveying and mapping services. Section 287.055(9), Florida Statutes, provides the requirements that a municipality must follow when procuring the services of a "design build firm."

⁵ National Association of State Procurement Officials, *State and Local Government Procurement, A Practical Guide* (Lexington, KY: NASPO, 2008, 6th ed.) p.109, p. 125

⁶ Khi Thai, *Developing and Managing Requests for Proposals in the Public Sector*, (Herndon, VA: National Institute of Governmental Purchasing, Inc., 2007, 2nd ed.) p.111.

⁷ "Professional Services" is defined as "those services within the scope of the practice of architecture, professional engineering, landscape architecture or registered survey and mapping, as defined by the laws of the state, or those performed by an architect, professional engineer, landscape architect or registered surveyor and mapper in connection with his or her professional employment or practice."

OIG Review:

Section 2.1 of the City's RFP, titled "Introduction", states:

"Selection of the professional team shall be based on 'Competitive Proposal Selection' in accordance with Florida Statutes §287.055, 'Consultants Competitive Negotiation Act.' The scoring criteria included in Section 6 herein will be used in the evaluation and ranking of the Proposal based on the response within this Request for Proposals (RFP) by the Selection Committee. Negotiations will then begin with the highest-ranked proposer for a contract at a price determined to be fair and competitive in the best interest of the CITY."

Section 287.055(9)(c), Florida Statutes provides municipalities with two options. They must award design-build contracts either through a "competitive proposal" selection process **or** through a "qualifications-based" selection process. The City claimed to be using the "competitive proposal" selection method; however, this procurement did not qualify as a "competitive proposal" selection. The RFP included multiple design packages; however, they were not "design criteria packages" as defined in section 287.055(2)(j), Florida Statutes and as required by section 287.055(9)(c), Florida Statutes. In addition, the "preliminary design" documents were not prepared and sealed⁸ by a design criteria professional, contrary to the requirements of section 287.055(9)(b), Florida Statutes.

Instead, the procurement was a "qualifications-based" selection process, which per section 287.055(9)(c), Florida Statutes requires compliance with subsections (3),(4), and (5). Most of the rating criteria utilized are indicative of, and appropriately reflect a "qualifications-based" selection process. However, this procurement, by awarding points for pricing in determining the most qualified proposer, violated the specific requirements of subsection (4), which prohibit price from being considered until after the most qualified proposer has been chosen.

The City's decision to include price in the "qualifications-based" selection process is a fundamental error that altered the position of the two highest ranked firms. Specifically, the highest ranked firm after the "qualifications-based" selection process became the second ranked firm after considering price; the second ranked firm after the "qualifications-based" selection process became the highest ranked firm after considering price; and, the third ranked firm was unchanged.

To summarize, the City committed two fundamental errors in awarding the design/build contract; awarding points for oral presentations and including price in the "qualifications-based" selection process. Fortunately for the City, these two fundamental errors had the effect of negating each other and ultimately the design/build contract was awarded to the design/build firm that would have been awarded the contract utilizing the correct procedures.

⁸ "Sealed" documents represent the preparation, review and approval by a design professional, either an architect or landscape architect, who has a current certificate of registration given under Chapter 481, Florida Statutes; or a registered engineer with a current certificate of registration under Chapter 471, Florida Statutes, and is who is employed by or under contract to the agency (City) for the providing of professional architect services, landscape architect services or engineering services.

RECOMMENDATIONS

The City of Boynton Beach should:

1. Adhere to its Administrative Policy Manual when publishing Requests for Proposals. Specifically, Chapter 10, Section 7 requires that “only criteria disclosed on the solicitation for bid may be used to evaluate the items or services proposed.”
2. Ensure that solicitation documents set forth the relative importance of the factors, and any subfactors, that will be considered in awarding the contract. Disclosure of the relative importance of all evaluation factors and subfactors should apply to the items listed on the evaluation score sheets.
3. Adhere to the requirements of the Consultants’ Competitive Negotiation Act when awarding design/build contracts by either a “qualifications-based” selection process or a “competitive proposal” selection process.

RESPONSE FROM MANAGEMENT

On July 16, 2014, Lori LaVerriere, City Manager, provided a response to this Notification (Attachment A). Ms. LaVerriere stated, in part,

“The City believes that they followed a fair and equitable procurement method in this instance but realizes there are policies and procedures of the City’s that would benefit by clarification and will take every effort in the future to follow its procurement policies and procedures.

The City is clarifying it’s process for requesting proposals to include clear scoring criteria in a matrix that will be included in each Request for Proposals released that will be used as the only scoring criteria by the evaluation team which will ensure compliance with the Administrative Policy Manual. Separate scoring criteria matrices will be developed for the ‘competitive proposal’ selection and the ‘qualification-based’ selection process for clarity and use by procurement staff and the evaluation team. ...”

ACKNOWLEDGEMENT

The Inspector General’s Contract Oversight staff would like to extend our appreciation to the City of Boynton Beach’s management for the cooperation and courtesies extended to us during the contract oversight process.

This report is available on the OIG website at: <http://www.pbcgov.com/OIG>. Please address inquiries regarding this report to Hank K. Nagel, Contract Oversight Manager, by email at inspector@pbcgov.org or by telephone at (561) 233-2350.

ATTACHMENT A – PAGE 1

The City of Boynton Beach

OFFICE OF CITY MANAGER
100 East Boynton Beach Boulevard
P.O. Box 310
Boynton Beach, Florida 33425-0310
City Manager's Office 561-742-6010
Fax: (561) 742-6011
e-mail: laverriere@bbfi.us
www.boynton-beach.org

July 16, 2014

Hank K. Nagel
Office of Inspector General
Contract Oversight Unit
P.O. Box 16568
West Palm Beach, FL 33416

RE: OIG Contract Oversight Notification relating to "Ion Exchange Resin Plant and East Water Treatment Plant Improvements" RFP 006-2821-14/DJL

Dear Mr. Nagel:

This is in response to the above mentioned Contract Oversight Notification dated July 7, 2014 relating to RFP 006-2821-14/DJL "Ion Exchange Resin Plant and East Water Treatment Plant Improvements". After reviewing the notification, I would like to provide the following response in regards to the findings contained in the notification:

Findings:

1. The City of Boynton Beach did not follow the requirements of its Administrative Policy Manual or the evaluation process described in its Request for Proposals.
2. The City of Boynton Beach did not follow the requirements of Chapter 287.055, Florida Statutes-Consultants' Competitive Negotiation Act-when evaluating proposals from qualified design/build firms.

Recommendations:

1. Adhere to its Administrative Policy Manual when publishing Requests for Proposals. Specifically, Chapter 10, Section 7 requires that "only criteria disclosed on the solicitation for bid may be used to evaluate the items or services proposed."
2. Ensure that solicitation documents set forth the relative importance of the factors, and any sub-factors, that will be considered in awarding the contract. Disclosure of the relative importance of all evaluation factors and sub-factors should apply to the items listed on the evaluation score sheets.
3. Adhere to the requirements of the Consultants' Competitive Negotiation Act when awarding design/build contracts by either a "qualification-based" selection or a "competitive proposal" selection process.

America's Gateway to the Gulfstream

ATTACHMENT A – PAGE 2

The City believes that they followed a fair and equitable procurement method in this instance but realizes there are policies and procedures of the City's that would benefit by clarification and will take every effort in the future to follow its procurement policies and procedures.

The City is clarifying it's process for requesting proposals to include clear scoring criteria in a matrix that will be included in each Request for Proposals released that will be used as the only scoring criteria by the evaluation team which will ensure compliance with the Administrative Policy Manual. Separate scoring criteria matrices will be developed for the "competitive proposal" selection and the "qualification-based" selection process for clarity and use by procurement staff and the evaluation team. This matrix will include all factors and sub-factors that will be scored and the relative points for each factor. The factors will be based on the requirements of the Consultants Competitive Negotiation Act so the requirements for the respective selection processes are followed in the selection of a vendor for professional services.

Based on the review of this issue, I feel that City staff's intent was to have a fair and equitable selection process but agree that there are areas that the City can improve upon as to policies and procedures as it relates to this type of procurement method and are currently in the process of reviewing and updating policies and procedures to address the issues you have raised.

Please contact me if you need any further information on this matter.

Sincerely,



Lori LaVerriere
City Manager