



**OFFICE OF INSPECTOR GENERAL
PALM BEACH COUNTY**

CONTRACT OVERSIGHT NOTIFICATION

2012-N-0001

ISSUE DATE: FEBRUARY 3, 2012

Sheryl G. Steckler
Inspector General

"Enhancing Public Trust in Government"

Boynton Beach Invitation to Bid Regional Lift Station at Pence Park

ISSUES

On August 12, 2011, the Hinterland Group notified the Office of Inspector General (OIG) that they had protested Boynton Beach's contract award to Wharton-Smith, Inc. the second lowest bidder. The Hinterland Group had submitted the lowest bid by \$27,262 for the approximate \$900,000 project.

Following receipt of this protest notification, the OIG staff reviewed the bid solicitation process. The OIG found that the Invitation to Bid (ITB) appeared to be a "hybrid" solicitation, using a combination of standard ITB (lowest responsive and responsible bidder) and Request for Proposal (RFP) (evaluation criteria) processes. By inserting language into the ITB that allowed the City to evaluate multiple criteria in addition to price, the award of the bid moved from being objective to subjective; thus, changing the intended purpose of an ITB which typically is awarded to the lowest responsive, responsible bidder.

In the ITB, the City identified 12 criteria for determining "responsible" bidders. These criteria were not all well defined and not weighted or ranked as to their relative importance, and as such a consistent, objective evaluation of the bidders could not be conducted. The Wantman Group (WGI), the City's engineering consultant, evaluated the Hinterland Group, as the lowest bidder, against 10 of the 12 criteria. While WGI's analysis appeared to be thorough and raised some concerns regarding the Hinterland Group, their report to the City did not state whether the Hinterland Group was a responsible bidder. The City subsequently asked WGI to evaluate Wharton-Smith, the second lowest bidder. After reviewing the two evaluations and the recommendation from WGI that Wharton Smith was a better choice, the City staff recommended award to Wharton Smith. However, before a contract was awarded, the City Commission canceled the ITB as recommended by City staff because the City did not have an engineer to oversee the project.

The following is a summary of the process that was followed by the City in conducting this procurement:

The City advertised the contract for the Project through an ITB (#059-2821-11/TWH). The contract was to furnish, install and provide all labor, materials and equipment to complete the City's Regional Lift Station at Pence Park (Project). The City included language within the ITB (Attachment A) stating that lowest responsive, responsible bidder would not in all cases be awarded the contract or purchase order and, in addition to the bid evaluation criteria specified, other factors as well may be considered.

All bids were due June 23, 2011. Ten (10) bids were received. The City's engineering consultant, (WGI), conducted "due diligence" evaluations using 10 of the 12 criteria identified in the Instruction to Offerors (Attachment A), on the two lowest bidders only (as directed by the City) to determine if they were "responsible". The pricing difference between the two bids was \$27,262 (3.47% of the low bid amount). WGI determined based on their evaluation of the criteria that the Hinterland Group, low bidder, was "a good contractor and experienced at rehabilitation of existing lift stations", but that the Hinterland Group "did not provide any data or references for projects where they constructed large and technically advanced regional or sub-master lift stations". WGI also questioned Hinterland Group's aggressive completion schedule, which they believed could indicate a lack of understanding of the magnitude of the project.

After their evaluation of the Hinterland Group, WGI was asked by the City to evaluate Wharton-Smith, Inc. WGI determined that Wharton-Smith, Inc. had "relevant and broad based experience needed for the project as well as extensive experience in all facets of wastewater facilities from rehabilitation projects to multi-million dollar wastewater treatment plants". The City's Utilities Department reviewed the bid packages from the three lowest bidders as well as WGI's due diligence evaluations/documentation and recommendations on the two lowest bidders. Based on this information, the City's Director of Utilities recommended the contract be awarded to Wharton-Smith.

The Hinterland Group protested the contract award on August 11, 2011. The City subsequently denied the protest and the Hinterland Group appealed the City's protest decision.

On August 16, 2011, the City Commission tabled the proposed resolution NO. R11-087 to award the contract to Wharton-Smith with a bid price of \$812,000 and an owner's contingency¹ of 10% for a total funding authorization of \$893,200. The City Commission tabled the proposed resolution at several subsequent meetings. On October 18, 2011, the City Commission canceled the ITB (#059-2821-11/TWH) based on a recommendation from the City's Utility Department to re-issue a new solicitation at a later date because they didn't have an engineer to oversee the project.

¹ Contingency: provision made against future unforeseen events.

Based on our review of this procurement, we concluded that the City did not follow sound contracting practices. The process the City followed for the ITB solicitation created a hybrid procurement that was a cross between standard types of source selections - sealed bidding (typically an ITB) and sealed proposals (typically a RFP) with an ITB being the more objective evaluation based primarily on price. Although the ITB identified criteria that would be evaluated in determining whether a Bidder was "a responsible Bidder", it did not identify the relative importance of the criteria to be evaluated in comparing bids among "responsible Bidders". The criteria were also vague in some areas. For example one criteria was, "Experience of the firm with similar projects" and another was "Largest completed project". Both the words "similar" and "largest" are open for interpretation, thus increasing the subjectivity of the evaluation.

Also, WGI did not establish a methodology to objectively evaluate the criteria. When factors in addition to price are to be considered, a RFP is typically issued and the specific criteria and their weighting are announced in advance, increasing the objective nature of the bid evaluations. Had the City followed the process commonly used for an ITB, the lowest bidder would have been selected based on low bid and other objectively measurable factors, as identified in their policy. In addition, it was not clear from the WGI's evaluation report issued to the City's Utility Department that they had determined whether the Hinterland Group was or was not a "responsible bidder".

Based on the nature and complexity of this project, a RFP is the solicitation vehicle best suited for projects such as this, which require a comprehensive assessment of the bidder's capability, knowledge and experience to successfully accomplish the project. In a RFP, requirements are less than well-defined, awarded based on evaluation criteria (to include price) with identified weighted factors, and include discussions/negotiations. Thus, a RFP yields a contract by negotiation. Commonly in an ITB, requirements are well-defined, there is adequate competition, and the award is based on price and price related factors with no discussions allowed. Also a solicitation issued as an ITB establishes the expectation by bidders that the contract will be awarded to the lowest responsive and responsible bidder.

RECOMMENDATION

Although the City appears to have a sound procurement policy in place and used The 2000 Model Procurement Code for State and Local Governments by the American Bar Association (Attachment B) in the formulation of their procurement policy, the City should review their procurement policy and procedures to ensure they follow standard procurement processes when making competitive solicitations and awards. ITBs (sealed bids) should be awarded based on lowest price from responsive and responsible bidders and RFPs (sealed proposals) should be awarded based on weighted evaluation factors (to include price) identified in the RFP from responsive and responsible bidders.

RESPONSE FROM MANAGEMENT

Interim City Manager Lori LaVerriere provided the following response to this Notification, wherein she accepted the OIG recommendation. (Attachment C)

"I have reviewed your memorandum dated January 23, 2012 and the Contract Oversight Notification draft with City staff and the City Attorney. The City appreciates the thoroughness of the review and the guidance provided in the referenced documents. We accept the recommendations offered and will apply them as we initiate review of our procurement policies, procedures and documents."

OIG RESPONSE

Based on management's response, the OIG will periodically check with the (Interim) City Manager to confirm if any procurement policies or procedural changes to their competitive selection processes were implemented.

The Office of Inspector General's Contract Oversight Unit is established to review an organization's procurement and contracting activity. When necessary, reports will be issued to: 1) identify areas and/or instances where activity conflicts with an organization's established policies and procedures, and; 2) recommend improvements that will result in more effective and consistent contracting practices.

ATTACHMENT A

The following language was included in the ITB.

In the **Notice to Contractors (page NC-3)**, the City stated the following:

The City of Boynton Beach reserves the right to reject any and all bids or accept any bid as made by the most satisfactory, responsible bidder.

The low monetary Bid will NOT in all cases be awarded the Contract or Purchase Order. Contracts or Purchase Orders will be awarded by the City to the most responsive, responsible bidder whose Bid represent the most advantageous Bid to the City, price and other factors considered. Evaluation of Bids will be made based upon the evaluation factors and standards heretofore set forth in the Instruction to Bidder.

In no case will the award be made until all necessary investigations have been made into the responsibility of the bidder and the City is satisfied that the most responsive, responsible bidder is qualified to do the work and has the necessary organization, capital and equipment to carry out the required work within the time specified.

Instruction to Bidders (page IB-1), Paragraph 1, General: The City reserves the right to negotiate any and all amounts contained in the bidding and contract documents.

Instruction to Bidders (IB-12), Paragraph 26, Selection Criteria: Each Bidder shall complete the "Statement of Bidder's Qualifications" (Attachment A-1) which will be used as a source of information in the selection process. The following factors will be considered to determine whether the Bidder is a responsible Bidder.

Experience of the firm with similar projects.*

Background and experience of principal personnel in company.*

Bonding capacity.*

Evidence of possession of required licenses.*

Experience in performance.*

Contracts on hand.*

Largest completed projects.*

Review of references.*

Consideration of past lawsuits or arbitrations to which the firm has been a party.*

Price.*

Per diem direct job site overhead.

Home office overhead costs.

(The above criteria that are asterisked were evaluated by a consultant for the two lowest bidders only.)

The following language is excerpted from the City's Purchasing policies:

The City's Purchasing Policy 10.05.01 – Procedure for Formal Bids:

Paragraph I. – Bid Acceptance and Bid Evaluation: Bids should be evaluated based on the requirements set forth in the Invitation for Bids, which may include criteria to determine suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award, excluding cash discounts, shall be objectively measurable, such as discounts, transportation costs, and total or life cycle costs. The Invitation for Bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluations that are not set forth in the Invitation for Bids.

Paragraph K. – Bid Evaluation and Award: Bids should be evaluated based on the requirements set forth in the Invitation to Bid, which may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, service, price and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award shall be objectively measurable, such as discounts, transportation costs, and total life cycle cost. The Invitation to Bid shall set forth the evaluation criteria to be used.

The contract shall be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation to Bid. In determining "lowest responsible bidder", in addition to the bid evaluation criteria above, the following may be considered: acceptability, such as.

- a. The ability and skill of the bidder to perform the contract.
- b. Whether the bidder can perform the contract or provide the supplies/services as required, without delay or interruption within the time specified.
- c. The quality of performances of previous contracts or services.

The following definitions were extracted from the City's **Purchasing Policy 10.02.02, Terms and Definitions:**

Invitation to Bid - A written solicitation for competitive sealed Bids with the title, date, and hour of the public Bid opening designated and specifically defining the commodities or Contractual Service for which Bids are sought. The Invitation to Bid will be used when the City is capable of specifically defining the scope of work for which a Contractual Service is required or when the City is capable of establishing precise specifications defining the actual Commodities required. The Invitation to Bid will include instructions to bidders, plans, drawings and specifications (if any), Bid form, and other required forms and documents to be submitted with the Bid.

Responsible Bidder or Responsible Offeror - The person, vendor, contractor or company who has the capability in all respects to perform fully the Contract requirements and the tenacity, perseverance, integrity, experience, ability, reliability, capacity, facilities, equipment, financial resources and credit which will give reasonable expectation of good faith performance.

Responsive Bidder or Responsive Offeror - A person, vendor, Contractor or company who has submitted a Bid which conforms in all material respects to the Invitation to Bid or Request for Proposals.

ATTACHMENT B

The 2000 Model Procurement Code for State and Local Governments by the American Bar Association states the award of a contract associated with an ITB “shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the ITB.” The 2000 Model Procurement Code further delineates the differences between competitive sealed bidding and competitive sealed proposals. “Under competitive sealed bidding, judgmental factors may be used only to determine if the supply service, or construction item bid meets the purchase description. Under competitive sealed proposals, judgmental factors may be used to determine not only if the items being offered meet the purchase description but may also be used to evaluate the relative merits of competing proposals. The effect of this different use of judgmental evaluation factors is that under competitive sealed bidding, once the judgmental evaluation is completed, award is made on a purely objective basis to the lowest responsive and responsible bidder. Under competitive sealed proposals, the quality of competing products or services may be compared and trade-offs made between price and quality of the products or services offered (all set forth in the solicitation). Award under competitive sealed proposals is then made to the responsible offeror whose proposal is most advantageous to the [STATE]. Competitive sealed bidding and competitive sealed proposals also differ in that, under competitive sealed bidding, no change in bids is allowed once they have been opened except for correction of errors in limited circumstances. The competitive sealed proposal method, on the other hand, permits discussions after proposals have been opened to allow clarification and changes in proposals provided that adequate precautions are taken to treat each offeror fairly and to ensure that information gleaned from competing proposals is not disclosed to other offerors.”

The 2000 Model Procurement Code for State and Local Governments defines the terms of “responsive bidder” and “responsible bidder” as follows:

Responsive bidder – a person who has submitted a bid which conforms in all material respects to the Invitation to Bid.

Responsible bidder – a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.

ATTACHMENT C

The City of Boynton Beach



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January 26, 2012

Mr. Dennis Schindel
Director of Audit
Officer of Inspector General
P.O. Box 16568
West Palm Beach, FL 33416

Re: Contract Oversight Notification; City of Boynton Beach Invitation to Bid
Regional Lift Station at Pence Park

Dear Mr. Schindel:

I have reviewed your memorandum dated January 23, 2012 and the Contract Oversight Notification draft with City staff and the City Attorney. The City appreciates the thoroughness of the review and the guidance provided in the referenced documents. We accept the recommendations offered and will apply them as we initiate review of our procurement policies, procedures and documents.

Very truly yours,

A handwritten signature in blue ink that reads "Lori LaVerriere".

Lori LaVerriere
Interim City Manager

LL/lms

Cc: James A. Cherof, City Attorney