

TO: ALL COUNTY PERSONNEL
FROM: VERDENIA C. BAKER
COUNTY ADMINISTRATOR
PREPARED BY: COUNTY ATTORNEY
SUBJECT: CONTRACT NEGOTIATIONS AND THE SUNSHINE LAW
PPM #: CW-O-091

ISSUE DATE
February 12, 2019

EFFECTIVE DATE
February 12, 2019

PURPOSE:

To provide procedures for compliance with the Sunshine Law relating to Competitive Solicitations and Contract Negotiations.

UPDATES:

Future updates to this PPM are the responsibility of the County Attorney.

AUTHORITY:

- § 286.011, Florida Statutes, as may be amended (“Sunshine Law”).
- § 286.0113, Florida Statutes, as may be amended (“Negotiation exemption”).
- §§ 2-51 - 2-58, Palm Beach County Code, as may be amended (“Purchasing Code);
- PPM CW-L-023, “Requirements for the Acquisition, Disposition, Lease and Exchange of Real Property”, as may be amended.
- PPM CW-O-048, “Selection of Professional Engineers, Architects, Landscape Architects, Land Surveyors and Mappers”, as may be amended (“CCNA”).

SCOPE:

This PPM is intended to provide procedures for Competitive Solicitations and contract Negotiations in order to comply with the Sunshine Law. This guidance is intended to supplement existing PPMs and be general in nature. Since this guidance does not encompass every situation each department is encouraged to draft a department specific PPM to address issues and provide examples relevant to that department.

DEFINITIONS:

Competitive Solicitation means the process of requesting and receiving bids or proposals in accordance with the terms of a competitive process.

Negotiation means mutual discussion among the parties to a transaction in order to agree upon or to finalize the terms and conditions of an agreement.

Negotiation Team means a group of staff and/or consultants that are negotiating a contract with a Selected Respondent.

Noncompetitive Selection Process means a process used to identify a Selected Respondent that does not require a Competitive Solicitation, including, but not limited to, a sole source selection.

Respondent means an entity that provides a response to a Competitive Solicitation.

Selected Respondent means the entity selected for contract Negotiation and award.

Selection Team means a group of staff and/or consultants assigned or tasked with scoring or ranking a Competitive Solicitation.

Sole Negotiator means a person assigned to negotiate the terms of a contract.

BACKGROUND:

Florida's Sunshine Law (Section 286.011, F.S.) states that; 1) all meetings of any board or commission of any county at which official acts are to be taken or at which public business is to be transacted or discussed must be open to the public; 2) reasonable notice of such public meeting must be provided; and 3) written minutes of each public meeting must be maintained.

Courts have interpreted the Sunshine Law to apply to Selection and Negotiation Teams that score and/or rank bids or proposals or that Negotiate contracts because these teams are part of the overall contract decision making process.

However, if a department director or designee serves as a Sole Negotiator of a contract, that individual is not a board or committee subject to the Sunshine Law. In that instance, the director can obtain facts and information from staff and/or consultants but cannot engage in shared decision making with others. The director must remain willing and able to be solely responsible for all contract decisions and Negotiations.

There is a limited Sunshine Law exemption for Negotiations during a **Competitive Solicitation** process. Any portion of a Negotiation Team meeting: 1) where the Respondent either makes an oral presentation or answers questions; 2) at which Negotiation strategies are discussed; or 3) at which Negotiation with a Selected Respondent is conducted, is **temporarily** exempt from the Sunshine Law. However, a complete recording of the exempt portions of the meeting must be made. These recordings will only remain exempt from public disclosure until the intended decision is posted or until 30 days after the opening of the bids, proposals or final replies (whichever comes first). **The exemption does not apply to Negotiations resulting from a Noncompetitive Selection Process.**

POLICY:

Department directors overseeing Selection Teams and/or Negotiation Teams will comply with the Florida Sunshine Law by conducting Selection Team/Negotiation Team meetings at properly noticed public meetings and by keeping written minutes of the meetings and recording exempt portions of those meetings.

RESPONSIBILITIES

This PPM applies to all solicitations and contract Negotiations.

Prior to the issuance of a Competitive Solicitation the department director will determine whether the contract Negotiation will be handled by:

- a. A Negotiation Team; or
- b. An individual as a Sole Negotiator (the department director or designee).

The person in charge of a Negotiation Team is responsible for ensuring that the contract Negotiations are conducted in compliance with the Florida Sunshine Law. If it is a Competitive Solicitation, the solicitation documents should describe how contract Negotiations will be conducted. For Negotiations arising from a Noncompetitive Selection Process, the department director or designee should provide instructions to the Selected Respondent on which process will be used.

Section A below describes general procedures for Negotiations by a Team; 1) following a Competitive Solicitation process, and 2) following a Noncompetitive Selection Process.

Section B below describes Negotiation procedures to be followed by Sole Negotiators, regardless of whether the procurement method used was a Competitive Solicitation or a Noncompetitive Selection Process.

PROCEDURE:

A. NEGOTIATIONS CONDUCTED BY A TEAM

1. Competitive Solicitation Negotiations. For Competitive Solicitations, if selections or Negotiations are conducted by a Selection Team or Negotiation Team, then all meetings and communication among team members are subject to the Florida Sunshine Law.

- a. **Exemption.** A Selection Team or Negotiation Team meeting or portion of a meeting may be closed to the public when:
 - i. A Respondent makes an oral presentation or answers questions from the Selection Team;
 - ii. The Negotiation Team discusses Negotiation strategies; or
 - iii. The Negotiation Team conducts Negotiations with a Selected Respondent.

This exemption only applies to *Competitive Solicitations*. Although the portions of a meeting dealing with Respondent presentations, Negotiation strategies or contract

Negotiations and any records presented at the exempt meeting are closed to the public, those portions of these meetings considered exempt ***must be recorded***. Participants in the recorded meeting should be notified the meeting is being recorded.

- b. Limited Duration of the Exemption.** The recording and records only remain exempt from public disclosure until a notice of intended decision is posted or until 30 days after the opening of the bids, proposals, or final replies, ***whichever comes first***.
- c. Reissued Competitive Solicitation.** If all bids or proposals are rejected, and the department provides notice of its intent to reissue a Competitive Solicitation, the recording and any records presented at the exempt meeting(s) remain exempt until the earlier of; 1) Notice of an intended decision concerning the reissued Competitive Solicitation, or 2) Twelve (12) months after the initial notice rejecting all bids, proposals or replies.

2. Negotiations following a Noncompetitive Selection Process. If a Negotiation Team has been assigned the task of negotiating a contract including, but not limited, to a sole source procurement, all meetings must be conducted at a properly noticed public meeting. Team meetings, including Negotiation strategy meetings must be conducted in the Sunshine with no exemptions. No Negotiations or presentations can take place outside of the Sunshine.

B. SOLE NEGOTIATOR

If contract Negotiations are conducted by the department director or designee as the Sole Negotiator, then the Sunshine Law does not apply. The Sole Negotiator must:

1. Notify the Selected Respondent that all Negotiations will be conducted with the designated Sole Negotiator.
2. Act as the only person who negotiates the contract.
3. Not utilize other staff or consultants to assist in Negotiations or share in decision making regarding the contract terms and conditions.
4. Use staff or consultants as required ***solely*** to gather information and facts or provide subject matter expertise to better inform the Sole Negotiator.
5. Clearly delineate with staff, consultants and the Selected Respondent that only the Sole Negotiator is permitted to negotiate the proposed contract.
6. The County Administrator retains administrative authority and oversight over all County contracts.


VERDENIA BAKER
COUNTY ADMINISTRATOR

Supersession History