



**OFFICE OF INSPECTOR GENERAL
PALM BEACH COUNTY**

**CONTRACT OVERSIGHT OBSERVATION
(2013-O-0002)**

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Inspector General

"Enhancing Public Trust in Government"

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To: Irwin Jacobowitz, J.D., Director, Contract Development and Control
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From: Sheryl G. Steckler, Inspector General

Subject: Design-Build Projects for Water, Wastewater and Reclaimed Water

The Palm Beach County Contract Review Committee (CRC), in its capacity as an internal control oversight body, effectively identified consultant services authorizations and/or work authorizations that could violate established laws, regulations, policies and procedures.

Summary

Palm Beach County Policy and Procedure Memorandum (PPM) CW-F-050, established the CRC to "review and approve/reject additional services against annual Professional Services Agreements or contracts and, change order and construction change directive requests against construction contracts" from multiple Palm Beach County departments.

Staff from the Office of Inspector General, Contract Oversight Unit, regularly attends the weekly CRC meetings. On October 24, 2012, Office of Inspector General staff attended the CRC meeting where the Palm Beach County Water Utilities Department (WUD) requested approval of a consultant services authorization¹, issued against a contract developed from Request for Proposal (RFQ) WUD-11-134. The CRC members, while discussing contracts developed from the RFQ and the merits of WUD's consultant services authorization request, uncovered two issues that if not adequately addressed could have resulted in violations of the State of Florida's Consultants' Competitive Negotiation Act (CCNA). The CRC was concerned with the following issues: (1) did WUD competitively procure the construction costs associated with the planned projects; and, (2) were architect/engineer firms acting in a dual capacity: first as a design criteria professional, by preparing the design criteria package², then as the design-build firm³,

¹ PPM CW-F-050 defines a Consultant Services Authorization as "a document utilized in relation to professional services approved by the Board with engineers, architects, landscape architects and land surveyors that request additional services in relation to that contract, which may also be referred to a task order, supplemental agreement or work task order."

² Chapter 287.055(2)(j), Florida Statutes defines a design criteria package as a "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

who was awarded a contract pursuant to the CCNA procurement method. As a result, the CRC rejected WUD's approval request pending guidance from the Palm Beach County Attorney Office.

Consultants' Competitive Negotiation Act

The (WUD) has a series of planned minor construction, rehabilitation, or renovation projects that they believed would benefit from the design-build delivery method. To select a design-build firm(s) for all planned projects, the WUD issued RFQ WUD 11-134, titled "Design-Build Projects for Water, Wastewater and Reclaimed Water" under the CCNA procurement method.

The CCNA procurement method creates a qualifications-based selection process for procuring the professional services of engineers, architects, landscape architects, or land surveyors and mappers, as described in Florida Statutes, section 287.055, and PPM CW-O-048. According to the Florida Attorney General, Advisory Legal Opinion Number AGO-2010-20, the CCNA procurement method "contemplates a four-step process: public announcement of the work, qualifications-based selection of the professional firm, arms-length negotiations with the most qualified firm and, ultimately, execution of a contract." A contract negotiated under a CCNA qualifications-based selection process does not consider compensation until the "arms-length negotiations" stage.

Moreover, under certain circumstances, the CCNA procurement method applies to design-build contracts. Using design-build contracts for construction projects is commonly known as the design-build delivery method. The design-build delivery method involves four parties: (1) the owner, or government entity, (2) a design criteria professional⁴, (3) an architect/engineer firm, and (4) a builder. Collectively, the architect/engineer firm and the builder are considered the design-build firm. Additionally, the design-build delivery method involves the owner and the design criteria professional working together to produce a design criteria package. Once the design criteria package has been developed, it is presented to the design-build firm (architect/engineer firm and the builder) for construction.

Request for Qualifications Selection Process

The WUD received four (4) proposals in response to RFQ WUD 11-134 and appointed a selection committee to evaluate their relative strengths and weaknesses according to the evaluation criteria (factors and sub-factors) contained in the RFQ. After scoring and ranking the proposals, the selection committee members advanced all four (4) proposers to the presentation and interview phase to be held on December 9, 2011.

On December 9, 2011, a separate selection committee was appointed to listen to presentations and conduct interviews. In accordance with PPM CW-O-048, this

quality standards, design and construction schedules, site development requirements, provision for utilities, stormwater retention and disposal, and paring requirements applicable to the project."

³ Chapter 287.055(2)(h), Florida Statutes defines a "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 register building contractor as the qualifying agent; or, (2) is certified under s. 471.023 to practice or to offer to practice engineering; certified under s. 481.219 to practice or offer to practice architecture; or certified under s. 481.319 to practice or to offer to practice landscape architecture."

⁴ Chapter 287.055(2)(k), Florida Statutes defines a "design criteria professional" as: "a firm who holds a current certificate of registration under chapter 481 to practice architecture or landscape architecture or a firm who holds a current certificate as a registered engineer under chapter 471 to practice engineering and who is employed by or under contract to the agency for the providing of professional architect services, landscape architect services, or engineering services in connection with the preparation of the design criteria package."

selection committee was comprised of the County Administrator (Chair), an Assistant County Administrator, three staff members from WUD, a representative of Contract Development and Control Department and a representative of the Office of the Small Business Administration. The primary goal of this selection committee was to select an architect/engineer entity to lead the design-build firm. After listening to presentations and interviewing the proposers, the selection committee recommended an award go to two (2) architect/engineer firms; (1) Global Tech, Inc. and (2) Calvin, Giordano and Associates. It should be noted that the first entity, Global Tech, Inc. ("Global"), has the capacity to act as both the architect/engineer and builder while, the second entity, Calvin, Giordano and Associates ("Calvin"), has the capacity to only act as the architect/engineer and as a result partnered with Cardinal Contractor, Inc. ("Cardinal") to act in the capacity of the builder.

After the selection committee made their award recommendations, WUD staff commenced negotiations with each of the design-build firms. This was done to establish their respective compensation rates. After negotiating the compensation rates, the WUD prepared contracts incorporating the following three sections: (1) General Provisions; (2) Professional Services; and (3) General Conditions. Contained within section I, titled General Provisions, is subsection A, whereas it outlines the "General Scope of Work" as providing "a continuing contractual mechanism for the Water Utilities Department to obtain professional Design-Build Consulting Services within the scope of the practice of architecture, engineering, landscape architecture or land surveying, as defined by the laws of the state of Florida" Additionally, contained within section II, titled Professional Services⁵ it states: "One of Design/Build Entity's responsibilities under this Contract is to provide professional design/consultation services as more specifically set forth in the Scope of Work and as more particularly detailed in such CSA(s)⁶ or WA(s)⁷ as may be issued pursuant to this contact." Finally, contained within section III, titled General Conditions, in subsection 3 titled "Before Starting Construction" in subparagraph (A), it states, "Design/Build Entity shall not perform any services pursuant to this section until County has issued a Work Authorization for such work." On January 24, 2012, the Palm Beach County Board of County Commissioners approved the contracts with both design-build firms.

Contract Review Committee

Subsequently, on October 11, 2012, WUD issued a consultant services authorization (CSA) which PPM CW-F-050 required to be submitted to the CRC for review and approval. On October 24, 2012, while reviewing the documents associated with WUD's request, the CRC members became concerned with two issues that, although not directly related to the October 11, 2012 CSA document, were related to WUD's procurement process. The first was whether WUD competitively procured the construction costs attributable to all the planned projects; and, second, whether Global and Calvin, the architect/engineer firms, were acting in a dual capacity: first, as a design

⁵ The Contract defines Professional/Consulting Services as "...all design, study, operation, management, and report activities primarily performed by licensed architects, engineers, their employees and subconsultants as may be authorized by CSA or required by an issued WA."

⁶ The Contract defines Consultant Services Authorization (CSA) as "A document so labeled, which, when executed by the County and Design/Build Entity, becomes a part of the Contract Document and specifies the scope of work, duration, total price, liquidated damages, and schedule for **specific professional services** *[emphasis added]* to be rendered regarding a project to be demolished, repaired, replaced or constructed by the Design/Build Entity in accordance with the terms of the contract document."

⁷ The Contract defines Work Authorization (WA) as "A document which, when executed by the County and Design/Build Entity, becomes a part of the Document and specifies the scope of work, duration, total price, liquidated damages, and schedule for a **specific project** *[emphasis added]* to be demolished, repaired, replaced or constructed by the Design/Build Entity in accordance with the terms of the contract document."

criteria professional, by preparing the design criteria package then second, as a participant in the design-build firm, who were awarded contracts pursuant to the CCNA procurement method.

The CRC's first concern involved WUD's process of awarding design build contracts under the CCNA procurement method without following the specific guidance found in section 287.055(9)(c), Florida Statutes which states, in part, "...shall award design-build contracts by the use of a competitive proposal selection process as described in this subsection, **or by the use of a qualifications-based selection process pursuant to subsections (3), (4), and (5) for entering into a contract whereby the selected firm will, subsequent to competitive negotiations, establish a guaranteed maximum price and guaranteed completion date**" [emphasis added]. Specifically, although WUD entered into contracts with Global and Calvin through a qualifications-based selection process and their compensation rates were competitively negotiated, WUD could not demonstrate that the project construction costs identified in work authorizations (WA) were competitively bid or in the alternative that the builders, Global and Cardinal, established guaranteed maximum prices and guaranteed completion dates for all of the planned projects when the contracts were approved on January 20, 2012. It is important to note that neither Global nor Cardinal could have established a guaranteed maximum price and a guaranteed completion dated because, as mentioned above, section I of the contract contains only the "General Scope of Work" to be performed. Therefore, if the CRC and ultimately the Palm Beach County Board of County Commissioners approved a work authorization, it could have violated section 287.055, Florida Statutes.

The CRC's second concern involved Global and Calvin acting in a dual capacity as the design-criteria professional, by preparing the "design criteria package", and then as a participant in the design-build firm for the same WUD construction project. This scenario is prohibited under the CCNA procurement method. Specifically, section 287.055(9) titled, Applicability to Design-Build Contracts, in subsection (b), states: "the design criteria package must be prepared and sealed by a design criteria professional..." and "**a design criteria professional who has been selected to prepare the design criteria package is not eligible to render services under a design-build contract executed pursuant to the design criteria package**" [emphasis added].

Based upon these two concerns, the CRC collectively decided to reject the CSA prepared by WUD on October 11, 2012, and subsequently presented to the CRC on October 24, 2012, until the attorney assigned to the CRC could discuss this matter with the Palm Beach County Attorney Office.

ACKNOWLEDGEMENT

The Inspector General's Contract Oversight staff would like to extend our appreciation to the County staff for the cooperation and courtesies extended to us during the contract oversight process.

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