



OFFICE OF INSPECTOR GENERAL PALM BEACH COUNTY

CONTRACT OVERSIGHT NOTIFICATION (2014-N-0005)

Sheryl G. Steckler
Inspector General

ISSUE DATE: APRIL 16, 2014

"Enhancing Public Trust in Government"

Beach Equipment Concession for the Publicly Owned Beach Invitation to Bid #2013-48

SUMMARY

After issuing Office of Inspector General (OIG) Contract Oversight Notification 2014-N-0004 on February 14, 2014, the OIG received a complaint concerning a material change to the City of Delray Beach's ("City") Invitation to Bid (ITB) No. 2013-48 titled, "Beach Equipment Concession for the Publically Owned Beach" ("Beach Concession") solicitation document and resulting contract. The material change increased the number of beach equipment rentals from 250 **pieces** to 250 **groupings**.

The OIG identified that the City failed to clearly specify these critical terms in the Beach Concession solicitation document. The lack of clarity caused confusion and raises questions about the fundamental fairness of the procurement process and whether it served the best interest of the City.

BACKGROUND

The City awarded the "Beach Equipment Rental Concession for the Publically Owned Beach-Rebid" contract to Oceanside Beach Services, Inc. ("Oceanside") for the period of June 15, 2009 through June 14, 2012. Prior to the contract expiring, and without City Commission ("Commission") authorization, the former City Manager approved a three-year renewal of the contract. On April 9, 2013, the Commission determined that the contract renewal required their approval and subsequently directed City staff to competitively procure the contract.

On August 18, 2013, the City issued a Beach Concession solicitation document that incorporated certain material terms from the previous solicitation, including stating that, **"at no time will more than two hundred fifty (250) beach chairs, cabanas, umbrellas, and windbreakers/clamshells be permitted on the beach."** [emphasis added]

On August 27, 2013, the City held a mandatory pre-bid conference¹. Only four prospective bidders attended. At the pre-bid conference, a representative from Oceanside asked the City why they were limiting the number of beach equipment rentals to 250 pieces when under the current contract it was allowed to rent much more equipment. On August 29, 2013, the City issued Addendum No. 1 ("Addendum"), stating:

¹ The City will not accept proposals from vendors who do not attend the mandatory pre-bid conference.

“The current contract and new contract both allow ‘250 beach chairs, cabanas, umbrellas and windbreakers/clamshells.’ This has not changed and the current contractor does not exceed this number.”

Proposals were due by September 17, 2013. One vendor submitted a Statement of No Bid, asserting that the contract was cost prohibitive. Only Oceanside submitted a bid. However, during the Commission meeting on October 15, 2013, City staff made a recommendation to the Commission that they “reject all bids and re-advertise” the Beach Concession contract. City staff recommended rejecting Oceanside’s bid because “with only one bid it cannot be determined if it is competitive pricing.” The Commission voted 3-2 to “not reject the only bid received”.

However, there was continued uncertainty as to the number of beach equipment rentals allowed under the contract by Oceanside and the Commission. At the Commission meeting on November 19, 2013, the former City Attorney² told the Commission that the solicitation document only allowed 250 **pieces** of beach equipment. The Commission subsequently voted 3-1³ to award the contract to Oceanside. On January 6, 2014, the City executed the contract with Oceanside. It is noted that section 12 of the contract states, in part, “a maximum of two hundred fifty (250), **in total**, [emphasis added] beach chairs, cabanas, umbrellas, and windbreakers/clamshells shall be allowed.”

At the January 21, 2014 Commission meeting, City staff was asked about the historical number of beach equipment rentals. Staff responded that they considered a cabana, consisting of two chairs, a table and a hood/cabana, as one piece of equipment. Moreover, the Interim City Attorney⁴ informed the Commission that because of the conflicting information in the solicitation document, the Addendum, and the contract executed on January 6, 2014, they could either terminate or amend the existing contract.

At the February 4, 2014 Commission meeting, the Interim City Attorney sought direction from the Commission concerning a proposed amendment to the contract; the Commission unanimously decided that the Interim City Attorney should proceed with the amendment. On March 21, 2014, the City and Oceanside executed Amendment No. 1 (“Amendment”) to the contract that states, in part:

“A maximum of two hundred fifty (250) in total **groupings** [emphasis added] of equipment. A grouping of equipment shall consist of: two (2) sand arm chairs with foot rests constructed of solid oak wood with brass hardware, one (1) solid oak wood table with brass hardware, two (2) ‘delray blue’ chair cushions (one (1) per each chair) and one (1) ‘delray blue’ umbrella made of solid oak wood with brass hardware and sunbrella fabric.”

FINDING

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The City failed to clearly specify the critical terms in the Beach Concession solicitation document. The lack of clarity resulted in confusion among vendors, the City Commission and City staff.

² City Attorney Brian Shutt resigned January 3, 2014.

³ Commissioner Adam Frankel was absent.

⁴ Terrill Pyburn

OIG Review

The solicitation document states that, **“at no time will more than two hundred (250) beach chairs, cabanas, umbrellas and windbreakers/clamshells be permitted on the beach.”** [emphasis added] After Oceanside (incumbent) asked why the City was limiting number of beach equipment rentals to 250 pieces, the City issued an Addendum stating: **“the current contract and new contract both allow ‘250 beach chairs, cabanas, umbrellas and windbreakers/clamshells.’ This has not changed and the current contractor does not exceed this number.”** [emphasis added]

The OIG spoke with two prospective vendors⁵ that attended the mandatory pre-bid conference but did not submit a bid. One vendor submitted a “Statement of No Bid” while the other stated his current business model did not meet the requirements of the bid specifications. Both vendors acknowledged that the solicitation document language was unclear. They further informed the OIG that it is normal and customary in the industry for beach rental equipment to be expressed as “groupings” not “pieces”.

It is unknown whether other vendors chose not to attend the pre-bid meeting because they understood the solicitation document to mean that only 250 pieces of beach equipment would be allowed for rent and as a result, the City’s requirement that a vendor pay a minimum annual concession fee (revenue) of \$170,000 would make the contract unprofitable. Furthermore, even if a vendor was aware that more than 250 pieces of beach equipment could be rented, the uncertainty resulting from the conflicting information could make them unsure of exactly what was being offered by the City. Even the Commission was uncertain about the number of beach equipment rentals allowed under the contract. This uncertainty led the former City Attorney to reassert to the Commission that the solicitation document allowed only 250 pieces of beach equipment and he incorporated language into the contract stating that “a maximum of two hundred fifty (250) **in total** [emphasis added] beach chairs, cabanas, umbrellas and windbreakers/clamshells shall be allowed.” It is noted that this language is included in the contract executed by the City and Oceanside on January 6, 2014; however, it was directly contrary to the written representation the City made in the Addendum dated August 29, 2013 to the Beach Concession solicitation document. Nevertheless, on March 21, 2014, the City and Oceanside executed an Amendment to the contract allowing for “a maximum of two hundred fifty (250) in total **groupings** [emphasis added] of equipment.”

Based upon the forgoing, there was a lack of effective communication among City staff and with the Commission to arrive at a common understanding of what the City desired to contract for. Because the City staff lacked a common understanding of the nature of the franchise it intended to award, the City was unable to clearly communicate to all prospective vendors the critical terms of the franchise it intended to award.

The State of Florida, Department of Management Services publishes a “Guidebook to Public Procurement⁶” that details current procurement practices. The Guidebook contains an array of information; however, of specific interest is Section 2.2, titled “Phase 1: Gather and Analyze Requirements” contained therein the “Guidebook” recommends:

⁵ Although four prospective vendors attended the mandatory pre-bid meeting, only three were considering submitting a bid: Oceanside (incumbent), A & A Beach Services, Inc. and Island Beach Services. The fourth attendee, an attorney with the firm of Becker & Poliakoff, was observing the process.

⁶ The Guidebook to Public Procurement can be located at: http://www.dms.myflorida.com/business_operations/state_purchasing

“After identifying stakeholders in a particular **procurement project**, the **procurement staff** must work with those **stakeholders** to define the **critical business requirements**. **Critical business requirements** are those essential functions which must be met by the commodities or contractual services provided in a contract. The **procurement staff** should meet with particular program areas and encourage discussion about the **procurement need**. Procurement staff should ask sufficient and pertinent questions to ensure the entire **solicitation team** fully understands and documents the **critical business requirements** of a potential contract.”

“The **solicitation team** uses the data gathered from stakeholders above and from other sources consulted during analysis of the **scope of procurement need** to develop the **competitive solicitation** and evaluation requirements”

When it submitted its bid, Oceanside was justified in relying on the City’s representation that its current number of rental equipment pieces was compliant. However, the lack of clarity in the solicitation document raises questions about the fundamental fairness of the procurement process and whether it served the best interest of the City.

RECOMMENDATION

The City of Delray Beach should:

1. Develop, or incorporate within an existing policy/procedure, the means and methods by which the critical business requirements (*essential functions which must be met by the commodities or contractual services provided in a contract*) of procurement projects are developed, documented and communicated.

RESPONSE FROM MANAGEMENT

On April 15, 2014, Mr. Louie Chapman, Jr., City Manager, submitted a response to this Notification (Attachment A). Mr. Chapman stated:

“Thank you for affording the City the opportunity to review and comment on the draft report. My staff and I want to compliment the OIG on the manner that you handled the review. I have no other comment to the report.”

ACKNOWLEDGEMENT

The Inspector General’s Contract Oversight staff would like to extend our appreciation to the City of Delray 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

Hank Nagel K.

From: Chapman, Louie [chapman@mydelraybeach.com]
Sent: Tuesday, April 15, 2014 9:02 AM
To: Hank Nagel K.
Cc: Dennis Yeskey
Subject: Re: 2014-N-0005 - Beach Equipment Concession for the Publically Owned Beach

Dear Mr. Nagel,

Thank you for affording the City the opportunity to review and comment on the draft report. My staff and I want to compliment the OIG on the manner that you handled the review. I have no other comment to the report.

Louie Chapman, Jr.

City Manager
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