



OFFICE OF INSPECTOR GENERAL PALM BEACH COUNTY

CONTRACT OVERSIGHT NOTIFICATION (2014-N-0092)

John A. Carey
Inspector General

ISSUE DATE: SEPTEMBER 26, 2014

"Enhancing Public Trust in Government"

Track "K" Land Sale

SUMMARY

What We Did

Pursuant to a citizen complaint, we reviewed the June 13, 2013 sale of real property by Palm Beach County, Division of Property & Real Estate Management (PREM). We specifically reviewed Palm Beach County's legal authority for disposing of real property; the solicitation document; scoring of the proposals; multiple electronic communications; and the March 15, 2013, audio recording of the mandatory bidder's conference.

What We Found

We found that by selling the property, Palm Beach County increased the parcel's taxable value; however, PREM's process for disposing of real property did not disclose all relevant material and information to all of the potential bidders.

We also found that although PREM generally followed the established legal requirements for the disposition of real property, its scoring of the proposals was inconsistent with its Request for Proposals (RFP) solicitation document and statements it made at the mandatory bidder's conference.

We determined that Palm Beach County has established general policies and procedures for the disposition of real property; however, the Department of

Facilities Development & Operations (Facilities) does not have written, documented procedures for conducting Invitation for Bids (IFB) and Requests for Proposals (RFP) as required by Palm Beach County Policy and Procedure Memorandum (PPM) CW-L-023.

What We Recommend

We issued three recommendations. First, that PREM encourage open, transparent and competitive solicitations by ensuring that all relevant information is disclosed to all potential bidders in the solicitation document and at the mandatory bidder's conference. Second, that PREM ensures that proposals are evaluated and scored in a manner consistent with the solicitation document. Third, that Facilities establish written procedures for conducting IFB and RFP competitive solicitations for the acquisition, disposition, exchange and lease of real property as required by PPM CW-L-023.

In its response to this report, Facilities **agrees** with recommendation numbers one and three. As to recommendation two, Facilities **disagrees** with our finding that the proposals were not evaluated and scored consistent with the solicitation document and instructions provided at the pre-proposal conference.

BACKGROUND

On March 3, 2013, the PREM issued RFP No. 2013-002-PB requesting interested parties submit proposals to “Purchase Approximately 1.14 Acres of Vacant Land” (“Track K”), located in Lantana, Florida. The solicitation document states the property will be sold “AS-IS” with no warranty or representation related to access or use of the property for any intended purpose. Track K is unimproved land containing two drainage easements and a “lift station which significantly impact this site.”

On June 18, 2013, Facilities submitted an agenda item to the Board of County Commissioners (Board) recommending that the Board approve a contract selling the property to RaceTrac Petroleum, Inc. (RaceTrac) The agenda item provided the following scoring and ranking summary for each proposal:

Bidder	Purchase Price (Maximum 60 points)	Use (Maximum 10 points)	Contingencies (Maximum 30 points)	Total (100 points)
RaceTrac	60	5	20	85
Kickstart	46	10	20	76
Big Man’s	46	5	15	66
Michael S. Brown	30	5	20	55

The Board approved selling the Track K property to RaceTrac.¹

On May 1, 2014, the Office of Inspector General (OIG) received a citizen complaint alleging that Palm Beach County’s sale of the Track K property violated the spirit of a competitive procurement process. Specifically, the complainant alleged that PREM knew there was the possibility that the lift station could be moved, but it was not disclosed and that the evaluation and scoring of the proposals was “heavily weighted in favor of” a particular vendor.

FINDINGS

FINDING (1):

The Palm Beach County Division of Property and Real Estate Management process for the disposition of real property did not disclose all relevant information to all potential bidders.

OIG Review

We reviewed numerous electronic communications, documents and an audio recording of the mandatory bidder’s conference, which indicates that Palm Beach County’s sale of the Track K property was not transparent because relevant material and information was not disclosed to all potential bidders.

The documents reviewed show that beginning in September 2012, PREM was



¹ Agenda Item 5. C. 3 (R-2013-0793)

in repeated communication with RaceTrac and others in an attempt to facilitate the sale of the Track K property to RaceTrac. These communications included, but were not limited to:

1. A September 20, 2012, e-mail from PREM to RaceTrac, advising of PREM's intent to assist RaceTrac in obtaining approval for the removal of a lift station from the property. The e-mail specifically offered to assist RaceTrac in communications with the owner of the lift station, the City of Boynton Beach, and even suggested that other County property could be made available to Boynton Beach as a site for the lift station.
2. An October 24, 2012, e-mail from PREM to the City Manager of Boynton Beach stating that RaceTrac was interested in this County property and PREM was "interested in selling the property to them," but Boynton's lift station would have to be moved. The e-mail states that this transaction would benefit both the City and the County, and advised that RaceTrac would be contacting the City to discuss the matter.
3. An October 25, 2012, e-mail from PREM to another County Department inquiring about rights of way relating to this property and stating that "PREM is in the process of trying to sell this surplus site..."

Significantly and also on October 25, 2012, PREM sent a letter to a different party which had inquired about purchasing this property, stating that "Currently, the County has not determined – if, when or by what process the property will be sold; however, . . . you will be notified should we move forward with an actual sale of this surplus site."

4. A November 27, 2012, e-mail from RaceTrac to PREM, advising that it had met with the City of Boynton Beach and that "They are open to relocating the lift station and it is not too difficult."

The March 3, 2013, solicitation document issued by PREM to solicit bids for this property warned prospective bidders that the property contained both two drainage easements and a "lift station which significantly impact" the site. However, the solicitation document did not disclose that PREM had reason to believe that Boynton Beach might be open to having the lift station moved, information RaceTrac was privy to partly as a result of PREM's previous outreach to Boynton Beach.

On March 15, 2013, at the mandatory bidder's conference a potential bidder asked the following question concerning the lift station:

Question: "Can it be moved . . . ?"

Response: "That's up to you to determine with the City of Boynton Beach . . ." [emphasis added].²

When we questioned PREM about the apparent failure to provide full disclosure to other potential bidders in either the RFP or when asked, at the bidder's conference, we were advised that, upon reflection, they now understand that they should have provided more complete information. However, at the time their belief was that

² The mandatory bidder's conference was audio recorded.

substantial proposers are aware of issues involved with relocating a lift station and that, if specifically approached, they would have provided the same information regarding the lift station to any other proposer.

According to the National Institute of Governmental Purchasing, the sourcing and solicitation process must be conducted equitably and consistently.³ The written and verbal communications of PREM in this solicitation were inconsistent with an equitable public procurement because relevant information was not disclosed to all potential bidders.

FINDING (2):

Proposals were evaluated and scored inconsistent with the Request for Proposals solicitation document and instructions provided at the mandatory bidder's conference, thereby violating the provisions of section 22-104 of the County's Code of Ordinances.

OIG Review

Section 22-104 of the Palm Beach County Code of Ordinances states, in part: "The solicitation issued by the division shall provide for the competition and qualification standards upon which the sale or lease of county-owned real property will be determined."⁴

The RFP advised prospective bidders that each proposal would be awarded points in a number of specified categories and that the proposer with the most points would be the winner. One of the categories was "contingencies to closing," for which "[a] maximum of 30 points shall be assigned . . . with the most points being given to the proposal with the fewest contingencies." Additionally, at the mandatory bidder's conference, a potential bidder asked a question about the points attributed to this evaluation factor. A representative of PREM reaffirmed that a proposal without contingencies would receive 30 points.

Four proposals were received. Only one, RaceTrac's, contained contingencies. RaceTrac's proposal was contingent on receipt of all development approvals it intended to request. Despite this, three proposers including RaceTrac were awarded 20 points in this category and the fourth proposer, also with no contingencies, was awarded only 15 points. Had PREM adhered to its representations and awarded 30 points to the proposers with no contingencies, the proposer which finished with only nine fewer points than RaceTrac would have been the winner.

When we questioned PREM about this discrepancy, PREM stated that they believed that RaceTrac had the best overall proposal, and consequently applied points on that basis. PREM's neglect to score this category in accordance with its representations in its solicitation document and at the bidder's conference violated section 22-104 of the county's Code of Ordinances. Coupled with PREM's prior exclusive communications with RaceTrac concerning the lift station, it had the effect of undermining the policy goals requiring or encouraging public entities to conduct competitive procurements, as explained in the following passage from section 287.001, Florida Statutes:

³ Introduction to Public Procurement, Third Edition, Jack T. Pitzer, Ph.D., CPPO and Khi V. Thai, Ph.D., National Institute of Governmental Purchasing, Inc. 2009

⁴ Palm Beach County, Florida, Code of Ordinances, Chapter 22 – Planning and Development, Article VI. Real Property Acquisition, Disposition and Leasing

“The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured.”

FINDING (3):

Palm Beach County, Department of Facilities Development & Operations does not have written procedures for the disposition of real property.

Palm Beach County’s Policy and Procedure Memorandum (PPM) CW-L-023, titled “Requirements for the Acquisition and Exchange of Real Property”, provides a single location for all countywide procedures for the acquisition, disposition, exchange and lease of property. Section I. Source Selection of this PPM states: “The Director of Facilities Development & Operations . . . shall develop written procedures for the conduct of an IFB [Invitation for Bids] and RFP [Requests for Proposals] for real property.”

OIG Review

The OIG was informed by Facilities that it does not have written procedures for disposing of property by either the IFB or the RFP selection method; however, Facilities stated that it is in the process of drafting procedures.

Established written procedures provide detailed, specific direction to personnel to ensure clarity, consistency and quality control in the solicitation process. Procedures generally include, but are not limited to, procurement goals, objectives, and responsibilities, and a systematic outline of the procurement process. An outline of the procurement process may include, but is not limited to, development of evaluation criteria and its scoring, advertising and public notice requirements, selection committees and their composition, required forms and documents and preparation of PREM’s recommendation to the Board.

RECOMMENDATIONS: PROPERTY & REAL ESTATE MANAGEMENT

The Division of Property & Real Estate Management should adhere to the public policy statement contained in section 287.001, Florida Statutes by:

1. Ensuring that all relevant information is disclosed to potential bidders in the solicitation document and mandatory bidder’s conference.
2. Evaluating and scoring bidders’ proposals in a manner consistent with PREM’s solicitation document and representations.

RECOMMENDATION: FACILITIES DEVELOPMENT & OPERATIONS

The Department of Facilities Development & Operations should:

3. Establish written procedures for conducting Invitation for Bids (IFB) and Requests for Proposals (RFP) for the disposition of real property as required by Palm Beach County Policy and Procedure Memorandum (PPM) CW-L-023.

RESPONSE FROM MANAGEMENT

On September 22, 2014, the Director of Facilities Development & Operations provided a response to this Notification (Attachment A). The Director **agrees** with recommendation numbers one and three; however, as to recommendation two, Facilities **disagrees** with our finding that the proposals were not evaluated and scored consistent with the solicitation document and instructions provided at the pre-proposal conference.

Specifically, the Director states, “. . . there was substantial discussion regarding the evaluation criteria and that the evaluation criteria were interrelated, inherently subjective and should be interpreted in a manner which would result in the selection of the proposal which was in the best overall interest of the County.”

We acknowledge that Facilities wanted to sell the Track K property to the party offering the County the highest price and best value; however, according to Developing and Managing Requests for Proposals in the Public Sector, published by the National Institute of Governmental Purchasing, a fair evaluation should be based upon clearly defined evaluation criteria. The solicitation document clearly defines the points awarded to the “contingencies to closing” evaluation factor as being “a maximum of 30 points . . . with the most points being given to the proposal with the fewest contingencies.” This was affirmed by PREM’s staff at the pre-proposal meeting when it was acknowledged that proposals, without contingencies, would receive 30 points (maximum points); however, this did not occur. RaceTrac was the only proposal that listed contingencies and it was awarded the same number of points as two proposals and more than one proposal, which listed no contingencies. If Facilities intended to include in this criteria its own subjective views of the financial strength of each bidder, it should have clearly indicated so in the solicitation documents and during the pre-proposal conference. It did neither.

ACKNOWLEDGEMENT

The Inspector General’s Contract Oversight staff would like to extend our appreciation to the Division of Property & Real Estate Management’s staff 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.

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September 22, 2014

To: Hank Nagel, Contract Oversight Manager
Office of the Inspector General

From: Audrey Wolf, Director *Audrey*
Facilities Development & Operations

Re: Track K Land Sale RFP No. 2013-002 PB
CON 2014-N-0092

The following is FDO's response to the findings set forth in the OIG's Draft Contract Oversight Notification on the Tract K Land Sale.

Finding (1) FDO concurs that an expanded discussion of the lift station and its impact upon the property at the pre-proposal conference regarding the City of Boynton Beach apparent willingness to consider the relocation of the lift station would have been appropriate. Specifically, that discussion would have been that the City had indicated its willingness to consider relocation, and that potential bidders whose development plans are impacted by the lift station should contact the City to determine what requirements the City may impose as preconditions to relocation and provided contact information for City representatives.

Finding (2) FDO disagrees with your conclusion that the scoring was inconsistent with both the RFP and the instructions provided at the pre-proposal conference. At the pre-proposal conference, there was substantial discussion regarding the evaluation criteria and that the evaluation criteria were interrelated, inherently subjective and should be interpreted in a manner which would result in the selection of the proposal which was in the best overall interest of the County.

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In the pre-proposal meeting, there was also discussion regarding what options were available to bidders in the event that they disagreed with Mr. Hering's subjective analysis, and it was clearly identified that his ranking of the proposals was only a recommendation, the bidders would have the opportunity to present their case for a different ranking to the Board and the Board retained complete discretion to select the proposal they deemed to be in the best interest of the County.

In applying the contingencies to closing evaluation criteria, Mr. Hering focused on the likelihood that the transaction would close and the County would get paid within a reasonable period of time and did not give the 3 proposals without expressly stated contingencies the full 30 points. His rationale, which was summarized in the Board item for the Board to consider prior to making a final decision, is set forth below.

Kickstart Foundation. This not for profit entity was relying on donations from charitable donors and only had letters from donors indicating that they would provide the required funding. The County has had a substantial amount of experience with not for profits being unable to raise required funding.

Big Man's. Payment of the purchase price was proposed to be spread over time: \$60,000 at closing, interest over 10 years, with the balance of \$240,000 paid in year 11. Mr. Hering questioned whether the County had the legal ability to essentially extend credit and to obtain security for Big Man's payment obligation as this was essentially a contingent payment which wouldn't be satisfied for 11 years, if at all.

Michael Scott Brown. This proposal contemplated an exchange of property at a floating price, valuation of the property to be exchanged could be argued, and the County had previously sued the owner of the property to enforce the terms of a contract to buy portions of this property. There were just too many details to work out with difficult parties to not discount the likelihood that the transaction would close and the County would receive the consideration within a reasonable period of time.

For these reasons, it is our opinion that the application of the contingencies to closing evaluation criteria was consistent with the discussions at the pre proposal conference and resulted in the selection of the proposal which both had the highest price proposal and was in the overall best interest of the County.

Finding (3) FDO Staff has made substantial progress in drafting a Departmental PPM governing the conduct of the IFBs and RFPs for real estate transactions. The PPM should finalized within the next 30 days.

c: Robert Weisman, County Administrator
Ross Hering, Director Property and Real Estate Management