



## OFFICE OF INSPECTOR GENERAL PALM BEACH COUNTY

### CONTRACT OVERSIGHT NOTIFICATION (2012-N-0002)

ISSUE DATE: MARCH 1, 2012

Sheryl G. Steckler  
Inspector General

---

*"Enhancing Public Trust in Government"*

### **Delray Beach Solid Waste, Vegetative Waste and Recycling Collection Franchise Agreement**

#### **ISSUES**

In response to a complaint concerning open competition related to Delray Beach's (City) Solid Waste, Vegetative Waste and Recycling Collection Franchise Agreement, OIG staff reviewed the City's past solid waste franchise agreements.

We found that the City had not competitively bid the solid waste management contract since 2001 (Bid No. 2001-021) when Browning-Ferris Industries Waste Systems of North America, Incorporated (BFI) was awarded the solid waste contract for the five year period from October 1, 2001 through September 30, 2006. The contract stated "This Agreement is renewable for an additional five-year term upon approval of both parties."

In 2003, Waste Management Inc. of Florida (WM) entered into an agreement to purchase certain assets of BFI, including its rights under its agreement with Delray Beach. In September, 2003, the City entered into an agreement (Amendment 1 to the BFI 2001 Franchise Agreement) with WM which not only permitted WM to assume BFI's rights under its contract with the City, but extended the term of that contract until September 30, 2008 (from 2006), and further provided that it was "renewable for one five year term upon approval of both parties." In 2008, without a competitive procurement, the City and WM entered into a new five year agreement (Amendment 3 to the BFI 2001 Franchise Agreement) that extends until September 2013.

The City Commission was presented with a WM proposal at their January 17, 2012, City Commission meeting, wherein the existing agreement would be renewed with options of a five, eight or ten year agreement, without a competitive procurement. The Commission discussed the WM proposal and directed staff to work with WM on modifications to the proposal. After City staff met with WM to negotiate proposal modifications, Lula Butler, City Director of Community Improvement, sent a memorandum, through the City Manager, to the Mayor and City Commissioners that outlined the revised proposal. The revised proposal (Amendment 5 to the BFI 2001 Franchise Agreement) extends the Agreement for eight (8) years through September 30, 2021 with an unspecified number of renewable five (5) year terms, upon approval of both parties.

The revised proposal was pulled from the February 7, 2012 Commission Meeting agenda and placed on the agenda for the February 21, 2012 Commission Meeting.

The City Purchasing Ordinance, Section 36.02. requires that when the City procures contractual services of \$15,000 and up, it either procures competitive bids, or utilizes a purchasing contract established by another governmental agency.

Section 36.01 requires that the details of all city purchasing be performed in accordance with the standard practice instruction issued by the City Manager, which currently requires that all purchases over \$15,000 utilize “a formal competitive bid/quote process.”

The City’s purchasing manual specifically states:

*“With the exception of emergency and sole source purchases, purchase orders should not be issued without sufficient competition being solicited from vendors. The reasons for this requirement are threefold:*

- 1. It assures the City of the best of several competitive prices and products.*
- 2. It promotes competition for the City’s business and increases the City’s sources of supply.*
- 3. It negates criticism of preferential treatment toward favored vendors.”*

It appears that the repeated amendments extending the BFI 2001 Franchise Agreement conflict with the City’s own competitive procurement requirements. At the end of the current contract, WM will have provided Franchise Agreement services for ten (10) years without going through a competitive procurement. Likewise, the new proposed amendment would extend the existing BFI 2001 Franchise Agreement for an additional eight (8) years plus an unspecified number of renewable five (5) year terms, upon approval of both parties, without competition.

Florida law encourages and in certain cases mandates competitive procurements. In 2002, Florida’s 3<sup>rd</sup> District Court of Appeal, in *City of Sweetwater v. Solo Construction Corporation*, 823 So. 2d 798, stated:

*“11. There is a great public interest in ensuring that contracts be awarded to effectuate the intent of the competitive bid laws. See Engineering Contractors of South Florida, Inc. v. Broward County, 789 So. 2d 445 (Fla. 4th DCA 2001); City of Miami Beach v. Klinger, 179 So. 2d 864 (Fla. 3d DCA 1965).*

*‘Florida’s competitive bid statutes are enacted for the protection of the public. They create a system by which goods or services required by public authorities may be acquired at the lowest possible cost. The system confers upon both the contractor and the public authority reciprocal benefits, and confers upon them reciprocal obligations. The bidder is assured fair consideration of his offer, and is guaranteed the contract if his is the lowest and best bid received. The principal benefit to the public authority is the opportunity of purchasing the goods and*

*services required of it at the best price obtainable. Under this system, the public authority may not arbitrarily or capriciously discriminate between bidders, or make the bid based upon personal preference.’ Marriott Corp. v. Metro. Dade County, 383 So. 2d 662, 665 (Fla. 3d DCA 1980)(quoting Hotel China and Glassware Co. v. Bd. of Pub. Instruction, 130 So. 2d 78, 81 (Fla. 1st DCA 1961).*

*The purpose of competitive bidding is to secure the lowest responsible offer. See Robinson Elec. v. Dade County, 417 So. 2d 1032 (Fla. 3d DCA 1982).*

*12. While a public authority has wide discretion in award of contracts for public works on competitive bids, such discretion must be exercised based upon clearly defined criteria, and may not be exercised arbitrarily or capriciously. Liberty County v. Baxter’s Asphalt & Concrete, Inc., 421 So. 2d 505 (Fla. 1982), Miami-Dade County, supra, at 1088, [\*\*9] City of Miami Beach, supra.”*

## RECOMMENDATION

The City should follow its own procurement policies and procedures by conducting a full and open competition for its Solid Waste Franchise Agreement, which has not been competitively bid for over ten (10) years.

The City should also periodically review and update its procurement ordinance and policies and procedures documents to ensure they are following best procurement practices as well as to ensure they are in agreement with each other.

## RESPONSE FROM MANAGEMENT

On February 27, 2012, the City of Delray Beach responded to the OIG report (Attachment A). The City does not agree that failure to compete their Solid Waste Franchise Agreement violates their competitive procurement requirements. The following comments were excerpted from their response:

“In a normal purchasing scenario the City would use money from its General Fund or other funds to purchase supplies or contractual services in order to operate the City. In the case of the solid waste collection franchise agreement, the money collected by the City for garbage service is passed through to the City’s garbage hauler, Waste Management (WM).... Therefore, as the funds that were paid to WM, in accordance with the franchise agreement were a pass through from the residents of the City, the City was not expending funds that would trigger the requirements of Section 36.02.”

## OIG COMMENTS

The OIG does not agree with the City’s position. We maintain that the City’s own Purchasing Ordinance and Policy Manual requires this service to be competitively procured. In fact, the City Policy Manual requires that “every effort” be made to obtain competitive quotes before a procurement is made for purchases of as little as \$100.01.

This Solid Waste Franchise Agreement is a major, multi-million dollar commitment of residents' funds. We see no provision in the City's purchasing policies that would exempt this procurement from competition solely on the basis that funds expended by the City have been collected from residents. Irrespective of whether this charge is paid for by the City residents through general tax revenues or special purpose assessments, it is being paid by the City to the contractor on behalf of its residents. In fact, the City's contract with Waste Management requires the City to pay for the services provided regardless of whether they collect all the fees from the residents. This is clearly a contractual obligation between the City and the contractor that establishes the City as more than just a "pass through" of residents' fees. The distinction the City is making to exempt this procurement from the competitive requirements of their Purchasing Ordinance does not appear to have a sound basis.

Moreover, even if the current City Purchasing Ordinance and purchasing policies do not definitively require competition for this type of contract, sound procurement principles and practices dictate that a contract of this scope and size be competed. As we pointed out in this report, Florida law encourages and in certain cases mandates competitive procurements. Competition helps ensure the public's interest is protected and ensures that businesses can compete fairly for goods and services purchased by the government. We affirm our recommendation. Rather than seeking a basis for not following the City Purchasing Ordinance requiring competitive procurements, the City should conduct a full and open competition for the Solid Waste Franchise Agreement.

We also noted that the City did not address our second recommendation and we plan to follow up to determine if the City has reviewed and updated their purchasing ordinance and their policies and procedures.

*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.*

# CITY OF DELRAY BEACH



100 N.W. 1st AVENUE • DELRAY BEACH, FLORIDA 33444 • 561/243-7000

February 27, 2012

Dennis Schindel  
Office of the Inspector General  
Palm Beach County  
P.O. Box 16568  
West Palm Beach, FL 33416

Re: Contract Oversight Notification (2012-N-0002)

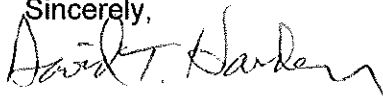
Dear Mr. Schindel:

The City of Delray Beach is submitting our response to the Office of Inspector General regarding contract oversight notification (2012-N-0002). One issue was stated in the contract oversight notification; that the City failed to follow City Code Section 36.02 which outlines the procedure to be followed when the City seeks to acquire contractual services of a certain dollar amount.

Prior to placing the amendment to the Waste Management Franchise Agreement on the February 21, 2012 City Commission agenda, City staff reviewed the City's purchasing policies and ordinances. In a normal purchasing scenario the City would use money from its General Fund or other funds to purchase supplies or contractual services in order to operate the City. In the case of the solid waste collection franchise agreement, the money collected by the City for garbage service is passed through to the City's garbage hauler. The City bills and collects a monthly fee for garbage collection from its residential customers. This amount is then passed on to the City's garbage hauler, Waste Management (WM). The City does not pay WM other monies, other than what was billed to its customers, for the service that they perform. WM also provides solid waste collection services to certain City owned properties; however, this is done at no charge to the City.

Therefore, as the funds that were paid to WM, in accordance with the franchise agreement were a pass through from the residents of the City, the City was not expending funds that would trigger the requirements of Section 36.02.

Please contact me if you have any further questions.

Sincerely,  
  
David T. Harden  
City Manager

cc: Brian Shutt, City Attorney