



## OFFICE OF INSPECTOR GENERAL PALM BEACH COUNTY

### CONTRACT OVERSIGHT NOTIFICATION (2012-N-0007)

ISSUE DATE: SEPTEMBER 12, 2012

Sheryl G. Steckler  
Inspector General

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*"Enhancing Public Trust in Government"*

#### Jupiter Solid Waste Agreements – Violation of Policy to Competitively Procure

#### ISSUES

The OIG received a complaint alleging that the Town of Jupiter (Jupiter) violated its own policy by contracting with Waste Management, Inc. (WMI) for solid waste services without the use of a competitive bidding process, first in 2006 and again in 2011. An OIG staff review of Jupiter's solid waste contracts, ordinances, resolutions, procurement policies, and other related documentations revealed that it has been at least 25 years since Jupiter had competitively procured their solid waste service contract.

In 1987, Jupiter entered into a Franchise Agreement<sup>1</sup> with Nichols Sanitation Inc. (Nichols) for the collection and disposal of residential and commercial solid waste for a period of five years with the option to renew for an unlimited number of five year terms. Jupiter executed the first five year extension in 1991. In 1997, at the conclusion of the five year extension, Jupiter terminated the 1987 Franchise Agreement and re-negotiated a new franchise agreement with Nichols for an initial term of five years and an option to renew for **one (emphasis added)** additional five year period. However, despite the specified one-time renewal option, Jupiter has renewed the agreement **three (emphasis added)** times (2001, 2006, 2011).

Contrary to Jupiter's own policy, two of the extensions – one in 2006 and one in 2011 – occurred without the benefit of open competition. The latest contract renewal occurred in May 2011 and extended the franchise agreement through February 28, 2017, or approximately five years and nine months, for a combined franchise period of 30 years.<sup>2</sup>

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<sup>1</sup> Jupiter could not provide any solid waste contract documents prior to 1987. Also, Jupiter could not provide any documentation to support whether an open competitive procurement occurred in 1987.

<sup>2</sup> It is noted that Section 180.14 Florida Statutes limits franchise agreements to no more than 30 years.

1987	1992	1997	2002	2007	2012	2017
Exclusive Franchise Agreement/one 5 year renewal 3/1/1987 Nichols	5 Year Renewal/ 1987 Option 10/15/91 Nichols					
		Re-negotiated Franchise Agreement/one 5 year renewal- 1/21/97 Nichols	Renewal for Additional 5 yrs 9/17/01 Nichols	12/5/06 Waste Mgmt, Inc	5/17/11 Waste Mgmt, Inc	
			2002	2007	2011	
			\$6.96*	\$11.14*	\$11.27*	

\*Residential Rates provided by Jupiter.

### First Renewal (2001)

Pursuant to the re-negotiated 1997 Franchise Agreement, Jupiter exercised the one-time renewal option in 2001 (Ordinance No. 15-01), amending, restating, and extending the agreement from February 2002 through February 2007. The price for residential rates at the time of the first renewal was **\$6.96**.

### Second Renewal (2006)

In December 2006, Jupiter approved the second renewal (Ordinance 67-06) of the re-negotiated 1997 Franchise Agreement without the “use of formal competitive bids” as specified in Jupiter’s policy. This second renewal amended, restated, and extended the agreement through February 2012. The negotiated residential rate at the time of the second renewal was **\$11.14**, a **60%** increase over the price at the time of the first renewal.

### Purchasing Policy in effect at time of Second Renewal in 2006

Jupiter’s *Administrative Policies and Procedures: Purchasing*, effective May 3, 1994, revised March 10, 2002, Section IV, titled “Policy” states, “This policy is designed to insure that the Town procures all items at the lowest and best price consistent with the quality of materials, workmanship or level of service performance required.” Moreover, Section V, titled “Procedure” states that “Any purchase of items costing more than \$50,000 shall require the use of formal competitive bids and the authorization of the Town Council except where the item qualifies as an exception as provided below.” Subsection titled “Exceptions” states, “Purchases of continuing services, the professional services of

accountants, attorneys, architects, engineers, physicians or other persons possessing a high degree of professional skill shall be exempt from the requirements of advertising and competitive bidding and/or shall be as specified in Florida's Statute 287.055 (Consultants Competitive Negotiation Act), if applicable."

However, the Subsection titled "Exceptions", as worded, applies to professional services and not to other service contracts such as solid waste services.

### **Third Renewal (2011)**

Jupiter approved the third renewal (Ordinance 01-11) of the re-negotiated 1997 Franchise Agreement in May 2011. Again, contrary to Jupiter's Policy in effect at that time, the extension occurred without the benefit of a competitive bidding process. This third renewal amended, restated, and extended the agreement through February 2017. The negotiated residential rate at the time of the third renewal was **\$11.27**, a **1%** increase over the price at the time of the second renewal and a **62%** increase over the price at the time of the first renewal.

### **Purchasing Policy in effect at time of Third Renewal in 2011**

Jupiter's *Purchasing Policy, Standard Operating Procedures*, dated December 15, 2009, Section II. titled "Policy" specifies, "Unless specifically provided otherwise in this policy, the policy of the Town shall be to seek competition where possible in the purchase of material, equipment and services and to make such purchases at the lowest available net cost to the Town." Section III. titled "Procurement Amounts" further stipulates, "Any purchase of items over \$100,000.00 shall require the use of a formal RFP process . . . ."

Jupiter's policies and procedures in effect at the time of the third renewal also provide for a waiver to the competitive bidding process when the acceptance of a vendor's proposal occurs within one (1) year from the original date of acceptance (Section G) or the renewal does not exceed the original contract years (Section O). However, these sections do not apply because the renewal occurred beyond one (1) year of the original contract date and exceeded the term of the original contract years.

### **Trends/Competition**

Recent trends in procurement of municipal waste removal services indicate that competitive procurements have resulted in material reductions in overall rates. Per Jupiter's Town Council Meeting minutes, April 26, 2011, "Ms. Joanne Stanley, the Municipal Marketer for Republic Services, said her company currently handled the unincorporated areas in Jupiter and encouraged Council to get proposals on solid waste

collections. She said rates in Riviera Beach had dropped from \$15.53 to \$10.28 per home<sup>3</sup> and West Melbourne recently saved \$2.7 million in their contract”.

Florida courts have long recognized that public policy in our state strongly favors competitive procurements for two principal reasons. First, competition enables taxpayers to obtain the best value for the lowest possible cost. Secondly, competitive procurements provide an opportunity for all businesses to fairly compete for public business. “The law is clear that competitive bidding statutes are designed to secure fair competition on equal terms for all bidders, among other things to avoid favoritism and to secure public improvements at the lowest reasonable cost to taxpayers.” Harris v. Sch. Bd., 921 So. 2d 725 (1<sup>st</sup> DCA 2006), citing Mayes Printing v. Flowers, 154 So. 2d 864 (1<sup>st</sup> DCA 1963).

Sound government procurement practices encourage the award of new contracts generally every five years, with some exceptions, through “full and open” competition. The 2000 Model Procurement Code by the American Bar Association states “Fair and open competition is a basic tenet of public procurement. Such competition reduces the opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically.”

## RECOMMENDATION

Policies serve as rules to ensure effectiveness and efficiency in operations. As elected officials, Jupiter Council members act on the behalf of their constituents “to set policy, approve budgetary and financial activities, and set the Town’s strategic vision and direction.”<sup>4</sup> Hence, there is an expectation by the public and business community that Jupiter follows their own established policies. Jupiter should adhere to established procurement policies and procedures when procuring goods and services, especially when contract amounts require competitive bid.

## RESPONSE FROM MANAGEMENT

On July 7, 2012, Andrew Lukasik, Town Manager, responded to this Notification (Attachment A) in which he stated, in part:

- A) “The Town is in agreement with the OIG position regarding competitive bidding and acknowledges the need to improve its purchasing policy section on competitive bidding...” and “...the purchasing policy will be revised to provide for the reasonable exceptions that allow the Town Council to extend franchise agreements to balance the cost with the quality and level of services provided to its citizens and businesses.”; and

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<sup>3</sup> OIG staff research found WMI had the existing contract at Riviera Beach. The contract was expiring, at which time Riviera Beach issued RFP #246-09. WMI submitted a proposal, which included the residential rate reduction from \$15.53 to \$10.28.

<sup>4</sup> Jupiter Town Council Town of Jupiter Municipal Government, <http://www.jupiter.fl.us/government/> (accessed August 30, 2012)

- B) "...that rates have remained relatively stable since 1997, the year that the new franchise agreement was initially approved."

### OIG COMMENTS

Regarding the Town Manager's response:

- A) The Town Manager's comments evidence a complete misunderstanding of the concerns expressed by the OIG. The OIG is not recommending the Town revise its policy, but rather to follow the policy and competitively procure the service. The need to "balance the cost with quality" does not justify the decision to not competitively bid the service. Both cost and quality should be addressed in bid specifications. Moreover, when analyzing the cost it is important to consider all factors and level of service (quality). For example, residential rates for solid waste services depend on the levels of service and other factors which can vary significantly from municipality to municipality. In responding to an April 11, 2012 Juno Beach Town Council inquiry regarding rate comparison, Mr. Jeff Sabin, Waste Management, Inc., representative stated that "type communities, demographics, numbers and the type of vegetation and how it's handled" affect the price charged for service.

Amending policy to allow inadequate justification for an exemption sends a clear message to the public that the Town is creating a loophole to avoid competitive procurement. The OIG will continue to review contract renewals and selection committees to ensure compliance with policy and procedures.

- B) As the Town's own chart shows, the 2011 rate (\$11.27) is 70% more than it was in 1997 (\$6.63).





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# TOWN OF JUPITER

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September 7, 2012

Mr. Joe Doucette  
Office of Inspector General  
P.O. Box 16568  
West Palm Beach, FL 33416

**Re: Contract Oversight Notification (2012-N-0007)**

Dear Mr. Doucette:

Thank you for the opportunity to comment on the OIG's Contract Oversight Notification regarding the Town's decision to negotiate directly with Waste Management in an effort to renew the Franchise Agreement for solid waste collection services.

It is important to note that the Town generally agrees with the OIG's opinion with respect to the need to have private business compete to provide services to government. Specifically, I refer to the Contract Oversight Notification addressing this particular issue in which the OIG states that "sound government procurement practices encourage the award of new contracts generally every five years, **with some exceptions**, through 'full and open' competition" (emphasis added). In the case of the Town's solid waste services, it was determined that this service justified an exception to these practices because of the desire to deliver valued services to the community at a competitive rate without interruption.

**Determination to Extend the Franchise Agreement without a Competitive Bid:**

The Town Council deliberated publicly over the question of seeking bids or renegotiating the terms of the existing franchise agreement on two separate occasions. During both the August 5, 2010 (Attachment A) and December 21, 2010 (Attachment B) discussions, not only did the Town Council weigh the benefits and risks associated with these two choices, but the Council members carefully discussed the quality and level of services Waste Management has provided the Jupiter community as well as the cost of those services. For instance, the Town Council:

- Discussed the fact that renegotiating would maintain a service provider that is highly valued by Town residents, provides a high level of service and avoids the risk of contracting with a low bidder that cannot provide the type of service that the Town residents have become accustomed to receiving. Additionally, Council members were aware that certain areas in close proximity to Jupiter were receiving lower levels of service at a greater cost than the Town, which reinforced the value of the services the Town was receiving.
- Recognized that the Town receives relatively few complaints about the services provided by Waste Management and that the service has historically been rated as one of the highest quality municipal services provided in Jupiter (see Attachment A).

- Discussed the benefits of implementing a RFP process to better ensure that the rates offered to Jupiter customers are competitive.
- Concluded that the rates charged by Waste Management were significantly below the average rates charged in Palm Beach County (at the time of the discussion).

The Town Council members used the provisions included in FS 180.14 to guide their decision to extend the contract. The language indicates that municipalities may grant companies

*“the privilege or franchise of exercising its corporate powers for such terms of years **and upon such conditions and limitations as may be deemed expedient and for the best interest**” of the municipality provided that the **“rates or charges to be made by the private company or corporation to the individual users of the utility constructed or operated under authority of this chapter shall be fixed by the city council, or other legislative body of the municipality, by whatever name known, upon proper hearing had for that purpose”** (emphasis added).*

Based upon the available information, and after holding two public discussions on the question of whether to issue an RFP or extend the franchise agreement for solid waste services, the Council members determined that extending the franchise agreement would allow the Town to maintain a highly valued and high level of service at a regionally competitive rate. The Council members understood that a further reduction may have been realized by competitively bidding the Town’s solid waste collection services, but determined that the risk of having a low bidder unable to maintain the continuity and level of services demanded by citizens would outweigh the potential savings.

As noted by Town staff during its initial presentation to the Town Council, and as identified in the benchmark community comparison chart below, Waste Management has made the capital investments necessary to serve not only the Town (especially through the use of smaller collection vehicles to serve new urban neighborhoods, such as Abacoa ) and virtually all of north county. Staff observed, and the Town Council agreed, that this dynamic further reinforced the concerns about the ability of a low bidder to provide for a continuity of service.

1 PBC#9	47.91	16 Indiantown	13.16
2 PBC#8	39.91	17 WM- Martin County	13.16
3 PBC#10	30.41	18 Boca Raton	12.95
4 Glades County	26.50	19 Tequesta	12.92
5 Jupiter Inlet Colony	25.75	20 PBC#4	12.80
6 PBC#1	23.73	21 Juno Beach	12.67
7 Ft Pierce	21.95	22 PBC#2	12.55
8 Port St Lucie	18.19	23 Stuart	11.47
9 Indian River	16.09	24 Wellington	11.34
10 Riviera Beach	15.53	25 PBC#5	10.74
11 Okeechobee County	15.13	26 PBC#11	10.51
12 PBC#7	14.45	27 Palm Beach Garden	9.08
13 City of Okeechobee	13.94	28 PBC#6	8.10
14 Delray Beach	13.22		
15 PBC#3	13.37	Average	17.41
		Jupiter (2011 Rate)	11.27
Waste Management Franchise Area		25th lowest rate out of 28 rates surveyed	



**Negotiation to Reduce the Cost of Government:**

Even after providing direction to move forward with a negotiated extension of the franchise agreement, the Town Council formally considered extending the franchise agreement by ordinance, which required two public readings, held on April 26, 2011 (Attachment C) and May 17, 2011 (Attachment D), which afforded the public additional opportunities to provide comments.

Additionally, changes continued to be made to reduce costs by the Town Council, including eliminating an additional bulk pick-up in the Town's older neighborhoods, implementing a rate that would reduce the costs to customers due to CPI reductions due to the recession and implementing a rate that would be charged to Palm Beach County Public Schools that was a calculated reduction of solid waste costs by approximately \$36,250. As you will note, the Town Council took action not only to control the cost of service to Jupiter residents, but to manage the overall cost of government in Palm Beach County. The Town Council ensured that the School District received a benefit under this agreement in order to reduce its operating costs.

In the OIG's notice, the increase in residential rates between the first and second renewals of the agreement and the fact that this was accomplished without the use of a competitive bid was emphasized. However, this ignores the fact that the rates have remained relatively stable since 1997, the year that a new franchise agreement was initially approved:


Date	Fee/month	Percentage Change	Comments
1997	\$6.63	--	Decreased from 1993 established rate of \$8.46
2001	\$6.96	4.97%	Rate did not include disposal fees
2007	\$11.14	62.48%	Increase after nearly static rate for 10 years included CPI, fuel cost and increased level of service adjustments.
2011	\$11.27	1.17%	Competitive with benchmark communities and adjusted for a higher level of service including a more frequent yard waste and white goods collection (included in Attachment 1)

**Response to OIG Recommendation:**

The Town is in agreement with the OIG's position regarding competitive bidding and acknowledges the need to improve its purchasing policy section on competitive bidding. In this case, the research, analysis and transparent public process found that the possible savings did not outweigh the risk to service quality involved in changing providers. Going forward, the purchasing policy will be revised to provide for the reasonable exceptions that allow the Town Council to extend franchise agreements to balance cost with the quality and level of services provided to its citizens and businesses.

Thank you once again for the opportunity to respond to and clarify information contained within the IOG's Notice.

Sincerely,



Andrew D. Lukasik  
Town Manager