

BOARD OF COUNTY COMMISSIONERS



May 24, 2024

Mr. Charles Merkley
Charles.merkley@fccenvironmental.com

Subject: Response to Protest of RFP 2024020 – Solid Waste and Recyclables Collection Services

Dear Mr. Merkley:

We are in receipt of FCC's May 20, 2024 protest of the subject request for proposals ("RFP"). After review, your protest is denied.

Background

Five proposals were submitted in response to the subject RFP, and all were provided to the selection review committee for independent review and scoring of the technical portions of the proposal (points for the price proposals were determined by a formula, based on total proposed annual contract values). Price points for each firm and service option were provided to each committee member, after they indicated their technical reviews and scoring were completed.

Your protest asserts the integrity of the RFP process was not maintained because the identity of the proposals by firm was revealed at the second selection committee meeting, and the committee changed its ranking of firms after it was disclosed that incumbent Waste Management ("WM") was ranked third.

Your protest also states no clarification relating to modification to resources as related to the received best and final offers ("BAFOs") was requested by the County.

Your letter complains the BAFO process allows competing firms to "undercut the lowest bid."

Your protest asserts staff failed to comply with Board of County Commissioners decision by requesting BAFOs, and that the BAFO directly contradicts the Board's direction to "pursue simultaneous negotiations with the top two firms."

Finally, your protest states the recommendation to the Board is misleading.

Your memo requests the County either cancel the current RFP and begin a new proposal process, or issue a new request for BAFO to "allow proper and fair negotiations between County Staff and all relevant firms in compliance with the County's purchasing requirements."

Basis for Decision

With the exception of the final protest asserting the recommendation to the Board is misleading, the complaints made by FCC are not timely. Each was submitted more than five days after FCC knew, or should have known, of the grounds relating to the protest.

The assertion that the committee changed its ranking of firms after it was disclosed that incumbent WM was ranked third is incorrect. An initial ranking meeting was held March 8, 2024, during the limited period during which contents of proposals were exempt from public release under section 119.071(1)(b)2, Florida Statutes. To facilitate anonymity, proposals had been distributed to the committee with any external identification of the proposing firm removed from public view, however the contents of the proposals, containing numerous indications of the proposing firm, were not redacted. Initial rankings were developed referencing proposals as A, B, C, D and E, however, the committee knew the identities of the firms throughout the process. Therefore, there was no change to the ranking by the committee based on the public identification of the firms.

Per the referenced statute, sealed proposals are only exempt from public record until 30 days after opening the proposals (or upon notice of an intended decision, if earlier). The received proposals, including pricing, were no longer exempt from public record, effective March 22, 2024. The second ranking meeting, at which some committee members modified their ranking of firms, based upon information received after requests for clarification were made of all proposers, was held on April 1, 2024, when the proposal contents were no longer eligible to be withheld from the public.

The protest that the County did not analyze any potential change to the level of resources allocated in the BAFOs is also incorrect. There should be no change to the level of service or resources provided by WM, or FCC, as a result of the BAFO, as the BAFO request stated: “no changes shall be made to the minimum technical and contractual requirements as included in the RFP No. 2024020 and in the Sample Agreement, all clarifications or revisions included in the RFP addendums, all previous submissions by the Proposer in response to the RFP remain as is, and the Proposer is not taking any exception at this point in the process.” FCC suggests changes to the level of resources dedicated to the County are certain under WM’s BAFO, but the County has never indicated that any such changes would be considered or accepted.

The protest that the proposals and pricing were released during the RFP process, and allowed FCC’s prices to be undercut cannot be sustained. The documents were requested on March 22, 2024, and made available to the requester and all five proposers when the exemption period expired later that day. As the documents were no longer exempt from public records under Chapter 119, Florida Statute, there was no legal option for the County to withhold the proposals and pricing.

Under “Failure to Comply with BCC Direction,” FCC states staff failed to “pursue simultaneous negotiations with the top two firms” by utilizing the BAFO process. Utilization of the BAFO had been discussed with the Board. BAFO is defined in the NIGP (the Institute of Public Procurement) dictionary as “a process requested from one proposer or short-listed proposers for their best price(s) for a specific solicitation prior to determining a contract

award. Sometimes used during the Request for Proposals method of procurement.” The motion passed by the Board was “as staff recommended.” Staff’s recommendation relating to negotiations in the staff report was to “pursue simultaneous negotiations with the top two firms of FCC Environmental Services of Florida, Inc. and Waste Management, Inc. of Florida to obtain their “Best and Final Offer” for that option.” The two top ranked proposers were sent opportunity to submit a best and final option on May 3, 2024.

The protest relating to content of the staff report prepared for award cannot be upheld, as I am not technically capable of disputing the Solid Waste Disposal District’s interpretation of the data.

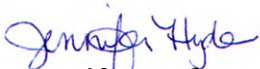
Due to the denial of the statements in the protest, there is no need for the RFP to be canceled, or for a BAFO to be reissued. It remains staff’s assertion that WM and FCC both submitted their best price for the services detailed in their original proposals, in their BAFO.

Conclusion

Should you disagree with my denial of your protest, you may appeal to our Board of County Commissioners. To appeal, a written notice of your intent to appeal must be submitted to me within three business days of receipt of this memo. I will submit, and the Board will consider, the appeal with reasonable promptness.

Please feel free to contact me at (772) 226-1575 or by email at jhyde@indianriver.gov if you have any questions.

Sincerely,



Jennifer Hyde, NIGP-CPP, CPPO
Purchasing Manager

Encl: Formal Protest by FCC
Updated Formal Protest by FCC

Cc:

Waste Management, Inc. of Florida, Ms. Debbie Perez, dperez@wm.com
Waste Pro of Florida Inc., Mr. Kenneth Skaggs, kskaggs@wasteprousa.com
Republic Services, Mr. Fulton Smith, fsmith@republicservices.com
Coastal Waste & Recycling, Mr. John Casagrande, jcasagrande@coastalwasteinc.com



May 20, 2024

Indian River County Purchasing
1800 27th St.
Vero Beach, FL 33407
Attn: Jennifer L. Hyde, Purchasing Manager

***RE: Formal Protest by FCC Environmental Services Florida, LLC (“FCC”)
RFP No. 2024020; Solid Waste and Recyclables Collection Services (“RFP”)***

Dear Ms. Hyde,

Please consider this letter as a formal protest regarding RFP No. 2024020; Solid Waste and Recyclables Collection Services. FCC strongly believes that the integrity of this RFP process has been compromised in several aspects. FCC has detailed those instances further in depth within the body of this letter for the County’s consideration. Section 5.1(A)(5) of the Indian River County Board of County Commissioners Purchasing Manual says “The County may negotiate with any proposer to revise, value engineer, etc. any proposal, provided the revisions do not amount to a substantial and material change to the proposal, and provided that such revisions do not unfairly affect other proposers.” It is undeniable that the material changes to certain proposals has had an unfair impact on FCC.

Integrity of RFP Process Not Maintained

At the first evaluation committee meeting, the Indian River County (the “County”) personnel maintained anonymity of all proposing firms, referring to the responding firms only as “Proposer A, B, C, D, and E.” This was presumably intended to be done in order to preserve the integrity of the RFP and prevent firms from circumventing the process entirely as stated by County personnel. However, the names of each ranked firm were then revealed at the following evaluation committee meeting, thereby eliminating efforts to protect the process by the County from the first meeting.

As such, it was revealed that FCC was the top-ranked firm for Options 1-4, while Coastal Waste & Recycling (“Coastal”) was ranked second. It was not until the names of the proposing firms were known that members of the evaluation committee altered their scoring, thereby ranking Waste Management (“WM”) second and Coastal third. If the names of the firms had remained anonymous as originally intended and scores unaltered, then only FCC and Coastal would have been selected by the committee to be presented to the Board of County Commissioners with WM being eliminated from the next steps of the process.

The integrity of the RFP process was then further violated during the BAFO process when at no point did the County request clarification as to the revised number of resources proposed for each option. By not confirming the new number of routes, staff, and equipment under each option, the County would have no



feasible way to provide a recommendation of award with any basis on the ability to perform the work outlined within the scope of services. To further this point, in Staff Report dated May 13, 2024, within the section titled “Analysis”, Staff describes evaluating the BAFO prices under the same scoring metrics as the original RFP. Within this section, Staff describes combining the new price scoring with the original technical scores to support the new ranking of WM as first and FCC as second. However, this has proven to be a flawed process due to the revised proposed resources being drastically different as seen in the astonishingly large decrease in price that WM put forth for Option 3 and 4. The Staff Report stated that “the goal is to continue to meet the service needs of our community with high quality service with improved efficiency, higher diversion of waste from our landfill and in turn improve our recycling program while providing the overall lowest costs to our residents.” The manner in which this process has been carried out only further clarifies that, despite RFP language that states otherwise, high quality of services was never an important factor but rather the cheapest price was the only relevant factor.

Without analyzing the new level of resources, the County’s Negotiations Team has essentially provided a recommendation for award based solely on pricing, thereby abandoning the RFP process for that of an ITB (Invitation to Bid). No part of any of the Staff Reports or Presentations to the Commissioners included any mention or reference to the initially proposed or BAFO revised resources.

Unfair Structure of the BAFO

In the midst of the RFP process, the County released the documents from each participating firm pertaining to the RFP including the technical proposal and pricing for each option. By doing so, the County removed any fair competition from the process and allowed competing firms to undercut the lowest bid. As such, WM was able to unfairly reduce their subscription rate by over 50% meaning \$11.42M per year and the universal rate by over 25% (\$4.10M per year) based on the released information. We urge the County to question whether WM would have reduced their prices in such a dramatic fashion if the integrity of the process had been upheld. Why was WM’s original pricing so egregiously high, and how were they able to reduce their pricing in such dramatic fashion?

In large part, this reduction was made possible due to the parameters that the County set forth for the BAFO process. With the letter issued May 3, 2024, titled “Request for Best and Final Offer”, the County states “the Proposer may not increase the price in any or all categories”. FCC submitted the lowest pricing received during the initial process as a sign of good faith to the County and our commitment to a successful partnership. However, by limiting the BAFO in this way, the exceptionally more expensive firm received an unfair advantage as cost could still be allocated within different portions of the submitted proposal while also lowering the inflated rates of the initial bid.

Furthermore, FCC calls to question how the County can reasonably accept pricing that is 50% and 25% lower than the original bidding price without questioning the number of resources that these prices include. Clarification questions were extended to each participating firm during the evaluation process which lends itself to the County’s placed importance of the proposed service to residents and commercial customers. Yet, this level of examination was not present during the BAFO process.



Unless a firm was to arbitrarily submit overinflated bid rates with the intention to increase profit margin to the detriment of the County, then the only reasonable result of such severe reductions is the removal of key resources such as staffing, equipment, and routes. Either scenario is extremely troubling and does not represent the best interests of the County. With the BAFO letter stating, “the Proposer hereby acknowledges that no changes shall be made to the minimum technical and contractual requirements as included in the RFP and in the Sample Agreement”, we strongly believe as though this aspect has not been requested, reviewed, or confirmed.

Failure to Comply with Board of County Commissioners Decision

During the Special Call Meeting on April 24, 2024, Staff requested the Board of County Commissioners vote on 5 items so the RFP process may be continued. Regarding item 4, Staff requested “authorization to the Negotiations Team to pursue simultaneous negotiations with the top two firms...” However, despite the Board approving this request, the subsequent letter received on May 3, 2024, clearly stated that “this will be the only opportunity provided to the Proposer to submit the BAFO and no negotiations shall be made as part of this process.” This statement directly contradicts the decision made by the Board and therefore should eliminate any subsequently received BAFOs.

Misleading Recommendation to the Board

As a final item, we want to express our skepticism on the similarity in WM’s pricing in both Options 3 and 4. After reviewing the released BAFO supports, we are surprised that Staff has not brought into question the near identical pricing that WM has submitted for both options. When the evaluation committee and staff reviewed initial proposals, it was shown that each company has submitted an overall higher rate per household for the subscription base option than the universal base option. The reasoning for the increase of this option was due to a myriad of factors including a lesser number of units to allocate overheads, a lower performance for each route type due to the longer travel distance between customers and increase of expenses such as invoicing customers and bad debt for nonpaying customers. As proof of this, WM’s original price was 50% higher than their universal rate (\$37.53 for subscription option, compared against \$25.08 for universal option). The difference between these rates has somehow been reduced to \$.05 or .02% (\$18.65 for subscription option, compared against \$18.60 for universal option). With such a dramatic swing, this can only be justified as a firm that has acted in a desperate manner and has acted without any consideration for the expenses associated to providing the services outlined within the RFP. We find it equally as surprising that the Staff Report has failed to identify the parity between these rates.

Although it is ultimately the decision by the Board, FCC believes that the recommendation for universal service to be misleading as the report indicates that the universal option provides a lower price. While that may be correct on a per resident basis, what the report has failed to consider is that the universal option includes ~30% more residential units than the current number of subscription units. In effect, the recommendation of universal service acts against the best interests of the County and its residents. This



option forces the 30% of unsubscribed residents into the service while only providing a savings of \$.05 to those residents currently subscribed.

Additionally, we have found the recommendation to be further misleading in the fact that there has been no mention of submitted pricing that would apply to commercial customers under this contract. WM proposed commercial rates pose a nearly 100% increase (from \$5.45/cubic yard to \$10.80/cubic yard). As an example, this represents \$6,672 more per year for a customer that has 1-8 cubic yard front load dumpster that is serviced 3 times per week. When considering the subscription base option, each single family unit will only receive an annual increase of \$89.88. Therefore, it is presumed that WM has placed an unfair burden of their overall price increase onto the commercial customers.

While the Staff Report highlighted the difference in residential pricing between the firms, there is no comparison of the commercial rates which would highlight a 22% higher annual cost for WM compared to FCC. This difference in cost increases exponentially depending on quantity of containers, size of containers, and the frequency of service. Disregarding this portion of the submittals constitutes as a misrepresentation of total bid submittals to the Board as it does not consider the higher rates for commercial constituents in its findings.

Pursuant to Section 7.1(C) of the County's Purchasing Manual, "the County shall not award the Contract until the administrative appeal is resolved". As such, item 15.B.5. regarding to the recommendation for Franchise Award to WM must be removed from the May 21st, 2024 Board of County Commissioners Agenda. With such a breach of integrity in the process for RFP, we firmly request that the County proceed in one of two ways: 1) Cancel the current RFP and begin a new proposal process, giving Staff and firms a fair opportunity to participate in the new process while operating with the integrity of the County's rules and procedures; or 2) issue a new request for BAFO on the current RFP, to allow proper and fair negotiations between County Staff and all relevant firms in compliance with the County's purchasing requirements.

Thank you for your time and consideration of this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Dan Brazil', is written over a white background.

Dan Brazil
Chief Executive Officer
FCC Environmental Services Florida, LLC



May 23, 2024

Indian River County Purchasing
1800 27th St.
Vero Beach, FL 33407
Attn: Jennifer L. Hyde, Purchasing Manager

**RE: *Formal Protest by FCC Environmental Services Florida, LLC (“FCC”)
RFP No. 2024020; Solid Waste and Recyclables Collection Services (“RFP”)***

Dear Ms. Hyde,

On May 20, 2024, FCC submitted a timely filed formal protest related to RFP No. 2024020; within five (5) calendar days that FCC knew or should have known the facts giving rise to this protest (receiving the final BAFO scoring on May 16, 2024). Subsequently, on May 21, 2024, after the Board of County Commissioners meeting concluded in a vote to recommend the award to WM, Indian River County Administrator John Titkanich Jr, informed FCC that we needed to resubmit our protest since prior to the Board vote, FCC had not yet been aggrieved. The following is a resubmission of our previously filed protest based on the instruction from the County Administrator:

Please consider this letter as a formal protest regarding RFP No. 2024020; Solid Waste and Recyclables Collection Services. FCC strongly believes that the integrity of this RFP process has been compromised in several aspects. FCC has detailed those instances further in depth within the body of this letter for the County’s consideration. Section 5.1(A)(5) of the Indian River County Board of County Commissioners Purchasing Manual says “The County may negotiate with any proposer to revise, value engineer, etc. any proposal, provided the revisions do not amount to a substantial and material change to the proposal, and provided that such revisions do not unfairly affect other proposers.” It is undeniable that the material changes to certain proposals has had an unfair impact on FCC.

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Thank you for your time and consideration of this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Dan Brazil'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Dan Brazil
Chief Executive Officer
FCC Environmental Services Florida, LLC