MEMORANDUM

To: Lee R. Feldman, City Manager
City of Fort Lauderdale

From: John W. Scott, Inspector General

Date: July 24, 2013

Subject: OIG Final Report Re: Misconduct by the City of Fort Lauderdale in the Award of the Contract for the Design and Construction of the Fort Lauderdale Aquatic Complex, Ref. OIG 13-012

Attached please find the final report of the Broward Office of the Inspector General (OIG) regarding the above-captioned matter. The OIG investigation found that the City of Fort Lauderdale engaged in misconduct when it awarded a $32 million contract for the design and construction of the Fort Lauderdale Aquatic Complex. Specifically, we determined that the City conducted an inadequate procurement and legal review process which resulted in a violation of Florida Statute § 287.055, the award of a non-responsive contract, and other deficiencies. Those deficiencies included the fact that the City Commission was told the contract contained language that was never, in fact, incorporated, and the contract also allocated $60,027 for unidentified costs. Most significantly, the City agreed to a provision in the contract that shielded $1.66 million of reimbursable labor costs from audit, which would have prevented the City from determining if it was being overbilled for the vendor’s supervisory and administrative labor costs.

Although the OIG appreciates the City’s cooperation throughout the investigation, we remain concerned that the City persists in ignoring the explicit requirements of the statute. Thus, the OIG will continue to monitor future solicitations involving design-build projects and work with the City to ensure proper application of the statute. With regard to the recommendations the OIG made in the preliminary version of this report, the City has indicated that it has now incorporated a more comprehensive legal review of its procurement process and entered into a contract amendment with RDC that will enable the City to properly audit the project. Accordingly, the OIG will require no additional action at this time.

Attachment

cc: Honorable John P. “Jack” Seiler, Mayor, City of Fort Lauderdale
and Members, Fort Lauderdale City Commission
John Herbst, City Auditor
Cynthia A. Everett, City Attorney
BROWARD OFFICE
OF THE INSPECTOR GENERAL

FINAL REPORT

OIG 13-012
July 24, 2013

Misconduct by the City of Fort Lauderdale in the Award of the Contract for the Design and Construction of the Fort Lauderdale Aquatic Complex
FINAL REPORT RE: MISCONDUCT BY THE CITY OF FORT LAUDERDALE IN THE AWARD OF THE CONTRACT FOR THE DESIGN AND CONSTRUCTION OF THE FORT LAUDERDALE AQUATIC COMPLEX

SUMMARY

In November 2012, the Broward Office of the Inspector General (OIG) initiated a review of the City of Fort Lauderdale’s (City) award of a contract for the design and construction of the new Fort Lauderdale Aquatic Complex (Aquatic Complex), including the International Swimming Hall of Fame (ISHOF). The OIG had received allegations that the City was engaging in favoritism in the award of the project to redevelop the Aquatic Complex after receiving only one proposal in response to Request for Proposals (RFP) 105-10408. The OIG investigation included a comprehensive review of the procurement process and the resulting agreement. Although the investigation did not substantiate the allegations of favoritism, we determined that the City engaged in misconduct when it awarded the final contract for the Aquatic Complex. Specifically, the City, motivated by the rapidly deteriorating condition of the existing structure, conducted an inadequate procurement and legal review process that resulted in a violation of Florida Statute § 287.055, the award of a non-responsive contract, and other deficiencies.

When the City issued the RFP in November 2009, the solicitation document stated that, upon award, the successful proposer would enter into a “Development Agreement” with the City. Our review of the solicitation revealed that it was vague, improperly used the legally defined term of “development agreement,” and undermined competition by confusing prospective proposers with respect to the services sought by the City. Despite the defective solicitation, the City executed a design-build contract with the sole proposer, Recreational Design and Construction, Inc. (RDC). The award of the design-build contract violated § 287.055, which mandates a specific competitive process for proper solicitation and award of design-build contracts including the development of a design criteria package and obtaining no fewer than three proposals.

Our review of the final contract also revealed additional deficiencies: the City Commission was told the contract contained language that was never, in fact, incorporated, and the contract also allocated $60,027 for unidentified costs. Most significantly, the City agreed to a provision in the contract that shielded $1.66 million of reimbursable labor costs from audit, despite RDC’s history of double-billing the City and maintaining inadequate accounting processes. This exclusion would prevent the City from determining if it was being overbilled for RDC’s supervisory and administrative labor costs. The OIG has discussed the issues raised by this report with the Mayor, the City Manager, and the City Attorney. We appreciate the City’s cooperation throughout the investigation. In the past year, the City has independently undertaken procurement reforms which should generally strengthen the procurement process. However, the preliminary version of this report contained additional
recommendations designed to address the specific deficiencies identified by our investigation, which the City has since acted upon.

**OIG CHARTER AUTHORITY**

Section 12.01 of the Charter of Broward County empowers the OIG to investigate misconduct and gross mismanagement within the Charter Government of Broward County and all of its municipalities. This authority extends to all elected and appointed officials, employees and all providers of goods and services to the County and the municipalities. On his own initiative, or based on a signed complaint, the Inspector General shall commence an investigation upon a finding of good cause. As part of any investigation, the Inspector General shall have the power to subpoena witnesses, administer oaths, require the production of documents and records, and audit any program, contract, and the operations of any division of the County, its municipalities and any providers.

The OIG is also empowered to issue reports, including recommendations, and to require officials to provide reports regarding the implementation of those recommendations.

**BACKGROUND AND RELEVANT GOVERNING AUTHORITIES**

**The Existing Fort Lauderdale Aquatic Complex**

In May 1963, the State of Florida dedicated a man-made peninsula in the Intracoastal Waterway to the City of Fort Lauderdale “for public municipal purposes only,” and further required that the land be used as the site for the Swimming Hall of Fame. In December 1965, the City opened the Swimming Hall of Fame complex, which included a museum and competitive swimming and dive pools. The complex has been operated by the City, which leases space to the renamed ISHOF under a revenue sharing arrangement. The site was renamed as the Fort Lauderdale Aquatic Complex, although it is often referred to as the Fort Lauderdale Aquatic Center.

The existing Aquatic Complex is located at 501 Seabreeze Blvd. in Fort Lauderdale and is within the area covered by the Fort Lauderdale Beach Community Redevelopment Plan. The Plan is administered by the Fort Lauderdale Community Redevelopment Agency (CRA), whose Board of Directors is the Fort Lauderdale City Commission. In their role as Directors of the CRA, the City Commissioners may authorize expenditure of CRA funds.

**The Administration of the City of Fort Lauderdale**

All legislative powers of the City are vested in the City Commission. There are four Commissioners and a Mayor-commissioner, who is elected to that office and exercises all the powers and duties of Mayor. The City Manager is responsible to the City Commission for the proper administration of all affairs of the City.
Florida Statutes § 287.055

Florida Statutes § 287.055, establishes, among other things, the procedures for municipalities to award a design-build contract, defined as a single contract with a design-build firm for the design and construction of a public construction project. Those procedures mandate use of a competitive proposal selection process, which includes preparation of a design criteria package by the municipality, or by a “design criteria professional.” A design criteria package is defined as the concise, performance-oriented drawing or specifications of the public construction project. The design criteria package must specify performance-based criteria for the public construction project, including the legal description of the site, survey information concerning the site, interior space requirements, material quality standards, schematic layouts and conceptual design criteria of the project, cost or budget estimates, design and construction schedules, site development requirements, provisions for utilities, storm water retention and disposal, and parking requirements applicable to the project. The purpose of the design criteria package is to furnish sufficient information to permit design-build firms to prepare a bid or a response to an agency’s RFP, or to permit an agency to enter into a negotiated design-build contract.

Florida Local Government Development Agreement Act

Florida Statutes §163.3223 enables local governments to enter into agreements with developers having a legal interest in real property. The agreements set zoning requirements, regulations and other terms that provide sufficient assurances of future local regulations to warrant long-term or significant investment in a specific property.

The Charter of the City of Fort Lauderdale

The Charter of the City of Fort Lauderdale (Charter), at Article VIII – Public Property, Section 8.09, empowers the City to lease to private persons, firms or corporations, for nonpublic purposes, any lands, improvements, public buildings, recreational parks or facilities, golf courses, public beaches, public utility plants, or any public works or public property of any kind including air space over public property owned or operated by the City, and not needed for governmental purposes. Section 8.09 also prescribes the process for the City Commission to adopt a resolution that authorizes lease of a facility, followed by a competitive proposal process. One of the conditions for leasing such public property may be obligations of the lessee to construct buildings or improvements to be used in connection with an existing facility, or to construct improvements on the property if it is vacant.

INDIVIDUALS AND ENTITIES COVERED IN THIS REPORT

John P. “Jack” Seiler

Mr. Seiler is the Mayor of the City of Fort Lauderdale and a Commissioner. He has served in that position since 2009. He previously served in the Florida House of Representatives.
Lee R. Feldman

Mr. Feldman is the City Manager. He assumed that office in June 2011. Mr. Feldman was previously employed by the City of Palm Bay, Florida, where he served as City Manager from October 2002 through June 2011.

Harry Stewart

Mr. Stewart is the former City Attorney and served in that position between 2002 and June 2013.

Recreational Design and Construction, Inc.

RDC describes itself as “a company that specializes in the design, construction, and development of recreational, aquatic, and sport facilities.” The company has been in business for 20 years and has been a vendor to the City for various projects since 1997.

INVESTIGATION

This investigation was predicated on information alleging favoritism and other improprieties in the award of a public works contract by the City to the only vendor who responded to the RFP. The OIG did not substantiate those allegations. However, the investigation revealed that the City’s procurement process and award of the contract was in violation of Florida law. In addition, the investigation identified other deficiencies in the final contract and the procurement process.

The investigation involved the review and analysis by OIG staff of substantial materials including, but not limited to, RFP 105-10408; various draft contracts; Florida Department of State business records; initial and revised proposals submitted by RDC in response to the RFP and subsequent guidance from the City Commission and City staff; City Commission documents, including meetings minutes, audiotapes and videotapes; correspondence among City staff and between City staff and RDC and its legal counsel; Beach Redevelopment Advisory Board meeting minutes, audiotapes, and videotapes; Beach Business Improvement District Advisory Committee meeting minutes; a City Auditor report; relevant Florida and City laws and ordinances; and professional literature regarding design-build and contracting best practices. OIG staff also conducted interviews of the Mayor, the City Attorney and staff, the City Manager, commercial developers, and construction and design company principals.

The City Issued a Vague RFP Seeking a “Development Agreement” which Hindered Competition

By 2009, after more than forty years of use, the Aquatic Complex’s physical condition and appearance had deteriorated and it was being operated by the City at an annual financial loss of about $1 million. A 2007 conceptual plan and feasibility study commissioned by the City, known as the LARC study, had recommended redevelopment as a multi-use complex of competitive swimming, community activities, new entertainment and educational activities, and additional retail and dining. The components of the project would include the ISHOF, an aquarium, water park, competitive swimming
facilities, community meeting space, restaurant and retail space for lease, parking and an Intracoastal Waterway entrance. The site would also have a consistent aquatic theme throughout and utilize common design and landscaping. The study proposed a net investment of between $51 and $72 million from an investor or a public/private partnership, with a principal payback period of between five and eight years.

In June 2009, the City administration proposed that a follow-up contract be issued to develop specific plans for the redevelopment of the Aquatic Center. During his interview with the OIG, Mayor Seiler recounted the Commission’s frustration with what he perceived as a never-ending series of studies to determine how the site would be redeveloped. At a June 2, 2009 meeting, the Commission decided by consensus that, rather than authorize another in a series of feasibility studies and action plans, the City would test the market and request proposals for redevelopment. On November 16, 2009, the City issued RFP 105-10408.¹ The RFP articulated three project goals:

- provide a financially viable multi-use recreational and entertainment facility;
- provide a state-of-the-art competitive swim/dive complex; and
- provide a site for the ISHOF.

However, the RFP did not articulate the City’s expected role in the redevelopment. It sent mixed signals to prospective proposers. On one hand, the LARC study, included as an attachment to the RFP, contemplated a project cost of up to $72 million. On the other hand, the RFP itself provided only a general description of the City’s vision for the Center, and without specifying any cost estimate, stated: “While limited City funds may be available for this project, it is the City’s intent to complete the redevelopment at a minimum cost to the City. The City will consider innovative and creative suggestions for funding alternatives, including public/private partnerships, private sponsors, naming rights, bonds, etc.” During his interview, Mayor Seiler indicated that any ambiguity in the RFP was probably intentional since it was the intent of the Commission that the RFP not limit the creative options that the market might produce. Thus, in the hope of spurring creative private sector solutions, the RFP contained no specifics with regard to financing or costs. Under “Proposer Response Format” of the RFP, proposals were required to describe how the proposer intended to finance the project. Long-term lease agreements were one of the funding mechanisms included in the non-exclusive list of possibilities.

Other sections of the RFP communicated to vendors that the City expected a solution which would place the financial burden on the developer. Specifically, the RFP stated that the outcome of the solicitation would be a “Development Agreement” with the City for the construction of the project. A Development Agreement, as defined in Florida law, is an agreement between a local government and a developer with an interest in the real property, such as a property owner or a long-term lessee, wherein

¹The RFP, in its entirety, is available for viewing at https://www.bidsync.com/bidsync-app-web/vendor/links/BidDetail.xhtml?bidid=445955.

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the City agrees to zoning regulations in exchange for public benefits.\(^2\) It is typically used to contractually determine permitting, zoning and other arrangements that would allow a developer to redevelop privately owned property.\(^3\)

The RFP also communicated with potential vendors through its omissions. Florida law requires that solicitations for the design and construction of a public works project contain certain elements—described later in this report—many of which were not contained in the RFP. The omission of these requirements brought into question the City’s intent to fund any significant portion of the redevelopment. In light of the City’s stated intent to enter into a “Development Agreement” and “to complete the redevelopment at a minimum cost to the City,” the RFP could reasonably be read to seek more than merely a contractor to design and build a publicly-owned aquatic facility.

Thus, rather than inspire a flurry of private sector creativity, the RFP confused prospective proposers and dissuaded competitive participation. At the City Commission Conference meeting on April 20, 2011, Mayor Seiler inquired about the lack of competitive responses to the RFP. The Director of the City’s Business Enterprises Office’s response acknowledged that the RFP sought an agreement that would do more than merely design and construct a city facility. She indicated that the City’s use of the term “minimal cost to the city” caused developers to question the City’s desires. She then stated, “I think private developers were limited in how they could do anything but build for the City.”

The OIG interviewed representatives of two firms that attended the pre-proposal meeting on December 9, 2009, but elected not to submit proposals. Both described the RFP as very unclear. One said that the City did not understand what it wanted and the other thought that the City was not serious about the project. They indicated that, with such vague parameters, it would have been difficult to determine how much to invest in preparing a proposal. The risk was too high, especially with issues about deed and usage restrictions on the adjacent properties. At that time, developers’ access to financing was very limited and this project was too risky. Both thought that the RFP asked for a development concept, not a design-build contract. One of the representatives stated that if this was awarded as a design-build, “it’s a problem.”

**The Original Proposal by RDC**

Only one proposal was received in response to the RFP: RDC proposed a project with a total cost of $76,216,175.00, including $19.7 million of private financing. RDC proposed itself as a developer, design-builder, lessee, operator, and source of capital funding. In order to provide the private financing that the RFP indicated would be necessary, RDC’s proposal included a long-term lease of the area north of D.C. Alexander Park, which would have secured a legal interest in the City-owned property that would justify private capital investment of $19.7 million. The long-term lease would


\(^3\) The RFP does include leasing as a possibility. However, the Charter, Article VIII – Public Property, Section 8.09, mandates a very detailed process for authorizing, competing and awarding leases of City-owned property. The City did not follow this process in advance of offering the possibility of a long-term lease of the Aquatic Complex in the RFP.
have also provided RDC with an interest in the real property, conforming, to some extent, with the
definition of a “Development Agreement.” As part of RDC’s proposal, the City would receive about
$537,000 from operations in the first year, including about $129,000 from private development on the
property leased to RDC. The Park itself would be developed with an interactive splash park, shade
structures, seating, band shell and restrooms.

The Awarded Contract was Not Responsive to the Solicitation

Florida courts have held that a local government does not have unbridled discretion to negotiate the
terms of the contract following the selection of a vendor in a competitive solicitation. Local
governments are still bound by the material terms of the solicitation.\(^4\) The OIG’s investigation
revealed that, nonetheless, revised proposals considered by the City, as well as the contract it
ultimately awarded, were not responsive to the terms of the solicitation.

After receipt of only one proposal, City staff, with guidance from the City Commission, spent the
following two-and-a-half years negotiating an agreement with RDC. By the fall of 2011, the revised
proposal was extremely scaled back and contemplated that the Aquatic Complex would be exclusively
publicly funded. In addition, the revised proposal contemplated an investor-funded development on
the adjacent city-owned property presently containing a parking lot. The differences between the
original proposal and the then-current proposal called into question whether the proposed agreement
was responsive to the solicitation. At an October 4, 2011 Commission Conference meeting, Mayor
Seiler asked Mr. Stewart to make a recommendation at the next meeting “whether the proposal [was]
responsive to the RFP.”

The OIG’s investigation revealed that the question of responsiveness was never answered. A review
of City correspondence disclosed that Mr. Stewart stated that he referred the matter to the
“management team,” but acknowledged that if the proposal was no longer responsive to the
solicitation, the project would have to be rebid. (See December 2011 email communications between
Mr. Stewart and the City Auditor, attached as Exhibit 1). The OIG’s review of recordings and minutes
indicates that the question of responsiveness was not answered at the following Commission meeting,
or at any other meeting thereafter. Indeed, Mr. Stewart admitted to the OIG that he never answered
the question. Mr. Feldman and the Procurement Services Director both told the OIG they did not
determine if the proposal was responsive to the solicitation. Mr. Feldman had no knowledge of any
determination being made to resolve the issue of responsiveness.\(^5\)

Despite the failure by Mr. Stewart and the City Administration to respond to Mayor Seiler’s request,
the Commission nonetheless moved forward with consideration and award of a contract that differed

\(^4\) *Emerald Correctional Management v. Bay County Bd. Of County Com’rs*, 955 So.2d 647 (Fla. 1st DCA 2007); *State,
Dept. of Lottery v. Gtech Corp.*, 816 So.2d 648 (Fla. 1st DCA 2001).

\(^5\) As the division that would typically oversee procurements, the Procurement Services Division may have been able to
assess responsiveness, but the Director denied that the question was ever referred to his department. (Exhibit 2)
radically from the elements contemplated by the RFP. At the September 18, 2012 City Commission meeting, the Commission was presented with a contract for the design and construction of the Aquatic Complex at a cost to the city of $32,437,434.00. The final agreement stripped away key elements of the initial proposal: RDC would not have any leasehold interest in the property; it would not operate, manage, or maintain any aspect of the completed facility; there would be no new sources of revenue generation; and, there would be no form of private investment.

Mayor Seiler acknowledged that the RFP may have been ambiguous in its requirements and that the proposal was substantially altered during negotiations, but he stated that the City nevertheless continued to negotiate with RDC so as not to “penalize” the only proposer. However, in pursuing a course of action that protected the interests of RDC, the City consequently penalized all other design-build firms that might have bid on the “down-sized” design and construction contract that the City had decided to pursue. At the same time, the City’s financial interests may have suffered by not having the benefit of competing offers.

The City Awarded a Design-Build Contract in Violation of the Requirements of Florida Law

The most important manner in which the awarded contract was not responsive to the RFP involves the very nature of the contract that was eventually awarded to RDC. The City awarded a design-build contract without regard for the fact that the RFP did not properly seek proposals for a design-build contract. Florida Statute § 287.055 defines a design-build contract as a single contract with a design-build firm for the design and construction of a public construction project. It imposes several requirements for the proper competitive solicitation and evaluation of design-build proposals. First, it requires that a solicitation contain a design criteria package. The purpose of the design criteria package is to furnish sufficient information to permit design-build firms to prepare a response to an agency’s request for proposal. It is also required if an agency wishes to enter into a negotiated design-build contract. Although the City did use a competitive proposal selection process, the City’s proposal did not include the legally required design criteria package.

A second requirement for a design-build award is the “qualification and selection of no fewer than three design-build firms as the most qualified, based on the qualifications, availability, and past work of the firms.” However, because the RFP did not contain the required information, potential proposers in the business of performing design-build contracts for government projects were not notified by the RFP that a proposal for a design-build contract would be deemed responsive. The RFP contained no indication that a proposal lacking private investment or a business plan for maintaining and operating a financially viable multi-use recreational and entertainment facility would be deemed responsive. Not surprisingly, the City did not obtain sufficient responses to comply with the required number of qualified firms.

6 Mayor Seiler told OIG staff that when the Aquatic Complex issue finally came back onto the City Commission agenda, he assumed that the issue of responsiveness must have been resolved.

7 Design Criteria Package is defined above on page 3.
Although the City may not have intended a design-build arrangement when it originally issued the RFP, after 30 months of negotiation and reconsideration, it ultimately awarded RDC, a self-described design-build firm, a design-build contract without complying with the requirements of Florida law. Despite the title of “Developer’s Agreement,” the contract was not in fact a development agreement as stated in the RFP, nor as that term is defined in Florida Statutes. Under the terms of the contract, RDC would not obtain any interest in the real property, contrary to the requirements of §163.3223. The City, through the CRA and parking revenue bonds, would completely fund the project.

There is also evidence that the City intended to award a design-build contract long before the negotiations were finalized. At the City Commission Conference meeting on June 21, 2011, the City Auditor clarified to Commissioners that the City was not entering into a development agreement for the Aquatic Complex, stating:

 “[T]ypically the public private partnerships that I’ve seen, the benefit to the public sector is that the private sector puts up the money and we save the financing and pay it back to them over a period of time. You’ll see that with most public-private partnerships. In this case, we’re being asked to fund all the public sector improvements, so it’s not your traditional public-private partnership in that model. Essentially, we’ve got a developer who’s going to develop our land and we’re going to pay for it.”

Later, according to the April 3, 2012 City Commission Conference meeting minutes, an RDC spokesperson stated, “[w]ith consensus to negotiate with the City Manager, RDC will return in forty-five days with a design-build agreement for the east side and a developer’s agreement for the west side and be ready to begin the Development Review Committee process.” (Emphasis added). Mr. Feldman then reiterated the design-build approach to the Commission: “[o]nce the Commission indicates it approves of the design, the City Manager indicated that he will negotiate lease agreements for the Ron Jon and ISHOF facilities and a design-build guaranteed maximum price open book contract with RDC for the aquatic center.” (Emphasis added).

In interviews with the OIG Mr. Feldman denied that the final contract with RDC was a design-build contract pursuant to § 287.055. Mr. Feldman admitted to the OIG after review of the statute that a design criteria package was not prepared by the City prior to solicitation nor at any point during the negotiations. He maintained, though, that the City had used the developer’s proposal “essentially” as a design criteria package, a practice not permitted by the statute. Mr. Stewart also maintained that, despite the definition contained in the statute, the contract the City awarded was not a design-build contract, but a “Developer’s Agreement.” After he was shown a copy of the statutory definitions by the OIG, Mr. Stewart volunteered that the RDC contract is “design-build-like.” He also admitted that the final proposed contract was not reviewed by his office for compliance with § 287.055, defining design-build contracts, nor §163.3223, pertaining to development agreements. Mr. Stewart stated
those types of reviews were typically only conducted by his office prior to advertisement of the solicitation, and not prior to award of the actual contract.

**Despite RDC’s History of Insufficient Accounting for Reimbursable Costs, the City Agreed to Exempt $1.66 Million of Reimbursable Costs from Audit**

When the City initially issued the RFP, it required that the contract include a right to inspect and audit the developer’s accounts, records, files and finances. Nevertheless, the City ultimately accepted contract language which exempted certain costs from audit. This exemption applied to some costs for which the City was responsible for paying only actual costs, thus seriously compromising the City’s ability to determine if it is being overbilled.

As Mr. Feldman stated at the April 3, 2012 Commission Conference meeting, the City intended to enter into an open-book guaranteed maximum price contract. A Guaranteed Maximum Price (also known as GMP) contract is “a cost-type contract (also known as an open-book contract) where the contractor is compensated for actual costs incurred plus a fixed fee subject to a ceiling price. The contractor is responsible for cost overruns, unless the GMP has been increased via formal change order (only as a result of additional scope from the client, not price overruns, errors, or omissions). Savings resulting from cost underruns are returned to the owner.”

On June 8, 2012, RDC responded to the City’s draft contract with a considerably revised version that included, among many other changes and additions, this new section:

3.10.8 Included within the GMP is the Developer’s general conditions costs (“General Conditions”), which shall be referenced as a separate line item in the Schedule of Values…. Notwithstanding anything contained herein to the contrary, the General Conditions are a fixed amount and shall not be subject to audit or shared “Savings,” as hereinafter defined.” (Emphasis added).

The “General Conditions” shielded from the City Auditor are comprised of estimated itemized costs, including approximately $1.66 million of proposed RDC labor. Included in the General Conditions, are costs specifically defined as reimbursable:

3.5.1.2 Wages or salaries of Developer’s supervisory and administrative personnel who are stationed at the Project site which includes Schedule 3.10.2 – Basis for GMP, and all such personnel listed on Exhibit B-4. Costs to be reimbursed will be per Division 1, General Conditions Schedule and will be the actual wages paid inclusive of labor burden to the individuals performing the work. (Emphasis added).

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10 “This is different from a fixed-price contract (also known as stipulated price contract or lump-sum contract) where cost savings are typically retained by the contractor and essentially become additional profits.” Cushman, Robert F.; Myers, James J. (1999). Construction Law Handbook, Vol. 1. p. 357. ISBN 0-7355-0392-3
Thus, while the City should only be billed for the actual wages of RDC’s onsite supervisory and administrative personnel, it will not be entitled to verify that it is not being overbilled for these services. While this exemption from audit would constitute a red flag in any “open-book” contract, it is especially disconcerting in light of RDC’s history with the City.

In January 2003, the City’s Internal Audit Division issued an audit report which found that, in a design-build task order valued at $328,614.00, RDC was overpaid $89,374.17 for ineligible/disallowed expenditures and there were another $110,667 of questioned costs. The audit specifically found that a contributing factor in RDC’s overcharging of $89,374.17 was RDC’s practice of charging for the same equipment and personnel as direct reimbursable costs and as part of a “general conditions” multiplier in the task order. According to the report, RDC was able to carry out the double billing, in part, because of its inadequate accounting practices: “RDC does not have adequate internal controls in place to monitor the accuracy and processing of financial transactions associated with construction projects.”

The City Auditor informed the OIG that the report was part of the internal discussion among City staff involved in review of RDC’s proposals for the Aquatic Complex, indicating that staff was aware of the company’s history. Yet, there is no indication that the City objected to 3.10.8, or even took note of it. It remains in the final executed contract. When asked about the exclusion, Mr. Feldman said he had no specific recollection of it, or the circumstances surrounding its insertion into the contract, and he would have to go back and reread the contract. He went on to explain that the City had negotiated various terms, some which were to the benefit of RDC and others that were to the benefit of the City. During his interview, Mayor Seiler stated that he was unaware of the exclusion. He noted that RDC may have changed its practices in the past ten years, but he still felt that the City should not exclude reimbursable actual costs from audit.

Other Deficiencies and Omissions in the Contract

During its investigation, the OIG also noted additional omissions and potential deficiencies in the contract:

1. **The City Manager told the City Commission that the contract they were considering contained language that could reduce the cost of the contract, but such language was not included in the final version of the contract**

At the September 18, 2012 City Commission meeting that considered the proposed contract, one of the Commissioners closely questioned and challenged Mr. Feldman concerning the various costs in the agreement, particularly the Developer’s Fee. Mr. Feldman informed the...
Commissioner that the Developer’s Agreement contained language that would reduce the final amount of the Developer’s Fee if the costs were lower than estimated by RDC. Emails reviewed by the OIG reveal that Mr. Feldman had asked the City Attorney’s Office to add the following language to section 3.10.1 of the contract: “At such time, the Developer’s Fee shall be adjusted based on any changes to the GMP Sum based on the formula provided in Section 3.10.4.”

This language was intended to ensure that if the cost estimate for construction of the pools was reduced at the 90% design completion point, there would also be a corresponding reduction in the Developer’s Fee, which had been calculated at 17.87% of RDC’s cost estimate. For example, if the City’s cost estimator concludes that the pools’ cost should be $1 million less than RDC’s current estimate, and RDC agrees, the language referred to by Mr. Feldman would require RDC’s fee to be reduced by $178,700. However, the language was never actually incorporated into the contract. An Assistant City Attorney interviewed as a part of this investigation characterized that omission as a “scrivener’s error.” She stated that, despite the omission of the language which would have made the reduction explicit, the City has full discretion as to whether or not it desires to move forward with the Agreement based on the cost details provided by the Developer at the 90% stage. There is no evidence that RDC agreed with the proposed language, which would have the potential to reduce its profit. In addition, the Assistant City Attorney’s position does not take into account the cost of terminating the agreement prematurely.

2. **The Contract Allocates Costs to Unspecified Items**

The OIG investigation also found that the final executed contract contains a line item, specifically line item 136 of the “Basis of GMP 3.10.3.4: Aquactic [sic] Facility,” for $60,027 which is unspecified and lacks any description. (Exhibit 3) A review of the earlier drafts did not reveal the purpose of the allotment and a review of emails between the parties does not indicate that the blank item cost was ever questioned.

3. **The Structure of the Contract May Enable RDC to Reap Thousands in Profit Beyond the Approved Fee**

Finally, in addition to the concerns addressed above, multiple provisions of the final contract have the potential to enable RDC to reap profits above and beyond the agreed upon rate of 17.87%, or allow it to charge for unreasonable costs. The OIG has shared these concerns with Mr. Feldman and has received assurances that the contract contains controls which will ensure independently verified reasonable pricing. Presently, of course, the OIG has insufficient information to determine how these contractual provisions will ultimately be executed by the parties. Therefore, the OIG will continue to monitor the execution of the contract and final costs to ascertain if the terms result in significant waste of public funds.
INTERVIEW SUMMARIES

As part of the investigation, OIG staff conducted numerous witness interviews. Significant interviews are summarized below:

1. Interview of Mayor Jack Seiler

Mayor Seiler has been Mayor of Fort Lauderdale since March 2009. He was elected along with an entirely new City Commission, except for Commissioner Charlotte Rodstrom. He recalled that there were serious structural issues with the Aquatic Center when he took office in 2009. Some of the grandstands were falling down and unsafe, and had to be roped off and not used. The pools were leaking. Some events were being cancelled because of the deteriorated conditions. City staff said that something had to be done immediately to address the situation. Mayor Seiler stated that the RFP was deliberately broad. He also stated that he didn’t want more studies because the City had been conducting studies for almost a decade. It was his goal for the RFP to stimulate creative ideas and broad concepts and let the market inform the City of the possibilities. He admitted that, with these goals in mind, he encouraged staff not to make the RFP restrictive. He stated his belief that the RFP did not require private investment.

Mayor Seiler acknowledged that, at a June 21, 2011 meeting, he stated that RDC would have a role in the Aquatic Center project. He explained that his comment referred to the fact that RDC was the winning proposer. He stated that he understood the concerns raised by the fact that RDC was the sole proposer, and he also was concerned that their initial proposal was too high, and thus unacceptable to the City. He further stated, however, that he did not want to “penalize” RDC for being the only proposer. Mayor Seiler stated that, when city activists complained about RDC being the only proposal, he did not agree with re-competing the project because of the resulting delay in addressing the deteriorating conditions.

Mayor Seiler recalled asking Mr. Stewart for an opinion regarding the responsiveness of the revised proposal to the RFP. When the issue came back onto the City Commission agenda, he assumed that if staff put it back on the agenda, the issue of responsiveness must have been answered. He believes that because the proposal had been downsized, as opposed to being expanded, it could still be awarded under the RFP. He also believes that if they substantially reduced costs, it remains responsive. Mayor Seiler stated that he has always been concerned about how long the process was taking, which resulted in the loss of additional events to other local swimming facilities like Coral Springs. He also stated that he required looking for cost reductions on all items. Parking was a particular concern: he wanted more parking and lower cost.

Mayor Seiler did not recall any discussion of compliance with statutory design-build requirements during the process of reviewing the RDC proposal. He was aware that § 287.055 applies to design-build, but was under the impression that this contract and proposal was not
for a design-build as covered by the statute. He added that no concerns regarding the application of the statute were raised by Mr. Stewart or City staff.

Mayor Seiler was aware of the history of RDC with the City, but pointed out it occurred nearly a decade ago, long before his time with the City. OIG staff reviewed the audit provisions in the contract with Mayor Seiler and identified the audit exclusion discussed in this report. He stated that he had not been aware that the exclusion had been inserted into the contract. He also stated that he does not agree with excluding any costs from audit and if such were the case, it should not have been done. He further stated that the City’s ability to audit is important and should not be restricted.

2. Interviews of City Manager Lee R. Feldman

Mr. Feldman began working as the City Manager in June 2011, after the procurement of the Aquatic Complex was underway. He inherited an ongoing process that he stated he wasn’t particularly pleased with and might have initiated differently. However, the physical condition of the current facility is very poor and he felt it was essential that the City act expeditiously to address the condition of the property. He stated that some of the bathrooms had to be closed and ceiling panels are falling down. In addition, the bleachers had been condemned and, due to the condition of the facility, some competitive swimming events were moving elsewhere.

Mr. Feldman stated that shortly after his arrival at the City, staff was asked to come up with an alternative, lower-cost design, because the City Commission was not going to approve the $76 million RDC proposal. They presented their concept, which included putting one of the pools on top of the parking garage. At the same time, RDC revised its design and reduced costs. He stated that City Commissioners liked the revised RDC proposal and decided to move forward with RDC. There was no interest in the City to delay the project any further. He never believed that the swimming pool would be self-sustaining. The City staff’s concept was that a hotel and restaurants on the site would help subsidize operations of the Aquatic Complex. Mr. Feldman stated that staff projected that the new parking garage would generate some revenue beyond the cost of servicing the bond interest, which would partially address the annual deficit.

Mr. Feldman stated that he was responsible for requiring an offer with a GMP. He felt this offered significant protection for the City. He explained that RDC had 90 days after the contract was awarded to conduct a due diligence inspection and to confirm its GMP.

During his first interview Mr. Feldman, when asked by the OIG to describe the type of contract and the developer’s risk, stated “I think it’s more a design/build contract…We’ve used a design/build contract, but it wasn’t a design/build under the statute.” He explained that this was the first phase of a two-part process. The “development” would be conducted in the second phase with the development of the property across the street from DC Alexander Park, currently a municipal parking lot between A1A and Seabreeze Avenue. During a subsequent interview, Mr. Feldman stated that he signed a “Developers Agreement,” not a design-build
contract. He also stated that it was not certain what the “second phase” would consist of, due to legal complications in leasing out the City’s property. He did acknowledge that the contract with RDC would not produce a long-term lease of city property.

Mr. Feldman stated his belief that the fact that the contract has a guaranteed maximum price is an indication that it is a developer’s agreement with developer’s risk, and not just a design/build contract. He admitted that a design criteria package was not prepared by the City. Instead, he stated that the City used the developer’s proposal essentially as a design criteria package. The Design Fee in the contract is what RDC proposed. In Mr. Feldman’s opinion, it was “a little high,” but not out of line with design costs for other City contracts.

Mr. Feldman stated that the City really did not negotiate the specific cost points of the GMP because they would later be verified by a cost estimator. He also stated that he was the principal negotiator on what he called a technical team, consisting of city attorneys, staff, and the City Auditor. He prepared the original contract based on an old design/build contract that he had from previous employment elsewhere.

Mr. Feldman stated that he thought the design fees were reasonable. In July 2012, the City Auditor told him that he had not had enough time to review the agreement and it was removed from the agenda. Before the agreement was again placed on the agenda in September, RDC revised its GMP, reducing the Developer’s Fee and increasing and adding other costs, resulting in the same GMP. Mr. Feldman stated that there was a perception that the City Commission would not approve a contract with a Developer’s Fee that was over 20%. The revised agreement created a contingency, which he described as three “buckets of funds” for the developer: (1) unforeseen changes by the developer; (2) owner’s desired changes; and (3) cost savings to be split 75/25. Despite the changes, the GMP remained the same, but Mr. Feldman argued that the project met the City’s budgetary needs. He conceded that negotiating with a single proposer “was not the best process in the world.” However, he felt the City was protected by the design review at the 90% design phase, which will allow a cost estimator to review the plans and ensure that the costs were appropriate.

When asked about the audit exemption contained in the final contract, Mr. Feldman responded that he had no specific recollection of why it was included, but that there are also conditions in the contract that are clearly “one-sided” for the City. He cited an example which limited the City’s liability to $1000. He also opined that most contractors and their attorneys don’t read the full contracts. Ultimately, he concluded that the contract is fair and that RDC has assumed a huge risk, which justified the compensation it would receive.

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12 Section 287.055(9)(c) states, “[m]unicipalities… shall award design-build contracts by the use of a competitive proposal selection process as described in this subsection, or by the use of a qualifications-based selection process pursuant to subsections (3), (4), and (5) for entering into a contract whereby the selected firm will, subsequent to competitive negotiations, establish a guaranteed maximum price and guaranteed completion date.” (Emphasis added).
Mr. Feldman stated that the RFP was issued by the Business Enterprises Office, which no longer exists. The procurement function is now centralized under the Procurement Services Division. The Public Works Department will manage the construction contract. He also stated that the City ordinances dealing with procurement have been amended about four times in the past year as part of a consolidation effort.

3. Interview of City Attorney Harry Stewart

Mr. Stewart, at Mr. Feldman’s request, appeared at Mr. Feldman’s second interview with the OIG. During that interview, Mr. Stewart volunteered some information in response to the OIG’s questions. He did the same during the interview of Mayor Seiler. Mr. Stewart stated that to ensure compliance with law, including § 287.055, his office reviews all RFPs over $100,000 before they are issued publicly. Any solicitation that the City Commission must approve before it is released also goes to his office for review. Mr. Stewart also stated that final contracts are reviewed for legal sufficiency, but there is no specific final or intermediate review designed to assess responsiveness or compliance with statutes such as § 287.055.

Mr. Stewart stated that he did not think that the question of compliance with statutory design-build requirements ever came up during consideration of the RDC proposal. He admitted that he did not raise design-build compliance as a concern. The City had issued an RFP for a “development agreement,” not for a design-build. He offered his opinion that the contract for the design and construction of the Aquatic Center is not a design-build contract covered by § 287.055. When questioned about the definition of design-build contracts, he stated that the RDC contract is “design-build-like.” Mr. Stewart admitted, though, that the RFP did not contain all the elements of a design criteria package required by the statute.

Mr. Stewart stated that there were some obstacles to proceeding with development as originally envisioned. He also stated that the City had determined that a long-term lease could not be awarded on City-owned property as part of the 2009 RFP process. The City Charter requires that it be bid out separately.

With regard to Mayor Seiler’s request that he determine if the revised proposal was responsive to the RFP, Mr. Stewart admitted that he did not provide the requested opinion. He stated that instead, he told City staff that they should send that question back to the committee that evaluated the proposal to answer. When asked why the City did not issue a new RFP, he replied that the City always takes into consideration costs and exigencies.
RESPONSE TO THE PRELIMINARY REPORT AND OIG COMMENT

In accordance with Section 12.01(D)(2)(a) of the Charter of Broward County, a preliminary version of this report was provided to the City of Fort Lauderdale for its discretionary written response. The OIG received a response from the City, which is attached and incorporated herein as Appendix A. We appreciate receiving the response.

Response of the City of Fort Lauderdale

In its response, the City concluded that the “recommendations of the OIG are well received by the City and are consistent with the efforts already underway by the City to continuously improve processes.” However, the City continues to disagree with the OIG’s determination that the contract is a design-build contract subject to the provisions of § 287.055. The City does not cite to any exceptions or alternative definitions in the law. Thus, the OIG stands by its findings, described in detail in this report, that the contract comports with the succinct definition contained in the statute. Although it is apparent that the initial intention of the City may not have been to enter into a design-build contract subject to § 287.055, the statute makes no exception for projects that evolve into a design-build as opposed to those that are initially contemplated in that manner.

The City now also contends, for the first time, that it was in compliance with a second option offered by § 287.055(9)(c). This subsection of the statute provides municipalities with two options for the proper selection of a firm for a design-build contract: 1) a competitive proposal selection, or 2) a qualifications-based selection which requires compliance with § 287.055(3), (4) and (5). The body of this report addresses the first option, a competitive proposal selection, because the City advertised a request for proposals (as opposed to a request for qualifications or a review of previously qualified firms) and the City officials, when interviewed, all indicated that the City’s intention was to elicit competitive proposals.

However, the City now states that “the process employed by the City meets the requirements set out in Florida Statute § 287.055(9)(c) through its compliance with the procedures set forth in § 287.055(3), (4) and (5).” To be clear, the information reviewed during the investigation clearly demonstrates that the City was not in compliance with either option under § 287.055(9)(c). Without discussing the many distinctions between a proper qualifications-based selection process and what was done in this instance, both options require discussions with no fewer than three firms. As clearly established during this investigation, the City entered into discussions with only one vendor.

More importantly, if a municipality genuinely intended to comply with the qualifications-based selection process set forth in § 287.055(3), (4) and (5), it would be prohibited from requesting prices in its solicitation. In this case, the City’s initial solicitation required interested vendors to submit a proposed cost. In fact, the RFP stated that 30% of the evaluation would be based on “Finance Plan,

13 See footnote 12. Subsections (3), (4) and (5) do not generally apply to design-build contracts, but a municipality may elect that process instead of the competitive proposal process described in subsection (9)(c).
14 Section 287.055(4)(a) requires that the governmental entity “shall conduct discussions with, and may require public presentations by, no fewer than three firms regarding their qualifications.”
Funding Alternatives, Break Even Analysis and Estimated Cost to City.” The law explicitly mandates that price cannot be considered nor requested prior to the selection of the best qualified vendor.15

Finally, Mr. Stewart admitted to the OIG that § 287.055 was never considered in relation to this contract. He stated that the contract was never reviewed for compliance with the statute. Thus, the City’s after-the-fact attempt to shoehorn the facts into some semblance of compliance with the statute is disconcerting. The OIG is concerned that the selective reading of the statute displayed in the City’s response, which ignores explicit requirements described above, among others, indicates a continuing misapprehension of the statute.

CONCLUSIONS AND RECOMMENDATIONS

The OIG investigation revealed that the City, motivated by the rapidly deteriorating condition of the existing facility, fashioned a solicitation that misled and confused the prospective proposers. Ironically, the confusion caused by the vague solicitation likely resulted in the three-year long negotiation process and the additional deterioration of the facility that ensued. The City’s error was compounded by a deficient legal review process that failed to identify the violation of Florida Statute § 287.055, despite public meetings where the City Manager and the proposer explicitly acknowledged the intent of the City to enter into a design-build agreement. Even when the Commission independently identified issues and asked for legal guidance, such as in the case of the Mayor’s request for an assessment of responsiveness, the City Attorney and City administration failed to follow through with any review of the facts or legal determinations.

Ultimately, the City contracted for design-build services in a manner that did not comply with Florida law. The preparation of a design criteria package, including a cost estimate for the project and clearly defined specifications, would have eliminated confusion in relation to the redevelopment. Instead, without benefit of its own cost estimate, the City agreed to a GMP of $32,437,434 for a design-build scope of work that is markedly different from the “Development Agreement” specified in the RFP, and the original $76 million public-private development project that was proposed. The City’s lack of care is also evident in the terms of the final contract. The vulnerability created when the City accepted the exclusion of reimbursable costs from audit and failed to incorporate desired language reveals a troubling lack of due diligence.

Due to the City’s 2012 consolidation of public works procurements under the Procurement Division, the OIG believes the likelihood of repetition of the improprieties discussed in this report is reduced.

15 Section 287.055(4)(b) states, “[t]he agency may request, accept, and consider proposals for the compensation to be paid under the contract only during competitive negotiations under subsection (5).” (Emphasis added). This section of the statute is relied upon by the Attorney General in AGO 2010-20 which, in reference to the process contained in subsections (3), (4) and (5), states, “Section 287.055. . . . describes a process of qualification-based selection whereby professional services firms are selected in order of preference based on their ability to perform the required services. Following competitive selection, a contract is negotiated for professional services at a fair, competitive, and reasonable price. Nothing in section 287.055, Florida Statutes, authorizes an agency to include compensation rates as a factor in the initial consideration and selection of a firm to provide professional services.”
However, circumstances may again arise when the City feels pressure to bypass proper procurement procedures and thorough legal review for the sake of expediency. Regardless of the circumstances, a solicitation should effectively communicate the government’s most accurate and current description of its requirements and terms for the contract. Confusion and gross inefficiency ensue if interested parties are forced to guess at the government’s true intentions in every solicitation. Companies that specialize in a particular kind of work might find themselves compelled to submit bids on every public construction solicitation on the chance that the requirements might change toward their specialty.

The OIG remains concerned about the former City Attorney’s admission that the final contract was not reviewed for compliance with Florida Statute § 287.055, essentially because the City did not originally intend to award a design-build contract. The City’s response to the preliminary report persists in ignoring the explicit requirements of the statute and does not inspire confidence in the City’s ability to properly apply the statute in future contracts. Thus, the OIG will continue to monitor future solicitations involving design-build projects and attempt to work with City to ensure proper application of the statute.

During interviews with City officials and in the preliminary version of this report the OIG recommended that the City incorporate a more comprehensive legal review of solicitations and proposed contracts. Such a review should not be limited by the original intentions of the City, but should objectively assess the documents on the basis of the finalized terms. The OIG also recommended that the City attempt to reach an agreement with RDC that would address costs shielded from audit and language which was omitted from the final contract. The City has indicated that it has already acted on the recommendations of the OIG, including incorporating a more comprehensive legal review of its procurement process, and entering into a contract amendment with RDC that will enable the City to properly audit the project. Accordingly, the OIG will require no additional action at this time.
From: Harry Stewart  
Sent: Monday, December 05, 2011 9:34 AM  
To: John Herbst  
Subject: RE: FLAC

I referred the matter to the management team to determine a factual question first, i.e. whether the new proposal is responsive to the original RFP. If it is, we are good to go. If not, it should be rebid.

From: John Herbst  
Sent: Friday, December 02, 2011 1:08 PM  
To: Harry Stewart  
Subject: FLAC

I was reading the minutes of the 10/4/11 conference meeting. On page 12, Jack asked for a legal opinion about whether the reduced RDC proposal is responsive to the RFP. Did you ever put anything out? I can’t recall.

John Herbst, CPA, CGFO  
City Auditor  
City of Fort Lauderdale  
Ph: (954) 828-4350  
E-Mail: jherbst@fortlauderdale.gov

WHEN YOU DON'T ASK, YOU GET WHAT IS, NOT WHAT COULD BE

Under Florida law, most e-mail messages to or from City of Fort Lauderdale employees or officials are public records, available to any person upon request, absent an exemption. Therefore, any e-mail message to or from the City, inclusive of e-mail addresses contained therein, may be subject to public disclosure.
OIG 13-012

EXHIBIT 2
Hi John, my calendar is pretty full for the day. I would suggest sometime next week. Attached, is my calendar for next week. You can e-mail Gina Rizzuti, my admin aide, to schedule a meeting.

However, in regards to your question below, I was not directed to make a determination of responsiveness of RDC’s revised proposal. As the minutes point out, the City Commission requested that the City Attorney make that recommendation.

Kirk W. Buffington, CPP, C.P.M., MBA
Deputy Director of Finance
City of Fort Lauderdale | Department of Finance
V: 954.828.5144 | F: 954.828.5576
E: kbuffington@fortlauderdale.gov

PLEASE NOTE: Florida has a very broad public records law. Most written communications to or from city officials regarding City business are public records available to the public and media upon request. Your e-mail communications may be subject to public disclosure.

May I come to your office today to discuss?

John F. Lord
Contract Oversight Specialist
Broward Office of the Inspector General
954 357 7812
www.browardig.org
The minutes of the October 4, 2011, City Commission Conference Meeting contain the following:

The City Attorney pointed out the question of whether this was listed on the agenda and the status of the RFP because this is a substitute. Mayor Seiler pointed out that the proposal is a reduction of the scope, not an expansion. He asked for the City Attorney to make a recommendation at the next meeting whether the proposal is responsive to the RFP. At the same time, he requested staff to work on the issues raised. Commissioner Rogers wanted staff to work on the four items highlighted as next steps in Exhibit 2 to the Commission Agenda Report, that being, funding sources, construction costs, land leases and revenue sources and financial engineering and debt service management. Commissioner Rodstrom believed that the Commission decides whether something is a substantial change. Both Commissioners Rogers and Roberts indicated they would like to move forward with this proposal if it is legally possible.

Mr. Blosser advised that RDC has worked diligently to make sure every component in the RFP has been included. RDC does not want to work through the rest of the details without knowing they are compliant with the RFP. Mayor Seiler wanted Mr. Blosser to meet with the City Attorney. Mr. Blosser pointed out that issues raised on the revenue side are operational issues for the City. RDC has stayed within the budget. There is room in the budget to increase the stadium and other amenities including the parking. Pending the legal opinion, the City Manager indicated that staff will be working with RDC on the next steps or the due diligence stage.

The full text of the minutes for that meeting are attached.

Question: Do you recall your office and/or the committee that reviewed the original RDC proposal being asked to decide whether RDC's revised (October 2011) proposal was responsive to the RFP?

If you prefer to respond orally, feel free to call me.

Thank you.

John F. Lord
Contract Oversight Specialist
Broward Office of the Inspector General
954 357 7812
www.browardig.org
From: Kirk Buffington [mailto:KBL .gton@fortlauderdale.gov]
Sent: Monday, December 03, 2012 3:58PM
To: Lord, John
Subject: RE: Fort Lauderdale Aquatic Center

John, attached is what I've been provided with from the City Attorney's office. Hope this helps.

Kirk W. Buffington, CPPO, C.P.M. MBA
Deputy Director of Finance
City of Fort Lauderdale | Department of Finance
V: 954.828.5144 | F: 954.828.5576
E: kbuffington@fortlauderdale.gov

PLEASE NOTE: Florida has a very broad public records law. Most written communications to or from city officials regarding City business are public records available to the public and media upon request. Your e-mail communications may be subject to public disclosure.

From: Lord, John [mailto:JLORD@broward.org]
Sent: Wednesday, November 28, 2012 2:47PM
To: Kirk Buffington
Subject: Fort Lauderdale Aquatic Center

Dear Mr. Buffington:

Thank you for your offer to assist me in locating the GMP Schedule 3.10.2 for the Developer's Agreement that was on the July 10, 2012 City Commission Meeting Agenda. If you find it convenient, feel free to forward this email to the person who can provide the document and he/she can just reply with the document attached.

John F. Lord
Contract Oversight Specialist
Broward Office of the Inspector General
954 357 7812
www.browardig.org

Under Florida law, most e-mail messages to or from Broward County employees or officials are public records, available to any person upon request, absent an exemption. Therefore, any e-mail message to or from the County, inclusive of e-mail addresses contained therein, may be subject to public disclosure.

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to or from the County, inclus

of e-mail addresses contained therin may be subject to public
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**50 Meter Pool Total Cost:** $2,508,220.00

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**Dive Well Total Cost:** $1,658,048.54

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**Spa Total Cost:** $185,092.00

**Total Spa Cost:** $185,092.00

**Refurbish 50 Meter Pool**

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**Total Spa Cost:** $185,092.00

**Total Site Work Total Cost:** $2,472,820.00

**General Conditions Total Cost:** $1,717,305.00

**50 Meter Competition Pool**

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**50 Meter Pool Total Cost:** $2,508,220.00

**Total Site Work Total Cost:** $2,472,820.00

**Budget Estimation:**
- Fort Lauderdale Aquatic Center, GMP1 - 12-2203
- Budget Estimate - August 2012
- EXHIBIT 3
- Page 2 of 6
City of Fort Lauderdale’s Response
to
RE: Misconduct by the City of Fort Lauderdale in the Award of the Contract for the Fort Lauderdale Aquatic Complex

The Broward Office of the Inspector General (OIG) has issued a preliminary report wherein they allege misconduct by the City of Fort Lauderdale (“City”) in the award of the contract for the Fort Lauderdale Aquatic Complex. First, it is important to recognize the OIG undertook the review of this matter due to an allegation that the City was engaging in “favoritism” in the award of the project. The OIG report did not substantiate any allegation of favoritism. The OIG’s criticism of the City’s procurement process appears to be based upon a subsequent review of the documentation. The City believes that this criticism is both, unwarranted and unsupported.

The OIG contends that the City’s Developer’s Agreement with Recreational Design & Construction, Inc. (RDC) is a Design-Build Contract subject to the provisions of the Consultant’s Competitive Negotiation Act (Florida Statutes §287.055, et. seq.). The City strongly disagrees with that conclusion and has stated to the OIG that the project, over time, was reduced in scope due to the rapidly deteriorating condition of the facility, an opportunity to save time and money, as well as to maximize efficiencies.

The Request for Proposal for this project was issued in November 2009 and RDC was the sole respondent in March 2010. At no less than seven City Commission Conference and Regular meetings, as well as numerous advisory board meetings, the City publicly reviewed and negotiated with RDC regarding the cost and scope of the work to be performed. It is important to note that extensive public input and comments were received and considered at all steps of the process. Ultimately, due to the deteriorating condition of the facility, time and funding constraints, as well as concerns with developmental impacts to traffic, it was agreed by the parties to limit the project to the renovation of the current facility (to include the construction of a parking garage complex) and the development of an adjacent parcel for commercial use. It is important to note that no action has been taken at this time with regard to development of the adjacent parcel. It is the Developer’s Agreement for the reduced scope of work that the OIG believes violates Florida Statute. Again, the City strongly disagrees with this conclusion.
However, even if the OIG is correct and the Developer’s Agreement is a Design-Build Contract, the City believes that the OIG does not correctly apply the applicable statute. Florida Statute §287.055(9) governs the applicability of the Consultant’s Competitive Negotiation Act. Specifically, Florida Statute §287.055(9)(c) provides:

"Except as otherwise provided in s. 337.11(7), the Department of Management Services shall adopt rules for the award of design-build contracts to be followed by state agencies. Each other agency must adopt rules or ordinances for the award of design-build contracts. Municipalities, political subdivisions, school districts, and school boards shall award design-build contracts by the use of a competitive proposal selection process as described in this subsection, or by the use of a qualifications-based selection process pursuant to subsections (3), (4), and (5) for entering into a contract whereby the selected firm will, subsequent to competitive negotiations, establish a guaranteed maximum price and guaranteed completion date. If the procuring agency elects the option of qualifications-based selection, during the selection of the design-build firm the procuring agency shall employ or retain a licensed design professional appropriate to the project to serve as the agency’s representative. Procedures for the use of a competitive proposal selection process must include as a minimum the following:
1. The preparation of a design criteria package for the design and construction of the public construction project.
2. The qualification and selection of no fewer than three design-build firms as the most qualified, based on the qualifications, availability, and past work of the firms, including the partners or members thereof.
3. The criteria, procedures, and standards for the evaluation of design-build contract proposals or bids, based on price, technical, and design aspects of the public construction project, weighted for the project.
4. The solicitation of competitive proposals, pursuant to a design criteria package, from those qualified design-build firms and the evaluation of the responses or bids submitted by those firms based on the evaluation criteria and procedures established prior to the solicitation of competitive proposals.
5. For consultation with the employed or retained design criteria professional concerning the evaluation of the responses or bids submitted by the design-build firms, the supervision or approval by the agency of the detailed working drawings of the project; and for evaluation of the compliance of the project construction with the design criteria package by the design criteria professional.
6. In the case of public emergencies, for the agency head to declare an emergency and authorize negotiations with the best qualified design-build firm available at that time. [emphasis added]"

However, subsections (3), (4), and (5) of the Consultant’s Competitive Negotiation Act provides for Public Announcement and Qualifications Procedures, Competitive Selection and Competitive Negotiation, respectively. The City believes it is undisputed that RFP #105-10408 was publicly noticed; competitively selected; and, competitively negotiated. The ultimate Developer’s Agreement entered into with RDC contains both, a guaranteed maximum price and a guaranteed completion date. Therefore, it is the City’s contention that if it is construed by the OIG that the Developer’s Agreement is a Design-Build Contract, the process employed by the City meets the requirements set out in Florida Statute §287.055(9)(c) through its compliance with the procedures set forth in §287.055(3),(4) and (5).
Additionally, the OIG specifically makes two recommendations. The City responds accordingly.

**Recommendation 1.** “In addition to a more effective drafting of solicitations, the OIG recommends that the City incorporate a more comprehensive legal review of solicitations and proposed contracts.”

The City’s current procurement function is now centralized under the Procurement Services Division of the Finance Department. Additionally, as the OIG noted, the City has “independently undertaken procurement reforms which should generally strengthen the procurement process.”

As it relates to the City incorporating a more comprehensive legal review of solicitations, the Procurement Services Division will work closely with the City Attorney’s Office to review all solicitations and proposed contracts throughout the entire process.

**Recommendation 2.** “The OIG recommends that the City attempt to reach an agreement with RDC that would address the concerns detailed in the report.

On May 7, 2013 (prior to the receipt of the Preliminary OIG Report) the City and RDC entered into a First Amendment to Developer’s Agreement which included:

- An amendment to Section 3.10.8 of the Developer’s Agreement to allow for the audit of the General Conditions costs;

- An amendment to Section 3.120.2 to clarify that when the Construction Documents are 90% complete, the City shall utilize the services of an independent cost estimator to verify the final Guaranteed Maximum Price (GMP). The City Manager shall submit to the City Commission for review and approval the 90% Construction Documents and the final GMP, not to exceed $32,437,434. If the City Commission does not approve the 90% Construction Documents and the final GMP, the City Commission reserves the right to terminate the Developer’s Agreement.

The City Commission, the City Manager and the City Attorney do not take lightly the trust placed in to them to create and administer a procurement system based upon transparency, integrity and fairness. In fact, the citizens amended the City’s Charter in 2004 to create an office of City Auditor, whose duties include, among other things, to review procurement practices. The Administration of the City has worked and continues to work closely with the City Auditor to improve the procurement process. During this specific procurement, review by the City Auditor occurred during all phases. The
recommendations of the OIG are well received by the City and are consistent with the efforts already underway by the City to continuously improve processes.

Submitted by:
John P. "Jack" Seiler
Mayor

Lee R. Feldman, ICMA-CM
City Manager

July 22, 2013