

**FLORIDA PROCUREMENT: INVITATION TO NEGOTIATE - THE EQUIVALENT
OF THE FEDERAL REQUEST FOR PROPOSAL**

PRESENTED AT THE SECOND ANNUAL STATE AND LOCAL PROCUREMENT SYMPOSIUM

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I.

Introduction

In Florida, there are three general competitive procurement methods for the acquisition of goods and services: (1) sealed bidding or invitations to bid; (2) sealed proposals or request for proposals; and (3) sealed replies. *See* Fla. Stat. §§ 287.57(1)-(3) (2006).¹ This paper explores the third method, competitive sealed replies or Invitations to Negotiate (“ITN”), focusing on the differences between an ITN and an RFP under Florida law and comparing an ITN’s characteristics to an RFP under federal law. As discussed below, an ITN in Florida is more like an RFP under federal law, but an ITN provides the Government with more discretion than a Federal RFP.

¹ Chapter 287, regarding procurement, only directly applies to procurements involving units of the Executive Branch of the government, such as state officers, departments, boards, commissions, and divisions, but not to local procurements, such as Counties and Cities, although most have similar procedures by local ordinance. *See* Fla. Stat. § 287.012(1) (2006).

II.

The Invitation to Negotiate (“ITN”)

A.

ITN Defined

Under Florida law, an “Invitation to Negotiate” means a written solicitation for competitive sealed replies to select one or more vendors with which to commence negotiations for the procurement of commodities or contractual services. Fla. Stat. § 287.012 (17) (2006). As discussed below, the ITN as procurement method became necessary because under Florida law, agencies are not permitted to engage in discussions or negotiations with vendors when using a Request for Proposals, which means a written solicitation for competitive sealed proposals. Fla. Stat. § 287.012 (22) (2006).² In this respect, the Florida RFP resembles a federal RFP where the government makes an award without discussions.

B.

Other Procurements Under Florida Law

Before we consider the appropriate circumstances for the use of an ITN, a review of the use of an ITB and RFP is helpful.

² The third vehicle, “Invitation to bid,” means a written solicitation for competitive sealed bids. Fla. Stat. § 287.012(16) (2006). Florida also condones the use of less formal competitive procurements, under appropriate circumstances, including requests for information and requests for quote. *See* Fla. Stat. §§ 287.012(21) & (23) (2006)

1.

The ITB

Under Florida law, an agency's initial procurement method of choice should be an invitation for bid ("ITB"). Fla. Stat. § 287.057(1)(a) (2006). As in federal procurement law, the government is to use an ITB when it is capable of specifically defining the scope of work for which a contractual service is required or when it is capable of establishing precise specifications defining the actual commodity or group of commodities required. Fla. Stat. § 287.012(16) (2006). Similarly, the government is to award a contract to the responsible vendor that submits the lowest responsive bid, using only the criteria in the ITB. *Id.* at § 287.057(1)(b).

2.

The RFP

The government may use an RFP when it first determines in writing that it is not practicable for the agency to specifically define the scope of work for which the commodity, group of commodities, or contractual service is required and when the agency is requesting that a responsible vendor propose a commodity, group of commodities, or contractual service to meet the specifications of the solicitation document. Fla. Stat. § 287.012 (22) (2006). The RFP must include the criteria, which shall include, but need not be limited to, price, to be used in determining the acceptability of proposals, and the government must indicate the relative importance of price and other evaluation criteria. Fla. Stat. § 287.057(2)(a) (2006). The government must award the contract to the responsible and responsive vendor whose proposal is determined in writing to be the most advantageous to the state, taking into consideration the price and

the other criteria set forth in the request for proposals. *Id.* at § 287.057(2)(b) (2006).

Like an ITB, Florida law does not permit a vendor to revise its proposal after initial submissions. It is in this manner that an RFP under Florida law is very different from an RFP under federal law, which permits discussions or negotiations so as to maximize the government's ability to obtain the best value. *See* FAR Part 15 (Contracting By Negotiation). Over time, agencies frequently attempted to stretch the boundaries of the appropriate use of an RFP by permitting vendors to revise the terms of their proposals.

Courts, however, properly restricted Florida's version of the RFP to the vendors' original proposals, concluding that an RFP did not permit an agency to negotiate substantive terms of a contract with the highest ranked vendor.³ This tension reached its pinnacle in *Florida Dep't. of Lottery v. GTECH Corp.*, 816 So.2d 648 (Fla. Dist. Ct. App. 2001). In *GTECH*, the agency had issued an RFP, but stated that it would "negotiate a contract with the most highly qualified respondent." While it is doubtful that the use of negotiation, even if provided for in the RFP, was appropriate under Florida law within an RFP, such negotiation had become more of the norm rather than the exception. *GTECH*, which had prevailed on summary judgment, challenged the action in court contending that the negotiated contract included items not in the RFP and that the awardee could not have provided those items at its offered price, which served as the primary basis to give it a higher ranking. The appellate court agreed, holding that the agency could not use the

³ *See also Miami Marinas Assoc., Inc. v. City of Miami*, 408 So. 2d 615 (Fla. Dist. Ct. App. 1982), *rev. denied*, 418 So. 2d 1278 (Fla. 1982) (reversing decision of trial court action that had denied bid protest, holding that agency could not use negotiations when bidding required); *Prison Health Services, Inc. v. Department of Corrections*, DOAH Case Nos. 01-0450, 01-0452, & 01-0453 (Fla. Div. Admin. Hrgs. May 4, 2001) (In a RFP, the agency's proposed award of contract by negotiation was improper).

RFP process for ranking purposes only and then negotiate a contract with the successful bidder that materially differed from its original proposal.⁴

3.

Origins of ITN

This line of cases restricting or prohibiting negotiation within an RFP led to the enactment of a statutory direction for such negotiation. Florida officially added the option of competitive negotiation in 2001. *See* Laws of Florida, Ch. 2001-278. Despite this lack of statutory authority, however, the Department of Management Services (Florida's equivalent of the General Services Administration) has had a rule authorizing ITNs for years for executive agencies. Fla. Admin. Code R. 60A-1.001(2) (defining an invitation to negotiate as a “[c]ompetitive solicitation used when an Invitation to Bid or Request for Proposal is not practicable.”); *see also Medimpact Health Care Sys., Inc. v. Department of Mgmt. Servs.*, 2000 WL 1754848, *5 (Fla. Div. Admin. Hrgs. Nov. 21, 2000) (“Invitations to negotiate do not enjoy the status of specific statutory recognition.”)

4.

ITN Reserved for Complex Procurements in Florida

The government should only use an ITN in complex, sophisticated procurements not otherwise suitable for Invitations to Bid (“ITB”) or Requests for Proposal (“RFP”). The Invitation to Negotiate is used when the agency determines that negotiations may be necessary for the state to receive the best value, which means the highest overall value to the state based on objective factors that include, but are not limited to, price, quality,

⁴ A dissenting judge would have denied GTECH's legal challenge because the RFP's terms clearly contemplated such negotiation, even if improper, and GTECH did not file a timely protest to such terms.

design, and workmanship. Fla. Stat. § 287.012(4) (2006). The contract file must contain a short plain statement that explains the basis for vendor selection and that sets forth the vendor's deliverables and price, pursuant to the contract, with an explanation of how these deliverables and price provide the best value to the state.

If one or more of the following criteria apply, then an ITN is probably the appropriate purchasing method:

- The government cannot accurately and completely define the scope of work for the contract, which often occurs for acquisitions of rapidly changing technology, outsourcing, or complex services;
- The goods or services can be provided in several different ways, any of which could be acceptable, which occurs for acquisition of emerging technologies or complex services;
- Contractor qualifications and the quality of the goods or services to be delivered can be considered more important than the contract price;
- The responses may contain innovative solutions that differ from what the government may have requested and this process allows for those types of alternatives to be considered; and
- The responses may contain a different level of goods or services than that requested, requiring negotiation to reduce price or services to match available contract funds or increase price to meet a higher level.

Before it issues an ITN, the government must determine in writing that the use of an ITB or a RFP will not result in the best value to the government. The government's written determination must specify the reasons that explain why negotiation may be

necessary in order for the government to achieve the best value and must be approved in writing by the agency head or his or her designee prior to the advertisement of an ITN.⁵

5.

The ITN Permits Negotiation

Like an RFP, the government must evaluate and rank responsive replies against the evaluation criteria set forth in the ITN. Based on those rankings, the Government then selects one or more vendors with which to commence negotiations. There are two general methods of negotiation for determining which vendor represents the best value to the government in ITNs, sequential or simultaneous negotiations. *See* Fla. Stat. § 287.057(17)(b) (2006) (provides standards for negotiators in certain value procurements); Fla. Stat. § 287.0731 (creation of team to specialize in the negotiation of information technology procurement under an ITN). These negotiation methods, however, are not mandated by statute or regulation, and the government may use any other negotiation technique

In the first method, sequential negotiations, the agency may consider the offerors' statement of qualifications without regard to prices, it then may select the most qualified offerors as finalists. Next, the agency may conduct interviews with all of the finalists, resulting in a ranking of offerors without regard to price. The agency then commences negotiations with the top ranked offeror as to the scope of work and price. If unable to negotiate a contract with the top ranked offeror, the agency then may commence

⁵ A practice note, before responding to an ITN, a vendor should make a public records request, under Chapter 119, Florida Statutes, for this written determination because it may provide insight into the government's goals and desires for the procurement.

negotiations with the successive ranked offerors, and continue until an agreement reached.

In the second method, simultaneous negotiations, the agency considers the offerors' statement of qualifications and prices, but subject to future negotiation. The agency then selects a group of most qualified offerors as finalists and commences simultaneous negotiations with each regarding the scope of work and price, and awards the contract to the offeror representing the best value to the government.

6.

Florida's ITN Does Not Have Limits or Requirements for Negotiation

Unlike federal procurement law once discussions are going to occur, there are no rules that require negotiations with each offeror in the competitive range. *See* FAR 15.306(d)(1). Likewise, there are no standards requiring Florida negotiators to advise vendors of their significant weaknesses, deficiencies, and other aspects of their proposals such as cost, price, technical approach, past performance, and terms and conditions that could be altered or explained to materially enhance their potential for award. *See* FAR 15.306(d)(3).

Likewise, Florida law does not include any prohibition as to the types of exchanges that may occur within negotiations, such as technical leveling or auctioning. For instance, there is no clear prohibition that prohibits Government personnel from engaging in conduct that favors one offeror over another, reveals an offeror's technical solutions to another offeror, reveals an offeror's price without the offeror's permission, or reveals the name of individuals providing reference information about an offeror's past performance. *See* FAR 15.306(e).

Without sufficient guidelines for negotiations, as provided under the federal system in the FAR, the possibility of abuse in Florida negotiated procurements is increased. It is the negotiation phase, where best value is determined, that gives Florida agencies the broadest discretion as compared to an RFP under either Florida law or federal law, where the award still must be based on the ranking of offerors using the criteria in the RFP. On the other hand, in an ITN, the rankings are a starting point, and the government makes the award to the Vendor who can negotiate a solution that gives the Government the best value based on any objective factor, regardless of whether such objective factors are included in the ITN. *M/A Com, Inc. v. Department of Management Services, State Technology Office*, DOAH Case No. 04-1091BID, 2004 WL 1182720 (Fla. Div. Admin. Hrgs. May 25, 2004).

In *M/A Com*, the Florida Division of Administrative Hearings, which hears bid protests (similar to the General Accountability Office, except with full discovery and hearings), provided its official imprimatur on the government's near absolute discretion within the context of determining the best value in an ITN. This case involved an ITN for an interoperability network solution for a statewide communication system for public safety users. After the initial evaluations, the agency narrowed the number of vendors from four to three. After ranking the three, the agency negotiated simultaneously with all, and then requested best and final offers (BAFOs). The negotiation team then re-ranked the vendors, but did not use the evaluation scores for the ranking instead they were used only as a check on the process, and the negotiation team did not limit itself to the evaluation criteria in the ITN in determining the best value.

In rejecting the protester's argument that the use of "undisclosed" criteria was improper, the Administrative Law Judge concluded that "[a]bsent a showing that [the government] was not engaged in an honest exercise to obtain the best value for the state, [the government] was free to use whatever criteria in the negotiation phase that it chose." *Id.*, at ¶ 32. See also *Choicepoint Government Services, Inc. v. Department of Law Enforcement*, 2006 WL 198260, DOAH Case No. 06-1466BID (Fla. Div. Admin. Hrgs. July 12, 2006) (denying bid protest challenging intended awardee's response to ITN as nonresponsive without much discussion, but noting that one of the requirements was added by an Addendum, issued during negotiations when only 2 of 8 vendors remained in the procurement).

III.

Conclusion

The ITN provides Florida government with a much needed procurement method that permits negotiations to ensure that the government obtains the best value. Unfortunately, there are insufficient enacted statutes, regulations, rules, or standards to ensure that government does not abuse the amount of discretion it possesses in an ITN to determine which vendor represents the best value. The Florida system for ITNs would be much improved if the State would enact limits on the form and process for the use of negotiations to ensure fair and open competition.