Memorandum

MIAMI-DADE COUNTY

Agenda Item No. 9(A)(2)

Date: January 22, 2009

To: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

From: George M. Burgess
County Manager

Subject: Award of Contract No. 8578-0/23: Development of Landfill Gas Utilization Systems (LFGUS) at North and South Dade Landfills

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RECOMMENDATION

It is recommended that the Board of County Commissioners approve award of this contract to Industrial Power Generating Company, LLC (INGENCO) for the development and operation of Landfill Gas Utilization Systems (LGFUS) at the North and South Dade landfills. This is a contract for 17 years. The first two years will be for construction and start up operations of a plant that converts landfill gases to energy. Revenue generated by this contract will be paid to the County for the remaining 15 years based on the amount of landfill gas generated. Ownership of the plants and associated equipment will be transferred to the County at the end of the contract term.

CONTRACT NUMBER:	8578-0/23
CONTRACT TITLE:	Development of Landfill Gas Utilization Systems at North and South Dade Landfills
TERM:	17 years (two years to construct and 15 years to operate). The contract is for 17 years as it requires two years to construct the plant; 15 years to operate and amortize the plant. Fifteen years is the industry time frame used by other landfills and was accepted by all bidders that attended the pre-bid conference.
APPROVAL TO ADVERTISE:	December 14, 2007
CONTRACT AMOUNT:	-$0 - This is a revenue-generating contract.
ESTIMATED REVENUE TO THE COUNTY:	$7,500,000 Estimated annual revenue (both landfills): $500,000 per year after construction is completed for (years three through 17).
USING/MANAGING AGENCY AND FUNDING SOURCE(S):	Department of Solid Waste Management (DSWM) – This is a revenue generating contract. DSWM is a proprietary department.
PREVIOUS CONTRACT AMOUNT:	There is no previous contract.

METHOD OF AWARD: To the responsive, responsible vendor who submitted the highest price per thousand cubic feet of landfill gas for each landfill location (North Dade and South Dade) in response to an open competitive Invitation to Bid.

VENDOR(S) RECOMMENDED FOR AWARD:

Vendor	Address	Principal	Award
Industrial Power Generating Company, LLC (INGENCO) (Non-local vendor)	2250 Dabney Rd. Richmond, VA 23230	Charles Packard	North and South Dade Landfills

VENDOR(S) NOT RECOMMENDED FOR AWARD:

Ameresco, Inc.
This vendor was deemed non-responsive
(Non-local vendor)

Greenfield Energy, LLC
This vendor was deemed non-responsive and non-responsible
(Non-local vendor)

CONTRACT MEASURES: The Small Business Enterprise Bid Preference was applied in accordance with the Ordinance.

LIVING WAGE: The Living Wage Ordinance does not apply.

USER ACCESS PROGRAM: The User Access Program does not apply to revenue-generating contracts.

LOCAL PREFERENCE: The Local Preference was applied in accordance with the Ordinance.

PERFORMANCE DATA: There are no performance issues with the recommended firm.

COMPLIANCE DATA: There are no compliance issues with the recommended firm.

CONTRACT MANAGER(S): Km! Ra, Department of Procurement Management

Lee Casey, Department of Solid Waste Management

ESTIMATED CONTRACT COMMENCEMENT DATE: Upon approval by the Board and expiration of the Mayoral veto period.

BACKGROUND

The purpose of this contract is to procure the development of Landfill Gas Utilization Systems (LFGUS) at the North Dade and South Dade Landfills for the Department of Solid Waste Management (SWM). In order for SWM to qualify for renewable energy credits, the project must be a landfill "gas to electrical energy" project. The volume of gas produced by each landfill is an act of nature based on the rate of decomposition and the type of garbage in the landfill. The County currently has a landfill gas control system that extracts and burns the landfill gas through flares, as required by the Environmental Protection Agency. This contract allows the gas to be used to generate electricity instead of burning it off through the flares.

The first two years of the contract will not produce revenue due to construction and start up of the plant. In years three through 17 of this contract, the County will receive an estimated $500,000 per year in revenue. The generating equipment, plants and any other facility provided for this landfill "gas to electrical energy" project will be owned and operated by the contractor. Ownership will be transferred in its entirety to the County at the end of the contract term. The 15-year period is the industry accepted standard timeframe for the vendor to amortize and recover his investment in the project.

Three hundred and ninety seven vendors were notified of this solicitation; 74 downloaded the bid documents, and three vendors submitted offers. The responding vendors are: Greenfield Energy, LLC (Greenfield); Ameresco, Inc.; and Industrial Power Generating Company, LLC (INGENCO). Ameresco, Inc. offered a bid for the South Dade landfill only.

Bidders were permitted to submit offers for either or both landfills. After the issuance of Addendum #8 and prior to bid opening, Greenfield submitted to the Clerk of the Board a replacement to their initial bid. In this replacement bid, they offered prices of $475.50 per thousand cubic feet (MCF) and $1,380.83 per MCF for the North and South Dade landfills, respectively. Because the prices in their replacement bid were significantly higher than those offered by the other vendors, and not within normal industry pricing, staff requested that the vendor confirm their pricing offer.

Greenfield advised that the replacement bid prices were calculated in error at per "million cubic feet" (MMCF) instead of MCF as required in the solicitation. After consultation with the County Attorney's Office (CAO), Greenfield was offered the opportunity to withdraw its bid. The bidder declined to withdraw its bid because the bidder claimed that the County should waive the price error as an irregularity. However, the CAO advised that irregularities affecting prices cannot be waived, and the vendor should confirm whether it could develop the landfills at the prices offered. Subsequently, Greenfield was deemed non-responsible as the company provided written communication (copy attached) indicating they could not honor the prices offered. Additionally, the bid required that the bidder provide evidence of a qualifying landfill "gas to energy" project they own or operate that must have been constructed <u>and</u> operational for two years. Greenfield's offer did not meet this requirement.

Ameresco, Inc. submitted their bid with 12 exceptions and stated that their bid price was calculated based on these exceptions. For example, the contract requires that the project equipment and facilities be turned over to the County after 17 years. Ameresco, Inc. stated in their exceptions that the plant and equipment would be dismantled and removed from the

County premises at the end of the contract term. In accordance with Section 1, Paragraph 1.3 (D) of the solicitation, the vendor was deemed non-responsive for taking exceptions to several clauses in the terms and conditions of the solicitation. A copy of the County Attorney's opinion regarding Ameresco Inc.'s responsiveness is attached.

Consistent with Section 1, Paragraph 1.5 (D) of the solicitation, INGENCO, the sole remaining responsive, responsible bidder, was invited to negotiate a better price with no changes or exceptions to the existing terms, conditions, and scope of work outlined in the solicitation and their proposal. INGENCO agreed and offered higher revenue per MCF as noted below:

Vendor	Location	Original offer price	Replacement offer price	Results of negotiations with sole responsive/responsible bidder
Responsive/responsible bidder				
INGENCO	North Dade	$0.30 per MCF	N/A	$0.32 per MCF
INGENCO	South Dade	$0.30 per MCF	N/A	$0.35 per MCF
Non-responsive bidder				
Ameresco	South Dade	$0.50 per MCF	N/A	N/A
Non-responsive/responsible bidder				
Greenfield	North Dade	$0.90 per MCF	$475.50 per MCF	N/A
Greenfield	South Dade	$0.90 per MCF	$1,380.83 per MCF	N/A

*MCF = thousand cubic feet

On March 28, 2008, a recommendation to award the contract to INGENCO was posted with the Clerk of the Board. This action was a staff error, since the recommendation was made based on the County receiving annual estimated revenue of $500,000 for a single year, instead of each of the 15 years as outlined. Upon further review with the CAO, a letter rescinding this award recommendation was posted with the Clerk of the Board on May 13, 2008 since this contract requires award by the Board. The contract is estimated to produce annual revenues of $500,000. The County will receive revenue in the last 15 of the 17 year terms. The estimated total revenue is $7,500,000 over the 15 year period. A copy of the rescission letter was transmitted to INGENCO, Greenfield Energy, and Ameresco explaining why the original recommendation was rescinded, re-instating the Cone of Silence and advising that the award requires the approval of the Board.

Assistant County Manager

Memorandum

MIAMI-DADE COUNTY

Date: March 10, 2008

To: Km Ra
Procurement Contracting Officer

From: Oren Rosenthal
Assistant County Attorney

Subject: Responsiveness of Bids – Solicitation No. 8578-0/23 Landfill Gas to Energy Project

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You have asked this office if two proposals may be considered responsive to the above referenced Invitation to Bid ("ITB") by two putative bidders: Ameresco, Inc. ("Ameresco") and Greenfield Energy LLC ("Greenfield"). Ameresco's bid was subject to a "Scope of Work Assumptions" that is in conflict with the express terms of the ITB and Greenfield's bid contained a material error in pricing not apparent on the face of the bid. For the reasons set forth below, we conclude that Ameresco's bid is non-responsive to the ITB and DPM does not have the discretion to accept it. Greenfield's bid is responsive, but DPM should afford Greenfield an opportunity to withdraw its bid subject to specific conditions.

FACTS

We rely on the information provided in your e-mail to this office dated March 6, 2008 and attached hereto.

One of the bidders, Ameresco, provided a Scope of Work Assumptions with its bid that was not requested by the ITB. The Scope of Work Assumptions differs from the express terms of the ITB in several ways. For example, the tenth assumption states that Ameresco will remove the plant and equipment at the end of the contract term which is in direct conflict with Paragraph 2.4 of the ITB regarding the ownership of the plant and equipment be transferred to Miami-Dade County at the end of the contract term. In its bid, Ameresco states that the Scope of Work was included to explain its "financial modeling of the project" and that if those assumptions are clarified, Ameresco can "revise our offer immediately."

Subsequent to its bid, Ameresco submitted a letter to the Procurement Officer attempting to withdraw its Scope of Work Assumptions and requested that the bid be considered as if filed without condition.

Another bidder, Greenfield submitted a bid that is 1000% higher than the price offered by the next highest bidder. As the ITB is revenue generating this bid makes Greenfield the highest bidder for the project. Greenfield subsequently informed the County, however, that it had made a mistake in its bid and bid a price per million cubic feet instead of thousand cubic feet.

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DISCUSSION

Based on the facts set forth above, DPM may not consider Ameresco's bid as responsive to the ITB and should permit Greenfield to withdraw its bid subject to equitable considerations.

In general, a proposal may be rejected or disregarded if there is a variance between the proposal and the advertisement. *See Robinson Electric Co. v. Dade County*, 417 So.2d 1032, 1034 (Fla. 3d DCA 1982). Only when a variance is immaterial or "minor" is a bidder permitted to withdraw the variance. *Harry Pepper & Associates, Inc. v. City of Cape Coral, 352 So.2d 1190, 1129* (Fla. 2d DCA 1977) ("a bidder cannot be permitted to change his bid after the bids have been opened, except to cure minor irregularities"). Bidders who propose impermissible exceptions to invitations to bid do so at the risk of those exceptions being deemed material to the proposal and having their bid rejected as nonresponsive.

The determination of whether a variance or irregularity is minor is fact specific and may differ from bid to bid. Florida courts have used a two part test to determine if a specific noncompliance in a proposal constitutes a substantial and thus nonwaivable issue: (1) whether the effect of the waiver would be to deprive the County of the assurance that the contract would be entered into, performed and guaranteed according to its specific requirements; and (2) whether it would adversely effect competitive bidding by placing a proposer in a position of advantage over other proposers. *See Glatstien v. City of Miami*, 399 So.2d 1005 (Fla. 3d DCA), rev. denied, 407 So.2d 1102 (Fla. 1981). For price bids, if the irregularity has a clear and demonstrable affect on the amount of the bid, it is a material deviation that cannot be waived. *See Harry Pepper*, 352 So. 2d at 1193 ("The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive nature is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders").

In some cases, however, irregularities that are tangential to the actual bid may not be considered material if they do not adversely affect the interests of the County. *See Tropabest Foods, Inc. v. State, Dept. of Gen. Services*, 493 So.2d 50, 52 (citing the Florida Administrative Code's provisions that a minor irregularity is one which "does not affect the price of the bid, or give the bidder an advantage or benefit not enjoyed by other bidders or does not adversely impact the interests of the agency").

Ameresco has brought to the County Attorney's attention a previous opinion from this office regarding Project No. ITB MDAD 01-07. In that bid, this office opined that the bidder was permitted to withdraw some irregularities with a bid after the bids have been opened. In that case, the irregularities in question were merely requests to negotiate terms of a potential contract that did not expressly relate to the product or service being procured. Accordingly, that decision is distinguishable from the instant facts.

Here, Ameresco's Scope of Work materially varied its bid from the advertisement. By its own terms, the price presented to the County was incomplete and excluded key portions of the requested work. For example, Ameresco's price was premised on the fact that they would retain all residual value in the plant and equipment after the term of the contract where the advertisement explicitly provided that that residual value be deeded over to the County. Ameresco's nonconforming exclusion of the value of the plant from its pricing was an advantage not enjoyed by other bidders. Ameresco may not now, after all the bids are opened, decide whether it wants the job badly enough to incur this additional expense to win the bid. As such, Ameresco's bid is not responsive.

OFFICE OF COUNTY ATTORNEY, MIAMI-DADE COUNTY, FLORIDA
TELEPHONE (305) 375-5151

Greenfield's bid, on the other hand, presents the issue of a whether an error in calculation may permit a bidder to withdraw an offer without being subject to the penalties associated with such an action. In Florida, a contractor bidding on a public project may withdraw his bid because of an error in bidding if it can be show that: "(1) the bidder acted in good faith in submitting the bid; (2) in preparing the bid there was an error of such magnitude that enforcement of the bid would work severe hardship upon the bidder; (3) the error was not a result of gross negligence or willful inattention; (4) the error was discovered and communicated to the public body, along with a request for permission to withdraw the bid, before acceptance." *Department of Transportation v. Ronlee, Inc.*, 518 So.2d 1326, 1328 (Fla. 3d DCA 1988) (citing *State Board of Control v. Clutter Construction Corp.*, 139 So.2d 153 (Fla. 1st DCA), *cert. denied*, 146 So.2d 374 (Fla. 1962).

Here, it is clear that Greenfield committed an error of such magnitude that enforcement of the bid would present an undue hardship. DPM should confirm that this error was made in good faith, was not the result of gross negligence, and that Greenfield wishes to withdraw the bid. If so, Greenfield should be permitted to withdraw the bid without consequence. If not, Greenfield's bid is responsive and should be considered as is.

Oren Rosenthal

OFFICE OF COUNTY ATTORNEY, MIAMI-DADE COUNTY, FLORIDA
TELEPHONE (305) 375-5151

Rosenthal, Oren (CAO)

From: Ra, Km (DPM)

Sent: Thursday, March 06, 2008 1:56 PM

To: Rosenthal, Oren (CAO)

Cc: Roundtree, Amos (DPM); Lafarga, Alicia (DPM); Ripley, Mark (DPM)

Subject: Request for Opinion on Solicitation No. 8578-0/23 Landfill Gas to Energy Project (LFGUS)

Please provide a legal opinion as to the determination of responsiveness and responsibility for the following two bidders who submitted offers on Solicitation No. 8578-0/23 for the development of landfill gas to energy projects at the North Dade and South Dade landfills. I have previously provided you with PDF copies of the bids submitted By Ameresco, Inc. and Greenfield Energy LLC.

Ameresco, Inc. submitted a bid that contained a Scope of Assumptions on which their offer price is based:

1. The first clause states that the costs for the required payment and performance bond are not included in the bid price. This clause appears to suggest that these costs may be added at a later date.

2. The second clause of the assumptions states that green energy value credits will be retained by Ameresco. Section 2, Paragraph 2.34 requires a 50% sharing of all environmental credits and there have been no subsequent addenda changing this requirement.

3. The fourth clause of the assumptions state that the County will provide "up to 90 days" for completion of the gas sales agreement, with extensions as mutually agreed. This is not part of the terms and conditions of the solicitation.

4. The tenth clause of the assumptions state that Ameresco will remove the plant at the end of the contract term. Section 2, Paragraph 2.4 requires that the ownership of the plant and equipment be transferred to Miami-Dade County at the end of the contract term.

5. The twelfth clause modifies the termination for convenience clause in Section 1, Paragraph 1.23 of the solicitation.

6. The thirteenth clause states that the County will provide reasonable support for financing including market-based consent to assignment with the lenders. This is not provided for in the ITB.

Greenfield Energy was asked to clarify the pricing offered in its bid. The vendor offered a price that was more than a 1000% higher that that offered by the next highest bidder (this is a revenue contract). When contacted and asked to clarify the price, the bidder stated that the price was in error and was based on a unit of measure of a million cubic feet instead of the contract's required thousand cubic feet.

Thank you.

Km! Ra, CPPO, CPPB, C.P.M.
Senior Procurement Contracting Agent
Miami-Dade County Department of Procurement Management
111 NW 1st Street, 13th Floor, Miami, Florida 33128 USA
Tel: (305)-375-1291 Fax: (305)-375-4407
"Delivering Excellence Every Day"

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MEMORANDUM

(Revised)

TO: Honorable Chairman Dennis C. Moss and Members, Board of County Commissioners

DATE: January 22, 2009

FROM: R. A. Cuevas, Jr. County Attorney

SUBJECT: Agenda Item No. 9(A)(2)

Please note any items checked.

_____ **"4-Day Rule" ("3-Day Rule" for committees) applicable if raised**

_____ **6 weeks required between first reading and public hearing**

_____ **4 weeks notification to municipal officials required prior to public hearing**

_____ **Decreases revenues or increases expenditures without balancing budget**

_____ **Budget required**

_____ **Statement of fiscal impact required**

_____ **Bid waiver requiring County Manager's written recommendation**

_____ **Ordinance creating a new board requires detailed County Manager's report for public hearing**

_____ **Housekeeping item (no policy decision required)**

_____ **No committee review**

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 9(A)(2)
1-22-09

RESOLUTION NO. _____

RESOLUTION AUTHORIZING AWARD OF CONTRACT NO. 8578-0/23, A SEVENTEEN YEAR REVENUE GENERATING COMPETITIVE CONTRACT IN THE ESTIMATED AMOUNT OF $7,500,000 FOR THE DEVELOPMENT OF LANDFILL GAS UTILIZATION SYSTEMS AT THE NORTH AND SOUTH DADE LANDFILLS, AND AUTHORIZING THE MAYOR OR THE MAYOR'S DESIGNEE AUTHORITY TO EXERCISE OPTIONS-TO-RENEW ESTABLISHED THEREUNDER

WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board authorizes award of a seventeen year revenue generating competitive contract in the estimated amount of $7,500,000, for development of landfill gas utilization systems at the North and South Dade Landfills, with authority to exercise options-to-renew established thereunder.

The foregoing resolution was offered by Commissioner ,
who moved its adoption. The motion was seconded by Commissioner
and upon being put to a vote, the vote was as follows:

Dennis C. Moss, Chairman
Jose "Pepe" Diaz, Vice-Chairman

Bruno A. Barreiro	Audrey M. Edmonson
Carlos A. Gimenez	Sally A. Heyman
Barbara J. Jordan	Joe A. Martinez
Dorrin D. Rolle	Natacha Seijas
Katy Sorenson	Rebeca Sosa
Sen. Javier D. Souto	

The Chairperson thereupon declared the resolution duly passed and adopted this 22nd day of January, 2009. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By:_____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

Oren Rosenthal