

Memorandum



Date: July 20, 2021

To: Honorable Chairman Jose "Pepe" Diaz
and Members, Board of County Commissioners

From: Daniella Levine Cava
Mayor

A handwritten signature in blue ink that reads "Daniella Levine Cava".

Agenda Item No. 8(F)(2)

Resolution No. R-711-21

Subject: Recommendation for Approval to Reject All Proposals: Battery-Electric Articulated Buses and Charging System

Recommendation

It is recommended that the Board of County Commissioners (Board) approve the rejection of all proposals received in response to *Request for Proposals No. RFP-01501, Battery-Electric Articulated Buses and Charging System*, for the Department of Transportation and Public Works for the South Dade Bus Rapid Transit Corridor. The solicitation would have established a contract for the purchase of battery-electric buses and charging system; however, the proposers were both deemed non-responsive as detailed below.

A replacement RFP will be advertised in July, and will include language indicating a recommendation has been submitted to the Board to reject all proposals received in response to this solicitation. As such, award of a contract as a result of the new RFP may only be made if the Board rejects the proposals received in response to RFP-01501. All interested proposers are eligible to submit a proposal for the new solicitation, which will contain Federal Transit Administration provisions to enable the County to seek federal funds. The approval of this rejection will not delay the progress of the construction of the South Dade Bus Rapid Transit Corridor or the delivery of buses for this corridor.

On February 7, 2020, the County issued a competitive Request for Proposals (RFP) under full and open competition seeking proposals from firms capable of manufacturing up to one hundred, 60ft battery-electric, heavy duty, articulated transit buses, spare parts, installation/construction of charging system, and provide training. The RFP provided that the contract would be awarded to the responsive, responsible Proposer whose offer represented the best value to the County.

On September 25, 2020, the County received two proposals, from New Flyer of America, Inc. (New Flyer); and BYD Coach and Bus LLC, (BYD). Following review of the proposals submitted, the County Attorney's Office (CAO) opined that New Flyer included in its proposal a document that purports to be a Certificate of Assurance, but was not signed by New Flyer, and BYD's proposal deviated from the RFP requirements. As such, both proposals were deemed non-responsive and thus ineligible for award. Full details regarding the proposers' non-responsiveness are included in the attached CAO Opinions.

It should be noted that this technology is in line with the County Mayor's priorities reflected in the April 22, 2021, Miami-Dade County's Climate Action Strategy. This strategy provides the framework for County government and the community to reduce vehicle and mobile equipment usage, expand effective low-carbon mobility options, accelerate the electrification of vehicles and equipment and prioritize those powered by renewable energy and curb overall related transportation emissions.

Scope

The scope of this item would have been countywide in nature.

Delegated Authority

There is no delegated authority required or requested for this rejection.

Fiscal Impact/Funding Source

There is no fiscal impact to the County with the rejection of all bids.

Track Record/Monitor

Vanessa Stroman of the Internal Services Department is the Procurement Contracting Manager.

Vendor Recommended for Award

None.

Vendors Not Recommended for Award

Vendor	Reason for Not Recommending
BYD Coach and Bus, LLC	Deemed non-responsive by the County Attorney's Office (opinions attached)
New Flyer of America, Inc.	

Applicable Ordinances and Contract Measures

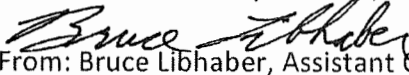
- The two percent User Access Program provision would have applied on all purchases.
- The Small Business Enterprise Selection Factor would have applied.
- The Local Preference would have applied.
- The Living Wage would not have applied.

Attachments



Jimmy Morales
Chief Operations Officer

To: Jesus Lee, Procurement Contracting Officer 3
Internal Services Department, Miami-Dade County


From: Bruce Libhaber, Assistant County Attorney
Miami-Dade County Attorney's Office

Date: February 12, 2021

You have inquired as to the responsiveness of the proposal submitted by New Flyer of America, Inc. (New Flyer) in response to the Request for Proposals entitled RFP-01501, Battery-Electric Articulated Buses and Charging System. I have reviewed the relevant portions of New Flyer's proposal and of RFP-01501 and have also reviewed your correspondence in reaching this opinion.

Section 3.0 of RFP-01501 entitled Certificate of Assurance (COA) and Utilization Plan (UP) reads as follows:

For all projects with approved SBE-CONS, SBE-A/E, SBE-G, and SBE-S "Set Aside" or "Goal" measures, all bidders are required to submit Small Business Development (SBD) Certificate of Assurance (COA) at the time of bid submission. The COA must be completely filled out, signed, notarized, and submitted with each bid in order for the bidder to be compliant by SBD. Failure to submit the required COA at the time of bid submittal will result in the bidder being deemed non-compliant and not eligible for award of the contract.

In RFP-01501, a 4% SBE goal for goods and a 7.4% goal for construction was included.

New Flyer, in its proposal included a document that purports to be a Certificate of Assurance. The document was not signed by New Flyer, but rather someone seemingly affiliated with a potential sub-contractor to New Flyer. In this instance, the bidder (the entity seeking to enter into a contractual relationship with Miami-Dade County) did not sign the Certificate of Assurance and thus did not make the binding commitment to comply with its terms. Moreover, this "Certificate of Assurance" can not be construed to mean that the sub-contractor listed will be utilized to meet the goal, since the sub-contractor signing this "Certificate of Assurance" is not an SBE firm. The RFP clearly required a properly signed and completed Certificate of Assurance "at the time of bid submission." In addition, the RFP clearly delineates the consequence of failing to submit the required Certificate of Assurance at the time of bid submittal- "being deemed non-compliant and not eligible for award of the contract."

Moreover, the County Code makes clear that the entity submitting the bid must actually sign the Certificate of Assurance.

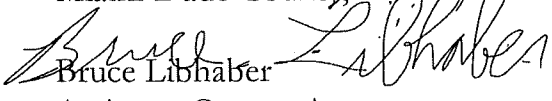
Section 10-33.02 of the County Code states in relevant part:

Where a first tier subcontractor goal has been imposed, bid documents shall require bidders to submit a Certificate of Assurance on the bid submittal due date . . . Failure to submit the required Certificate of Assurance at the time of bid submission shall render the bidder non-compliant to the contract requirement and this section

Section 10-33.02 defines Certificate of Assurance to mean "the departmental form submitted with bid documents whereby the Bidder acknowledges: (i) Small Business Enterprise ("SBE") measures apply to the project; and (ii) Bidder will submit its list of certified SBEs to satisfy the measures via Miami-Dade County's web-based system, within the specified time frame." See also Miami-Dade County Implementing Order 3-41.

Thus, the County Code clearly requires that the Certificate of Assurance be submitted with the bid and the bidder acknowledge the SBE measures. By failing to sign the Certificate of Assurance, New Flyer did not submit a proper Certificate of Assurance nor did it acknowledge the SBE measures. Consistent with the unambiguous terms of the RFP and the County Code, the Division Director of the Small Business Division of the Internal Services Department correctly found New Flyer's proposal non-compliant. For the aforementioned reasons, New Flyer's proposal is non-compliant and should not be considered for award pursuant to RFP-01501.

To: Jesus Lee
Procurement Contracting Officer 3
Miami-Dade County, Internal Services Department

From: 
Bruce Libhaber
Assistant County Attorney

Date: April 20, 2021

RE: Request for Proposals No. 01501, Battery-Electric Articulated Buses and Charging System

On February 7, 2020, Miami-Dade County issued Request for Proposals No. 01501 for Battery-Electric Articulated Buses and Charging System (the “RFP”). The County requested proposals “for the manufacturing and delivery of a minimum quantity of up to one hundred (100) buses, one (1) overhead pantograph charging system, and two (2) on-route overhead pantograph charging system(s) with installation/construction, in accordance with the terms and conditions of this Solicitation, Technical Specifications (Attachment A), and Construction Documents (Attachment B).” (Section 2.1 of RFP, as revised by Addenda #6, p.1 of Addenda #6).

On September 25, 2020, the County received proposals in response to the RFP from New Flyer and BYD. For separate reasons not covered in this memorandum, New Flyer’s proposal was deemed unresponsive and shall not be considered for award. As set forth in greater detail below, BYD’s proposal deviated from the requirements of the RFP as to two of the RFP’s material terms. Accordingly, BYD’s proposal should be deemed unresponsive to the RFP and not considered for award.

One significant term and condition of this Solicitation was compliance with the delivery schedule and completion of the required work. Specifically, the RFP at Section 2.1 Background states “All buses and charging system(s) must be fully operational and final construction accepted by no later than February 28, 2022, given an estimated Notice to Proceed date of no later than January 1, 2021. Should the actual NTP date be later than January 1, 2021, the acceptance date will be changed commensurately, on a day-by-day basis with the difference between the projected and the actual NTP dates.” (Section 2.1 of RFP, p.9 of RFP- emphasis in the original).

Of similar importance to the analysis, the RFP at Section 2.2 Tasks states “The Contractor shall furnish all labor, materials, tools, equipment, transportation and supervision, and shall perform all design, engineering, manufacturing, tests, repairs, retrofits, technical support and other services necessary and incidental to the proper, timely, and satisfactory completion of the Work. The Work shall include project management and assembly required to complete and deliver the transit buses with spare parts, install and/or construct charging system(s), and training for County staff, as further detailed in Attachments. Quality assurance shall be provided by the Contractor to ensure that all Work submitted meets all Specifications. One (1) pilot bus shall be completed one-hundred fifty (150) days prior to the beginning of the rest of the bus build, in accordance with the Technical Specifications (Attachment A).” (Section 2.2 of RFP, p.9 of RFP).

In this context the use of the word “shall” pertaining to the completion of the pilot bus indicates that such completion of the pilot bus prior to the beginning of the rest of the bus build is mandatory and not discretionary. Thus, the RFP explicitly required the proposers to commit to completion of the work within a 14-month period including a 150-day period between the completion of the pilot bus and the commencement of the rest of the bus build.

Section 2 of the Proposer Information portion of the RFP required proposers to include with their proposal “evidence that the staffing and physical resources are sufficient to perform the contract as specified and assure delivery of all equipment within the time specified in the Contract (fully operational and final construction accepted by no later than February 28, 2022).” (Proposer Information Section 2 of RFP, p. 36 of RFP). In its proposal, however, BYD did not include evidence that it would provide the necessary resources to perform the contract and assure all delivery of all equipment within the time specified. On the contrary, BYD’s proposal demonstrates that it will not comply with the 14-month required completion schedule.

BYD’s proposal included two schedules. The first schedule contains the following language “BYD has provided two schedules. The following schedule has an earlier delivery and meets the 2/28/2022 delivery, but anticipates that there will be no pause in building the buses during the 150 days pilot testing. This schedule is based on the Altoona tested model.” By this, BYD acknowledges that its compliance with the 14-month schedule requirement can only occur if another critical component of the

RFP requirements—the 150-day period for inspection, testing, and adjustments of the pilot bus prior to the commencement of the construction of the remaining buses—is ignored. Moreover, the first schedule is based on the Altoona tested model. BYD in its proposal stated “BYD has taken into consideration that DTPW’s expectations to purchase a bus that is designed with a modern and progressive train like. BYD’s design team has mocked up additional designs to satisfy DTPW’s vision. Figure 2 design is not Altoona tested but can be designed and tested for Miami-Dade.” (BYD proposal, p.1) Therefore, for Figure 2- the buses described by BYD as “modern and progressive” and “train-like”, BYD provided no schedule at all. For the Figure 1 bus, the schedules provided ran afoul of the clear and unambiguous terms of the RFP.

The second schedule included in BYD’s proposal contains the following language: “This schedule has a conservative delivery and includes the 150-day period after pilot delivery. Note: This schedule is also based on the Altoona tested model.” That second schedule identifies the anticipated last vehicle being shipped to the County on September 12, 2022— nearly seven months after the due date clearly required in the RFP. By this, BYD attempts to convert the 14-month delivery schedule required by the RFP into a nearly 21-month delivery timeframe. Allowing this modification after proposal submittals would provide BYD an unfair competitive advantage over other actual proposers or potential proposers deterred from proposing due to the strict timeframe requirements.

Florida law is clear that public solicitation requirements may not be materially changed subsequent to the submission of bids. *See Air Support Servs. Int'l, Inc. v. Metro. Dade Cty.*, 614 So. 2d 583, 584 (Fla. 3d DCA 1993); *Robinson Elec. Co. v. Dade County*, 417 So. 2d 1032 (Fla. 3d DCA 1982).

The test under Florida law for whether a deviation from the initial requirements of a public solicitation is “material” is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders. *See Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977); *Tropabest Foods, Inc. v. State, Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

While the County can oftentimes waive irregularities in its RFP documents or in the proposals, Florida courts have consistently held that post-submission modifications providing an unfair competitive advantage are improper and represent arbitrary and capricious action by the government entity. *See Harry Pepper & Assocs.*, 352 So. 2d at 1193 (holding that city could not waive pump brand requirement because there was an economic difference between approved and non-approved pumps, and allowing proposer to proceed with non-approved pump was an advantage not enjoyed by other bidders who were required to propose only approved pumps); *City of Opa-Locka*, 193 So. 2d at 32 (holding that city could not waive certification requirement because “[i]f the City may in its discretion waive this section it would be conducive to favoritism by allowing some bidders to qualify after their bids are accepted”).

The purpose of competitive bidding is to secure the lowest responsible offer, and this purpose is best served by construing the bid requirements in a way that would give all bidders an opportunity to compete. *See Air Support Servs.*, 614 So. 2d at 584; *Robinson Elec. Co.*, 417 So. 2d at 1034.

In this case, the RFP clearly mandated that proposers submit a proposed schedule of 14-months in duration that included the delivery of a pilot bus and then a 150-day period prior to the commencement of the rest of the bus build. To waive those requirements or to ignore BYD's failure to comply with these requirements, would give BYD an unfair competitive advantage. For the aforementioned reasons, BYD's proposal is ineligible for award pursuant to RFP 01501.

Should you have any questions or wish to discuss this matter in further detail, please do not hesitate to contact us.

cc: Dale P. Clarke, Assistant County Attorney



MEMORANDUM

(Revised)

TO: Honorable Chairman Jose "Pepe" Diaz
and Members, Board of County Commissioners

DATE: July 20, 2021

FROM: 
Gen Bonzon-Keenan
County Attorney

SUBJECT: Agenda Item No. 8(F)(2)

Please note any items checked.

- ☐ "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
- ☐ Statement of social equity required
- ☐ Ordinance creating a new board requires detailed County Mayor's report for public hearing
- ☒ No committee review
- ☐ Applicable legislation requires more than a majority vote (i.e., 2/3's present ____, 2/3 membership ____, 3/5's ____, unanimous ____, CDMP 7 vote requirement per 2-116.1(3)(h) or (4)(c) ____, CDMP 2/3 vote requirement per 2-116.1(3)(h) or (4)(c) ____, or CDMP 9 vote requirement per 2-116.1(4)(c)(2) ____ to approve
- ☐ Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 8(F)(2)
7-20-21

RESOLUTION NO. _____ R-711-21

RESOLUTION REJECTING ALL PROPOSALS RECEIVED IN
RESPONSE TO REQUEST FOR PROPOSAL NO. RFP-01501
FOR THE PURCHASE OF BATTERY-ELECTRIC
ARTICULATED BUSES AND CHARGING SYSTEM FOR THE
DEPARTMENT OF TRANSPORTATION AND PUBLIC
WORKS

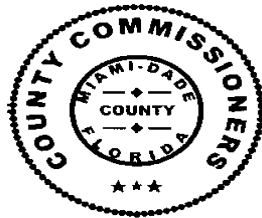
WHEREAS, this Board desires to accomplish the purposes outlined in the accompanying memorandum, a copy of which is incorporated herein by reference,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board rejects all proposals received in response to Request for Proposal No. RFP-01501 for the purchase of battery-electric articulated buses and charging system for the Department of Transportation and Public Works. A copy of the solicitation document and the proposals received in response are on file with and available upon request from the Internal Services Department, Strategic Procurement Division.

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

Jose "Pepe" Diaz, Chairman	aye		
Oliver G. Gilbert, III, Vice-Chairman	aye		
Sen. René García	aye	Keon Hardemon	aye
Sally A. Heyman	aye	Danielle Cohen Higgins	aye
Eileen Higgins	aye	Joe A. Martinez	nay
Kionne L. McGhee	nay	Jean Monestime	aye
Raquel A. Regalado	aye	Rebeca Sosa	aye
Sen. Javier D. Souto	absent		

The Chairperson thereupon declared this resolution duly passed and adopted this 20th day of July, 2021. This resolution shall become effective upon the earlier of (1) 10 days after the date of its adoption unless vetoed by the County Mayor, and if vetoed, shall become effective only upon an override by this Board, or (2) approval by the County Mayor of this resolution and the filing of this approval with the Clerk of the Board.



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

HARVEY RUVIN, CLERK

By: **Melissa Adames**
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.
Bruce Libhaber

A handwritten signature in dark ink, appearing to read "B. Libhaber", is written over a horizontal line.