



**TO : The Honorable Mayor and Members of the City Commission**

**FROM : James M. Messer, City Attorney**

**RE : Little Jim's Bait & Tackle**

**DATE : March 9, 2018**

In order to ensure a complete analysis of the subject issue for the upcoming Conference Agenda, I have conducted a more detailed review of the potential terms of the proposed Request for Proposal (RFP) to supplement my previous memorandum of February 23<sup>rd</sup>, 2018.

At issue are two proposed terms of the RFP:

- (1) A term that offers the successful bidder an opportunity to negotiate the purchase of the inventory of the current tenants.
- (2) A term that permits the current tenants to participate in the evaluation and selection process by stating "[T]he successful bidder will, on acceptance by City and the current Lessee ...."

As part of the review, I have consulted extensively with other municipalities, including a procurement expert. Although there does not appear to be a specific legal prohibition against the inclusion of the terms, the terms could be construed to be at odds with basic principles of fairness and arm's length business transactions.

Based on these discussions, I would recommend an extremely cautious approach to the inclusion of terms that would extend an opportunity to the successful bidder to either purchase the current tenant's inventory or to allow the current tenants to participate in the selection process. Those terms are subject to legal and ethical challenges because they serve little or no municipal purpose.

In regard to the purchase of the inventory, Florida Constitution, Article VII, section 10, prohibits a municipality from using its credit or influence to benefit a private entity. The purpose of this section is to protect public funds and resources from being exploited in assisting or promoting private ventures when the public would at most be incidentally benefitted.

A challenger to the bid award could well claim that the City used its authority and resources to benefit a private entity's interests by requiring the bidder to purchase the current tenant's inventory. Caution should be exercised to ensure that opportunity does not translate to requirement in the eyes of a prospective bidder.

As to the second issue regarding participation of the current tenants in the selection process, most municipalities prohibit any individual or entity with a financial interest in the results from participating in the reviewing, ranking and selection of proposals. As a practical example, a person who has placed a bet on the outcome of a sporting event is not permitted to referee the game. It, therefore, becomes less of a matter of law and more of a matter of fundamental fairness and ethics.

Similarly, the City's Code at section 2-72(b) states that "[i]t shall be unethical for any city employee to participate directly or indirectly in a procurement contract when the city employee knows that: (1) [t]he city employee or any member of the city employee's immediate family has a financial interest pertaining to the procurement contract."

The City should extend this principal to any participant in the procurement process with a financial interest in order to ensure that there is no unfair advantage; be it real or perceived.

Any participation by an individual with a financial interest in the procurement process exposes the City to a bid award challenge based on the real or perceived bias, prejudice and/or unfair self-interest of the participating individual because of that very same financial interest.

Alternatively, the City could include a provision in the RFP that would allow the successful bidder, at its option, to contract separately with the current tenant for the purchase of its inventory. The City should not, however, be a party to these negotiations or any resulting contract.

cc Nicholas C. Mimms, P.E., City Manager  
Linda Cox, City Clerk  
Johnna Morris, Finance Director