



Flagler County Board of County Commissioners Special Meeting Agenda

April 23, 2018 • 10:00 a.m.

Government Services Building 2, Board Chambers, 1769 E. Moody Blvd., Bunnell, FL 32110

1. Pledge to the Flag and Moment of Silence
2. Chair Comments
3. **Consideration of Bid Challenge by Communications International (CI) for Flagler County Request For Proposal (RFP) 18-032P and Award of Contract Not to Exceed \$14,795,000:**
Request the Board accept the County Administrator's finding declaring Communications International (CI) proposal as "non-responsive" for failing to meet the minimum standards of the RFP. If the Board upholds the Administrator's findings, then authorize the Chair to execute the contract as approved to form by the County Attorney and approved by the County Administrator.

4. Adjournment

Section 286.0105, Florida Statutes states that if a person decides to appeal any decision made by a board agency, or commission with respect to any matter considered at a meeting or hearing, he or she will need a record of the proceedings, and that, for such purpose, he may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

**FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS
SPECIAL MEETING / AGENDA ITEM # 3**

SUBJECT: Consideration of Bid Challenge by Communications International (CI) for Flagler County Request For Proposal (RFP) 18-032P and Award of Contract Not to Exceed \$14,795,000.

DATE OF MEETING: April 23, 2018

OVERVIEW/SUMMARY: Staff is seeking Board approval accepting the County Administrator's finding which declared Communications International, Inc. (CI) proposal as "non-responsive" for failing to meet the minimum standards of the RFP. As a non-responsive (non-legitimate) proposal, per Flagler County Purchasing Policy Section 4.12, CI is not entitled to protest the RFP award. The County Administrator, in his April 19, 2018 correspondence, provided details of the findings in response to the Formal Protest filed by Communications International (CI) on April 5, 2018, regarding the Public Safety Communications Network as defined in RFP 18-032P. Though the Administrator deemed the proposal as "non-responsive", the findings also demonstrated if the proposal would have been legitimate, the outcome would not have changed based on all things considered. The Flagler County radio system is a critical, lifesaving, component in the County's overall emergency communications. In light of the most recent events surrounding the Sheriff's Office communication issue at a school, it is imperative the County continue to advance the installation of the system. Not moving forward at this time creates a high potential for critical outcomes that can result in death, serious injury, or loss or severe damage to equipment or property. On a daily basis, the system provides connectivity to all of our first responders (law enforcement and fire rescue), many non-emergency operations, and multiple agencies outside of the County. With the current system being over 12 years old, some of the equipment and technology is currently at, or scheduled to reach, "end-of-life" as designated by the manufacturer within the near future.

Flagler County advertised RFP 18-032P requesting proposals from qualified firms to provide a proposed solution that would include the design, engineering, equipment and installation, implementation services, operator and technical training, and continued maintenance services for a state of the art P25 Phase 1 and Phase 2, public safety trunked simulcast radio system. The County received, on February 28, 2018, responses from Communication International, Inc. (CI) and Motorola Solutions, Inc. On March 13, 2018, the evaluation committee met to rank the proposals and recommended for the County Commission authorizing staff to enter into negotiations with the top ranked firm -- Motorola Solutions, Inc. -- to finalize the scope of work, schedule and associated fees with the intent to award a contract.

The Commission, on March 19, 2018, approved the final ranking of RFP 18-032P for a Public Safety Communications Network and authorized staff to negotiate with the top ranked firm Motorola Solutions, Inc. Staff placed the item on the April 2, 2018 County agenda requesting the Boards' approval and authorizing the Chair to execute the contract embodying the price, services and product terms with Motorola Solutions, Inc. for a Public Safety Communications Network in an amount not to exceed \$14,795,000.

Upon receipt of the Formal Protest from CI, staff held the item in abeyance to address the challenge.

DEPT., CONTACT, PHONE: Craig Coffey, County Administrator (386) 313-4001

RECOMMENDATION: Request the Board accept the County Administrator's finding declaring Communications International (CI) proposal as "non-responsive" for failing to meet the minimum standards of the RFP and alternatively the Motorola Solutions, Inc. proposal is exceeding the CI, Inc. proposal. If the Board upholds the Administrator's findings, then authorize the Chair to execute the contract as approved to form by the County Attorney and approved by the County Administrator.

ATTACHMENTS:

1. Communication International, Inc. Pre-Protest Submittal, dated March 28, 2018
2. Motorola Rebuttal of Communication International, Inc. Pre-Protest Submittal, dated March 29, 2018
3. Communication International, Inc. Formal Protest, dated April 5, 2018
4. Motorola Rebuttal of Communication International, Inc. Formal Protest, dated April 10, 2018
5. County Administrator's Response to CI Protest, dated April 19, 2018

Flagler County Evaluation Issues in Question

Thank you for taking the time to evaluate Communication International's (Ci) proposal, as well as our competitor Motorola's proposal in connection with the subject RFP. While we are disappointed that we were ranked second by the evaluation committee, when we were fully compliant and appear to be low bidder, we remain hopeful that we have an opportunity to negotiate with the County to remain your vendor and provider of excellent radio service for your first responders.

Below are a list and description of errors/inaccuracies we have found in the initial documents provided by your team in response to our public records request. We debated whether to send this list before a formal protest, but thought the County deserves to know what issues we have already discovered in the process. This may or may not affect your decision to proceed in negotiations with Motorola, but we believe in transparency.

Of course, please do not hesitate to contact us with any questions. We hope that the below information, beckons you to reconsider fully going forward with negotiations, but at a minimum encourages you to address these issues in negotiations to ensure the County gets the best possible price for this service.

Vendor Comparison Sheet - The following categories are addressed in the document labeled Vendor Comparison Sheet. While no one category alone likely is cause for concern and bias, the fact that there are numerous one-sided errors affecting how Ci's proposal was evaluated by the evaluation committee warrants attention by the Purchasing Department. If the vendor comparison sheet is read as true, then it is understandable how the Evaluation Committee seemingly did not think that Ci's proposal was comparable to Motorola's. We are not sure the correct way to remedy this major error, but welcome the Purchasing Department's efforts to balance the scales and ensure that Ci is given a fair apples to apples review.

Infrastructure

RX Antenna System - The consultant comments that Motorola's dual receive antenna is meant for redundancy. However, the dual RX antennas proposed by Motorola are required to meet P25 Phase 2 coverage performance. A loss of either antenna will cause the system to not perform to the coverage requirement in the RFP. Thus, it cannot be claimed as redundant. This was clearly judged as positive for Motorola on the scoring sheets.

800 MHz Guaranteed Coverage

Portable 15dB Buildings – The attenuated radio configurations in RFP Section 16.5.1-E specify that a "Coverage testing of in-building polygons shall use attenuated antennas to simulate building loss." The in-building polygon specified by Flagler County is the entire area of the County east of U.S. Hwy 1. The test procedures detailed in RFP section 16.5.5 require a portable radio to be placed inside a vehicle with attenuators to simulate coverage within buildings. Motorola's guarantee of \geq to 95% for 15 dB buildings is not achievable given the

design and testing parameters defined by the consultant and documented in the RFP. “Motorola can claim 95% coverage, but the design and testing does not bear this out at all. Unless the County can show that it was tested and verified, we strongly object to this ascertainment.”

800 MHz Technical Specs

Phase 1 DAQ 3.4 and Phase 2 DAQ 3.4 – [State the problem – The consultant noted “the problem,” but that is simply not the case.]The RFP does not require any printed maps and/or guaranteed coverage percentage for the P25 Phase 1 (-108.5). The only printed maps requested were defined in Section 5.5. The RFP also only requested guaranteed coverage percentages per Table 6 which is for P25 Phase 2 operations. Ci clarified that our RF coverage printed documents rounded the values system signal level of -109.9dBm to -110 dBm and body loss of 10.3 dB to 10 dB. The specific values from -109.9 dBm and 10.3 dB were used in the predicted and guaranteed coverages provided in the proposal. Ci was fully compliant with the RFP specifications, yet was penalized because the consultant or evaluator made incorrect assumptions about Ci’s proposal.

Dispatch Consoles

LCD Monitors – Ci’s proposed 21” screen is to the requirement of the RFP. The 22” screen proposed by Motorola does not meet the RFP’s specification and is non-compliant. While this may not mean much, details matter. Ci followed the details, because we trust the County had specific reasons for a 21” as opposed to a 22” inch screen.

Microwave

Antennas with Radome – Per Sections 12.3.13 and 13.6.1 of the RFP, the requirement for antennas with radome was fully compliant in the Ci proposal. The radomes are listed on all of the pertinent pricing pages that include microwave. This was the consultant’s oversight and questioned by the consultant in error. This is especially troubling when, as noted above in LCD Monitors section, Motorola’s error was overlooked, and in this section Ci’s compliant use of randome was overlooked. These issues would need to be addressed.

Preventative Maintenance

According to Section 19 of the RFP, only a 1 year warranty maintenance period was required. The vendor comparison sheet stated there was a 2 year minimum warranty maintenance period required and misrepresented the warranty period presented by Ci, which was clearly stated as 2 years in the RFP and again answered in the Q&A sheet. Once again, Ci’s proposal was in compliance with RFP, yet Ci is penalized in the comparison sheet.

KVL Loader

Section 8.9 of the RFP specified the need for Key Variable Loaders. Ci met and exceeded this requirement. The KVL function was incorporated into the Radio Programming software suite to minimize the need for any additional hardware devices for loading encryption keys into the Harris subscriber radios. Although the requirement was met, this was mistakenly noted as “unknown” on the vendor comparison sheet.

Cost Proposal

Indications from the score sheet and the individual evaluation sheets indicate that Ci was significantly lower in infrastructure costs. Other sheets and audio recordings state that Ci was also lower in subscriber unit price. Until we receive the proposal of Motorola, we will not know for sure, but assuming so, both of these advantages received very little point recognition or difference in the scoring sheets making the scoring arbitrary in the price section. Additionally, it is concerning that the one objective criteria, “Cost Proposal,” appeared to have such a subjective scoring. While all evaluators clearly agreed that Ci’s proposal was lower in cost, some had multiple-point separation between Ci and Motorola and some had single point difference. We submit that this criteria should have been without subjective scoring and scored objectively with Ci and Motorola receiving scores out of 25 based on their spread in cost. To hold otherwise would allow for a situation where Motorola, assuming its cost is higher than Ci’s, could have received a better score than Ci, which would appear both arbitrary and capricious. And thus, without a legitimate spread in score based on the numerical difference in cost, it appears that the evaluators score for cost was either arbitrary or capricious.

Score Sheets - In the Public meeting recordings it appears the Evaluation sheets were scored prior to the answers to the questions being released, causing evaluators not to score accurately, due to misconceptions that were clarified in the Q&A sheets. Below are inaccurate comments/scores/questions assigned to the evaluator.

(Ike Leary) Cost Proposal – What was the basis for rating and point’s difference between Motorola and Ci? Price score included product durability in evaluation score when it should have just been based on cost.

(Ike Leary) Point by Point – Stated Motorola “exceeds” requirements in the point by point in scoring sheet. In Ci scoring sheet, stated “most requirements” were met. However, Ci met ALL requirements.

(Jarrod Shupe) Equipment determined “better?” This determination is based on an inconsistent and uncontrolled environment test, which had Motorola tested twice as long, on tapes.

(Don Petito) Service and Maintenance – His past experience influenced score negatively for Ci. His response was not based on the information in the proposal.

(Jarrod Shupe) Technical Approach – Comments about the radio were based on a “non-controlled” testing environment, allowing for possible tampering.

(Jarrod Shupe) Service and Maintenance – Years of warranty were identified incorrectly in his comment as only 1 year while it was listed as 2 years in Ci’s RFP response.

Ike Leary and Jarrod Shupe both scored Motorola higher in the Point by Point section, noting that Motorola “exceeds” in their explanations. The RFP only allowed 3 responses to the section questions – Fully Compliant, Partially Compliant or Non-Compliant.

Testing Videos

Testing videos show too many uncontrolled and verifiable issues to list. Motorola radios were tested twice as long to accommodate late evaluator.

The issues listed influenced the score on the scoring sheet as shown by written statement in the scorer’s comments.

For example, but not limited to this instance, the video shows after water submersion test that Moto radios tested at a distance (15 ft) to not create feedback squeals, while Harris portables were held close together (<3 ft) and creating feedback squeals which was mistaken as not functioning. This is basic high school PA system physics. If the speaker and microphone are too close, feedback is created. Thus assuming that Harris radios were not functioning, because the test was not done consistently, we and the County will never know for sure. We respectfully submit that the entire testing procedure should be redone with a list of clear protocols and an attention to detail to ensure that the tests applied to Motorola are also applied to Ci (Harris). Otherwise, the entire process is flawed and subject to protest.

The testing of the radios as shown in the video was prior to the evaluation of proposal. It is very possible that this flawed testing process negatively impacted the evaluation of the Ci/Harris equipment and overall proposal.

Sincerely
Geno Viviano
President Sales and Service
Communications International



March 29, 2018

Kris Collora, CPPB
Purchasing Manager
Flagler County Board of County Commissioners
1769 E. Moody Blvd, Bldg #2
Bunnell, FL 32110

Reference: Communications International (CI) Correspondence dated March 28, 2018

Dear Kris,

Motorola respectfully submits the following comments in response to the CI correspondence received by the County and provided to Motorola through our FOIA request. Generally speaking we disagree with CI's position and suggestion that the Flagler County purchasing policy was not strictly adhered to throughout the procurement process. We offer the below comments (Blue Font) in response to the specific discussion items introduced by CI (Red Font).

Flagler County Evaluation Issues in Question

Thank you for taking the time to evaluate Communication International's (Ci) proposal, as well as our competitor Motorola's proposal in connection with the subject RFP. While we are disappointed that we were ranked second by the evaluation committee, when we were fully compliant and appear to be low bidder, we remain hopeful that we have an opportunity to negotiate with the County to remain your vendor and provider of excellent radio service for your first responders.

Below are a list and description of errors/inaccuracies we have found in the initial documents provided by your team in response to our public records request. We debated whether to send this list before a formal protest, but thought the County deserves to know what issues we have already discovered in the process. This may or may not affect your decision to proceed in negotiations with Motorola, but we believe in transparency.

Of course, please do not hesitate to contact us with any questions. We hope that the below information, beckons you to reconsider fully going forward with negotiations, but at a minimum encourages you to address these issues in negotiations to ensure the County gets the best possible price for this service.

Vendor Comparison Sheet - The following categories are addressed in the document labeled Vendor Comparison Sheet. While no one category alone likely is cause for concern and bias, the fact that there are numerous one-sided errors affecting how Ci's proposal was evaluated by the evaluation committee warrants attention by the Purchasing Department. If the vendor comparison sheet is read as true, then it is understandable how the Evaluation Committee seemingly did not think that Ci's proposal was comparable to Motorola's. We are not sure the correct way to remedy this major error, but welcome the Purchasing Department's efforts to balance the scales and ensure that Ci is given a fair apples to apples review.

*Motorola's observation was that the vendor comparison sheet completed by the Consultant was provided as an additional source of information to the evaluation committee. The committee members were provided with complete copies of each vendor's proposals as well as feedback from the field testing of the vendor provided end user equipment. The committee members were also provided the vendor responses to the technical questions/clarifications requested by the consultant. Motorola suggests that all these elements were considered and discussed in the public evaluation meeting **prior** to final scoring.*

Infrastructure

RX Antenna System - The consultant comments that Motorola's dual receive antenna is meant for redundancy. However, the dual RX antennas proposed by Motorola are required to meet P25 Phase 2 coverage performance. A loss of either antenna will cause the system to not perform to the coverage requirement in the RFP. Thus, it cannot be claimed as redundant. This was clearly judged as positive for Motorola on the scoring sheets.

Motorola's use of dual receive TTAs and Antennas does provide some amount of receive diversity/aperture gain, however the loss of a receive TTA or antenna does not reduce the coverage beyond what the RFP requires. Since both TTAs connect to all 10 trunked base radios, redundancy is a major feature beyond the small amount of gain realized. Complete loss of a TTA or receive antenna at a site allows that site to stay on the air rather than losing the site altogether. This is a great feature, because, as everyone knows, failures that may occur requiring a tower climb may take several days to repair due to weather conditions. Motorola Solutions is the only vendor today that provides this feature.

800 MHz Guaranteed Coverage

Portable 15dB Buildings – The attenuated radio configurations in RFP Section 16.5.1-E specify that a “Coverage testing of in-building polygons shall use attenuated antennas to simulate building loss.” The in-building polygon specified by Flagler County is the entire area of the County east of U.S. Hwy 1. The test procedures detailed in RFP section 16.5.5 require a portable radio to be placed inside a vehicle with attenuators to simulate coverage within buildings. Motorola's guarantee of \geq to 95% for 15 dB buildings is not achievable given the design and testing parameters defined by the consultant and documented in the RFP. “Motorola can claim 95% coverage, but the design and testing does not bear this out at all. Unless the County can show that it was tested and verified, we strongly object to this ascertainment.”

In accordance with the RFP, Motorola contractually committed to guarantee the required level of coverage defined as 15 dB portable in building for the east service area polygon. The in-building polygon specified by Flagler County is the entire area of the County east of U.S. Route 1. Additionally Motorola included coverage maps in our RFP submittal depicting the RFP compliant coverage performance and validating full adherence to the RFP testing parameters.

CI's 80% coverage guarantee is NON-COMPLIANT to the most critical specification in the RFP which is coverage performance. Per Section 5.3.2 the Contractor's proposed system design requires a minimum of 95% SAR for portable in-building coverage, in the polygon area east of U.S. Route 1 in 15 dB buildings.

The need for improved coverage was communicated by the County as a key catalyst for replacing the current system. The delta between Motorola's 95% coverage commitment and that of Communications International at only 80 % is monumental. The level of coverage provided by the Communications

International proposal falls short of the coverage level required by public safety service providers in key operational areas east of US 1 and would undoubtedly be unacceptable to fire and law enforcement system users. This reduced level of coverage would directly impact user safety and their ability to perform their jobs at critical moments in critical locations.

Direct Insert from the RFP:

5.3.2 Coverage Requirements and Area Polygons

A. The Contractor's proposed system design shall address radio coverage in the following four polygons.

a. Polygon #1: a minimum of 97% SAR for mobile coverage within the polygon area of the County boundaries.

b. Polygon #2: a minimum of 97% SAR for portable outdoor coverage in the polygon area west of U.S. Route 1.

c. Polygon #3: a minimum of 95% SAR for portable in-building coverage, in the polygon area east of U.S. Route 1. The Contractor shall assume a building loss of 15 dB

800 MHz Technical Specs

Phase 1 DAQ 3.4 and Phase 2 DAQ 3.4 – [State the problem – The consultant noted “the problem,” but that is simply not the case.]The RFP does not require any printed maps and/or guaranteed coverage percentage for the P25 Phase 1 (-108.5). The only printed maps requested were defined in Section 5.5. The RFP also only requested guaranteed coverage percentages per Table 6 which is for P25 Phase 2 operations. Ci clarified that our RF coverage printed documents rounded the values system signal level of -109.9dBm to -110 dBm and body loss of 10.3 dB to 10 dB. The specific values from -109.9 dBm and 10.3 dB were used in the predicted and guaranteed coverages provided in the proposal. Ci was fully compliant with the RFP specifications, yet was penalized because the consultant or evaluator made incorrect assumptions about Ci's proposal.

As stated in the previous response, Ci's 80% coverage guarantee is NON-COMPLIANT to the RFP Section 5.3.2 Coverage Requirement. Motorola provided the RFP required maps, and was the only vendor to meet the RFP specifications for coverage in Polygon #3.

c. Polygon #3: a minimum of 95% SAR for portable in-building coverage, in the polygon area east of U.S. Route 1. The Contractor shall assume a building loss of 15 dB

Dispatch Consoles

LCD Monitors – Ci's proposed 21" screen is to the requirement of the RFP. The 22" screen proposed by Motorola does not meet the RFP's specification and is non-compliant. While this may not mean much, details matter. Ci followed the details, because we trust the County had specific reasons for a 21" as opposed to a 22" inch screen.

Motorola offers the County the opportunity to use a larger or smaller LCD monitor. Following site walks, it was determined that the larger screens were more desirable. Motorola's 21" or 22" screen is available with the same exterior dimensions providing maximum flexibility in the dispatch center.

Microwave

Antennas with Radome – Per Sections 12.3.13 and 13.6.1 of the RFP, the requirement for antennas with radome was fully compliant in the Ci proposal. The radomes are listed on all of the pertinent pricing pages that include microwave. This was the consultant’s oversight and questioned by the consultant in error. This is especially troubling when, as noted above in LCD Monitors section, Motorola’s error was overlooked, and in this section Ci’s compliant use of radome was overlooked. These issues would need to be addressed.

During the public evaluation meeting the vendor clarifications were presented and discussed by the committee prior to final scoring.

Preventative Maintenance

According to Section 19 of the RFP, only a 1 year warranty maintenance period was required. The vendor comparison sheet stated there was a 2 year minimum warranty maintenance period required and misrepresented the warranty period presented by Ci, which was clearly stated as 2 years in the RFP and again answered in the Q&A sheet. Once again, Ci’s proposal was in compliance with RFP, yet Ci is penalized in the comparison sheet.

During the public evaluation meeting the vendor clarifications were presented and discussed by the committee prior to final scoring. Motorola is compliant to the requirement for Preventative Maintenance. Additionally, it should be noted that Motorola exceeds the 1 year maintenance requirement by including a five year warranty on subscriber radios.

KVL Loader

Section 8.9 of the RFP specified the need for Key Variable Loaders. Ci met and exceeded this requirement.

The KVL function was incorporated into the Radio Programming software suite to minimize the need for any additional hardware devices for loading encryption keys into the Harris subscriber radios. Although the requirement was met, this was mistakenly noted as “unknown” on the vendor comparison sheet.

During the public evaluation meeting the vendor clarifications were presented and discussed by the committee prior to final scoring. The KVL function was specifically addressed.

Cost Proposal

Indications from the score sheet and the individual evaluation sheets indicate that Ci was significantly lower in infrastructure costs. Other sheets and audio recordings state that Ci was also lower in subscriber unit price. Until we receive the proposal of Motorola, we will not know for sure, but assuming so, both of these advantages received very little point recognition or difference in the scoring sheets making the scoring arbitrary in the price section. Additionally, it is concerning that the one objective criteria, “Cost Proposal,” appeared to have such a subjective scoring. While all evaluators clearly agreed that Ci’s proposal was lower in cost, some had multiple-point separation between Ci and Motorola and some had single point difference. We submit that this criteria should have been without subjective scoring and scored objectively with Ci and Motorola receiving scores out of 25 based on their spread in cost. To hold otherwise would allow for a situation where Motorola, assuming its cost is higher than Ci’s, could have received a better score than Ci, which would appear both arbitrary and capricious. And thus, without a legitimate spread in score based on

the numerical difference in cost, it appears that the evaluators score for cost was either arbitrary or capricious.

The evaluation criteria was developed to identify the solution that represents best value for Flagler County. Motorola's fully compliant solution will provide the highest level of coverage, deliver maximum audio quality, ensure equipment durability as demonstrated during the County testing of end user equipment. For these reasons, the Evaluation Committee determined Motorola's proposal represents the best overall value solution for the County.

Per the RFP Section 2 Terms and Conditions

"Although Flagler County provides for the consideration of alternate proposals, it reserves the right to make an award in the best interest of the County. Such award may not necessarily be given to the lowest proposal offered."

Per Addendum 2 of the RFP

"8. With regard to the cost evaluation; what is the County's methodology for determining the price points for each vendor? As an example, will the County utilize simple math to determine the price points with a calculation of the lowest cost / cost of proposal being evaluated X maximum allowable points = awarded points? The points awarded are up to the determination of the evaluating committee member based upon the pricing provided over the course of the contract term."

Score Sheets - In the Public meeting recordings it appears the Evaluation sheets were scored prior to the answers to the questions being released, causing evaluators not to score accurately, due to misconceptions that were clarified in the Q&A sheets. Below are inaccurate comments/scores/questions assigned to the evaluator.

During the public evaluation meeting the vendor clarifications were presented and discussed by the committee prior to final scoring.

(Ike Leary) Cost Proposal – What was the basis for rating and point's difference between Motorola and Ci? Price score included product durability in evaluation score when it should have just been based on cost.

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(Jarrod Shupe) Service and Maintenance – Years of warranty were identified incorrectly in his comment as only 1 year while it was listed as 2 years in Ci's RFP response.

Ike Leary and Jarrod Shupe both scored Motorola higher in the Point by Point section, noting that Motorola “exceeds” in their explanations. The RFP only allowed 3 responses to the section questions – Fully Compliant, Partially Compliant or Non-Compliant.

Motorola’s response followed the required format and in addition to the Fully Compliant response Motorola identified areas in which we exceeded the requirement.

Testing Videos

Testing videos show too many uncontrolled and verifiable issues to list. Motorola radios were tested twice as long to accommodate late evaluator.

The issues listed influenced the score on the scoring sheet as shown by written statement in the scorer’s comments.

For example, but not limited to this instance, the video shows after water submersion test that Moto radios tested at a distance (15 ft) to not create feedback squeals, while Harris portables were held close together (<3 ft) and creating feedback squeals which was mistaken as not functioning. This is basic high school PA system physics. If the speaker and microphone are too close, feedback is created. Thus assuming that Harris radios were not functioning, because the test was not done consistently, we and the County will never know for sure. We respectfully submit that the entire testing procedure should be redone with a list of clear protocols and an attention to detail to ensure that the tests applied to Motorola are also applied to Ci (Harris). Otherwise, the entire process is flawed and subject to protest.

The testing of the radios as shown in the video was prior to the evaluation of proposal. It is very possible that this flawed testing process negatively impacted the evaluation of the Ci/Harris equipment and overall proposal.

Vendors were informed through the RFP, that radio testing would be conducted by the County as part of the evaluation process. See specific RFP language below:

Section 1 – Instructions to Proposers:

CLARIFICATIONS – It is the Proposer’s responsibility to become familiar with and fully informed regarding the terms, conditions and specifications of this RFP. Lack of understanding and/or misinterpretation of any portions of this RFP shall not be cause for withdrawal of your proposal after opening or for subsequent protest of award. Proposers must contact the Purchasing Representative, at the phone number or email provided, should clarification be required. Modification or alteration of the documents contained in the solicitation or contract shall only be valid if mutually agreed to in writing by the parties.

8.6 Portable Radio General Requirements

*P. The Contractor shall provide, with their proposal, two sets of two portable **radios for the County to test**. One set of radios will be tested by Law Enforcement in a simulated law enforcement environment, and the other set of radios will be tested by Fire in a simulated fire environment.*

8.2 Features and Functions



e. The County reserves the right to test the ability of all Contractor-proposed subscriber equipment to operate in high RF noise environments prior to approving them for purchase.

Motorola is optimistic this matter will be resolved in a timely manner. We are looking forward to working with Flagler County and begin the implementation of your much needed Public Safety radio system.

Sincerely,

Motorola Solutions, Inc.

A handwritten signature in cursive script that reads 'Michelle Poole'.

Michelle Poole
Senior Account Manager
904-814-9938

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April 5, 2018

VIA U.S. MAIL AND E-MAIL DELIVERY

Kris Collora
Purchasing Manager
Flagler County
1769 E. Moody Blvd., Bldg #2
Bunnell, FL 32110
kcollora@flaglercounty.org

**Re: Formal Letter of Protest
March 29, 2018 Staff Recommendation of Award
Request for Proposal - RFP #18-032P
Public Safety Communications Network**

Dear Ms. Collora:

Please be advised that GrayRobinson, P.A. represents Communications International (“Ci”). We submit this correspondence as Ci, in general accordance with the procedures outlined in the subject Request for Proposal #18-032P (the “RFP”) and the Flagler County Purchasing Policy (“Purchasing Policy”), hereby formally protests the Flagler County Evaluation Committee’s (the “Committee”) decision published March 29, 2018, to recommend Motorola International (“Motorola”) for award of the subject contract. Accordingly, Ci has four points of protest of the Committee’s decision to recommend Motorola and hereby officially offers its protest to the Purchasing Manager.

Summary of Argument

Flagler County’s evaluation of the RFP has encountered several violations, inaccuracies, and failure to conform to the very specifications the County laid out in the RFP. These errors have led to arbitrary and capricious action to the detriment of Ci. Namely, the County’s radio testing procedure was neither published nor complied with and was conducted in a manner that severely damaged Ci’s evaluation by the Committee members. Further, Motorola deviated from the RFP specifications with regards to in-building coverage and said deviation did not weigh against Motorola in the evaluation, but actually weighed in their favor. At a minimum Motorola should have been scored down or possibly disqualified for this deviation. Additionally, the Consultants’ Vendor Comparison report is replete with errors that clearly affect the scoring of Ci’s proposal. Finally, while these errors are enough to change the evaluation scores in favor of

Ci, the fact that it was also the lowest cost proposal, by \$1.5 Million should create a clear-cut shift in scoring and award of the subject RFP.

However, these errors pale in comparison to the violation of Florida's Sunshine Law that occurred in the Radio Testing Evaluation. This evaluation was neither publically noticed nor open to or attended by members of the public. Yet evaluators, subject to Florida's Sunshine Laws, attended this meeting, discussed, considered and reacted openly to the results of the testing as evidenced in video recordings. This clear cut violation of the Sunshine Law is grounds to completely unwind the evaluation process. As such, Ci respectfully requests that the County either rescore the evaluations and award the contract to Ci or completely redo the evaluation of both proposals utilizing a process that is transparent, blind and fair.

Relevant Law

The object and purpose of competitive bidding statutes is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove, not only collusion, but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the public authorities, by providing an opportunity for an exact comparison of bids. *Wester v. Belote*, 138 So. 721, 722 (Fla. 1938) (emphasis added). An act is contrary to competition if it (1) creates the appearance of and opportunity for favoritism; (2) erodes public confidence that contracts are awarded equitably and economically; (3) causes the procurement process to be genuinely unfair or unreasonably exclusive; or (4) is unethical, dishonest, illegal, or fraudulent. *Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist.*, Case No. 01-4385BID (Fla. DOAH Jan. 18, 2002), *modified in part*, Case No. 2002-051 (Fla. SFWMD Mar. 6, 2002) (emphasis added).

In procurements, the public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personal preference. *Hotel China & Glassware Co. v. Bd. of Pub. Instruction of Alachua County*, 130 So.2d 78, 81 (Fla. 1st DCA 1961). *See also City of Sweetwater v. Solo Constr. Corp.*, 823 So.2d 798 (Fla. 3d DCA 2002) (applying this arbitrary and capricious standard to RFPs as well as bids). Whether an evaluation committee acted arbitrarily is generally controlled by a determination of whether the committee complied with its own proposal criteria as outlined in the RFP. *Id.* at 802 (holding that the criteria espoused in the published invitation to bidders controlled the analysis of whether the city acted in an arbitrary manner).

A. Uniform, Published Standards For Evaluating Proposals Are Essential to Fairness in Procurement Process

It is important to have uniform standards for evaluating the proposals and for such standards to be published at the outset of the process. *RHC and Assocs. v. Hillsborough County*

School Board, DOAH Case No. 02-2230BID, 2002 WL 31125219 (Fla. Div. Admin. Hrgs. Sept. 6, 2002) (case involving application of CCNA to school board RFP). Otherwise, there is no way to determine whether each proposal is being measured by the same yardstick. *Id.* This principle was succinctly summarized by another administrative court as follows:

Part of the reciprocity achieved under the competitive bidding process is achieved in the bid specifications and weighted bid evaluation criteria. Potential bidders are advised in advance of the requirements to be met in order to receive the contract award, as well as the standards by which each bid will be evaluated by the agency and each standard's relative importance to the agency. In essence, this advance notice enables a potential bidder to gauge the agency's notions of the type of bid best suited to its purpose for the money involved. A potential bidder can then determine whether he can meet the bid specifications and criteria and thereby determine whether he wishes to go to the time, expense and trouble of preparing and submitting a fairly lengthy and detailed bid proposal. Therefore, central to the integrity and reciprocity of the competitive bidding process is the requirement that an agency's action on a bid can be expressed within the bid specifications and evaluation criteria which it created. In other words, should an agency reject a bid for reasons not given weight in the bid evaluation criteria, that action would go to the integrity of the competitive bidding process and would be arbitrary and capricious.

Deloitte & Touche LLP v Dept of Health & Rehabilitative Servs., DOAH Case No. 95-0727BID, Recommended Order (May 12, 1995) (citations omitted) (quoting *Courtney v Dept of Health & Rehabilitative Servs.*, 12 F.A.L.R. 2226 (1990)). *And cf.*, *Wester v Belote*, 138 So. 721, 724 (Fla. 1931) (“[I]t has been generally recognized and held by the courts that it is the duty of public officers charged with the responsibility of letting contracts under the statute to adopt, in advance of calling for bids, reasonably definite plans or specifications, as a basis on which bids, may be received.... Neither can they include other reservations which by their necessary effect will render it impossible to make an exact comparison of bids.”) (citing *Clark v Melson*, 89 So. 495 (Fla. 1921)).

Law: The specifications for evaluation of proposals must be clear and published before a proposal is submitted, and any deviations of said specifications materially affect the fairness of the bidding process.

B. Material Deviation Cannot Be Waived by County

A deviation in a bid on a public project is sufficiently material to destroy its competitive character if the variation affects amount of the bid by giving bidder a benefit or advantage not enjoyed by other bidders. *Harry Pepper & Associates, Inc. v. City of Cape Coral*, 352 So.2d 1190 (Fla. 2d DCA 1977). In *Pepper*, the City of Cape Coral allowed a non-conforming bid to

be amended after the bids were received. *Id.* at 1192. Specifically, the bid called for a certain grade of pumps for a water treatment plant. *Id.* After the bids were received, it was determined that the lowest bidder listed a brand of pumps that did not meet the specifications. *Id.* Thereafter, a city representative called the lowest bidder and asked for a letter saying that it would comply with the bid specifications. *Id.* The lowest bidder was thereafter awarded the contract, and the next lowest bidder appealed the results to the city council. *Id.* The city denied the appeal and the next lowest bidder sued for injunction and lost. *Id.* On appeal, the Second District Court of Appeal framed the issue as:

[W]hether a city has legal authority to accept a bid which, at the time of its submission, is facially nonconforming as to the acceptable materials and components, but which is subsequently amended, prior to acceptance, to conform to the specifications as stated in the original proposal.

Id. at 1191. The Second DCA held that the city did not have that authority for two reasons. First, they stated that the difference between the conforming and nonconforming pumps was material. Second, the inclusion of the nonconforming pumps was an “advantage not enjoyed by other bidders, who were required to specify only approved equipment.” *Id.* at 1193. Essentially, the lowest bidder had the advantage to submit a cheaper proposal and then later, after winning the bid, “decide whether it wanted to the job bad enough to incur additional expense of supplying the conforming pumps.” *Id.*

Ultimately, the Second DCA held that the City had two choices in the face of a nonconforming bid: “award the contract to the next lowest bidder who met the specifications, or to reject all bids and readvertise for new ones.” *Id.* This is valid and supported by more recent cases. *See Air Support Services Inter., Inc. v. Dade County*, 614 So. 2d 583, 584 (Fla. 3d DCA 1993) (“Public bid requirements may not be materially altered subsequent to the submission of bids.”); *see also, Robinson Elec. Co. v. Dade County*, 417 So. 2d 1032 (Fla. 3d DCA 1982) (substantial irregularities in the bidding process may not be waived or altered after the submission of bids).

Further, a contract award based on known misrepresentations by a vendor could constitute arbitrary and capricious action. *Academy Express, LLC v. Broward County*, 53 So.3d 1188 (Fla. 4th DCA 2011). In *Academy Express*, Broward County was not aware of the misrepresentation until after the award. Thus, the court excused the County from committing a violation. However, when a County is aware of a misrepresentation, and ignores it, it becomes tantamount to arbitrary and capricious action. *See id.*

Law: Material deviations, unlike immaterial (or minor) deviations, cannot be waived by the public entity, and thus, should result in the disqualification of deviating proposer or a rejection of all proposals. Further, a known misrepresentation by a vendor of compliance to RFP specifications by a County can raise to the level of arbitrary and capricious action.

C. Material Deviation is Present When One Contractor Receives An Advantage or Benefit Not Enjoyed by the Other Bidders

The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of a bid by giving the bidder an advantage or benefit not enjoyed by the other bidders. *Hubbard Construction Company v. FDOT*, 642 So. 2d 1192 (Fla. 1st DCA 1994); *see also, Tropabest Foods, Inc. v. State, Dept. of General Services*, 493 So. 2d 50 (Fla. 1st DCA 1986) (Holding that price deviation is a major factor in determining whether a deviation is material or not: “material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition.”).

Further, while requests for proposals allow for more innovative response, as opposed to rigid invitation for bids, innovation can be material, when it expressly violates the terms of the request for proposal. *See System Development Corp. v. Dept. of Health and Rehabilitative Services*, 423 So. 2d 433 (Fla. 1st DCA 1982). In *System Development*, the First District Court of Appeals addressed whether there was a material deviation in a response to an RFP and noted that “[i]mplicit in the definition of an RFP is the underlying rationale that, in some types of competitive procurement, the agency may desire an ultimate goal but cannot specifically tell the offers how to perform toward achieving that goal...” *Id.* at 434. In holding that there was not a material deviation by the lead proposer, that court based its decision on two grounds: (1) “[n]othing in the instant RFP precluded an offeror from proposing or suggesting innovations or improvements to [system]; and (2) the protester did not “show[] that the [lead proposer] enhancements to the [system] accorded [the lead proposer] a palpable economic advantage over the other offerors...” *See id.* at 435.

Law: Accordingly, where an RFP specifically precludes an offeror from proposing or suggesting an alternative method, and the proposal of such alternative method gives a distinct economic advantage, a material deviation has occurred.

D. Sunshine Law Governs Evaluation Committee

The Sunshine Law requires that “[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting.” While F.S. §286.011 applies only to meetings “at which official acts are to be taken,” F.S. §20.052 (2001) requires any “advisory ... or other collegial body adjunct to an executive agency” to conduct open meetings. The courts have construed §286.011 to extend well beyond meetings of official boards or commissions which take “formal action.” In *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*, 535 So. 2d 694, 695 (Fla. 3d DCA 1988), the court held that “[a]n ad hoc advisory board, even if its power is limited to making recommendations to a public

agency and even if it possesses no authority to bind the agency in any way, is subject to the Sunshine Law.” Similarly, in *Krause v. Reno*, 366 So. 2d 1244, 1248 (Fla. 3d DCA 1979), the court held that §286.011 extends to “acts of deliberation, discussion and deciding that occurred prior to and leading up to the affirmative formal action which renders official the final decision of a governing body.”

Three cases have established the applicability of the Sunshine Law to public procurement. In *Silver Express Co. v. Dist. Bd. of Lower Tribunal Trustees of Miami-Dade Community College*, 691 So. 2d 1099 (Fla. 3d DCA 1997), the court held that a committee which evaluated and ranked competing proposals must hold its meetings in the sunshine. In *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857 (Fla. 3d DCA 1995), the court ruled that the Sunshine Law applied to meetings of an advisory committee which negotiated a lease with the top-ranked proposer and then presented the proposed lease to the county commission. Closed vendor presentations to an agency selection committee were voided as Sunshine Law violations in *Port Everglades Authority v. International Longshoremen's Assoc.*, 652 So. 2d 1169 (Fla. 4th DCA 1995). Thus the Sunshine Law applies broadly to the public procurement process, including evaluation team meetings, vendor presentations, and contract negotiations.

Argument

A. Flagler County Improperly Evaluated the Radio Systems

1. Flagler County Failed to Publish the Specifications for the Radio Testing

Nowhere in the RFP or the RFP Technical Specifications is there a statement of evaluation criteria for which Ci and Motorola could review and/or protest. The only criteria given is that “[o]ne set of radios will be tested by Law Enforcement in a simulated law enforcement environment, and the other set of radios will be tested by Fire in a simulated fire environment.” See the RFP Technical Specifications at Page 8-8. Other than that, there was no criteria published.

Further, this criteria or the date/time of testing was never published until after the testing. As such, there was no opportunity for Ci to review or protest the criteria by which it would be graded. Further, there was no means by which Ci could protest the process employed after the fact, because it was never publically noticed. Without these uniform standards for evaluating the proposals and for such standards to be published at the outset, Ci’s ability to properly and fairly evaluated were compromised. See *RHC and Assocs. v. Hillsborough County School Board*, DOAH Case No. 02-2230BID, 2002 WL 31125219 (Fla. Div. Admin. Hrgs. Sept. 6, 2002) (case involving application of CCNA to school board RFP).

2. Flagler County Failed to Adhere to Its Own Unpublished Standards

While Ci has grave concerns that the County, only after the fact, published testing criteria, it is even more troubling that the County's staff did not even follow its own Purchasing criteria. Attached to this Protest is the criteria for the radio testing labeled by the County as "Radio Evaluation Schedule 3 5 18" and marked as Exhibit "A" for purposes of this Protest.

In this document, a few key items stick out: (1) there are 12 tasks to be performed; (2) the tasks are to be done in sequence with each proposer's radio (Motorola and Ci) tested before moving onto the next task; and (3) tasks are to be performed separate from other evaluation committee members, except for tasks 11 and 12.

All 12 tasks were performed, but that is where the adherence to the Radio Evaluation Schedule ended. In addition, other errors and inconsistencies in the testing occurred as noted below and evidenced in the video provided of the radio testing:

- Volume levels appear to have been arbitrarily adjusted.
- Not conducted as a blind test.
- Confusion of which radio was being tested, as evidenced on video tapes.
- Individual test procedures not done simultaneously between radios to allow for comparison. Rather all tests were performed on one brand radio followed by all tests to the other radio. Nearly impossible to compare as it created about 10-15 minutes between comparative evaluations and different background noises.
- Motorola radios were tested twice.
- After submersion test, the Ci (Harris) radios were tested in close proximity of less than 3-5 feet which created feedback while Motorola's were tested with at least 15 feet separation, which is required separation to ensure no distortion or feedback.
- Ci (Harris) noise cancelling speaker mic not connected correctly causing three (3) minutes of dead airtime until testers were notified of the problem.

3. This Violation Negatively Affected Ci's Scoring

The testing of the radios clearly played a major role in the outcome of the decision to initiate negotiations with Motorola. Due to the unregulated, uncontrolled and inconsistent testing procedures conducted with the portable radios, the committee was unjustly influenced which was reflected in the evaluation committee audio recordings by at least two members and in the notes of the Committee members. For example, Mr. Jarrod Shupe noted:

Technical Approach and Proposed Solution (Maximum 20 points):

During testing of radios I found them to be lacking in many areas including noise cancelling, and clarity. Spare parts housed by CI at Daytona seems odd seeing as though they would have to drive to their office to get our spare parts and not just to one of our sites.

Score 17 (0-20)

His score allocated to Ci was a 17. The score provided for Motorola in the same category was a 19.

Another example is Mr. Steve Viscardi noted:

Technical Approach and Proposed Solution (Maximum 20 points):

RADIOS NOT WELL RECEIVED BY TESTERS. LIKE FIRE STATION ALERTING.
WORRY ABOUT VMWARE BASED SYSTEM AND SUPPORT

Score 17 (0-20)

His score provided to Ci was a 15. The score provided for Motorola in the same category was an 18 and his notations exemplify that the testing played a major role in this difference of scores:

Technical Approach and Proposed Solution (Maximum 20 points):

RADIOS VERY WELL RECEIVED BY TESTERS. LIKE SYSTEM CONFIG. MORE
COMPATIBLE WITH EQUIPMENT.

Score 18 (0-20)

This point differential proved to be the difference in Motorola (81 points) being ranked ahead of Ci (80 points) by Mr. Viscardi.

Thus, without a doubt, this predisposition appears to have played a major role in the scoring of the vendor's proposals. While Ci wants to give the benefit of the doubt, the fact that the process was never published, that process was not followed, and statements on the public record indicate that testing clearly affected the score demonstrates arbitrary and capricious actions to the detriment of Ci. As such, we respectfully request the County should re-evaluate both radio systems with published criteria, so that the evaluation committee can have an opportunity to truly compare the radio systems. To hold otherwise would compromise the integrity of the procurement process.

B. Motorola Materially Deviated from and Misrepresented its Compliance With the Specifications of the RFP

Motorola falsely states that they are 100% Fully Compliant in Section 5.1 A & B, but Partially Compliant in C. The consultant OCG stated Motorola submitted a fully compliant proposal. In section 5.1 A, B & C, Motorola stated they were either "Fully Compliant" or "Partially Compliant" with the "contour requirements, technical specifications, limitations, and technical requirements of the Region 9, 800 MHz Plan". Motorola actually should have stated NON-COMPLIANCE with all 3 sections of their proposed response as they did not adhere to Region 9 plan with the Matanzas Woods site, which they document in their proposal. This clear

violation of the RFP requirements supported their overstatement of RF coverage to achieve >95% coverage in the area East of US Hwy 1. Ci could have also committed to >95% coverage in the area East of US Hwy 1, if we had chosen to ignore the requirements of the RFP. Ci chose to provide a fully compliant design per the specific RFP requirements without manipulating the design parameters.

This clearly affected the evaluator's scoring in Motorola's favor. In Mr. Jarrod Shupe's evaluation sheet, he noted:

Point by Point Responses to RFP Requirements (Maximum 10 points):

Basically the response was a lot of "Fully Compliant" without much explanation or marketing of what separates them apart. In-building coverage (less than or equal to 80) is not as high as the other respondent. No hardware KVLs were included as they referenced their software version.

Score 7 (0-10)

His score provided to Ci was a seven (7). For Motorola, in that category, he gave a nine (9). The only difference in notes is the in-building coverage issue. This point differential for this category, combined with the Technical Approach category, if remedied, would create a tie between Ci and Motorola for Mr. Shupe. Accordingly, due to the fact that this evaluator alone demonstrated clear influence by the deviations of Motorola, we respectfully submit that the County either rescore the proposals to reflect this deviation, disqualify Motorola for this materially deviation, or completely reevaluate both proposals with this deviation not permitted.

C. Flagler County's Evaluation Committee Violated Sunshine Law During the Radio Testing

Ci's concerns with the publishing and adherence to the Radio Evaluation Schedule (attached as Exhibit "A") is addressed in section A above. A separate, and potentially more serious concern is the apparent Florida Sunshine Law violations during the Radio Testing.

In the Radio Evaluation Schedule, the County states clearly that the evaluators are not to speak with each other as noted in the screen grab below:

Reminder that committee members are not allowed to discuss any of the testing or the RFP with each other, especially when together to view tasks 11-12.

Further, the evaluators were assigned separate times to view the demonstrations, also noted in the screen grab below.

The following schedule will take place on Tuesday, March 6, 2018. Committee Members will be able to monitor transmissions at the Sheriff's Office Jail Administration building.

Petito: 1300
Shupe: 1315
Leary: 1330
Viscardi: 1345
Strobridge: 1400

The Policy reads plainly that the evaluators are not to discuss this with each other, and to ensure that, the County assigned individual times to see the demonstration. Those times are highlighted in yellow.

This testing meeting was held on March 13, 2018, by the evaluation committee. Audio and video recordings were made to document the committee's actions and have been reviewed by Ci. No documentation or evidence has been provided indicating that this was a "noticed" public meeting. If members of this committee are gathering to discuss an item to be voted upon, the meeting must be noticed, unless otherwise specified.

The meeting's recording shows several comments, actions and subsequent responses by the committee members that express the pleasure or displeasure of the equipment under test. This sharing of opinions, and the follow-up replies or gestures appear to have been an openly prohibited discussion. These actions and conversations are prohibited by the Florida Sunshine Law and appear to be a violation of that law.

Ci does not make this charge lightly. While we are sure that the evaluators and the County had no intention to violate the Florida Sunshine Law, that is irrelevant. What matters is that the violation occurred. It does not matter that the County attempted to separate these evaluators and took precautions to prevent Florida Sunshine Law violations. The video evidence clearly shows discussion between evaluators that ultimately made decisions on this proposal as a result of those discussions.

As such, Ci respectfully requests that the County throw out the results of the radio testing and the overall evaluation that is the poisonous fruit of that tree and restart the evaluation process.

D. Consultant Erred in Evaluating Both Proposals and Thus Evaluation Committee Made Clear Errors in Scoring Ci

1. RX Antenna System - The consultant comments that Motorola's dual receive antenna is meant for redundancy. However, the dual RX antennas proposed by Motorola are required to meet P25 Phase 2 coverage performance. A loss of either antenna will cause the system to not perform to the coverage requirement in the RFP. Thus, it cannot be

claimed as redundant. This was clearly judged as positive for Motorola on the scoring sheets.

2. According to Section 19 of the RFP, only a 1 year warranty maintenance period was required. The vendor comparison sheet stated there was a 2 year minimum warranty maintenance period required and misrepresented the warranty period presented by Ci, which was clearly stated as two (2) years in the RFP and again answered in the Q&A sheet. Once again, Communication International's proposal was in compliance with RFP, yet was penalized in the comparison sheet.

E. Evaluation Committee Improperly Scored Cost Proposals in a Subjective Manner

It should not go without notice and attention that Ci's cost proposal is less than Motorola's, by \$1,530,995.10. That \$1.5 million is not insignificant to any of the 67 counties in Florida. That is real money. Further, even after the County negotiated with Motorola to obtain a best and final price, Motorola is still \$830,995.10 greater than Ci's proposed cost. While we understand that in Requests for Proposal price/cost is not the only factor, it still plays a major factor. In fact, for this RFP, it was the highest weighted portion for consideration, allotting 25 possible points out of 100. See below.

<i>Cost Proposal</i>	<i>25 Points</i>
<i>Technical Approach and Proposed Solution</i>	<i>20 Points</i>
<i>Firm Project Team, Qualifications, Experience and Capabilities</i>	<i>15 Points</i>
<i>Project Management Plan, Implementation Schedule and Cutover Plan</i>	<i>15 Points</i>
<i>Service and Maintenance Plan</i>	<i>15 Points</i>
<i>Point by Point Responses to RFP Requirements</i>	<i>10 Points</i>

We are hopeful to be selected as the County's continued provider of public safety radio systems, and continue providing excellent service with fair pricing.

Prayer for Relief and Reservation of Rights

Ci requests that the County stop the RFP process until the subject of this protest is resolved by final action; that recommended and final orders be entered determining that:

- (1) the Committee re-rank the proposals and award the contract to Ci;
- (2) in the alternative, the Evaluation Committee's Notice of Intended Decision to award contract under the RFP to Motorola is contrary to the County's governing rules or policies and the RFP specifications, and is therefore clearly erroneous, contrary to competition, arbitrary and capricious; and
- (3) the Committee's final ranking of Ci be rejected because of the scoring deficiencies and/or mistakes by both the Radio Testers, Consultants and the Committee that are arbitrary and capricious and contrary to competition for determining its intended contract awardees; or

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(4) the entire process be reevaluated due to the incurable Florida Sunshine violation during the Radio Testing Evaluation meeting that was neither publically noticed nor open for public viewing.

We thank you again for you and your team's consideration of this formal protest. While Ci is prepared to seek all remedies available to it, Ci remains hopeful of this current protest process and eager to remain Flagler County's provider of public safety radio systems.

If you should have any questions or comments, please do not hesitate to contact the undersigned at 407-244-5649.

Thank you for your consideration.

Sincerely,



Christopher L. Carmody

Enclosure

cc (via email):

Al Hadeed, County Attorney, Flagler County (ahadeed@flaglercounty.gov)
Craig Coffey, County Administrator, Flagler County (ccoffey@flaglercounty.gov)

Exhibit A

Radio Evaluation Schedule 3 5 18

The following schedule will take place on Tuesday, March 6, 2018. Committee Members will be able to monitor transmissions at the Sheriff's Office Jail Administration building.

Petito: 1300

Shupe: 1315

Leary: 1330

Viscardi: 1345

Strobridge: 1400

Reminder that committee members are not allowed to discuss any of the testing or the RFP with each other, especially when together to view tasks 11-12.

Verbiage to be read is: "Trunking is frequently used by public safety for the large statewide networks, allowing a pool of channels to be shared by a large number of public safety agencies, without the need for each agency to source their own channels for communication."

Task 1: Transmission from an engine pumping multiple lines at high RPM while talking into lapel mic. Read Verbiage with single person transmitting, read Verbiage with single person transmitting and background conversations, then read Verbiage with single person transmitting and add intermittent air horn usage.

- Motorola
- Harris

Task 2: Transmission from an engine pumping multiple lines at high RPM from radio without lapel mic while rotating radio (talking into all sides of the radio). Read Verbiage with single person transmitting, read Verbiage with single person transmitting and background conversations, then read Verbiage with single person transmitting and add intermittent air horn usage.

- Motorola
- Harris

Task 3: Transmission from an engine pumping multiple lines at high RPM along with gas powered fan while talking into lapel mic. Read Verbiage with single person transmitting, read Verbiage with single person transmitting and background conversations.

- Motorola
- Harris

Task 4: Transmission from an engine pumping multiple lines at high RPM along with gas powered fan from radio without lapel mic while rotating radio (talking into all sides of the radio). Read Verbiage with single person transmitting, read Verbiage with single person transmitting and background conversations.

- Motorola
- Harris

Task 5: Transmission in front of Jaws of Life running with metal tools striking metal objects to simulate forcible entry while talking into lapel mic. Read Verbiage with single person transmitting, read Verbiage with single person transmitting and background conversations.

- Motorola
- Harris

Task 6: Transmission in front of Jaws of Life running with metal tools striking metal objects to simulate forcible entry from radio without lapel mic while rotating radio (talking into all sides of the radio). Read Verbiage with single person transmitting, read Verbiage with single person transmitting and background conversations.

- Motorola
- Harris

- Task 7: Transmission from a firefighter in full PPE with SCBA including face piece. Read Verbiage with single person transmitting.
- Motorola
 - Harris
- Task 8: Transmission from a firefighter in full PPE with SCBA including face piece and PASS alarm activated. Read Verbiage with single person transmitting.
- Motorola
 - Harris
- Task 9: Transmission with a chain saw (or K-12 – using the same tool for every test) running at varying speeds while talking into lapel mic. Read Verbiage with single person transmitting.
- Motorola
 - Harris
- Task 10: Transmission with a chain saw (or K-12 – using the same tool for every test) running at varying speeds from radio without lapel mic while rotating radio (talking into all sides of the radio). Read Verbiage with single person transmitting.
- Motorola
 - Harris

TASK 11 and 12 will be performed after all 5 committee members have completed tasks 1-10. This is anticipated to occur at approximately 1415hrs.

- Task 11: Radio drop form second story onto concrete pad.
- Motorola
 - Harris

- Task 12: Submerged in 5 gallon bucket full of water for 5 minutes.
- Motorola
 - Harris



LISTEN. SOLVE. EMPOWER.

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April 10, 2018

By Federal Express and Electronic Mail

Kris Collora, Purchasing Manager
Flagler County
1769 E Moody Blvd., Bldg. #2
Bunnell, FL 32210
kcollora@flaglercounty.org

Re: Motorola Solution's Response to Communications International's Formal Letter of Protest Regarding RFP #18-032P

Dear Ms. Collora:

We have the pleasure of representing Motorola Solutions Inc. ("Motorola") and submit this correspondence in response to Communication International's ("Ci") formal Letter of Protest dated March 29, 2018. As you are aware, Ci is protesting the recommendation to award Flagler County (the "County") RFP #18-032P, Public Safety Communications Network, (the "RFP") Motorola who was unanimously ranked the highest responsive bidder. Ci attempts to raise various issues that it argues warrant either the award of the RFP to Ci or that Flagler County re-bid the RFP. For the reasons set forth herein, Ci fails to present a convincing argument for overturning the recommended award and its protest should be denied.

Statement of the Issues

While indicating they raise four issues, Ci actually attempts to raise five factors as grounds for its protest: (1) the County improperly evaluated the competing Radio Systems by failing to publish the testing specifications, allegedly failing to adhere to the unpublished standards; (2) Motorola's response allegedly deviated from the RFP; (3) Flagler County allegedly violated Florida's "Sunshine Law" during the evaluation process; (4) the consultant retained by the County to assist in procuring the most responsive bid erred in a manner that allegedly impacted Ci's score; and (5) Ci's proposed costs were lower and therefore the Ci should be awarded the RFP. Ci's arguments fail for the following reasons:

- a. The County actually did follow their testing procedures and performed those tests in a manner that was fair for both Ci and Motorola;

- b. Motorola's response did not deviate from the RFP;
- c. Flagler County in no way violated Florida's Sunshine Law. First and foremost, the meeting cited by Ci as a violation was not subject to the Sunshine Law. Both Motorola and Ci were aware a test of the equipment was to take place as a result of specific RFP language and the requirement for vendors to provide equipment in their response to the County's request. None of the public records indicate Ci made an effort to inquire into the testing procedures, testing date or their ability to attend the test. Further, the Evaluators only recommended an award and in no way violated the Sunshine Law.
- d. The consultant hired by Flagler County followed the requirements of the RFP and there was no improper influence on the scoring of the respective bids; and
- e. This was an RFP. Ci's position that it provided a lower cost ignores the simple fact that cost was only one factor in determining the award of something as important as the Public Safety Communications Network.

For the reasons set forth herein, Ci's protest should be denied and the County should proceed with its award to Motorola.

Applicable Law

Under Florida law, governmental bodies are given wide latitude in evaluating bids for public services. Specifically, Florida Courts, when faced with determining whether a governmental body "abused its discretion" and did not comply with the RFP in evaluating proposals and/or the evaluators misinterpreted the RFP, proposal, statute or facts, the reviewing court need not second guess the members of the evaluation committee to determine whether reasonable persons might reach a contrary result. Scientific Games, Inc. v. Dittler Bros., Inc., 586 So.2d 1128, 1131 (Fla. 1st DCA 1991). Rather, a "public body has wide discretion" in the bidding process and "its decision, when based on an honest exercise" of the discretion, should not be overturned even if reasonable persons might disagree. See Sutron Corp. v. Lake Co. Water Auth., 870 So.2d 930, 932 (Fla. 5th DCA 2004) (explaining that discretion of public entity to solicit, accept or reject contract bids should not be interfered with by the courts absent a showing of dishonesty, illegality, fraud, oppression or misconduct). See also Emerald Corr. Mgmt. v. Bay Cty. Bd. of Cty. Comm'rs, 955 So. 2d 647, 651 (Fla. Dist. Ct. App. 2007)

Further, the First District Court of Appeal has summarized the differences between an invitation to bid and a request for proposal as follows:

In contrast to bids, [an] RFP is used when the public authority is incapable of completely defining the scope of work required, when the service may be provided in several different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity. In addition, the consideration of a response to a request for bid is controlled by the estimated costs, whereas, the response for a request for a proposal is controlled by estimated cost and technical excellence in the field.

Awards of contracts are generally based not solely on price, but on the results of an extensive evaluation that includes criteria, qualifications, experience, methodology, management, approach, and responsiveness to the RFP, etc. Further, at the conclusion of the RFP process, the procurement officer will seek authorization from the governing body to begin negotiating the terms of the contract with the highest ranking bidder. The contract is, thus, not formed until after the negotiation process.

Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs, 955 So. 2d 647 (Fla. 1st DCA 2007). Pursuant to Florida law granting wide latitude to governmental agencies in awarding contracts best suited for their particular needs, Motorola will address each of the issues raised by Ci as alleged grounds to set aside the award of the RFP to Motorola.

Ci's Arguments

A. Flagler County Properly Evaluated the Proposed Radio Systems

1. The County Did Publish the Specifications for the Radio Testing

Ci argues Flagler County failed to adequately publish the testing criteria as grounds for setting aside the award to Motorola. At the outset, it is the responsibility of Ci to raise issues related to clarifications before the submittal of responses to the County. Indeed, RFP's routinely allow for vendors to ask questions, as was the case here, or protest provisions they deem to be unclear or prejudicial. "The purpose of the bid solicitation protest provision is to allow an agency, in order to save expense to the bidders and to assure fair competition among them, to correct or clarify plans and specifications prior to accepting bids. A failure to file a timely protest constitutes a waiver of chapter 120 proceedings." Capeletti Bros. v. Dep't of Transp., 499 So. 2d 855, 857 (Fla. 1st DCA 1986).

Here, Ci had a responsibility to raise this issue at either the mandatory Pre-Proposal Meeting held on January 23, 2018 or request clarifications pursuant to the specifications contained in the RFP. Specifically, Section 1 of the RFP states the following:

CLARIFICATIONS – It is the Proposer's responsibility to become familiar with and fully informed regarding the terms, conditions and specifications of this RFP. Lack of understanding and/or misinterpretation of any portions of this RFP shall not be cause for withdrawal of your proposal after opening or for subsequent protest of award. Proposers must contact the Purchasing Representative, at the phone number or email provided, should clarification be required. Modification or alteration of the documents contained in the solicitation or contract shall only be valid if mutually agreed to in writing by the parties.

Further section 8.6 P. of the RFP titled "Portable Radio General Requirements" states:

The Contractor shall provide, with their proposal, two sets of two portable radios for the County to test. One set of radios will be tested by Law Enforcement in a simulated law enforcement environment, and the other set of radios will be tested by Fire in a simulated fire environment.

Finally, in section 8.2 e. of the RFP, the County reserved the right to test the ability Contractor-proposed subscriber equipment to operate in high RF noise environments prior to approving them for purchase. (Emphasis added).

As such, if Ci did have questions regarding the specifications, the RFP allowed for them to ask for clarification. They did not most likely because it is clear that the County intended to test the radios in “high RF noise environments.” Ci apparently had no concerns with the detailed testing procedures until after the scoring was completed. Unfortunately, even if there was a valid argument the radio testing procedures were not detailed, which they were, Ci failed to raise these concerns in accordance with the RFP provisions.

2. Flagler County Substantially Complied with its Testing Standards

Despite not inquiring into the testing procedures employed by the County, Ci next argues that the testing procedures were not followed. However, as the videotaped demonstrations and audio tapes prove, the County substantially complied with all of the requirements of their testing procedures. More importantly, both Ci’s and Motorola’s equipment were tested in identical fashion.

Ci cites to various cases as support for its argument the County failed to comply with its own testing procedures. However, the cases relied upon by Ci simply state that the County was required to provide “reasonably definite plans or specifications...or include other reservations which by their necessary effect will render it impossible to make an exact comparison of bids.” (Emphasis added) Wester v. Belote, 138 So. 721, 724 (Fla. 1931). However, it is important to note in the Wester case the Florida Supreme Court stated the following in denying the protest of an unsuccessful bidder:

But it by no means follows that a competitively awarded contract must in every instance be set aside, and payments under it enjoined, at the suit of a citizen and taxpayer, because of insufficient specifications embraced in the advertisement for bids, where what has been done by the board appears to have been done as the result of a bona fide effort on the county commissioner's part to comply with the statute, and no actual fraud, misconduct, favoritism, prejudice, or discrimination is charged with reference to the transaction as completed.

(Emphasis added) Wester, 138 So. At 726 (1931)

Ci sites to the video of the testing procedures as grounds for its allegation the County did not comply with its standards. A simple review of the videos indicates otherwise and

further, indicates that no fraud or favoritism was shown on the part of the testers or evaluators. Ci's arguments, italicized below, are factually incorrect.

- *Volume levels appear to have been arbitrarily adjusted.* The video of the testing indicates this was done for both sets of radios; therefore no bias is apparent to either vendor.
- *Not conducted as a blind test.* Nowhere in the documents is it required it be a blind test. The Evaluators were forbidden from discussing any of the testing or the RFP with each other. This is exactly what the Evaluators did during the testing and throughout the process as a whole. Further, it is questionable that Ci now argues the test should have been a blind test given the multiple attempts to highlight their past relationship with the County (See Ci's RFP Response, pgs. 2, 9, 10, 16, 17, etc.) In fact, a review of the documents indicates Ci referenced its relationship with the County on over 40 occasions. To now argue the test should have been blind is questionable at best.
- *Confusion of which radio was being tested, as evidenced on videotapes.* A review of the videotape of the testing indicates few if any examples of confusion. Both sets of radios were tested identically. The tests were conducted in high-frequency settings and it is to be expected that some clarifications would take place. Again however, in no way did this show bias towards either vendor.
- *Individual test procedures not done simultaneously between radios to allow for comparison.* This is simply a red herring. A review of the tests indicates that each set of radios were tested under exactly the same conditions minutes apart from one another. And again, there was no bias to either Motorola or Ci.
- *Motorola radios were tested twice.* One of the evaluators appeared late and missed the Motorola test. Therefore, a second test was performed for that evaluator only. Again however, in no way did this show bias towards Motorola.
- *After the submersion test, the Ci (Harris) radios were tested in close proximity.* Again it is apparent from the videotape that the radios were tested in almost identical conditions. Further, it is apparent that they tested Ci's equipment multiple times to make certain it was working.
- *Ci (Harris) noise canceling speaker mic not connected correctly causing three (3) minutes of dead air time until testers were notified of the problem.* While there appeared to be a short period of time where the Ci radio was not connected, this was rectified and had no bearing on the scoring. How this could be interpreted to impact the scoring is questionable at best.

It is apparent from a review of all of the procedures employed by the County in evaluating the two sets of radios that an honest effort was made to determine which radio would best serve the County in various conditions. There was no "unlawful or fraudulent intent on the part of the public officials" to in some way negatively impact Ci.

3. The County's Testing Process did not Negatively Impact the Scoring of Ci's Proposal.

Ci argues the testing of the radios was unregulated, uncontrolled and inconsistent and therefore negatively impacted the scoring. As stated above, each radio was tested exactly the same in close proximity to each other. It strains credibility to suggest Ci was somehow negatively impacted by the testing procedures. Rather, it is clear from the scoring Ci was negatively impacted by the performance of their radio equipment. This was the goal of the testing procedures.

As support for their position, Ci sites to two of the evaluators and comments they made in their scoring sheets. Specifically, Ci argues that somehow these comments reflect a predisposition towards Motorola. When in fact, a simple review of the comments indicate that Motorola's radios, tested in the exact same fashion as that of Ci's, performed better. There was nothing arbitrary or capricious and the evaluators were tasked with independently providing their opinions, and scoring based on those opinions. Simply not agreeing with result does not make the decision arbitrary or capricious. And again, Ci was fully aware that the tests were to be performed in high RF noise environments as this is a critical function of the radios. There was ample time to inquire into the procedure but Ci failed to do so and only now, after the fact, does Ci complain of the testing procedures. As a result, Ci's argument fails.

B. Motorola did not Materially Deviate or Misrepresent its Compliance with the Specifications of the RFP.

At the outset, Motorola's response is entirely compliant with the requirements of the RFP. There is no deviation from those requirements. Even if there was a deviation, which there is not, it is not enough to simply allege that a deviation is material. In order to determine whether there is a material deviation from the specifications, it must be determined "whether the bid stifles fair competition by giving the deviating bidder a substantial advantage or benefit not enjoyed by other bidders." 73A C.J.S. Public Contracts § 20 (2015). However, not every error in the bid-letting process necessarily voids the resulting contract or purchase. Errors are to be expected and will not be rejected if they are not material. Material deviations can include:

[A] failure to specify the time for completion of a project, failure to supply pertinent data that affects budgetary considerations, and failure to include an affirmative action plan. A failure to comply with a requirement in an invitation to bid that fixes the time within which bids must be received is not a minor defect or informality that may be waived but, rather, a material and formal requirement that must be fulfilled to the letter of the law. Id.

In determining whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity, the courts have applied two criteria—first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements; and second, whether it

is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition. Robinson Elec. Co. v. Dade Cty., 417 So. 2d 1032, 1034 (Fla. 3rd DCA 1982), (quoting 10 McQuillan, Municipal Corporations § 29.65 (3d Ed. Rev. 1981) (internal citations omitted); Tropabest Foods, Inc. v. State, Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986) (deviation is only material if it gives bidder an advantage not enjoyed by other bidders and thereby stifles competition).

It is not enough that a bidder conceivably *could have* gained an unfair bidding advantage as a result of a variation from the RFP specifications; instead, there must be a showing of an *identifiable* economic advantage before a challenge will be sustained. See Liberty County, 421 So. 2d at 507 (*emphasis added*). Such an actual economic advantage must have been in favor of the vendor for it to be improper. Id.

Here, Ci argues Motorola falsely states they are 100% fully compliant with section 5.1 A and B, but partially compliant in C of the RFP. Apparently, Ci argues Motorola overstated the coverage abilities of their proposal. As a result, Ci argues that *one* evaluator's scoring would have been impacted.

The requirement in section 5.3.2 of the RFP requires a minimum of 95% coverage for the area east of US Route 1. In accordance with the RFP, Motorola contractually committed to guarantee the required level of coverage defined as 15 dB portable in building for the areas identified in the RFP. The in-building polygon specified by Flagler County is the entire area of the County east of U.S. Route 1. Additionally, Motorola included coverage maps in their RFP submittal depicting the RFP compliant coverage and validating full adherence to the RFP testing parameters. In short, Motorola's bid is compliant and the County is guaranteed that the contract will be performed according to its specified requirements.

Ci's fails to reference it could only provide an 80% coverage guarantee. As a result, it is certainly understandable why Motorola would receive more points in this regard. Further, courts will not second guess the County or the opinions of the Evaluators. The Evaluators were tasked with evaluating the information provided to them and scoring based on their expertise. Further, Ci fails to illustrate either a material deviation by Motorola or, even if there was a deviation, Motorola received some sort of economic advantage. Motorola did not adjust its costs based on its commitment to provide the coverage required in the RFP. More importantly, Ci simply failed to meet the requirements of the RFP. As a result, Motorola was not placed a position of advantage over other bidders. Simply put, Motorola is required to meet the coverage requirements specified in the RFP. Motorola's proposal does just that. Ci's attempt to substitute its own interpretation of the responses is not grounds for overturning the intent to award. As a result, Ci's argument fails.

C. The County Evaluation Committee Did Not Violate the Sunshine Law during the Radio Testing.

The County did not violate Florida's Sunshine Law. Initially, Florida Courts have noted "the Sunshine Law was enacted in the public interest to protect the public from "closed door" politics and, as such, the law must be broadly construed to affect its remedial and protective purpose. Canney v. Board of Public Instruction, 278 So.2d 260 (Fla.1973); Board of Public Instruction v. Doran, 224 So.2d 693 (Fla.1969). Further "the purpose of the Sunshine Law is to "prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." Zorc v. City of Vero Beach, 722 So.2d 891, 896 (Fla. 4th DCA 1998) (citing Town of Palm Beach v. Gradison, 296 So.2d 473, 477 (Fla.1974)).

In Carlson v. State, 227 So. 3d 1261, (Fla. 5th DCA 2017), an unsuccessful bidder argued that an evaluation team was subject to the Sunshine Law. The bidder argued specifically the Evaluation Team was responsible for "crystallizing" the ultimate procurement decision, so it was obligated to meet—and to meet in public. Cf. Tolar v. Sch. Bd. of Liberty Cty., 363 So.2d 144, 145 (Fla. 1st DCA 1978) ("One purpose of the government in the sunshine law was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance."), aff'd, 398 So.2d 427 (Fla. 1981). However, the court ruled against the protesting vendor in Carlson because "each Evaluation Team member individually evaluated the competitors' proposals, individually assigned scores, and individually submitted their scores for consideration by others. The team never met, never collaborated, and never discussed the competing proposals." Carlson, 227 at 1265–66. Although the team made recommendations, all the applications went to the ultimate authority for a final decision. Id. Since the interview team simply had a fact-finding or advisory role, their meetings were not governed by the Sunshine Law. Id.

Carlson specifically holds that not all meetings are subject to the Sunshine Law. Ci argues:

The Sunshine Law requires that "[a]ll meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. While F.S. §286.011 applies only to meetings "at which official acts are to be taken... Similarly, in Krause v. Reno, 366 So. 2d 1244, 1248 (Fla. 3d DCA 1979), the court held that §286.011 extends to "acts of deliberation, discussion and deciding that occurred prior to and leading up to the affirmative formal action which renders official the final decision of a governing body."

Ci Protest, pg. 5. (emphasis added).

Ci argues the tests held by the County and the meeting of the Evaluation Committee in some way violated the Sunshine Law. At the outset, both Motorola and Ci attended the March 13 meeting where the evaluators disclosed their scoring.¹ The Evaluators did not deliberate at this meeting but simply disclosed their individually prepared scoring. As further grounds for this argument, Ci states that while the Evaluators were prevented from discussing the tests or their opinions prior to scoring the two proposals, the Evaluators did in fact meet and discuss the proposals. Ci vaguely cites to hand gestures or nods as some form of communication between the Evaluators at the test site. Further, Ci argues the test should have been publicly noticed and, despite attending, the March 13th meeting of the Evaluators should have been noticed. These serious allegations are not supported by the facts. Similar to Carlson, the County's Evaluators "individually evaluated the competitors' proposals, individually assigned scores, and individually submitted their scores for consideration by others." The recordings of the final meeting of the Evaluators on March 13 is the first time any of the Evaluators discussed the results of their scoring which were finalized individually by each respective Evaluator before their disclosure. In addition, neither were "official acts" taken nor was there "deliberation, discussion and deciding" at the testing held on March 7, 2018; therefore this meeting was not subject to the Sunshine Law.

Several factors weigh against Ci's reasoning. First and foremost, the RFP specifically states the following:

AWARDS – Results from the evaluation committee will be considered by the Flagler County Board of County Commissioners at the earliest possible regular meeting subsequent to the evaluation process. This RFP is issued in accordance with and shall be governed by the provisions of the County's Purchasing Policy and Florida Statutes.

The Flagler County Board of County Commissioners reserves the right to make award(s) by individual sections, groups, all or none, or a combination thereof, with one or more proposers; to reject any and all proposals, or to waive any informality or technicality in proposals received as deemed to be in the best interest of the County.

RFP, pg. 7. This is exactly the scenario described in Carlson as the Evaluators simply provided their finding to the ultimate decision makers, the Flagler County Board of County Commissioners. As such, no Sunshine Law violation occurred as the Evaluators are not subject to said law.

Further, both Ci and Motorola were aware that the Evaluators would observe testing and meet to disclose their individual scoring. Addendum #1 to the RFP states the following:

¹ Ci's protest incorrectly identifies the testing date as March 13, 2018. This date was actually the meeting where the evaluators disclosed their scoring. Both Ci and Motorola attended this meeting. The testing was performed on March 7, 2018. Each date is referenced in Addendum #1 provided to both Ci and Motorola.

Revisions to Instructions to Bidders:

- The RFP due date has been extended to Wednesday, February 28th, 2018 at 3:00 PM.

Revisions to Evaluation Schedule:

- The Initial Evaluation Committee meeting has been scheduled for Wednesday, March 7th, 2018.
- Shortlisted Firms Presentations/Discussions (If required) has been scheduled for Tuesday, March 13th, 2018.

This addendum was provided to both Motorola and Ci. Both companies provided radios that were the subject of the testing indicating that both knew the tests would take place. While Ci's protest mistakenly identifies when the meetings took place, there can be no question that Ci knew testing was to occur. Further, both Motorola and Ci were aware of and attended the meeting of the Evaluation Committee on March 13, 2018. Despite this knowledge and the opportunity, it is apparent that Ci made no request to attend the testing or inquired into what would be entailed in the tests... Motorola correctly assumed it would not be present at the testing because it was not a meeting where decisions would be made regarding the award. Certainly neither Motorola nor Ci was purposely excluded from the test or the meeting of the Evaluators. Only now, after the fact, does Ci allege it was deprived of the opportunity to attend these meetings.

Further, recordings were made of each of these meetings. As a result, it is difficult to understand the argument the County somehow participated in "closed door" politics or in some way tried to circumvent public notice of the above referenced meetings. Clearly Ci was aware of the County's intent to test the vendor radios as it provided the equipment to be tested. If the County intended to operate outside of the "Sunshine," one must wonder why the County staff recorded or videotaped the meetings. The videotaped recordings of the testing clearly demonstrate that there were no discussions or deliberations and certainly there were no decisions made or any official acts taken. Evaluators watched the testing procedures and were informed in an unbiased fashion as to the conditions of the tests to be performed. From these observations, the Evaluators later made their recommendations.

A review of the tapes and recordings indicates that the procurement department repeatedly warned Evaluators of their responsibilities under the guidelines of the RFP. Still, Ci sites generally to "comments, action and subsequent responses by the committee members that express the pleasure or displeasure of the equipment under test." Even if these actions took place, which did not based on a review of the recordings and tapes, they would not constitute a violation of either the RFP or the Sunshine Law. In fact, the recording of the half hour meeting that took place on March 13 clearly illustrates the Evaluators took their responsibility seriously and individually evaluated the competing proposals. Finally, the general nature of the

allegations evidences the complete failure of Ci to present a convincing claim under the Sunshine Law, even if it applied. General allegations regarding hand gestures and nods are simply not good enough.

The legal support provided by Ci is important to detail as it actually works against their position. Ci chiefly relies on three cases. In Silver Exp. Co. v. Dist. Bd. of Lower Tribunal Trustees of Miami-Dade Cmty. Coll., 691 So. 2d 1099, (Fla. 1st DCA 1997), a committee met to conduct its evaluation of the responses, doing so without notice to the public, and voted to recommend to the purchasing director that a two-year contract be entered into. Id. at 1100. The clear distinction between the present controversy and the meetings found to violate the Sunshine Law in Silver Exp. is the decision regarding to whom the contract in question should be awarded was actually made during these meetings cited in Silver Exp. The evaluators in the Silver Exp. essentially made the decision to award the contract and thus were subject to the Sunshine Law. There was deliberation, discussion and deciding resulting in “an official act.” This did not happen in Flagler County as the Evaluators individually evaluated the proposals and provided those findings to the ultimate decision maker, the Board of County Commissioners, at a later date.

Ci then relies upon Monroe Cty. v. Pigeon Key Historical Park, Inc., 647 So. 2d 857 (Fla. 3d DCA 1994) for the proposition that the Sunshine law applies to and advisory committee who negotiated a lease with a top-ranked proposer. However, the court in Monroe Cty. actually ruled against the protester because even in that case where public meetings were found to be held outside of the “sunshine”, the issue was cured by subsequent meetings. Id. at 860. In short, the Government did not simply rubberstamp the award recommendation. Here, there were no violations of the Sunshine Law. But even if there were, it cannot be credibly alleged that the intent to award the RFP to Motorola was simply a ceremonial process. Consistent with the RFP, the Evaluators each individually scored the proposals and provided the same to the Board. This was not merely a ceremonial process as there have already been two public meetings on the matter and a third will be held to consider the protest. There was no rubberstamp of the Evaluators’ findings. Monroe Cty. does not support Ci’s position.

The last case relied upon by Ci is Port Everglades Auth. v. Int'l Longshoremen's Ass'n, Local 1922-1, 652 So. 2d 1169 (Fla. 4th DCA 1995). The facts in this case are clearly distinguishable. In Port Everglades, the port authority actually excluded bidders from meetings while allowing others to stay. Correctly, the court held that this was a violation of the Sunshine Law. It cannot be seriously alleged here that CI was somehow excluded from a meeting that Motorola was otherwise able to attend. Further, both Motorola and Ci attended the meeting of the Evaluators on March 13.

Based on the RFP and the responsibilities and actions of the Evaluators, the Sunshine Law does not apply to the testing held on March 7 as there was no deliberation, discussion and deciding resulting in “an official act.” Even if the Sunshine Law did apply, which it does not, Ci knew the test would take place and did not apparently take advantage of the opportunity to question the testing procedures or request to attend the tests. Ci offers no facts or

circumstances specifically delineating a violation of the Sunshine Law. In summary, the Sunshine Law does not apply and even if it did, the meetings held by the County and actions of the Evaluators did not violate any provision of Florida's Sunshine Law.

D. The Consultant Hired by the County Did Not Err in Evaluating the Proposals.

Ci's argument here is simply a factual disagreement with the determinations of the County and its Representatives. As referenced above, a "public body has wide discretion" in the bidding process and "its decision, when based on an honest exercise" of the discretion, should not be overturned even if reasonable persons might disagree. Sutron Corp. v. Lake Co. Water Authority, 870 So.2d 930, 932 (Fla. 5th DCA 2004) (explaining that discretion of public entity to solicit, accept or reject contract bids should not be interfered with by the courts absent a showing of dishonesty, illegality, fraud, oppression or misconduct). See also Scientific Games, Inc. v. Dittler Bros., Inc., 586 So.2d 1128, 1131 (Fla. 1st DCA 1991) (a "public body has wide discretion" in the bidding process and "its decision, when based on an honest exercise" of the discretion, should not be overturned "even if it may appear erroneous and even if reasonable persons may disagree.").

Ci argues the County and its Consultant mistakenly gave credit to Motorola based on the proposed dual RX antennas. Factually, Motorola's use of dual antennas does provide some amount of receive diversity/aperture gain, however the loss of a receive TTA or antenna does not reduce the coverage beyond what the RFP requires. Since both TTAs connect to all 10 trunked base radios, redundancy is a major feature beyond the small amount of gain realized. Complete loss of a TTA or receive antenna at a site allows that site to stay on the air rather than losing the site altogether. This is a great feature because failures that may occur requiring a tower climb may take several days to repair due to weather conditions. Motorola exclusively provides this feature. It is certainly understandable that Ci may disagree with the County's evaluation of Motorola's system. However this cannot be grounds for a protest. The County performed an honest exercise in evaluating each proposal and scored them accordingly. There are no grounds for second-guessing the scoring.

E. The Evaluation Committee Properly Scored the Cost Proposals for Both Ci and Motorola.

Ci received more points for because their proposal did come in at a lower initial cost. Essentially therefore, Ci's argument is that they should receive even more points because more weight should be given based on price. However, this again attempts to second-guess the Evaluation Committee and Procurement Department for the County. As stated above, "[a]wards of contracts [in RFP's] are generally based not solely on price, but on the results of an extensive evaluation that includes criteria, qualifications, experience, methodology, management, approach, and responsiveness to the RFP, etc." Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs, 955 So. 2d 647 (Fla. 1st DCA 2007). Clearly, this is exactly what happened in this case. The Evaluation Committee scored Ci's proposal higher with

respect to cost as compared to Motorola. However, Motorola was scored higher in other factors resulting in a unanimous decision to award the contract to Motorola. This was because each of the Evaluators had the freedom, based on their best judgment, to weight the scores in accordance with their area of expertise. For example, functionality rather than cost may be more important to a representative of the Fire Department. This is why the bid was in the form of an RFP as simply getting the cheapest public radio system is not in the County's best interest. Ci's disagreeing with the result is not grounds for a protest and the County acted in a manner consistent with the requirements of the RFP and Florida law. In fact, even if one was to accept all of the reasons for rescoring the proposals as set forth by Ci, Motorola would still receive the highest score.

RECOMMENDATION

This matter essentially comes down to a simple fact; Motorola's proposal was better. It complied with the RFP and provided for next generation technology that will serve Flagler County's First Responders for years to come. No other company can provide these features. As in protests filed in sister counties across the State, this is the real basis for Ci's protest. Ci cannot provide the same quality of equipment or systems and therefore resorts to alleging there was something wrong with the process. This cannot be grounds for overturning the intent to award the RFP to Motorola. To do so would set the County back with respect to the installation and implementation of a critical system and likely lead to an inferior product. This threatens the citizens of Flagler County and the First Responders who serve them.

Based on the foregoing, Motorola respectfully suggests the Flagler County Board of County Commissioners deny the protest of Ci and continue with its intent to award RFP #18-032P to Motorola. Thank you for your consideration.

Regards,


Matthew T. Jackson

cc:

Al Hadeed, County Attorney, Flagler County (ahadeed@flaglercounty.gov)
Craig Coffey, County Administrator, Flagler County (ccoffey@flaglercounty.gov)
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April 19, 2018

Mr. Christopher L. Carmody, Esquire
P.O. Box 3068
Orlando, Florida 32801

Re: Response to Bid Challenge by Communications International (CI)
Flagler County RFP 18-032P

Dear Mr. Carmody:

First, I would like to respond to the positive sentiment that your client had expressed in the March narrative (pre-protest) provided regarding their RFP concerns. We likewise thank Communications International (CI) for their participation in our RFP process and have truly enjoyed a positive working relationship with the company and staff for many years. Overall, as a County we feel honored to have two quality vendors from which to choose for such a critical component of our public safety infrastructure. Unfortunately, only one vendor can be selected.

Overall, the evaluation committee believed Motorola's proposal not only met the County's minimum standards, but in many cases Motorola chose to exceed the standard. In reviewing the information and discussing the matter with evaluators they felt the Motorola fully embraced the RFP vs. bid concept. Where the CI proposal perhaps stated "meets minimum standards", Motorola's may have stated something above the minimum standard and provided additional follow up documentation and efforts on the proposal/project which reviewers generally felt demonstrated attention to detail, follow-through, and a more thorough understanding of the County's Emergency Communication needs.

To begin the response to the protest, I believe it is important for everyone's benefit to describe the distinct differences between a Request for Proposals (RFP) and a bid. The distinction between the two procurement processes was well described to us as part of the Motorola response to the CI protest. I have subsequently reused it below as a good description of the differences.

"In contrast to bids, an RFP is used when the public authority is incapable of completely defining the scope of work required, when the service may be provided in different ways, when the qualifications and quality of service are considered the primary factors instead of price, or when responses contain varying levels of service which may require subsequent negotiation and specificity. In addition, the consideration of a response to a request for bid is controlled by the estimated costs, whereas, the response for a request for a proposal is controlled by estimated cost and technical excellence in the field."

Charles Ericksen, Jr.
District 1

Greg Hansen
District 2

David Sullivan
District 3

Nate McLaughlin
District 4

Donald O'Brien, Jr.
District 5

Our RFP attempted to partially describe the complexity of the largest radio project in our County's history with over 265 pages of specifications, plans, and instructions, that you have stated still lack clarity in many areas. The RFP set minimum standards and left vendors the opportunity to provide solutions in a variety of different ways. Price was important but less important than qualifications and quality of the service proposed. Varying levels of warranties, service, redundancy, system configurations, equipment, etc., all had differences in importance and specificity. The point being that our RFP was not a little bit a RFP vs. a bid, it was entirely an RFP. We presented a set of minimum standards with the help of our consultant to seek technologically advanced companies to submit solutions to our complex problems. Again while both firms are quality firms and both firms worked hard to submit quality proposals, we can only select one firm.

I will now address the RFP Protest and items related to the RFP.

Non-Responsiveness – Meeting minimum RFP Standards

In reviewing your RFP protest and proposal I was very concerned about the 800 MHz Guaranteed Coverage in your client's proposal. The coverage standard was one of the primary objectives of the 800MHz P25 Phase II project and hence the RFP process. Your proposal at 80% did not meet one of the RFP's most critical coverage standards (in-building coverage). This was listed in CI's protest as a "deviation" by Motorola to meet this standard, when the exact opposite is true and is the primary purpose of doing an RFP.

Essentially, as part of the RFP procurement (vs. bid) the County is presenting a desired standard or a problem and it is up to the RFP respondents to propose solutions to meet the standards or solve the problem. Your competitor met this standard by securing the necessary approvals to meet the RFP standard and subsequently guaranteeing compliance at their risk. CI chose to simply say it could not meet the standard and offered no creative solutions to meet the standard with or without costs. CI instead waited until after the proposals were submitted and said it could have done that as well. While the County believes CI could have taken Motorola's approach or some other approach, CI didn't. CI also did not guarantee meeting the County's minimum standard at CI's financial risk, but your competitor did. Again, CI chose to submit its proposal not meeting that standard.

I assume the committee chose not to initially disqualify CI's RFP proposal because of the limited number of bidders and in deference to our ongoing relationship with CI. **However, although I will respond to the protest concerns raised, after further review of the matter via the protest process I cannot help but declare your proposal as "non-responsive" for failing to meet the minimum standards of the RFP. As a non-responsive (non-legitimate) proposal, per Flagler County Purchasing Policy Section 4.12, you are not entitled to protest the RFP award.**

Disqualification – Inappropriate Contact and Gratuity with regard to RFP

During the course of gathering information to appropriately respond to the protest, I was made aware of these potential violations of the RFP "Instruction to Bidders". The County sets proposer standards during the RFP procurement period in order to ensure a fair and

impartial process. Rather than try to determine the nature of the contact between two parties or the degree of influence exerted after the fact, the County takes the approach to simply forbid certain activities outright. The County was made aware of two potential inappropriate contacts during the RFP process. Only one was investigated and was found to be materially factual. The second was an incidental contact between the County CI service representative and a senior representative from a municipal agency where the parties have been friends for approximately 30 years.

The two applicable areas of the RFP that speak to these matters are both contained in Section I, Page 6, with the most pertinent portions shown in bold and italics below:

NO LOBBYING – All Proposers are hereby placed on notice that Flagler County Board of County Commissioners, County Employees/Staff, Members of the Evaluation Committee (with the exception of the Flagler County Purchasing Department personnel designated to receive requests for interpretations or corrections) or any members of public entities within the County of Flagler (*Cities, Sheriff*, etc.) participating in this RFP are not to be lobbied, directly or indirectly either individually or collectively, regarding this RFP. ***During the entire procurement process, all Proposers and their subcontractors, sub-consultants, or agents are hereby placed on notice that they are not to contact any persons listed above for such purposes as holding meetings of introduction, etc., if they intend to submit or have submitted proposals for this project. Any Proposer contacting individuals mentioned herein in violation of this warning may automatically be disqualified from further consideration for this RFP.***

The RFP no contact/lobbying period started with the posting/advertisement which officially began January 11, 2018 and continues to present. The inappropriate contact occurred in February at the annual Sheriffs conference with an adjunct meal outing for sheriffs that included the purchase of a meal for the Flagler County Sheriff and his wife. The RFP restriction was likely unknown to the Sheriff and CI was believed to simply be holding an annual adjunct vendor event with the conference. Without direct knowledge of the meal cost and in an abundance of caution the Sheriff chose to reimburse CI \$140 for the meals. While it appears the purpose of this activity may have been customary and somewhat incidental, it is purposely prohibited to ensure the fairest process possible and to avoid making the County procurement staff investigators of meetings they are not party to and also to avoid putting them in the position of trying to determine degrees of inappropriate procurement influence. Additionally, we have no proof, nor do we believe either party acted unethically or in an overt manner to directly influence the RFP. Nonetheless, the burden was on the RFP proposer to comply with the terms of the RFP.

Again, although I will respond to the protest concerns CI raised, after further review of the matter via the protest process I cannot help but declare your proposal as “disqualified” for violation of the base RFP instructions for the “no lobbying” provision. As a disqualified bid (non-legitimate) proposal per Flagler County Purchasing Policy, Section 4.12, you are not entitled to protest the RFP award.

As stated above I have reviewed your protest concerns and I am responding in the following manner:

Relevant Law - With regard to legal arguments made in the CI protest I would classify them as just that, “legal arguments”. I am not an attorney, this is not court, and believe that should it be necessary to undergo legal proceeding that this case law will become more relevant. Motorola also submitted rebutting case law, with applicability and interpretation different than CI’s. I believe that should legal proceedings become

necessary, the case law will be scrutinized by the County's legal representation and that potential contradictory conclusions about those cases or their applicability and/or additional case law will be presented. Rather than try to make conclusions about the case law cited, it is my intent to instead focus my efforts more on the issue-based "Argument" section of the protest.

Protest Argument Item A1. Failure to Publish the Specifications for the Radio Testing.

The County did publish the general intent and scenarios with which it would field test the radios. In the "RFP" the County indicated it would test the equipment in a simulated environment for law enforcement and fire. While the tests conducted may not have been the tests that CI would have desired, Flagler County believed the tests actually did conform with Flagler County's RFP general intent, to artificially recreate potential real world occurrences and scenarios, complete with real world imperfections.

The County is not required to publish the exact specifications for radio testing. The testers doing the evaluations do not work for underwriter laboratories. They are either IT professionals or men and women in uniform attempting to utilize the equipment the way they would in an emergency public safety setting, that is, a real world setting. Both vendors did provide laboratory tested radio specifications under ideal conditions, which, as most people know, do not always exactly translate in an uncontrolled, more spontaneous environment.

The County also had the following statement in the RFP on Section 1, Page 4 that allowed both proposers to raise any concerns about anything in the RFP process including testing:

Clarifications - It is the Proposer's responsibility to become familiar with and fully informed regarding the terms, conditions and specifications of this RFP. Lack of understanding and/or misinterpretation of any portions of this RFP shall not be cause for withdrawal of your proposal after opening or for subsequent protest of award. Proposers must contact the Purchasing Representative, at the phone number or email provided, should clarification be required. Modification or alteration of the documents contained in the solicitation or contract shall only be valid if mutually agreed to in writing by the parties.

CI did not object or raise these concerns at the pre-bid meeting; CI did not object or raise these concerns during the period for RFP questions from the RFP proposers; CI did not object or raise these concerns as part of their proposal submittal; CI did not object or raise these concerns before or after the bid evaluation meeting or anytime thereafter, until essentially after the notice of award.

Finding: The County did not have to publish any specifications and the testers were real end users that were tasked with trying to pick the best equipment from two vendors, outside of a laboratory environment. The specification issue raised affected both parties equally and both parties had multiple opportunities to seek clarification of the specifications and any testing process and procedure and neither did.

Note: This RFP clarification provision applies to multiple portions of the issues raised in CI's RFP protest and for which clarification was not sought by CI.

Protest Argument Item A2. Flagler County Failed to Adhere to Its Own Unpublished Standards.

The response in A1 is equally applicable to this response.

Additionally, what is referred to in the protest as "unpublished standards" and later as "purchasing criteria" are neither. This was simply the internal administrative description of the way the County was organizing to conduct the testing. When the County determined that they needed to adjust the administrative process slightly, they did. Any deviation that did occur was equally applicable to both parties and such minor adjustments provided no preference to either RFP proposer.

The individual items listed are de minimus and some minor testing imperfections are to be expected with non-professional testers. Items such as blind tests are not required and are somewhat difficult when the radios are distinctly different and heavily branded. The Motorola radio test was repeated at the request of a late arrival from the Sheriff's office. Both Motorola test results were consistent and the additional test provided no new negative or positive scoring effect to that proposer. Essentially, the first test was the test and the second was a demonstration for a latecomer. The remainder of items dealing with volume, hooking up of microphones, or distance apart are inconsequential at best.

Finding of Fact: The testing was fair and impartial albeit with imperfections in a non-laboratory setting. Minor administrative changes to the organization of the tests did not materially benefit either party in this process.

Protest Argument Item A3. This Violation Negatively Affected CI's Scoring.

The responses in A1 and A2 are equally applicable.

Again this protest narrative title of "Violation" is inflammatory and does not reflect the effects of the testing. Ultimately, what negatively affected CI's scoring was the equipment. CI had a broken screen during the drop test and the reason CI had distortion following the submersion test was that water was believed to have gotten into the speaker, not the proximity of the radios to one another.

Additionally, CI has attempted to refer to minor flaws in the testing process when there are other variables that the evaluator could have taken into consideration such as the design and wearing of the equipment. For example, where certain buttons were located, the size of the equipment or buttons/knobs, clips on the equipment, the ease of hooking up microphones, and other similar issues could have all played a role in the test. Additionally, this technology section includes all equipment of the system. With an RFP some subjectivity on personal preference is permitted as different approaches were taken and sometimes there is reasoned preference of one solution over another.

Finding of Fact: Both pieces of equipment performed well and were technologically impressive. There were minor differences in the design of end user equipment, the test results and the end user equipment, all of which factored into minor differences in the scoring. I could not factually determine that any differences in scoring was attributable to any testing bias or flaw that somehow gave preference to one proposer's equipment over another.

Overall (A1, A2, A3), I find that both sets of equipment were tested in a similar manner in what can be considered a reasonably fair and impartial process. Overall the Motorola equipment was believed to have performed better with audio quality, experienced less breakage, with no water intrusion, in the simulated tests. Additionally, some of the location of individual components on the equipment was deemed more desirable. While both sets of end user equipment technologically were impressive, field testing was necessary to distinguish between the proposals. Whether by fate, inexperienced testers, or non-standard tests, Motorola was chosen as slightly more reliable, better value, preferred end user equipment unanimously by the evaluators. Also, we must remember that the technical component of the evaluations included all the equipment of the system and not just the end user equipment. Additionally, had the "technology" ratings been equalized, Motorola would have still been the unanimously recommended RFP proposer.

Protest Argument B. Motorola Materially Deviated from and Misrepresented its Compliance with the Specifications of the RFP.

The Protest Response "Non-Responsiveness" on page 1 specifically addresses this issue.

Finding: I cannot find any basis for this claim as Motorola has done the extra work to thoroughly evaluate the options and chose to receive preliminary indications that a FRIP approval would likely be granted. If the FRIP approval were granted it would in turn allow their current proposal to achieve the County minimum RFP standards. In the event the FRIP approval cannot be obtained, Motorola guaranteed this standard by contractually obligating to the County that they would have to bear the additional expense to still meet this standard. CI had the equal opportunity through its RFP to present this solution or any others to meet the County's minimum standards.

Protest Argument C. Flagler County's Evaluation Committee Violated Sunshine Law During The Radio Testing.

Video recordings with audio were taken to document the conduct of the test and the test results, not to document the committee's actions as stated in the protest. CI is correct in that an internal administrative schedule for individual observation of the test was altered when it proved impractical to implement with the tests in the field. However, such a modification to the schedule is permissible, and does not magically make it a sunshine meeting.

There was no quorum and the committee could not legally meet to deliberate and act upon a recommendation. There were no official acts contemplated or taken and I could find no intent to otherwise circumvent any fairness, openness, or otherwise conceal any portion of

the testing. In fact, the precautionary guidance given was essentially to remind the parties of discussion pitfalls that may otherwise trip a threshold to bring the sunshine status into question. Similarly, I cannot determine from inquiry or watching the video that any such guidance was ignored. Gestures, facial expressions, and/or a visceral reaction to a test result do not rise to this level.

Both parties were put on notice of these tests and each proposer provided equipment for the testing. It should be noted that neither party at any step in the process sought to inquire about the testing particulars though it was their right to do so through RFP “question” and “clarification” sections on page 1 of the RFP. I can only surmise at this point, but had the parties wanted to be present, the County would have had no objection.

Finding: During the field testing phase members of the RFP review/recommending committee did not communicate, deliberate, and for all practical purposes simply observed. Any inadvertent gestures and visceral reactions to the observation of the tests or utterances about the obvious results of a test cannot be confused with communication in the context of an RFP recommendation discussion or deliberation or that of sunshine violation. The results of the field tests were brought forth and properly debated at a future publically noticed and recorded meeting with both RFP proposers present.

Protest Argument D. Consultant Erred in Evaluating Both Proposals and Thus Evaluation Committee Made Clear Errors in Scoring CI.

The consultant was hired by Flagler County to assist the County technically with the entire process and to provide the County relevant, impartial feedback as additional input into the process. The consultant’s credentials and experience are on file with Flagler County. Also, within that same record are a number of procurements throughout the State and Country. Through those other procurements in which the consultant was involved, a variety of radio vendors were selected, which to Flagler County demonstrates the impartiality of the consultant to give Flagler County the best, unbiased advice he can.

The consultant provided the County an RFP proposal comparison sheet. As the RFP proposers provided additional information, the consultant made subsequent corrections or clarifications to the comparison sheet. The consultant stands by his final comparison sheet as his professional opinion on the proposals. CI’s protest has raised issues, which may be more subjective and a difference of professional opinion vs. factual certainty.

In this Argument section CI’s protest mentioned the Infrastructure RX Antenna System and a warranty discrepancy.

Infrastructure RX Antenna System - CI was concerned that the additional Motorola antenna offered at each of the sites was considered a positive for Motorola in the area of redundancy above the minimum standard. CI’s protest states it does not offer any benefit and in effect both antennas are required to meet Phase II coverage performance. Contrary to that opinion, the County’s independent consultant has stated it does provide redundancy and Motorola has claimed it does as well, indicating in a document to the County that if one antenna were out of service that in fact the second antenna “does not reduce the coverage beyond what the RFP requires”. That indicates an above minimum

standard, offered by Motorola that the County considers to be integral to the RFP proposal that Motorola will have to financially stand behind as the system is installed.

I take no position on this except to say that I have two opinions saying that there is a redundancy benefit. One from the County's independent consultant and the other from CI's competitor Motorola who has firsthand knowledge of the operational aspects of its equipment and an inherent and ongoing performance standard responsibility.

With regard to the warranty issue, I believe that the base warranty was clarified by the consultant to effectively be the same for the base radio equipment. However, in the Motorola RFP proposal they did offer increased warranties for many of the other system components, whereas CI offered the minimum. The Committee likely viewed these additional warranties more favorably for the Motorola RFP proposal.

Finding: I cannot find any evidence that the consultant failed to act in good faith in attempting to provide the County with an unbiased professional opinion of the RFP proposals as he was so contracted to do. It is a given that professional judgement can vary and some may value their proposal's strengths differently. Ultimately, this is the reason the County pursued a RFP process, to determine which proposal better serves its needs.

Protest Argument Item E: Evaluation Committee Improperly Scored Cost Proposal in a Subjective Manner.

As the parties know, and as explained at the outset of my reply, this solicitation was not a sealed bid where cost and meeting the minimum specifications are the overriding considerations. A Request for Proposals (RFP) looks for quality, value, details and longer term aspects of a project such as maintenance, warranties, service, and equipment functionality, etc. Although cost is a consideration in the RFP process and involves the commitment of public funds, the RFP process accepts the fact that a better overall value may cost more, which is no different than a consumer considering multiple qualities and features of a product to purchase at different price points to best suit their needs. RFP's by their very nature are subjective as they consider a multitude of issues/services/equipment that are not always equivalent.

CI was scored the best for the cost portion of the analysis by all evaluators but failed to meet the minimum specifications for the system, thereby negating any cost advantage. Its proposal was generally perceived to be of lower quality for several other considerations such as end user equipment, infrastructure, thoroughness of proposal details, warranty periods, and other aspects of the project. Had CI chosen to meet all the minimum standards and in other cases exceed the minimum standards as Motorola's proposal did, the costs analysis may have been different. With regard to CI's desire to change the scoring methodology to one that better suits them, the County is under no obligation to modify to any proposer's most desired scoring process.

Further, had the County changed the Cost scoring portion of the proposal evaluation to the standardized scoring method requested by CI, it would not have changed the outcome of the overall scoring in favor of CI.

Finding: CI was rated higher by all parties under these criteria. The County is not required to adopt CI's desired rating system and at numerous times in the RFP process CI had the opportunity and inherent obligation to seek any clarity it desired. This issue is not material and would not have affected the overall outcome of the RFP recommendation.

Other Issues related to the Protest or pre-Protest submittal:

Some of the other issues that were not mentioned that set Motorola apart according to the information I received are as follows.

Warranties – CI offered the minimum warranties provided in the RFP solicitation as a standard 2-year. The Motorola proposal offered 5 and 10 year warranties on various components of the system such as tower, end user equipment, infrastructure, etc. Reference consultant's RFP comparison /analysis.

Spare Parts – As part of the procurement the County was to be purchasing initial spare parts. With Motorola's proposal the County would house them on-site readily available for a County technician to utilize. The CI proposal had the County owned parts available at a CI location in Daytona Beach requiring the technician to drive an hour round trip, during available hours to acquire the parts needed. While CI was likely willing to modify this approach and clarify this issue after the submittal, it was not clear to the evaluators reviewing the proposal.

KVL Loader – In the CI pre-protest narrative submitted, CI claimed it was compliant with this KVL Loader standard. CI was not compliant with the Key Variable Loader (KVL) requested because in CI's proposal it submitted a software based KVL that could only program Harris radios. This language is carefully worded as "Harris Radio" in the CI submittal. The hardware based KVL was specifically requested as it could be used by the County on multiple radio vendors of equipment to be non-proprietary, not just Harris equipment. Essentially this would allow the County "radio choice" by not being forced into only purchasing non-competitive, sole source, end user equipment. CI staff specifically knew this lack of radio choice was something that the County is opposed to and was trying to change with the new radio system.

LCD Monitor 21" vs 22" Dispatch Consoles – In the pre-protest narrative CI submitted, CI claimed Motorola violated the RFP specifications because it submitted a 22" monitor versus the 21" monitor listed as a minimum standard. CI chose to bid the minimum standard, Motorola submitted a slightly larger monitor above minimum standard. According to Motorola, the outer dimensions for the 21" and 22" Motorola monitor are the same. Motorola offered either. This is an example of a non-issue.

Thoroughness of the proposal – Overall to the evaluators it appeared the Motorola RFP proposal had made the extra effort and presented an optimal level of detail that included coordination with other entities, detailed explanations of system scenarios, and the provision of enhanced system features.

Finding: I do find that there were distinct differences in the proposals related to offerings, efforts, cost and equipment.

Final Protest Determination

As County Administrator I have completed the review of the bid challenge submitted by your firm on behalf of Communications International, Inc. (CI). After a careful and thorough review of the issues raised and review of the RFP record, my determination has been made. In summary, I must reject the protest of Communication International, Inc. for the following reasons:

1) I have determined CI's proposal was "non-responsive" for not meeting the minimum critical criteria of the RFP solicitation for radio signal building penetration and therefore is "not legitimate", nor eligible to protest under Flagler County Purchasing Policy Section 4.12.

2) I have determined CI's proposal is "disqualified" for violating the lobbying portion of RFP and therefore is "not legitimate", nor eligible to protest under Flagler County Purchasing Policy Section 4.12.

3. On the merits of the protest, I have determined the following in summary.

Upon consideration of the concerns you raised for protest I conclude that they are either not supported, non-material, or non-consequential in nature. The evaluation by the consultant and evaluation committee consisting of all the system users (Cities and County law enforcement, Fire/EMS, IT) all have deemed Motorola's RFP proposal a better overall value for the taxpayers of Flagler County. I could find nothing in the issues that you have raised to demonstrate any intentional bias, attempts to improperly evaluate the proposals and/or similarly other issues to otherwise determine anything other than a proper and complete RFP procurement process that has occurred on behalf of the interests of the citizens of Flagler County and the public safety personnel that rely on the system.

Further, I find that CI through its arguments is seeking to raise any concern regardless of merit in order to be awarded the bid on a technicality and it appears it is attempting to cloud or confuse the details of an RFP process to otherwise convert it into a bid process in CI's favor solely based on cost. Also, I find in general that in CI's protest it generally seeks to find fault with the County, the County's consultant, and the competitor's proposal/credibility without bearing any responsibility itself for the lack clarity in its RFP submittal, its failure to seek clarification in the process and for the lack of effort and quality in portions of its proposal. (Its method and approach may be the reason why the State of Florida recently chose Motorola over CI.)

However, hypothetically, I find that if the cost scoring portion were made more systematic as specifically requested by CI (CI 25 Motorola 22.5) and if the equipment "technology" scoring portion were made equal between vendors because of the CI issues raised in the protest, the scoring would change only slightly, but the overall result would not. Instead of being unanimous, 4 out of 5 evaluators would have still selected Motorola as the recommended RFP awardee.

I hereby incorporate the findings by issue as described herein, and hereby incorporate the protest rebuttal of the intended RFP awardee as a further response of your protest arguments.

Moving forward, Section 4.12 of the Purchasing Policy provides "in the event the challenge is not resolved the Board shall, within a reasonable time, be presented with the written challenge and the County Administrator's decision to the challenge prior to the award of the bid". Based on the desire to protect the substantial interest of the County without delay, as expressed at its March 19, 2018 meeting to include the County staff report, I would ask for CI to make a timely determination on the resolution of challenge. If the County does not hear from CI in writing that the challenge has been substantially resolved by 4pm Friday (April 20th), I will determine that challenge remains unresolved and will schedule it for a special meeting on Monday, April 23 at 10am in the BOCC Chambers at 1769 E. Moody Boulevard, Bldg. 2, Bunnell, Flagler County, Florida.

Please feel free to contact the County Attorney, Al Hadeed, or me should you have any questions regarding this challenge determination.

Sincerely,



Craig M. Coffey
County Administrator

Cc: Board of County Commissioners
County Attorney
Innovation Director
Purchasing Manager

Attachments

1. CI.pre-protest submittal
2. Motorola Rebuttal of CI's pre-protest submittal
3. CI's Protest
4. Motorola Rebuttal of CI's Protest