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**TO:** Anthony Hooper, Deputy City Manager

**FROM:** Evan P. Boone, Deputy City Attorney

**SUBJECT:** WWTP RFQ – Conflict of Interest Inquiry

**DATE:** March 6, 2019

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**Question:** “Can you please confirm that the entity, company, or person, hired by the City to perform the high-level study referenced in Section 2.1 (“Firm”) will have a Conflict of Interest as defined in RFQ Section 6.1 should they identify as an Offeror or any of its Major Participants, and will hence not be allowed to be part of a team responding to this RFQ?”

Section 2.1 of the RFP states, in pertinent part:

“Moreover, a high-level study commissioned by the City analyzed the technical and financial feasibility of a new replacement plant and found that a new replacement plant may cost the same or even less than the cost of upgrading and maintaining TCWTP over the coming years.”

**Answer:**

All offerors are required to disclose any Confidential Information that would give the offeror an unfair competitive advantage.

The fact that a high-level review was performed by Firm that concluded that there is at least one method where it may be feasible to design, build, finance, operate and maintain a water treatment plant that meets the City’s purposes stated in the RFQ does not make the study, or the prior work by Firm, “Confidential Information” because:

- (a) The “high-level study” is available to all offerors; and
- (b) The RFQ does not direct or favour any specific method be used to achieve the goal.

It cannot be determined prior to submission of SOQs that any SOQ the Firm may submit will be based on undisclosed Confidential Information.

**Discussion:**

The purpose of the RFQ is to:

The City intends to deliver a new wastewater treatment plant, which will replace the aging Tryon Creek Wastewater Treatment Plant. The replacement Plant must reliably treat wastewater over the term of the Agreement in accordance with all applicable standards. The City's primary objectives in delivering the Project are to:

- (i) **Keep costs at a level equal to or below the cost of upgrading the TCWTP;**
- (ii) Maximize financial stewardship by deferring the upfront financial outlays associated with the Project, instead tying payments to performance over the life-cycle of the replacement Plant;
- (iii) Optimize risk transfer to the private Developer;
- (iv) **Obtain a reliable plant design that is more compact, requiring a smaller footprint, and that would be a better neighbor to the existing and future development through odor control and a more visually appealing design;**
- (v) Achieve the earliest date of operations that is consistent with reliable and high-quality design and construction;
- (vi) Achieve reliable operations and effective maintenance; and
- (vii) Minimize life-cycle costs, consistent with the above objectives.

The City encourages consideration of small and local businesses. More details will be provided in the RFP.

Section 6.1 of the RFP defines a Conflict of Interest, and requires Offerors to disclose Conflicts of Interest when they submit their Statement of Qualification (SOQ):

Offerors are required to disclose information relating to their business dealings with the City, including affiliations and business and financial relationships that they may have with the City staff, officers or officials.

For purposes of this RFQ, "Conflict of Interest" means:

- a) any situation or circumstance where an Offeror or any of its Major Participants:
  - (i) has other commitments, relationships, financial interests or involvement in ongoing litigation that:
    - a. could or could be seen to exercise an improper influence over the objective, unbiased and impartial exercise of the City's independent judgment; or
    - b. could or could be seen to compromise, impair or be incompatible with the effective performance of its obligations under the Project Agreement;
  - (ii) is under contract with the City to prepare procurement documents for the Project; or
  - (iii) has knowledge of or access to confidential information (other than confidential information disclosed by the City in the normal course of the RFQ or RFP) of strategic or material relevance to the RFQ, the RFP or to the Project that is not available to other Offerors and that could or could be seen to give the Offeror an unfair competitive advantage; and

- b) an "organizational conflict of interest," which is defined under 23 CFR § 636.103 as follows:

"Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the owner, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage."

- c) an "actual conflict of interest" would be created for a City councillor, as defined by ORS 244.020:

"Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated...."

The question presented is whether Firm, as referred to in Section 2.1 that performed a "high-level study... (to analyze) the technical and financial feasibility (of a replacement plant that) may cost the same or even less than the cost of upgrading and maintaining TCWTP over the coming years," would be required to disclose in their SOQ whether that have a Conflict of Interest under Section 6.1. Because the question is whether the Firm's production of the study would constitute a Conflict of Interest, the focus of this analysis is whether that would be a Conflict of Interest under Section 6.1.a.iii specifically:

- a) any situation or circumstance where an Offeror or any of its Major Participants:

....

- (iii) has knowledge of or access to confidential information (other than confidential information disclosed by the City in the normal course of the RFQ or RFP) of strategic or material relevance to the RFQ, the RFP or to the Project that is not available to other Offerors and that could or could be seen to give the Offeror an unfair competitive advantage; and

Any Offeror that holds Confidential Information (any information of "strategic or material relevance to the RFQ, the RFP or to the Project that is not available to other Offerors and that could or could be seen to give the Offeror an unfair competitive advantage") is required to disclose the Confidential Information in the Offeror's SOQ. Thus, if Firm, from having performed the high-level study, holds information that is not available to other Offerors that would give the Offeror an unfair advantage, they are required to disclose the Confidential Information in their SOQ.

The fact that Firm performed a high-level study, which concluded that in its opinion it is possible that a new replacement plant may cost the same or even less than the cost of upgrading and maintaining TCWTP, is not evidence that the firm holds Confidential Information. If Firm submits an SOQ, the question would be whether Firm's SOQ was based on information not available to other offerors and that information would give it an unfair competitive advantage in the City's application of the evaluation criteria to the Firm's SOQ. See, for example, Oregon Government Ethics Commission staff opinion 98S-013 (<https://www.oregon.gov/OGEC/docs/Opinions/1998%20Opinions/98S-013.pdf>): a consulting firm to a public entity was a "public official" and thus was subject to the Oregon Ethics laws, which meant that the firm could not use "confidential information" in being awarded the contract. If the information

in the proposal was available to all other potential bidders, that would not be using confidential information as a result of their public employment to obtain a financial benefit.

**QUESTION #3:** Would the engineering firm be prohibited by Oregon Government Standards and Practices laws from responding to the RFP?

**OPINION:** The engineering firm can respond to the RFP if the information relied upon in the response is available to the public. ORS 244.040(4) prohibits public officials from using confidential information gained in the course of or by reason of their official position for personal financial gain. If all of the information that the engineering firm relies upon in submitting its proposal has been made available to all other potential bidders, the information would not be considered confidential. However, if the information used to respond to the RFP was not generally available to the public, the prohibition of ORS 244.040(4) would apply.

The Firm's entire study is made available to all interested offerors.<sup>1</sup> The study is subject to proprietary protection:

\*\*Without the prior written consent of the City, which consent may be withheld in the sole discretion of the City, no person or entity that receives and/or reviews a copy of the CDR may use in any manner the following unique design concepts contained in the CDR: (A) the subsurface tanks; (B) the common wall tanks; (C) the covered tanks; and (D) the construction of the operation buildings above the tanks.

The Firm's analysis is of the feasibility – based on the method employed by the Firm for the study -- that a new replacement plant may cost the same or even less than the cost of upgrading and maintaining TCWTP.

The evaluation criteria does not direct or favor any specific method to achieve the design, build, finance, operate and maintenance of a water treatment plant that meets the City's purposes stated in the RFQ. The SOQ is to be judged on the offeror's showing of its capabilities to meet the goals, for example: the "capabilities of the Offeror and its Major Participants in, amongst others, the following areas: (i) wastewater treatment plants, with advanced treatment technologies, particularly for space-constrained facility sites; ...."

#### **5.2.3.2. Design and Build Capabilities and Expertise**

- a) **Technical Experience:** The evaluation will consider the extent and depth of the experience of the Offeror and its Major Participants with the delivery of comparable projects. This will include considerations such as the design and construction of similar structures, design excellence, track record of cost and schedule compliance, general design experience, construction experience and expertise, past performance, references, etc. Each reference project will be evaluated on the degree to which it is comparable to the Project with respect to size, scale, and complexity.
- b) **Technical Capability:** The evaluation will consider the extent and depth of the technical capabilities of the Offeror and its Major Participants in, amongst others, the following areas:

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<sup>1</sup> I understand that the report will be made available by means of an online link that will be included in your response to the question.

- (i) **wastewater treatment plants, with advanced treatment technologies, particularly for space-constrained facility sites;**
- (ii) Track record as lead design, builder, design/builder, or EPC contractor on P3 projects, such as DBFOM or similar;
- (iii) Track record of meeting schedule and budget requirements associated with the construction of water / wastewater treatment plans;
- (iv) Expertise with system design and construction that provides system availability, reliability and resiliency to meet current and future demand;
- (v) Record of managing project schedule and budget including supply chain, project delivery logistics and on-site work;
- (vi) Expertise in construction work to achieve integration between designers, builders and maintenance providers / operators;
- (vii) Capability to abide by all applicable health and safety standards, required contractor permits, and professional licenses;
- (viii) Track record of stakeholder management and effective communication during construction;
- (ix) Expertise with startup, commissioning and performance testing of newly constructed water / wastewater treatment plants;
- (x) Develop effective construction approaches to account for environmental and ecological considerations;
- (xi) Provision of value-added, innovative solutions to design and technical challenges on relevant Projects
- (xii) Financial strength of the Design and of the Builder; and
- (xiii) Record of safety and security.

[The evaluation criteria also includes “Organization and Management” (5.2.2), other Technical Qualifications and Capability (5.2.3), and Financial Qualifications and Capability (5.2.4)].

All offerors are invited to address in their SOQ their technical capability regarding the evaluation criteria, including their preferred method to achieve a wastewater treatment “with advanced treatment technologies, particularly for space-constrained facility sites.” The evaluation criteria is neutral as to the method used; the criteria addresses the performance requirements of the WWTP, regardless of the method an offeror may choose to achieve those performance requirements. The existence of a high-level study to show that there is *some* method that *may* be feasible to achieve the performance standards does not constitute Confidential Information that the firm that prepared the study would be required to disclose as Confidential Information, especially when the study is available to all interested parties.

If an Offeror is of the opinion that Firm’s SOQ, if submitted, is based on Confidential Information – information that is not available to other Offerors and that could or could be seen to give the Offeror an unfair competitive advantage in addressing the evaluation criteria – that should be raised when the SOQs are submitted. It certainly cannot be determined that any SOQ the Firm may submit will be based on undisclosed Confidential Information.