



STATE OF LOUISIANA

**OFFICE OF
STATE INSPECTOR GENERAL**

TERREBONNE PARISH
FIRE TRUCK PURCHASES

Report by

Inspector General Bill Lynch

Prepared for

Governor M.J. "Mike" Foster, Jr.

September 5, 2001

File No. 1-01-0070



State of Louisiana

OFFICE OF
STATE INSPECTOR GENERAL

Terrebonne Parish

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B. L. Inspector General Bill Lynch

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August 7, 2001

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Terrebonne Parish Fire Truck Purchases

The Terrebonne Parish Consolidated Government's handling of the purchase of two fire trucks in February at a cost of \$750,000, which was \$114,000 above lower bids, subverted the mandatory Public Bid Law process. Fire department officials applied different standards in evaluating the bids, which favored the high bidder.

Sunbelt Fire Apparatus, an Alabama company, was awarded the bid on a demonstrator aerial ladder truck at \$442,885. Ferrara Fire Apparatus, a Louisiana

There are three basic reasons for finding fault with the award of the bids to Sunbelt.

- *One – Unequal treatment of bidders.*
- *Two – the specifications for the demonstrator aerial truck were substandard by the use of the term “similar,” which could mean more or less quality than sought.*
- *Three – Some of the reasons for rejecting the Ferrara bid were implausible. For example, Ferrara was cited for not taking exception to a light specified by the parish that was no longer being marketed. Ironically, Ferrara happened to have the light on hand and was able to meet the specification.*

company, offered to supply the demonstrator aerial ladder truck for \$381,351, a difference of \$61,534. However, the parish's specifications were too flawed to make a valid award of the purchase to either company.

Sunbelt bid \$307,145 on a new pumper fire truck, while Ferrara bid \$254,181, a difference of \$52,964. Ferrara's bids were thrown out on the basis of a technical violation also present in the Sunbelt bid. Two fire department officials assigned to evaluate the bids, failed to

evaluate the Sunbelt bids and therefore, did not detect that Sunbelt's bids contained the same type of technical errors. Moreover, deviations cited between the specifications and the pumper truck proposed by Ferrara did not justify elimination of its bid.

Background

The Terrebonne Parish Consolidated Government is a local governmental subdivision operating under a home rule charter. The governmental functions of the City of Houma are consolidated with the governmental functions of Terrebonne Parish. The Parish President is Robert “Bobby” Bergeron. The nine member Council is the legislative branch of the Terrebonne Parish Consolidated Government and is designed to serve as the policy-setting body of local government. The Council has no direct supervision of employees of the government.

The Houma Fire Department was organized to prevent fires, and to preserve and protect lives and property. Fire Chief Brian Hebert is responsible for the administration and management of the Fire Department. Chief Hebert was appointed in November, 2000.

The fire truck purchases discussed in this report are governed by the Louisiana Public Bid Law. The Public Bid Law is intended to advance the interests of the taxpaying citizens and to prevent public officials from awarding contracts on an arbitrary basis. Under the Public Bid Law, an agency must prepare specifications describing the product it seeks to purchase and award the sale to the lowest responsible bidder who meets the specifications, which may or may not be the lowest bidder. Failure to adhere to this requirement opens the door to favoritism and corruption that the Public Bid Law was established to prevent. Purchases contrary to the Public Bid Law are null and void.

Bids Request History

New Custom Pumper and Custom 75' Aerial

According to parish Purchasing Manager Mary Crochet and Senior Buyer Angela Guidry, the parish originally wanted to buy new fire trucks in 1996 or 1997. However, parish officials reviewed the specifications and felt they were written in favor of Sunbelt Fire Apparatus, an authorized dealer for Emergency One brand fire and rescue equipment. As a result, the parish rejected all bids and did not purchase any fire trucks.

In February or March, 2000, the development of new specifications began for a new custom pumper fire truck and a new custom 75' aerial fire truck. According to Chief Hebert, the specifications were originally developed by John Voison, fire chief at the time, Vernon Landry, fire truck mechanic at the time, Fire Equipment Operator Eddie Berthelot, Jr., and Fire Capt. Todd Dufrene. In July, 2000, the specifications were sent to the parish legal counsel for review. In December, 2000, the bids request containing specifications went out to potential bidders. The deadline for submitting bids was Jan. 25, 2001.

The invitation to bid required bidders to identify deviations from the specifications as "exceptions" and provided:

"Exceptions will be allowed if they are equal to or superior to that specified and provided they are listed and fully explained on a separate page entitled 'EXCEPTIONS TO SPECIFICATIONS.' . . . If there are no exceptions to the specifications listed, then it shall be understood that the owner [the parish] will find no deviations between the apparatus proposed and the apparatus specified. Proposals that are found to have deviations without listing 'EXCEPTIONS TO SPECIFICATIONS' will be rejected."

The bids request package states that the Chief of the Houma Fire Department, or his representative, shall be the sole interpreter of the specifications and the sole judge as to whether the apparatus or any part thereof complies with the

specifications. It also states that where the language “or equal” is used, the chief, or his representative, is to be sole judge as to whether the article proposed is equivalent to the article specified.

Demonstrator 75’ Aerial Bid Request

Chief Hebert said that after the invitation for bids for the new trucks was sent to potential bidders, he attended a fire equipment trade show in Baton Rouge. Chief Hebert stated Sunbelt Fire Apparatus had a demonstrator aerial fire truck at the show for viewing.

While at the show, Chief Hebert spoke with the Sunbelt salesman and inspected the demonstrator truck. The salesman suggested to Chief Hebert that the fire department could save time and money by purchasing a demonstrator aerial fire truck rather than a new one.

Chief Hebert requested the Parish Purchasing Office send out an addenda to the original bids request allowing vendors to submit a bid on a demonstrator 75’ aerial fire truck. Chief Hebert stated he did not request bids for a demonstrator pumper fire truck because he did not see any at the trade show.

On Jan. 22, 2001, an addenda was sent to vendors extending the deadline for submitting bids to Feb. 1, 2001. On Jan. 26, 2001, a second addenda was sent to vendors allowing them to submit an alternate bid on a demonstrator 75’ aerial fire truck based on the following stipulations:

- USE THE ATTACHED SHEETS FOR THE DEMO BID.
- The demo vehicle must be similar in capability and quality to specified aerial.
- If bidder submits a bid on the demo vehicle, the BIDDER MUST SUBMIT THE SPECIFICATIONS ON THAT VEHICLE for evaluation by the Fire Department/TPCG [Terrebonne Parish Consolidated Government].
- The demo vehicle should have never been in actual service or ever titled with motor vehicles.
- The demo vehicle should be no earlier than a year 2000 model.
- Pictures or a personal inspection of the unit will be required in order for the vehicle to be considered.

Fire Trucks

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- Aluminum or steel ladders shall be acceptable on the demo aerial and the new aerial fire truck.
- All other aspects of the specifications on the aerial truck shall remain as is.

The second addenda also changed the original specifications to the new trucks as follows:

- Provide one (1) Federal Q2B siren mounted on the front bumper with foot switches for both driver and captain.
- Change specs on Engine to: Cummins or Detroit 350 H.P. or higher.
- Change specs on Transmission to: 5 speed automatic Allison transmission that shall be compatible with engine.

According to Ms. Guidry and Chief Hebert, although the addenda issued to the original specifications called for similar specifications on the demonstrator truck, there were no detailed specifications that the vendors had to meet on the demonstrator vehicle.

The demonstrator aerial truck bid requirements and specifications pose multiple problems, including the following:

- The addenda for the demonstrator aerial truck, which required that the demonstrator be “similar” to the specifications for the new aerial truck, is too vague to meet the public bid law requirement that specifications describe the quality of the item to be purchased. The word “similar” clearly permits some degree of variation, but provides no guidance as to how similar the bidder’s product must be, or how different it may be. “Similar” can be either more or less in quality without a defining line as to how much less. In contrast, the Public Bid Law requires items with variations from definite specifications to be “equivalent” as to general style, character and quality, a subjective but less ambiguous standard.
- Also, although the invitation to bid stated that the parish sought the “earliest possible delivery,” no required delivery date was specified. As with the word “similar,” the phrase “earliest possible delivery” is too ambiguous to serve as a specification. Also, the Public Bid Law requires that bids be awarded to the lowest bidder, not the fastest bidder. If the circumstances had necessitated an early delivery date, a specific date or timeframe should

have been stated. However, there is no indication the parish had to have an earlier than normal delivery date.

- The requirement for pictures or a personal inspection of the demonstration aerial truck—which, in effect, is a surrogate for an immediate delivery date—is a “closed” specification. Closed specifications, those that impose requirements that unnecessarily eliminate other equally good products, are not permitted under the Public Bid Law. This requirement, which would effectively limit bidders to offering trucks that have already been produced, would eliminate equally good custom built trucks because a custom built truck is not built (and, therefore, cannot be photographed or inspected) until after the bid is awarded. In the absence of circumstances creating a necessity for bidders to propose an already built or immediately available truck, this requirement is a closed specification.

Taken together, these factors suggest that the demonstrator aerial truck specifications were designed to target the Sunbelt demonstrator aerial truck. These problems make any purchase using these specifications invalid under the Public Bid Law. It should be noted that the cost of the Sunbelt demonstrator truck was \$35,000 higher than the Ferrara bid for a new truck.

Awarding of Bids

On Feb. 1, 2001, the bids were opened. Sunbelt Fire Apparatus and Ferrara Fire Apparatus were the only bidders. The bids on the trucks were as follows:

<u>Vehicle Type</u>	<u>Sunbelt</u>	<u>Ferrara</u>	<u>Difference</u>
Custom Pumper	\$307,145	\$254,181	\$ 52,964
Custom Aerial	\$496,658	\$407,417	\$ 89,241
Demonstrator	\$442,885	\$381,351	\$ 61,534

Chief Hebert said he assigned two fire department officials, Captain Joe Mouton and Fire Equipment Operator Eddie Berthelot, to evaluate the bids. He said Mr. Berthelot reported that he found no problems with the Sunbelt bids, while Mr. Mouton cited the failure by Ferrara to list exceptions to specified items.

According to Chief Hebert and Ms. Guidry, Ferrara's bids on the custom pumper and custom aerial were rejected due to failure to list exceptions to specifications. Chief Hebert stated he could have lived with the Ferrara fire trucks.

The chief said he asked the parish legal counsel what to do about the Ferrara bids and was advised that the contract could not be awarded to Ferrara because Ferrara had not identified exceptions to specifications. No issue was raised over Sunbelt's failure to list exceptions for specified items.

Chief Hebert recommended to the parish council that the Sunbelt new custom pumper be purchased. He stated he recommended the Sunbelt truck because legal counsel advised that the Ferrara bids on the new custom pumper and the new custom aerial had to be rejected. Based on his recommendation, the parish council voted to purchase the Sunbelt trucks.

A month after the council vote, in response to Ferrara's demand for written reasons for the rejection of its low bids, the parish provided Ferrara a list of written reasons. The written reasons cited his failure to identify exceptions to specifications, as well as the purported deviations themselves. For the demonstrator aerial the reasons included the fact that Sunbelt's truck, unlike Ferrara's, was available for immediate delivery.

Our review of the Sunbelt bids revealed that its proposals on the custom pumper and custom aerial also did not match specifications on several items. Although some exceptions were noted, not all were noted as required. However, Sunbelt's bids were not rejected as were Ferrara's.

After our investigation determined that Sunbelt's bids failed to list some exceptions, Ms. Crochet and Ms. Guidry were consulted. They agreed that Sunbelt had failed to follow this bid requirement and should have been rejected, just as the Ferrara proposal had been rejected. They agreed it was obvious the Ferrara and Sunbelt bids had not been evaluated equally.

A meeting with them, Chief Hebert and our investigator followed. The fire chief agreed that Sunbelt had not followed the bid requirements and that its bid should have been rejected. He said that he had not personally evaluated the proposals, having assigned this task to Captain Mouton and Operator Berthelot, and said he could not explain why Sunbelt's bids were not rejected. He stated he was aware that the Ferrara bids were evaluated more stringently than the Sunbelt bids, but believed that Captain Mouton and Fire Equipment Operator Berthelot had evaluated both companies' bids and determined Sunbelt complied with bid requirements.

Captain Mouton and Operator Berthelot were then called to join the meeting. The ensuing discussion revealed that the Sunbelt bids for new trucks had not been evaluated. Captain Mouton said he was only directed to review the Ferrara proposals, and stated that his evaluation was stringent. Operator Berthelot stated he was given the proposals only a few days before the deadline, and that although he looked at the Sunbelt proposals, he did not have time to evaluate them. It was concluded at the meeting that the Sunbelt proposals were not actually evaluated and, therefore, that the bids were not treated equally.

In a response to a draft report, parish legal counsel now contradicts the earlier admission by fire department officials that they did not properly evaluate the Sunbelt bids while the Ferrara bids were stringently evaluated.

Chief Hebert and purchasing officials acknowledged that the Ferrara bids and the Sunbelt bids had not been treated equally. Ms. Guidry stated, based on these facts, they could not go forward with the purchase of the new custom pumper. Sunbelt was instructed on June 5, 2001, to halt construction of the new pumper truck.

To date, the parish has yet to produce any written evaluation of the Sunbelt trucks other than one prepared by Sunbelt after the fact.

Pumper Truck Award

The parish should have either rejected both the Sunbelt and Ferrara pumper truck bids for failure to identify exceptions, or awarded the pumper truck purchase to the lowest responsible bidder meeting specifications.

Because the bid specifications required bidders to identify and explain exceptions to bid specifications, rejection of bids that failed to do so was justified. However, it was not justifiable to enforce that requirement as to one bidder, but not another. Several of Sunbelt's exceptions involved items superior to what had been specified. However, the requirement to identify exceptions specifically directed that even items equal to or exceeding specifications be identified as exceptions in order to be considered.

Applying this requirement to Ferrara, but not Sunbelt, was unfair and arbitrary. This requirement should have been equally enforced for both Sunbelt and Ferrara. Alternatively, it could have been waived for both Sunbelt and Ferrara. Having not rejected Sunbelt's bid, Ferrara's bid should have been considered, too.

In its written reasons for rejecting the Ferrara bid, the parish listed eight specific exceptions from the bid specifications:

- Two cited exceptions, one involving an emergency light and the second the seating configuration, wrongly cited Ferrara for issues relating to defects in the parish's bid specifications.

The parish said Ferrara should have taken an exception to its requirement for a particular "Federal Crossfire Light" because the light had been discontinued by the manufacturer. After Ferrara was finally given written notice of this reason—a month after the bid had been awarded to Sunbelt—he replied that, although the specified light was discontinued, he had had two of them in inventory at the time of his bid and could have supplied them. Ferrara also offered to supply another acceptable light.

Similarly, the parish criticized Ferrara for not noting an exception for an ingress/egress problem inherent in the seating configuration it had specified for the rear seating. In fact, Ferrara's bid proposed a seating configuration that fixed the problem created by the parish's specs. Sunbelt's successful bid proposed the same seating configuration as Ferrara.

The parish's rejection of Ferrara's bid based on defects in its own specifications, combined with the fact that Ferrara's proposal would have

fixed both problems, lends strong support to the conclusion that the Ferrara bid was not evaluated in good faith.

- Two other cited exceptions, involving a section of stainless steel trim and the “rubrail” design, were inconsequential and had no bearing on the fire truck’s performance.
- Two more, involving the fuel pump and warranty, were in error.
- Another exception listed by the parish cited Ferrara for a narrow issue of cab design. The fire chief stated that Ferrara’s cab design was fine.
- The remaining exception cited by the parish, concerning the capacity of air reservoirs in the Ferrara truck’s air braking system, appears to be inconsequential. The parish said Ferrara’s bid did not propose the number of cubic inches of air reservoir capacity required by the specifications. However, Ferrara proposed a braking system meeting the FMVSS (Federal Motor Vehicle Safety Standards and Regulations) standard for air brakes. Sunbelt proposed a system meeting the same federal standard. Although Ferrara’s proposed braking system does not appear to supply the number of cubic inches of air reservoir capacity specified, the parish never has given an explanation why Ferrara’s brakes would not perform adequately.

The Public Bid Law does not permit the parish to reject Ferrara’s bid merely because it fails to precisely meet its specific standards. Rather, when such “definite standards” are used in a bid specification they may be used only to “denote the quality standard of the product desired,” and “do not restrict bidders to the specific ... specification named.” Such detailed “definite specifications” may be used only to “convey to prospective bidders the general style, character, and quality of product desired; and that equivalent products will be acceptable.”

The parish’s reasons for rejecting Ferrara’s bid do not indicate any attempt to assess whether Ferrara’s proposed truck was equivalent. None of the parish’s stated reasons for throwing out Ferrara’s bid are sufficient to support the conclusion that Ferrara’s proposed pumper truck was not equivalent.

An award of the pumper truck bid to Ferrara would have saved the parish \$52,964 compared to the Sunbelt bid.

Demonstrator 75' Aerial Award

The Terrebonne Parish Consolidated Government request for bids on a demonstrator aerial truck did not meet the requirements of the state public bid law in that it did not contain adequate specifications for the truck. Therefore, none of the bids submitted could be used. Nonetheless, the parish moved forward with the process.

Chief Hebert said that prior to the deadline for submitting bids, the Sunbelt salesman brought the demonstrator fire truck to Houma and fire department employees looked over the truck.

Chief Hebert stated that after the second addenda went out, he learned that Ferrara had no demonstrator aerial fire truck available. He was advised by Ferrara officials that Ferrara would build a new aerial fire truck and sell it as a demonstrator. Ferrara proposed to loan the fire department a truck while the new truck was being constructed.

The Ferrara demonstrator aerial was to be a new custom built truck matching the specifications of the bid submitted for the new truck with the following exceptions:

- The “demonstrator” would have a 350 hp engine.
- The “demonstrator” transmission would match up to the engine.
- The “demonstrator” chassis would be HME.

Chief Hebert stated he reviewed the bids on the demonstrator aerial and recommended to the parish council that the Sunbelt demonstrator aerial fire truck be purchased. He stated he recommended buying the Sunbelt demonstrator aerial for the following reasons:

- The Sunbelt aerial has a 470hp engine compared to a 350 hp engine in the Ferrara aerial.
- The Sunbelt aerial has an aluminum ladder compared to steel ladder in the Ferrara aerial.
- Sunbelt could deliver its aerial in 30 days compared to 120 days it would take Ferrara to build and deliver its aerial.

The addendum, in fact, permitted a 350 hp engine and steel ladder, and no required delivery timeframe had been specified. Additionally, the first two reasons are not included in the written reasons given to Ferrara a month after the award of the bid to Sunbelt.

Chief Hebert and purchasing officials acknowledged that the bid request for the demonstrator aerial fire truck did not contain detailed specifications. They stated the Sunbelt demonstrator was purchased because it was best suited for the job and it was available for delivery.

At the March 28, 2001, regular session of the Terrebonne Parish Council, council members approved a resolution accepting the bid of Sunbelt for the custom pumper and demonstrator 75' aerial in the amount of \$750,030. The purchasing office then issued purchase orders for the two vehicles. Total amount for the Ferrara custom pumper and demonstrator 75' aerial was \$635,532, a difference of \$114,498.

In contrast to the pumper truck bid, comparing the Ferrara and Sunbelt demonstrator truck bids is more difficult. An evaluation by Sunbelt of its own bid identifies over 25 exceptions. Some, but not all of the numerous reasons for rejecting Ferrara's bid are erroneous or inconsequential. The reasons the chief said he recommended to the parish council the purchase of the Sunbelt demonstrator aerial truck are different from the reasons stated by the parish in the written reasons it gave Ferrara.

If the new aerial truck specifications are used as a guide, some of the differences, such as those relating to the ladder proposed by Ferrara, arguably may be meaningful. However, concluding whether Ferrara's bid should have been accepted is impossible because the requirement that the demonstrator be "similar" to the new custom aerial specifications is too ambiguous a criterion against which to make that determination.

Conclusions:

1. The Ferrara and Sunbelt bids were not treated equally.
2. The contract for purchase of a new pumper truck and a demonstrator aerial ladder truck was awarded to Sunbelt Fire Apparatus Co., Inc., of Alabama, whose bids on the two vehicles was \$114,000 higher than the low bids submitted by Ferrara Fire Apparatus Co., Inc.
3. The bid submitted by Sunbelt for the new pumper fire truck was not evaluated by the Terrebonne Parish Consolidated Government. Yet, Sunbelt was awarded the purchase.
4. The Terrebonne Parish Consolidated Government disqualified the low bidder on the purchase of a new pumper fire truck on the basis it did not meet the specifications which required listing of exceptions to specifications. However, it approved a bid of the higher bidder even though its bid contained the same type omissions.
5. The parish should have either rejected both Sunbelt's and Ferrara's bids for the new pumper truck, or considered both of their bids on the merits.
6. The parish's reasons why the new pumper truck proposed by Ferrara did not meet specifications were inadequate to merit rejecting the bid.
7. The bid process utilized by the Terrebonne Parish Consolidated Government for purchase of a demonstrator aerial fire truck, which contained inadequate specifications as well as one closed specification, did not meet the requirements of the Louisiana public bid law. Thus, the parish's purchase of the demonstrator aerial truck from Sunbelt is invalid under the Public Bid Law.
8. The failure of Terrebonne Parish Consolidated Government officials to assure that the elimination of the Ferrara bid was truly warranted could cost the parish more than \$114,000.

Recommendations:

1. This report should be submitted to the State Attorney General's office for appropriate action.
2. Terrebonne Parish Consolidated Government should take steps to insure parish employees follow the public bid law when applicable.
3. All parties to these events should explore possibilities for an amicable resolution of this situation, thereby avoiding costly legal fees and loss of time.

Management Response:

A response by legal counsel for the parish government is attached..

Responses by Ferrara and Sunbelt are available to be reviewed in the Office of the Inspector General.

BL/DM/rb
1-01-0070

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July 13, 2001

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Re: File No. 1-01-0070

Dear Mr. Lynch:

This is in response to the draft report received by the Terrebonne Parish Consolidated Government on July 2, 2001. We object to the allegations of the report, which claim that the Terrebonne Parish Consolidated Government subverted the Public Bid Process. That allegation suggests that the Parish intentionally engaged in wrongdoing. However, we could find no evidence in your report, nor are we aware of any such evidence, which would suggest that any Parish employee or representative engaged in any wrong doing with respect to this procurement.

I. Both bids were fully evaluated by the Terrebonne Parish Consolidated Government.

Contrary to the assertions of the draft report, the Terrebonne Parish Consolidated Government fully evaluated both the Ferrara and Sunbelt bids prior to award. Upon receipt of the bids, the purchasing department evaluated the bids to determine if bid bonds and similar requirements were met. The Purchasing Department then provided the bids to the Houma Fire Department for a review of the technical requirements.

Captain Gerald Mouton and Fire Equipment Operator Eddie Bertholot reviewed both bids. Fire Equipment Operator Bertholot takes issue with the statements attributed to him in the draft report that "he did not receive the bids from the purchasing office timely and did not have time to evaluate Sunbelt's bids" or that he "acknowledged that Sunbelt's bids had not been evaluated." Instead, he has advised our office that he and Captain Mouton spent two entire shifts sitting together at a table reviewing both bids. Captain Mouton prepared notes of the numerous deficiencies in Ferrara's bid. Equipment Operator Bertholot did not prepare a report on Sunbelt's bid because he found no deficiencies which would warrant rejection of the bid. Although Equipment Operator Bertholot did say that he would have liked to have had more time to evaluate the bids, he reports that both bids were fully evaluated.

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Chief Hebert takes exception to the statement attributed to him that "he could have lived with the Ferrara fire trucks." He advised our office that he could have lived with fire trucks from any manufacturer as long as they met the specifications. However, because Ferrara's trucks did not meet the specifications in many critical areas, the Ferrara proposal was unacceptable. Chief Hebert and purchasing officials also take issue with the allegation that the bids were not treated equally. Both bids were fully evaluated.

- II. The Ferrara bid was not rejected for purely "technical" reasons but because the bid differed materially from the specifications in quality and function.

The draft report states that Ferrara's bid was rejected due to failure to list exceptions to specifications. The inference of the report is that these were minor errors, which should have been overlooked in order to award the bid to Ferrara.

A review of the Ferrara bid analysis prepared by the Houma Fire Department clearly shows, however, that many of the problems with the Ferrara bid were not minor paperwork issues but in fact involved major deviations from the specifications. A copy of the analysis is attached hereto as Exhibit A. (A copy of this analysis was provided to Ferrara and incorporated by reference in the letter rejecting Ferrara's bid). All of the deviations involve situations where Ferrara either omitted items required in the specification or proposed different items, which were inferior to what was required in the specifications. A review of all such deviations is not possible in this response; however, some of the major issues are noted as follows:

- 1) Ferrara took exception to the payment terms of the contract. Ferrara's bid rejected the liquidated damage provision of the contract and allowed for only a 5% retainage. This represents a substantial deviation from the payment terms of the bid package. In *Systems Plus, Inc. v. East Jefferson General Hospital*, 638 So.2d 404, 409-410 (La. App. 5th Cir. 1994), the court held that modifications to payment terms contained in a vendor's bid were substantial enough deviations from the specifications to render the bid unresponsive and properly subject to rejection.
- 2) The aerial device proposed by Ferrara did not meet or exceed the requirements of the specifications.

As discussed at great length in the Fire Department's analysis, the aerial device proposed by Ferrara did not meet the requirements of the specifications. The bid package made it clear that the aerial device was to be used to fight structural fires and for use in elevated rescue and vehicle and medical rescues. The specifications required that the aerial device should possess the highest structural safety factor and aerial performance available. Page 6 of the specifications specifically required a safety factor of 2.5:1. The specifications also stated that the aerial shall allow for distributed loads when used at full

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extension at reduced angles of elevation and that the builder of the device submit a letter certifying that the device complied with standards and certifying the safety factor of the apparatus. Finally, the specifications required that the aerial device operate with H type support jacks which do not require the use of manually inserted pins.

The aerial device proposed by Ferrara did not meet the requirements of the specifications. The Ferrara device had a safety factor of 2:1 rather than the 2.5:1 required by the specifications. The Ferrara device did not allow for distributed loads on the aerial at any elevation. No letter certifying that the device met safety standards was included in Ferrara's bid package. The Ferrara device required the use of manually inserted pins.

These deficiencies in the Ferrara bid represented more than mere paperwork errors. Representatives of the Terrebonne Parish Consolidated Government Purchasing Department conferred with the NFPA about the adequacy of the aerial device proposed by Ferrara. The NFPA confirmed that based upon the specifications for the aerial device proposed by Ferrara, no more than two firefighters and/or victims could be on the ladder at any one time. Since basic firefighting and rescue techniques often require four people to be on the ladder at any given time, [REDACTED]

Your inspector asked Parish employees how they could justify spending more money to purchase the Sunbelt aerial truck. I would submit that the safety of the firefighters of the Houma Fire Department and the citizens who depend on them, would more than justify the difference in price.

3) The Ferrara aerial device had numerous other deficiencies.

The analysis prepared by the Fire Department contains a detailed analysis of the other deficiencies in the Ferrara aerial truck. The following is a brief listing of the deficiencies noted:

- a. Safety roll cage in the cab does not include specified 3x3 upright members for center support.
- b. A 16.5 cubic foot air compressor and air reservoirs of 5200 cubic inches was specified. Ferrara proposed a 16 cubic foot compressor and reservoir of only 4362. No exception was taken.
- c. Stainless steel trim on the front of the cab and along the sides of the cab was omitted. No exception was taken.
- d. Auto-eject plug with charging pilot light was omitted.
- e. Federal crossfire light was omitted and no alternative was proposed.
- f. Lanyard chain for the air horn was omitted.
- g. Insufficient dome lights.

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- h. No exception taken to substituted driver's seat.
- i. Side beavertail compartments at the rear of the apparatus were omitted. No exception was taken.
- j. Specified rear seats not supplied and no exception is taken.
- k. Insufficient fold down steps. No exception was taken.
- l. Minimum cramp angle for front axle does not meet specifications. No exception was taken. This deficiency makes the vehicle less maneuverable and increases the turning radius.
- m. Upper mirror sections not included. No exception was taken.
- n. No T handle style exterior latches. The paddle type provided by Ferrara are difficult to operate with gloved hands. No exception was taken.
- o. No aluminum treadplate at front corners. No exception taken.
- p. Cab steps do not have aggressive non-skid surface. This is a safety hazard and does not meet NFPA standard. No exception was taken.
- q. Sikkens paint process not provided. No exception taken.
- r. Single "Z" Scotchlite stripes provided rather than the double stripe specified. No exception taken.
- s. Rubrails provided were non-channel and did not have the lower level marker lights or reflective stripe specified. No exception was taken.
- t. Plumbing was galvanized pipe rather than the stainless steel specified. No exception was taken.
- u. 2.5" individual line gauges for discharges were provided rather than the 3.5" diameter gauge specified. No exception was taken.
- v. Enfo III Electronic Module provided rather than the specified discrete gauges for tachometer, oil pressure, coolant temperature, and voltmeter. No exception was taken.
- w. Tags on pump panel were only glued, not glued and riveted as specified. No exception taken.
- x. MC Products gauges provided rather than the IC5 gauges specified. No exception was taken.
- y. Interior dimension of base ladder was only 34" rather than 37.5" specified. This could hamper rescue operations. No exception was taken.
- z. No heat sensor labels on aerial device. No exception taken.
- aa. Roll up door over ladder tunnel supplied rather than hinged door specified. No exception taken.
- bb. No short jacking of aerial device allowed. Ferrara aerial allows short jacking which creates the risk of tip-overs.
- cc. Warranty may not be valid.

Similar problems were noted in Ferrara's bid on the Pumper truck:

- a. No 3x3 upright members for center support on cab roll cage. No exception taken.

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- b. No electronic fuel pump as specified. No exception taken.
- c. Air reservoir proposed has only a total capacity of 4362 cubic inches rather than 5200 cubic inches specified. No exception taken.
- d. No stainless steel front trim.
- e. No Federal Crossfire light and no alternative proposed.
- f. Rear seats not as specified and no exception taken.
- g. Rubrails are not aluminum channel type with lower level marker lights and reflective material installed inside the channel. No exception taken.
- h. No single source warranty.

Chief Hebert advised our office that Ferrara's salesman, Frank Warren, stated that Ferrara did not take exceptions because they did not want the Parish to reject their bid immediately. Even if Ferrara had properly identified exceptions on the bid sheet, they still would not have been responsive since the Instructions to Bidders clearly provides that exceptions will be allowed only if "they are equal to or superior to that specified" The deviations in Ferrara's proposal were not equal to or superior to that specified.

III. The Sunbelt bid did not differ materially from the specifications.

The draft report alleges that the bid submitted by Sunbelt also did not match specifications on numerous items. Interestingly, the draft report contains no listing of these alleged deviations. A review of the items identified during the investigation show, however, that any deviations in Sunbelt's bid were not material and did not justify rejection of their bid. Sunbelt has prepared a full analysis of the alleged deviations noted. A copy of that analysis is attached as Exhibit B and summarized briefly herein:

1. Tank to pump flow rate of 150 GPM. Sunbelt met this specification.
2. Tank fill line with a flow rate of 80 GPM. Sunbelt met this specification.
3. Four dome lights in the cab. Sunbelt met this specification.
4. Rubber rubrail ends. Sunbelt met this specification.
5. T-type exterior door handles. Sunbelt met this specification.
6. Air system with minimum capacity of 5200 cubic inch capacity. Sunbelt proposed a system with a capacity of 5,214 cubic inches. Sunbelt met this specification.
7. 60-gallon fuel tank specified. Sunbelt offered a 65-gallon tank. Although this technically should have been identified as an exception, it exceeded the specification requirements and represents a minor deviation, which the Parish was authorized to waive.
8. 16-gauge steel specified for the gauge panel. Sunbelt offered 14-gauge steel on the panel. Although this technically should have been identified as an exception, it exceeded the specification requirements and represents a minor deviation, which the Parish was authorized to waive.

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9. A 14 kW generator was specified. Sunbelt provided a 15kW generator. Although Sunbelt did not specify this as an exception, they did note this on a separate sheet as a clarification to their bid. Again, this represents an item which exceeds the specifications, and the Parish was authorized to waive this minor deviation.

As the Court noted in *Boh Brothers Construction Co., LLC v. Department of Transportation and Development*, 698 S.2d 675, 678 (La. App. 1st Cir. 1997), a public entity may waive deviations which are not substantive in nature. The deviations in Sunbelt's bid were minor in nature and actually exceeded the requirements of the specification. As such, Sunbelt's bid was properly accepted.

IV. The Demonstrator Aerial Truck was properly bid.

- The second addenda to the bid allowed the bidders to submit an alternate bid on a demonstrator 75' aerial fire truck based on the following stipulations:
- USE THE ATTACHED SHEETS FOR THE DEMO BID.
- The demo vehicle must be similar in capability and quality to specified aerial.
- If bidder submits a bid on the demo vehicle, the BIDDER MUST SUBMIT THE SPECIFICATIONS ON THAT VEHICLE for evaluation by the Fire Department/TPCG.
- The demo vehicle should have never been in actual service or ever titled with motor vehicles.
- The demo vehicle should be no earlier than a year 2000 model.
- Pictures or a personal inspection of the unit will be required in order for the vehicle to be considered.
- Aluminum or steel ladders shall be acceptable on the demo aerial and the new aerial fire truck.
- All other aspects of the specifications on the aerial truck shall remain as is.

Sunbelt submitted a bid on the demonstrator aerial fire truck. Sunbelt made the demo truck available for inspection by the Houma Fire Department and included pictures

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and specifications on the truck with the bid. Sunbelt had a demonstrator truck available for immediate delivery. Finally, the demonstrator truck proposed by Sunbelt was similar in capability and quality to the specified aerial. Attached hereto as Exhibit C is an analysis by Sunbelt showing exactly how the demonstrator fire truck met the required specifications.

Ferrara did not have a demonstrator truck available for immediate delivery. Ferrara did not have a truck available for physical inspection by the Houma Fire Department, and they did not supply a photograph or specifications on the demonstrator fire truck with their bid. Ferrara simply indicated to Fire Department Officials that they intended to build an aerial truck to the specifications of the custom aerial and sell it as a demo. However, as previously discussed, the custom aerial proposed by Ferrara did not meet the required specifications so there was no reason to believe that a demonstrator would be in compliance. Ferrara simply did not submit a bid in compliance with the requirements of the addendum.

The draft report alleges that procurement of the demo aerial fire truck was improper because no detailed specifications were included. That claim is incorrect. The addendum included specifications pertinent to the vehicle's status as a demo and also provided that *All other aspects of the specifications on the aerial truck shall remain as is*. Thus the specifications for the custom built aerial truck were incorporated by reference and applied to the demonstrator truck. More detailed specifications providing for a specific truck could not be used because, as you know, closed specifications are prohibited by the Public Bid Law. In fact, L.A. R.S. 38:2212.1.C provides that "whenever in specifications the name of a certain ... definite specification is utilized, the specifications shall state clearly that they are used only to denote the quality standard of product desired and that they do not restrict bidders to the specific brand, make, manufacturer, or specification named; that they are used only to set forth and convey to prospective bidder the general style, type, character, and quality of product desired; and that equivalent products will be acceptable." The language in the addendum that "The demo vehicle must be similar in capability and quality to specified aerial" complies with this statutory provision. The specifications were not fatally vague but in fact provided a legitimate basis for evaluating the bids. Ferrara simply failed to submit a bid that was in compliance with the specifications.

V. Terrebonne Parish properly awarded the bid to Sunbelt.

As discussed above, Terrebonne Parish properly determined that Sunbelt was the lowest responsive bidder on the fire truck procurement. Ferrara failed to seek timely injunctive relief to set aside the award to Sunbelt and cannot now obtain any relief. "An unsuccessful bidder on a public contract who fails to resort to the relief granted by statute by attempting to enjoin timely the execution or the performance of the contract, when the facts necessary for injunctive relief are known or readily ascertainable by the bidder, is

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precluded from recovering damages against the public body.” Airline Construction Company, Inc. v. Ascension Parish School Board, 568 So.2d 1029, 1033 (1990).

Moreover, the Parish has already properly awarded the contract to Sunbelt. The Parish cannot now reject all bids and readvertise the project. *Donahue v. Board of Levee Commissioners*, 413 So.2d 488, 492 (La. 1982), holds that “once a public entity has exercised its option and accepted the lowest responsible bidder, it cannot then reject all bids and readvertise the project.”

In consideration of the above, we respectfully request that you reconsider the conclusions of your draft report.

With regards,



ROMAINE L. WHITE
ASSISTANT PARISH ATTORNEY

RLW:ld

Enclosures

cc: Robert J. Bergeron
Al Levron
Chief Brian Hebert
Mary Crochet
Gerald Mouton
Eddie Bertholot
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August 3, 2001

ALSO ADMITTED IN
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◊ Georgia
* Virginia

Mr. Bill Lynch
State of Louisiana
Office of State Inspector General
224 Florida Street, Suite 303
Baton Rouge, LA 70804-9095
VIA FEDERAL EXPRESS DELIVERY

Re: File No. 1-01-0070

Dear Mr. Lynch:

I am in receipt of your revised draft report sent to me on August 1, 2001. Many of the issues raised in your report were already addressed in our response dated July 13, 2001 and do not require further response. I am writing today to address the new arguments contained in your revised draft.

The Inspector General contends that the specifications for the demonstrator aerial truck were impermissibly vague because they required that the demonstrator truck be "similar" to the specifications for the new aerial truck. The Inspector General claims that the Public Bid law requires the use of the term "equivalent" which he claims is a less ambiguous standard. This, however, is a distinction without a difference.

The words similar and equivalent are often used interchangeably. In fact, the handout for a presentation on *Using Louisiana's Public Bid Law*, given to the National Institute of Governmental Purchasing, Southeast Louisiana Chapter, on May 26, 2000, by Assistant Attorney General Glenn R. Ducote, specifically states that "Specification may use a brand name and model number to indicate general quality and character of product sought, but must also clearly state that products of *similar* quality and character will be acceptable." (Emphasis added. Page 1-2 of handout attached).

The Inspector General contends that the requirement that a bidder on the demonstrator aerial truck supply a picture or physical inspection of the truck represents a prohibited closed specification because it precludes bidders who would wish to build a custom truck. Again, this argument is without merit.

The term "demonstrator" is a term of art which is understood to mean a product that has already been produced and used for demonstration purposes by the manufacturer or retailer. Demonstrator does not refer to a custom built truck that might take several months to complete. The requirement of a physical inspection or photograph of the truck is a reasonable means for the Parish to evaluate the truck proposed.

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A closed specification is a specification that is drafted in such a way that only one provider can possibly supply the item. There are many fire truck manufacturers who have demonstrator trucks available. There is no evidence that Sunbelt was the only manufacturer capable of bidding a demonstrator truck. Additionally, at the time that Fire Chief Hebert requested that addendum for a demonstrator truck, he had no knowledge that Ferrara could not supply a demonstrator truck. Clearly this requirement was not a closed specification.

The Inspector General also contends that some of the reasons for rejecting the Ferrara bid were implausible. This argument ignores, however, the several substantial deficiencies in the bid which were identified in my prior response. Even if the parish noted a few deficiencies incorrectly, this does not represent a violation of the Public Bid Law. The awarding agency has the right to be wrong, dead wrong, in the exercise of its discretion in determining whether to accept a bid, as long as it is not unfairly, arbitrarily wrong. *Tide Equipment Co. v. Pointe Coupee Parish Policy Jury*, 312 So.2d 154, 158 (1st Cir. 1975); *Williams v. Board of Supervisors*, 338 So.2d 438, 441 (2d Cir. 1980). A Parish's reasonable, good-faith interpretation of its own bid specifications should not be disturbed by a court with differing views. *Donald M. Clement Contractor, Inc. v. St. Charles Parish*, 524 So.2d 86, 89 (5th Cir. 1988).

Finally, I must address the recommendation that we negotiate a settlement of this matter. The Public Bid law does not allow us to negotiate the procurement of equipment over \$15,000.00. We are bound by the restrictions of the Public Bid law and are unable to follow this suggestion.

Please include both my original and supplemental responses with the report submitted to the Governor.

With regards,



ROMAINE L. WHITE
ASSISTANT PARISH ATTORNEY

RLW:ld

Enclosures

cc: Robert J. Bergeron, Parish President
Al Levron, Parish Manager
Brian Hebert, Fire Chief

Using Louisiana's Public Bid Law

*National Institute of Governmental Purchasing
Southeast Louisiana Chapter
May 26, 2000*

Presented by Glenn R. Ducote
Assistant Attorney General
Louisiana Department of Justice
Richard P. Ieyoub, Attorney General

■ Application

- The Louisiana Public Bid Law (La. R.S. 38:2211-2261) is applicable to all political subdivisions and to locally elected public officials. It is also applicable to the state Legislature and the judiciary.
- The law applies to contracts for public works by public entities, using public funds
 - construction, remodeling, drainage structures, utilities, improvements, roadways, etc.
- PBL applies to state agencies and colleges and universities for public works, but not for the purchase of materials and supplies
- The law applies to, "purchases of materials and supplies"
 - this includes equipment, vehicles, and all other movable property
- The law does not apply to contracts for services, professional or otherwise
- It does not apply to pure leases, but does apply to any lease where there is an opportunity to obtain title at any time such as the typical "lease purchase"
- It does not apply to insurance, which is considered a service
- The law becomes applicable when certain monetary "thresholds" fixed in the statute are met for a particular procurement
 - for public works the law becomes applicable when the total cost of a project, including labor and materials, exceeds \$ 100,000. No procedures are prescribed by state law for jobs under \$ 100,000
 - only jobs valued at less than \$ 100,000 for the total cost of materials and the value of labor and equipment to be used may be done by force account, using your regular employees.
- Labor required for the maintenance of public works built and completed can always be done with your own employees
- Construction of buildings cannot be undertaken with the city's own employees, no matter how little the construction may cost; construction of a building must be contracted out

Contracts for construction which are over \$50,000, even if not bid out, will require the use of a state licensed contractor

For purchases of materials and supplies the law requires the following:

- for a purchase below \$7,500, no procedure is specified
- for a purchase between \$7,500 and \$15,000, at least three telephone, facsimile or written quotations must be obtained on the same specification and documented in the procurement File
- for a purchase exceeding \$ 15,000, the procurement must be advertised and awarded based on sealed bids which are received timely

■ Specifications.

Under no circumstances shall there be a division or separation of any procurement or public works project into smaller procurements or projects which division or separation would have the effect of avoiding the public bid process

- Open Specifications. Specification may use a brand name and model number to indicate general quality and character of product sought, but must also clearly state that products of similar quality and character will be acceptable.

Contracts for materials, supplies, or equipment which will be needed in partial deliveries through the fiscal year must be purchased through a "requirements contract" based on the total value of that commodity to be purchased during the fiscal year

-this will apply to acquisitions such as office supplies, sand, gravel, gasoline, tires, auto parts and all commodities needed in small but recurring quantities during the fiscal year

Certain commodities such as gasoline may require the use of an index price (such as OPUS) to establish a price which adjusts with market conditions. Competition between bidders is based solely on the "margin over index price" which the bidder offers.

- "cost plus" contract arrangements cannot generally be used in public procurement

Alternates Specifications can call for no more than three alternates and when making an award, alternates must be accepted in the order that they are listed in the solicitation unless doing otherwise has no impact of the award.

- Procurement of telecommunications or data processing equipment, systems and related services may be done by public bids, but may also be done pursuant to a Request for Proposals (RFP).

- An RFP gives you greater flexibility in making an award. You may grade the proposers on a variety of criteria which must be set forth and weighted in the process of evaluating proposals. Prospective proposers must be informed in advance of the criteria to be utilized and the weight assigned to each criterion.