

## Scandals promote procurement reform (and the services of fairness consultants)

Scandals can sometimes be a good thing. A well-publicized scandal is worth a dozen studies, six policy papers, and ten annual briefings by the procurement director to the Council. A good scandal focuses the public's attention on one event which is so obviously wrong that the entire procurement process is subject to scrutiny. An effective scandal involves large amounts of public money, lots of media coverage, and a series of improprieties which are easily understood. Superior scandals lead to public inquiries or activities by the public prosecutor's office.

Scandals produce results: changes in procurement practices and changes in attitudes towards the procurement function. In many cases, the scandal spawns the adoption of a new practice - using a fairness consultant for major, high risk procurements.

The City of Toronto is Canada's largest city. It had a procurement scandal which we'd like to discuss here. And it then established the use of fairness consultants. First, let me give you a sense of the scope of this scandal.

What seems to have happened was that, away back in 97 and 98, the city decided to lease about 9,000 new Microsoft PCs and various companies lined up to provide them. The eventual winner, a company called MFP Financial Services, offered a purely financial deal around leasing the PCs and their software, thereby freeing the bureaucrats from having to deal with that pesky competitive bidding process in terms of actual configuration, deployment, and licensing.

Paul Murphy  
<http://www.winface.com/inside/mfp.html>

The public inquiry, headed by a judge, lasted two years and cost millions of dollars. (For more info: [www.torontoinquiry.ca](http://www.torontoinquiry.ca)) Here's what one of Canada's largest newspapers had to say on its editorial pages midway through the inquiry.

The inquiry showed that the very people whose job was to protect taxpayers' money -- who were to ensure that rules were being followed-- were wined, dined and treated to travel by corporate interests. Some were flown to a hockey game in Philadelphia. One was whisked to a golf tournament in Augusta, Ga.

This wasn't a matter of a few people suffering a lapse in judgement. The inquiry showed it was a common, and shameful, way of doing business for key figures responsible for signing contracts, for council's experts on computer technology, and for former budget chief Tom Jakobek.

From: City served well by MFP hearings Editorial, Toronto Star (Nov. 29, 2003.)

In this issue, we provide information which can help your management avoid their fifteen minutes of fame or their 30 second appearance on the evening news. Using a fairness consultant is not as exciting as being on CNN but it does represent a "best practice" in promoting fair and open competition.

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RFP's and the law of contracts

The process of issuing an RFP and receiving proposals does, by design or inadvertently, establish contractual rights and obligations. Each RFP and the associated process should be reviewed by your lawyer or legal department prior to issuing the RFP. The examples and sample RFP's used throughout this text have been used in many different jurisdictions in the past.

The author makes no claim about the appropriateness, correctness, or legal consequences of these examples or sample RFPs. Competent legal advice should be obtained to review your Request For Proposal and the associated process.

## Our Products

### Reference Materials

- The Request For Proposal Handbook
- The RFP Report
- A Searchable Library of the Best RFP Practices

### Video

- Creating A Winning Proposal (102 minutes)

## Our Web Site

[www.proposalsthatwin.com](http://www.proposalsthatwin.com)



In June, 2004, the Chief Administrative Officer of the City of Toronto submitted a staff report about "the merits of using external fairness consultants for certain procurements."

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The report contains an excellent discussion of the use of fairness consultants to ensure that a complex procurement process is fair, transparent, and incorporates best practices.

In this report, the CAO recommended that:

Council endorse the approach of using external fairness consultants (detailed in Appendix 2) in certain limited circumstances defined by call complexity and the likelihood of intense scrutiny such as high-profile projects;

They also investigated the cost of using such a consultant. Their findings are consistent with the results experienced in other jurisdictions:

The cost of using an external fairness consultant on a very complex procurement will average at \$25,000.00 with the (rare) possibility of a maximum of \$50,000.00.

Their Comments section contains a lot of valuable information about the purpose of a fairness consultant, the changing environment, and the benefits of using a fairness consultant.

The primary purpose of a fairness consultant (Fairness 'Commissioners', Fairness 'Monitors' or Process 'Monitors/Auditors') is to assess and provide assurance on the process, not the decision. Specifically, the consultant does not address whether the right product or vendor was selected. Rather, it is the process of the selection itself that is assessed in terms of whether all participants were evaluated objectively according to approved and required processes.

The report discusses the current procurement environment and the pressures of increasing demands:

**The Changing Procurement Environment:**

Coupled with new forms of collaboration, partnering, contracting, and funding arrangements, complex procurements often receive intense scrutiny. There are increasing expectations and demands for evidence of government accountability in procurement activities from vendors, the general public, elected representatives, and government staff themselves. As found by the Executive Resource Group, when reporting to the Toronto Computer Leasing Inquiry, such demands and developments have led to new:

- Demands for specialized knowledge of procurement management practices on large-scale, complex procurement initiatives;
- Precedents for procurement management processes based on common law decisions;
- Forms of arbitration/rulings based on challenges to public procurement undertakings;
- Statutory and regulatory directions requiring reform of administrative practice/procedures and standards, as part of new accountability frameworks; and
- Developments of methods and techniques for evaluation and selection processes.

The report spells out the role of the Fairness Consultant.

**Purpose of Fairness Consultants:**

Due to the increasingly complex public sector procurement environment, the use of external fairness consultants is also expected to increase. This is because their role is to provide oversight on procurement processes for the purpose of ensuring adherence to high standards, objectivity of evaluation, and transparency. This role can be particularly important for Request for Proposal (RFP) procurements where several solutions may be equally viable and need to be evaluated in a manner that ensures equability for all the proponents. Fairness consultants may be perceived by both internal and external parties, as providing more neutrality and independence than that provided by staff. Assurance from an arms-length party that procurement was consistent with best practices may reduce controversy, complaints and liability. This perceived objectivity, in turn, enhances the defensibility of procurement decisions.

An explicit focus on fairness produces benefits, both in terms of public confidence and quality.

The potential benefits to an organization of using a formal fairness role to advise, monitor and assess a complex procurement (depending on extent of involvement) include:

- Obtaining a second opinion at key, pre-identified decision stages;
- Providing support to the purchasing manager in encouraging departmental best practices;
- Additional insight on correct competitive processes;
- Raising the profile within an organization regarding the importance of risk management;
- Assisting the consideration of all aspects of evaluation processes for better understanding;
- Addressing concerns for accountability/fairness given costs to respond to complex calls;
- Independent assurance of integrity of process with a signed attest statement; and
- Assistance in the debriefing of unsuccessful proponents/vendors.

The extra effort and cost of a Fairness Consultant may be warranted only when the procurement is complex.

### **APPENDIX 3 CHARACTERISTICS OF COMPLEX PROCUREMENT INITIATIVES**

For the purposes of defining very complex procurement initiatives, assessment should be undertaken by a small group of representatives including the issuing Department, finance, legal, Corporate-wide/CAO representatives and others as required. Procurements should be assessed for the presence of several of the following characteristics:

- Rapidly evolving products, especially software (with a need to reconcile differing proposals);
- High-risk endeavours;
- Out-of-country vendors challenging required Canadian terms and conditions;
- New technologies such as waste management or information systems;
- Competition against a long-term incumbent (to avoid perception of undue advantage);
- Innovative forms of procurement;
- New, high-value products;
- Development/new use or operation of significant public sites/facilities/properties;
- Anticipated high-profile and controversy that can lead to few responses or pressure to take low bid/price regardless of other areas evaluated as best; and/or
- Private-public, or public-public, partnerships (known as P-3 projects).

There are many different tasks which the Fairness Consultant can do that add significant value to the process. These tasks occur throughout the procurement process.

#### **(i) Early-stage involvement such as:**

- Pointing out call development methods, their respective requirements and merits (e.g., Requests for Information/Expressions of Interest, or Requests for Qualification that may precede issuance of call document for formal competition);
- Overseeing the call document design and development by raising for consideration:
  - up-front involvement of necessary legal/other parties;
  - objectives intended when selecting specifications, or mandatory and other criteria;
  - a range of available and preferred evaluation tools and techniques; and
  - the impact on fair and reasonable evaluation of various weightings for financial, service, quality, legislative compliance and interview components, relative to other acceptable weighting scenarios;
- Advising on the purpose, steps, degree of information provision and other processes for any call pre-release consultations held with potential tender bidders/RFP proponents;
- Pointing out avoidance of methods/approaches that can cause potential biases in design (due to embedded public policy issues) to enable appropriate vendor choice, beyond fairness of the process that ensues;
- Identifying potential inconsistencies, or lack of clarity in call document requirements, in order to meet approved and stated business objectives, statutory regulations, policy directives, administrative requirements and best practices for procurement;

#### **(ii) Mid-Stage involvement such as:**

- Verification of the roles, responsibilities, decision authorities, and reporting requirements of the designated internal procurement management team;
- Attending and monitoring any information, briefing, or other sessions held with bidders/proponents by the procurement management team to note anomalies and followup with procurement management team;
- Ensuring that evaluation team members are provided with briefings on best practices including:
  - the principles and duties of fairness, care and proprietary information protection;
  - having a single-point of contact in place prior to and following evaluation;
  - avoidance and disclosure of conflict of interest, bias, and undue influence;
  - exclusion of any technical consultants used to design/establish call requirements;
  - inclusion of more than two persons as an evaluation team;
  - arms-length from political involvement/participation;
  - scoring procedures and sign-off on individual scoring sheets;
  - formal evaluation/scoring of any interview component of the evaluation process;
  - the preparation, treatment and retention of evaluation documents;
- Attending and monitoring evaluation team meetings to:
  - keep processes consistent with best practices (see above);
  - ensure all bids/proposals are evaluated in strict accordance with call specifications/criteria;
  - verification of bids/proposals evaluated as being non-qualified, non-compliant;
- Ensuring that principles and measures of success for how the procurement process is carried out, are established and provided to the government client as public information;
- Monitoring and documenting, at pre-identified points in the procurement process, the issues raised, solutions arrived at, and actions required and taken to ensure consistency with the original approved objectives;

**(iii) Late-stage involvement such as:**

- Monitoring and immediate reporting to pre-identified senior management on any known or perceived conflicts of interest, occurrences of undue influence, or other factors (among management/evaluation team members, as well as key stakeholder representatives), that may negatively impact the integrity of the evaluation/scoring or assessment process;
- Ensuring that the procurement management team, evaluation team members and other stakeholders understand ongoing confidentiality responsibilities post-contract award;
- Advising on proper vendor/proponent de-briefing processes and complaint procedures;
- If engaged for the contract negotiation/service-level agreement stage, ensure that the process is conducted in an ethical, structured manner by appropriate, skilled specialists adhering to the mandatory criteria/irrevocable terms and conditions of the RFP/tender; and
- Providing a full report at the conclusion of the procurement process to accompany the recommendation of contract award, as to whether and how the process has complied with fairness, openness, and transparency requirements.

**More Information**

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## Probity Auditor (Australian for Fairness Officer)

Victoria, a state in Australia, has provided some excellent advice and great documents dealing with the roles and responsibilities of the fairness consultant, or, as they label it, the Probity Auditor.

There is much valuable advice and practical assistance in their documents. They can be easily adopted with only a few modifications in many jurisdictions in North America. These documents deal with policy, “best practices” and building probity into your RFP process:

1. Probity Policy
2. Probity Best Practice Advice
3. Probity Plan (template)

This web site also contains a link to a 28-page template for a Probity Plan to be completed as one of the first project tasks. This document translates the policy and best practice advice into an actual document used to direct activities. The gem within this document is the table containing the forty probity tasks and steps.

	Task
1.	<b>Ask for conflict of interest declarations</b> Required at the outset of the tender process, from all steering committee and procurement team members and any external personnel involved in the tender. Remind members VPS Code of Conduct and VGPB policies. Members must also disclose any conflicts of interest arising during the procurement process.
2.	<b>Obtain confidentiality agreements</b> Required from all external personnel involved in the tender
3.	<b>Check budget approval obtained</b> Approval of funds needs to be assured before commencing the project
4.	<b>Ascertain if a probity auditor or adviser is required</b> Guidance is available from the Best Practice or Probity
5.	<b>Determine if it is necessary to go to public tender</b>
6.	<b>Check procurement team members' credentials.</b> They need to be properly authorised to represent stakeholders and be selected on the basis of their expertise. Where necessary, external expertise is to be engaged to ensure a full range of qualifications, skills and experience is available
7.	<b>Settle details of the Probity Plan</b> Complete any outstanding matters with the Probity Plan
8.	<b>Check procurement team members are familiar with and have access to all relevant policies</b>
9.	<b>Ensure that all tenderers have access to the same information</b> .Significant clarification or further detail is to be provided to all bidders equally. Telephone queries are handled by a single person, file notes are made of conversations, etc, No information should be provided for the benefit or detriment, of particular parties.
10.	<b>Set up confidentiality procedures</b> Confidential information must be protected and only be available to those who need it.
11.	<b>Set up proprietary information procedures</b> If tenderers are required to bid on the basis of matters such as innovation, all ideas they consider proprietary must not be communicated to competitors. The procurement team needs to establish ground rules to ensure that bidders have confidence in the process and the Government is not barred from sharing information which is commonly known. Categories of proprietary information should be defined early in the process and stated in the tender documentation.
12.	<b>Brief all staff involved</b> Confidentiality and security procedures need to be explained to all staff associated with tender.
13.	<b>Review probity at completion of PLANNING milestone</b> At this point, the Procurement Team should check that it has met all of the requirements of the Probity Plan.
14.	<b>Settle invitation documents (RFT)</b> Invitation documents should be designed to elicit the information necessary for proper assessment of each against the selection criteria. Settle performance measures and targets and detail how the contractors' performance will be evaluated. All legal issues, accountability and intellectual property restrictions are to be clearly set out. Detail evaluation criteria, weightings and selection processes, state how late and non-conforming bids will be dealt with and request declarations of any bidder's conflicts of interest. Include transition in and transition out arrangements.
15.	<b>Review probity at completion of TENDER PREPARATION milestone</b> At this point, the Procurement Team should check that it has met all of the requirements of the Probity Plan

16.	<b>Set up process for receipt, recording and acknowledging bids</b> Ensure no bids are read prior to the close of the tender period
17.	<b>Check advertising arrangements</b> This includes press advertisements, registration on website etc
18.	<b>Arrange tender briefing meetings</b> Record who attended. Prepare a summary report and post it on a website or make it available in hard copy.
19.	<b>Check tenders are received according to Conditions of Tender</b>
20.	<b>Secure documents</b> Ensure tenderers information is secure at all times.
21.	<b>Review probity at completion of TENDER INVITATION STAGE milestone</b> At this point, the Procurement Team should check that it has met all of the requirements of the Probitiy Plan
22.	<b>Notify bidders of any significant alternations that may occur in the future due to change of circumstances</b> Criteria should never be altered to give advantage to any particular party and all bidders should have access to the same information. If there are changes, allow all bidders the same time and opportunity to re-submit amended bids.
23.	<b>Assess bids as quickly as possible</b>
24.	<b>Ensure all bids are compared on the same basis</b> Evaluation criteria is to be followed, and responses assessed against pre-determined criteria. Detail reasons for the choice of the preferred tenderer, and ensure these reasons are clear and defensible. Note: The evaluation criteria should be established and documented prior to calling for bids.
25.	<b>Notify shortlisted tenderers of interview</b> <b>Ensure same information has been provided to all tenderers except matters specific to an individual tenderer.</b> Ensure that substantially the same time is allocated to each interview.
26.	<b>Notify tenderers not shortlisted</b> It is desirable to notify tenderers not shortlisted as soon as possible and hold any debriefs after the successful tenderer(s) has been informed.
27.	<b>Document interviews and post tender negotiations</b> This is usually with short listed tenderers only
28.	<b>Perform due diligence of short listed tenderers</b> This may include corporate information including ownership, litigation, director's profiles, financial security and past history. Referee checking procedures should be substantially the same and confidentiality assured
29.	<b>Plan and document site visits (if conducted)</b> An agenda prepared by the Procurement Team before the visit. A Chairperson is to lead the visit and ensure that there is a record of the meeting. Ensure fairness is maintained.
30.	<b>Brief Reference Group (if appropriate)</b> Ensure stakeholders are apprised of likely outcome and ensure that this process complies with arrangements for confidentiality and security.
31.	<b>Review probity completion of EVALUATION milestone</b> At this point, the Procurement Team should check that it has met all of the requirements of the Probitiy Plan
32.	<b>Prepare Supplier Selection Report</b> Prepare justification report consistent with reasons for selection and non-acceptance of bids
33.	<b>Review probity at completion of SUPPLIER SELECTION RECOMMENDATION REPORT</b> Review process from a probity perspective. Obtain probity report from probity auditor, if one has been engaged.
34.	<b>Prepare Supplier Selection Report for Ministers' or Secretaries' approval</b>
35.	<b>Submit Supplier Selection Report to APU or VGPB for approval</b>
36.	<b>Notify the successful tenderer</b> . This should be accepted subject to contract.
37.	<b>Notify unsuccessful tenderers their offers are not accepted</b>
38.	<b>Debrief unsuccessful tenderers</b> This should be done by the Chair of the procurement team, with at least one other team member
39.	<b>Settle transition arrangements</b>
40.	<b>Store all documents</b> Provide a complete and accurate record of how key functions and activities were carried out, in accordance with the <i>Public Records Act 1973</i> .

## More Information

1. Go to: <http://www.vgpb.vic.gov.au/>
2. Then, click on: VGPB PROCUREMENT POLICIES
3. Click on: PROCUREMENT PLANNING POLICIES, Probitiy
4. Click on: Probitiy Best Practice Advice

**Excellence and Innovation in California:  
Strategic Procurement at Orange County Sanitation District (OCSD)  
includes the use of a Fairness Consultant**



Over the last ten years, Orange County Sanitation District, and hundreds of similar facilities, have experienced rising costs for processing biosolids, stricter environmental regulations, and increasing litigation to limit their activities within the community.

**Creating a plan for innovation.** In 2001, OCSD's Planning Division was given the task of developing a long-range plan which would permit OCSD to comply with tougher regulations, optimize its processing costs, and reduce the amount of litigation. OCSD engaged CH2M Hill, a consulting engineering firm to assist in the development of a plan. The terms of reference for CH2M Hill included identifying new technologies that OCSD could employ to recycle 100% of its output into useful products. "Useful Products" were products that could be sold; products for which a market existed. One such example would be "direct use of biosolids for production of energy (electricity)".

In 2004, Orange County Sanitation District (OCSD) completed their Long Range Biosolids Management Plan (LRBMP), which provided a number of recommendations for management of biosolids over the next ten to fifteen years. A key recommendation of this plan was the utilization of new technologies. Their objective was to diversify the processing of biosolids products, markets, and contractors. The report set the direction for the future:

1. It identified the preferred markets and processing technologies to be sought.
2. It recommended that each market be allocated not more than 50% of OCSD's production;
3. It recommended that no supplier process more than 50% of OCSD's production.

This entire approach was innovative! Identifying intended viable markets for products was an innovation. And then evaluating technologies which could provide products for these markets was a second innovation. Using multiple vendors was innovative. Another key innovation was that each vendor would be required to propose a "total" solution - a complete management system.

It is OCSD's intention that the Proposers provide a complete management system, not just components. The services should include hauling of biosolids from designated points at OCSD's two wastewater plants, generation of energy or interim energy products and supply of the energy or interim product(s) to suitable markets.

Developing and issuing concurrent RFPs for four different technologies and markets was both an innovation and a challenge to OCSD's organizational capabilities. Their final innovation was the use of a fairness consultant.

**Planning for Excellence**

The RFP process itself was innovative, In addition, the RFPs were carefully planned to incorporate many of the 'best practices' found throughout North America. OCSD was going to use this opportunity to establish its procurement function as a leader in their industry.

The two major objectives in running this complex procurement were to (i) select the most appropriate vendors based on the Long Range Biosolids Management Plan and to (ii) use an exemplary RFP process based on “fair and open” competition. This process must be capable of withstanding the closest scrutiny by the public and the courts and thereby serve as a model for other jurisdictions.

### **Organizing the procurement effort**

Once the Long Range Plan was accepted, the procurement process was started. The size and complexity of the procurement process, the level of risk, and the large amount of money involved demanded a high level of planning. The high visibility of the project imposed additional requirements related to transparency and the ability to easily demonstrate that the process was both fair and open.

The following were key elements of their procurement strategy:

- To use dedicated senior staff - The process was planned, directed and managed by a Senior Procurement Person who would be actively supported by senior management.
- **To ensure that the process would survive scrutiny by the public and the courts - The Procurement Officer hired a Fairness Consultant whose role was to ensure that the process was conducted in an unbiased and defensible manner. He attended all project team meetings to provide guidance and assistance in planning the process, developing the RFPs and performing the evaluations.**
- To ensure that the evaluators did not compromise the process - Each member of the Evaluation Committee was required to declare that he/she had no conflict of interest in this procurement and to agree to a code of behavior to ensure that his or her activities would not favor, nor appear to favor, any particular supplier;
- To involve legal staff - General Counsel was actively involved in the preparation of the RFPs and would review each RFP prior to it being issued;
- To have the RFPs developed by the Project Team - The project team consisted of senior staff from key departments including Planning, Operations, Environmental Compliance, and Finance. Attendance at the monthly planning meetings would be mandatory. The same Project Team would later evaluate the proposals.
- To document the entire process - The process would be document-driven to ensure that “fair and open” could be easily demonstrated. In addition to the RFPs, the following documents were developed by the Procurement Officer and Fairness Consultant for use by the Project Team:
  1. Procurement Plan
  2. Evaluator agreement form
  3. Evaluation Guide
  4. Fairness Plan.

Four different RFPs were prepared and issued at the same time. Each RFP solicited proposals for managing a portion of OCSD’s biosolids through a different technology. These four RFPs were almost identical, differing only in their specification of the particular technology to be utilized or the market into which the resulting products were to be sold. These RFPs were carefully crafted over a period of about six months to reduce the risks of misunderstandings, miscommunications, and litigation. OCSD took great care to

structure the RFP process and the documents to ensure that all of their actions could survive close public scrutiny:

The RFPs were relatively complex although they were less than 40 pages in length. There were lots of notable features, innovations, and “best practices” built into these RFPs.

The following innovations and features were included in the RFP:

- The use of a two-step evaluation process;
- Inclusion of risk and environmental Issues as evaluation criteria;
- Development of a long list of reserved rights;
- Utilization of Minimum Acceptable Qualifications to discourage unqualified vendors from submitting proposals;
- Requirement for a product marketing plan;
- Developing a sensitivity analysis for key product variables.

Each of these features is described briefly in the following section.

- **The use of a two-step evaluation process**

Four different RFPs were issued for four different markets and technologies. During the first step, all the proposals received for the first RFP were evaluated and a “winner” selected. We did this for each of the four RFPs and ended up with four “winners”. (In a dog show, we would have selected the best of breed for four different breeds.) The selection was based on the stated evaluation criteria which emphasized technical, marketing and corporate factors. During the first step, cost would be only worth 10%.

We used Phase 2 to select the ‘best of breed’ from among the four surviving proposals. During Phase 2, these “winners” were re-evaluated and negotiations undertaken in the order that they had been ranked. Cost, environmental factors and risk were the factors, not technology, so it was a business decision driven by money, probability of success and strategic issues related to environmental concerns.

Here is how the RFP summarized this process.

**The Evaluation Process**

**Phase 1**

There is a two step selection process. First, we will evaluate the proposals for each of the four technologies separately and select the proposal which represents the “best value” for each technology.

**Phase 2**

We will now have identified the “best value” proposal for each technology. We will then review and evaluate each of these leading proposals based on the following factors:

- An analysis of the risks
- Total life cycle cost
- Environmental concerns and impact.

- **Inclusion of risk and environmental issues as evaluation criteria in the proposal**

The evaluation factors for Step 2 were selected and finalized only after a great deal of discussion and deliberation by members of the Project Team. Risk Analysis often provides insights into the project which are truly informative and assist the Project Team in their evaluation. Some previously unidentified risks may

directly influence the evaluation of a vendor's project plan, staffing, or timetable. Total Life Cycle Cost provides another perspective on the financing of this project. The final factor, environmental issues, was developed specifically in response to the Project Team's concerns related to the potentially negative effects of any technology.

**Section 10      Risk Analysis**

Identify the major risks associated with this project. For each risk, identify those activities which can be undertaken to reduce, mitigate or eliminate the risk. Identify the associated responsibilities. Ensure that these activities are reflected in your project and management plans.

**Section 11      Total Life Cycle Cost**

During Phase 2 of the evaluation, OCSD will calculate the total life cycle costs. Identify any value-added costs or benefits which you believe should be included in our costing analysis.

**Section 12      Environmental Issues**

We want Proposers to identify the environmental impact of the Proposer's procedures and technologies for processing and handling biosolids. We want the Proposers to identify ways in which the environmental impacts can be mitigated.

Potential impacts include factors such as:

- air emissions
- annual power consumption
- water consumption
- nuisances (odor complaints, traffic, aesthetics, etc),
- buildup of constituents in the soil, etc from our processing, hauling and our offsite management of our product.

Proposals could, for example, mitigate environmental impacts by the following activities:

- managing the material in closer proximity to the OCSD (fewer truck miles, emissions, less traffic etc),
- taking wetter material (less dewatering energy needed, pumped material = no trucks etc),
- creating products that do not add constituents (contaminants) to soil (bricks, synthetic coal, glass tile, etc) or air, or
- having low or no emission vehicles haul the material.
- creating a product within our service area or utilizing the material within our service to reduce hauling impacts
- growing trees to offset CO<sub>2</sub> emissions.

Identify the environmental impacts of your proposed biosolids management program. Identify your plans for mitigating any negative environmental effects.

• **Development of a long list of reserved rights**

Most organizations take great care to ensure that all of the rights that they might invoke are identified in the RFPs. This serves several purposes. First, it re-iterates what the lawyers in that jurisdiction believe are important issues. This keeps the legal team member happy. Just as importantly, it serves to make the vendors aware of the "small print" in the RFP – special circumstances and behaviors that the Buyers may

invoke. For example, one of the reserved rights is the right to eliminate mandatory requirements unmet by all Proposers. This instructs Proposers that if one mandatory condition is impossible to meet, and they believe that all the others are in a similar situation, then they should still consider submitting a proposal.

#### Section 1.17 Rights Reserved By OCSD

Many of the technologies are unproven and potentially high risk. This RFP does not obligate OCSD to accept any proposal or proceed with negotiations and award of a contract. To enable OCSD to acquire goods and services that represent the "best value," OCSD reserves the right to:

- a. Accept or reject any and all submittals, in whole or part;
- b. Discuss different or additional terms to those included in this RFP or received in any response;
- c. Amend or modify any terms of this RFP;
- d. Cancel this RFP and issue an alternative RFP;
- e. Define requirements to meet OCSD's needs and to modify, correct and clarify requirements at any time during the process provided the changes are justified and that modifications would not materially benefit or disadvantage a Proposer;
- f. Eliminate mandatory requirements unmet by all Proposers;
- g. Establish evaluation criteria relating to quality, quantity, performance and cost; establish the relative importance of each criterion; and evaluate proposals as well as award contracts on the basis of these criteria. As a result, service and technology procurements administered through an RFP process would not necessarily be awarded to the responsible Proposer submitting the lowest cost proposal.
- h. Waive the requirement to include in the Proposer's submittal those mandatory items set forth in Table 5 by allowing the Proposer to submit a supplement to its proposal within 72 hours of receiving notice from OCSD, provided that OCSD determines that (i) the Proposer gains no advantage from the opportunity to correct the deficiency; and (ii) other Proposers suffer no disadvantage.
- i. Disqualify proposed solutions that fail to meet mandatory requirements;
- j. Include an assessment of total life cycle costs and benefits in addition to the Proposers' costs in selecting the proposal most advantageous to OCSD;
- k. Consider every offer as firm and not revocable for a period of 180 days from the Proposal Due Date or such other period of time specified in the solicitation. Subsequent to such 180 day or other specified period, an offer may be withdrawn in writing;
- l. Negotiate with several Proposers concurrently;
- m. Ask for best and final offers;
- n. Terminate negotiations with any Proposer after a period of not less than two weeks if, in the judgment of OCSD, an acceptable contract has not been agreed to. (We may then invite the Proposer who submitted the next highest scoring proposal for that technology to negotiate a contract with us.)
- o. Award a contract for any or all parts of a proposal and negotiate contract terms and conditions to meet OCSD's program requirements consistent with the solicitation;
- p. Establish that in the event two offers are found to be substantially equivalent, total life cycle cost shall be the basis for determining the award recipient or, when total life cycle cost and other factors are found to be substantially equivalent, the determination of the OCSD Board of Directors to award a contract to one or more of such Proposers shall be made in the sole discretion of OCSD and shall be final. The basis for determining the award shall be documented in the Procurement Record;
- q. Elect to award a contract to one or more responsive and responsible Proposers, provided that the basis for the election among multiple contracts at the time of purchase shall be the most practical, environmentally sensitive and economical alternative and

shall be in the best interests of OCSD;

r. Require, at the discretion of OCSD and where not otherwise mandated by law, a bond or other guarantee of performance be submitted with the proposal, and to approve the amount, form and sufficiency thereof.

s. To reject the use of any subcontractor selected and proposed by Contractor for the performance of more than one-half of one percent (.005) of the total value of the agreement between District and Contractor. Rejection shall be for cause only, based on District's determination of subcontractor's prior breach of contract or breach of performance standards in similar contractual situations with District or other public agency.

**• Utilization of Minimum Acceptable Qualifications  
to discourage unqualified vendors from submitting proposals**

The Project Team was concerned that unqualified vendors could, at least in theory, read an RFP and decide that they could win. To discourage unqualified vendors from spending money needlessly and to promote good vendor relationships, the Project Team decided to publish their minimum qualifications. This list was accompanied with the statement that "Firms failing to satisfy these minimum qualifications, as defined, will be eliminated from further consideration."

**Section 4.3 Minimum Acceptable Qualifications**

There are many potential risks associated with this project related to a wide range of factors such as acquisition of a suitable site, financing, permitting and experience of the Proposer's team. We have identified some of these critical success factors and a corresponding set of minimum acceptable qualifications as criteria in Table 1 on the next page.

Firms failing to satisfy these minimum qualifications, as defined, will be eliminated from further consideration.

These Minimum Acceptable Qualifications were rudimentary but did serve to stop some totally unqualified vendors from submitting proposals. These qualifications also caused some vendors to seek partners possessing the missing qualifications so that they could, when combined, submit solid proposals.

Here is the table from the RFPs.

**Table 1: Minimum Qualification Criteria**

Criteria	Instructions to Proponents
1. Siting	Provide evidence that you have a suitable site. Examples of acceptable evidence are (i) a copy of lease/purchase documentation or option to lease/purchase document or (ii) a copy of a Memorandum Of Understanding with site owner.
2. Biosolids Management Experience	Provide one reference for your experience in biosolids management or similar organic management in North America. (Note that this experience does not necessarily have to be based on management involving the same process as that proposed and could be based on hauling, for example.) Include the name of the person, the public entity, its address, and telephone number for whom you provided such service.
3. Design, Construction & Operation Experience	Provide at least 1 reference for design, construction, and operations experience of a currently operating facility using similar processes anywhere in the world. (Note that the process or processes are not limited to biosolids feedstocks and could involve, for example, trash, or wood waste.) Include the name of the person, the public entity, its address, and telephone number for whom you provided such service.
4. Product Quality	Provide documentation from tests or other facilities using the same process of feedstock and product quality and anticipated product quality for OCSD based on biosolids quality data provided in Attachment 1.

5. Product Markets	Provide at least one letter of interest from an organization willing to purchase or consume product(s), or identify the team member that is the end user. For each, provide the name and address of the entity, the name of the contact and telephone number, and the quantity of product they anticipate to acquire each month.
6. Insurance Capabilities	Provide a completed Acknowledgement of Insurance Form which is provided in Attachment 6 of the RFP. Provide documentation to show that you, or one of the team member's bond rating, from a third-party bond rating firm, is A or better.
7. Non-compliance, Criminal & Financial Disclosure	Complete the Declaration of Minimal Suitability that is provided in Attachment 7 of this RFP.
8. Health & Safety Record	Provide the following documentation for construction and operations sections of the team: <ul style="list-style-type: none"> <li>• Experience Modification Rater (EMR) for the three most recent years. If EMR is &gt; 1, provide explanation.</li> <li>• OSHA 200 logs for the three most recent years.</li> <li>• Statement that the company has a drug screening program for all employees, including sub contractors. (Supporting documentation will be required before a contract is finalized.)</li> </ul>

**• Requirement for a product marketing plan**

The RFP was seeking proposals for a complete management system, not just components. One of the key components would be the Proposer's ability to market and sell the products produced. While many vendors possess technology which could be used to process biosolids, and other vendors have good marketing and selling skills, few vendors possess both. The specification of product marketing as an important factor was to encourage suppliers to propose complete systems, not simply pieces.

**Section 6      Product Marketing and Revenue**

The Proposer should present the marketing plan for use of the biosolids product(s). This should include identification of the range of products to be manufactured, the target markets, current and future size of the markets and acceptability of biosolids products in these markets. The status of contracts with the end users should be presented. If the end user is already a part of the team, this should be stated, along with information on the end use, such as maximum amount of biosolids that can be used and the anticipated life-span of that specific use.

Product specifications for each target market should be included in the marketing plan. Any seasonal variations in the market should also be identified and product storage or other methods of managing seasonal variations should be presented.

**• Developing a sensitivity analysis for key product variables**

The Project Team was concerned that a small change in one underlying factor could have a dramatic negative impact on the effectiveness of a particular solution. They wanted the Proposers to provide information about key product variables. For example, what happens if the cost of gasoline or natural gas doubles? Will the Proposer go bankrupt? What happens if a particular marketing initiative fails? Does the Proposer have alternative markets for the products?

**Section 8(a) 6.5    Sensitivity Analysis**

The effect of key project variables on the project economics should be discussed. Pertinent variables may include project size, location, energy costs, fuel costs, and product markets.

## Other RFP features to promote excellence

The RFPs had many other features that promoted the development of complete proposals, improved the information content for the evaluators, or made the process easier to defend as “fair and open”. Here are thumbnail sketches of some of them:

- Providing addition information – Rather than establish a document room, OCSD ensured that the critical documents were available from their web site.
- Identifying Proposers’ responsibilities – The RFP identified the tasks each Proposer had to complete for is proposal to be responsive. These tasks included submitting responses by the required dates, and satisfying the mandatory requirements as specified.
- Generating a timely complaint – The RFP instructed the Proposer that information about “unduly restrictive”, or “contradictory provisions” must be sent to OCSD within seven days of receipt of the RFP.
- Providing adequate preparation time – This was a complex RFP requiring lots of information and documentation from the Proposers. For these reasons, the RFP was open for 90 days. As expected, there still were requests for additional time.
- Identifying mandatory requirements - The Project Team identified 35 mandatory requirements. Proposals that failed to satisfy one or more mandatory requirements would be eliminated from further consideration. To assist vendors in submitting compliant proposals, all of the mandatory requirements were identified in a table which Proposers could use as a checklist.
- Providing adequate time for evaluation – The Project Team anticipated that there might be an extensive period of negotiation with one or more Proposers. To accommodate this requirement, Proposals were to be irrevocable for 180 days.
- Reducing the risk of non-performance – The RFP required that the Contractor post a performance bond equal to twice the annual value of the contract.
- Ensuring fair and open competition – The Statement of Work contained in the RFP was prepared by the consulting engineers who developed the long term plan. This firm was prohibited from submitting a proposal or assisting any other entity in the preparation of its proposal, or being a sub-contractor on any proposal.
- Identifying all the players – The RFP required each Proposer to provide information about “Proposed legal and working relationship between Proposer and all subcontractors, if applicable, and all entities having a financial interest in the proposal.” It also required a letter for “each subcontractor or entity having a financial interest in this proposal that it has read the proposal and agrees to be bound by any resulting contract.”
- Declaring that public participation was important – The RFP stated that “the Proposer will implement a proactive public participation and community involvement program to cover the product manufacturing facility, as well as product markets.” The requirement provide the Proposers with direction and the public with re-assurance that the issue was important to OCSD.

- Eliminating under-capitalized or poorly finance Proposers – While cost was only given a weight of 10% during Phase 1 of the evaluation, financial health was critical. The RFP stated that “firms failing to get at least 70% score on our evaluation of Section 8A (the financial data) of your proposal will be eliminated from further consideration. “

## The Players

Jim Burror, an engineer in OCSD’s Planning Division, was responsible for drafting the terms of reference for the engineering study to recommend a long term biosolids management plan. He, therefore, was the logical choice for Project Manager.

Anne Marie Feery was the senior procurement person responsible for the entire RFP process.

Michael Asner was hired as the Fairness Consultant to provide ongoing advice and assistance to the Project Team and to ensure that the RFP process could survive scrutiny by the vendors, the public and the courts.

## Additional Information

Orange County Sanitation District (CA) has a web site, [www.ocsd.com](http://www.ocsd.com), which contains a copy of the Long-Range Biosolids Management Plan. The report itself can be found at:

[http://www.ocsd.com/about/reports/strategic\\_plans.asp](http://www.ocsd.com/about/reports/strategic_plans.asp)

In July, 2004, OCSD issued the following RFPs:

1. Specification No. S-2003-168BD Biosolids Management for Energy Production
2. Specification No. S-2003-169A BD/Off-Site  
Biosolids Management with Thermal Drying for Production of Pellets or Granules
3. Specification No. S-2003-169B BD/On-Site  
Biosolids Management with Thermal Drying for Production of Pellets or Granules
4. Specification No. S-2003-170BD Biosolids Management using Heat Drying with Soil
5. Specification No. S-2003-171BD Biosolids Management Through Manufacture and Marketing of Compost Products

Note that RFPs 2 and 3 employed the same technologies and were counted as one RFP in this article.

# YES

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