

The “Special Review” of the Fox procurement, dated 11/25/08, raises more questions than it answers.

The Review discusses a Request for Proposals (RFP) for design work for the proposed elevator at Fox.

Prior to issuing the RFP, RPS had contacted Ballou Justice Upton (BJU) and requested a cost proposal for design of the elevator. BJU produced a proposal, priced at \$291,080. Three days later, RPS issued the RFP. The RFP described the project in terms identical to the proposal from BJU.

The RFP contained five criteria for decision as to the winning proposal. The First criterion was: “Firm’s previous experience in design of an addition at Fox Elementary School.”

Five firms submitted proposals in response to the RFP. By inference from this poorly written Review, BJU was the only firm with “previous experience in design of an addition at Fox Elementary School.” Thus, RPS short-circuited the competitive negotiation required by the Public Procurement Act and issued an RFP that assured BJU would receive the contract.

At CODE § 2.2-4301(3), the Act provides that a public body procuring professional services

shall engage in individual discussions with two or more offerors deemed fully qualified, responsible and suitable on the basis of initial responses and with emphasis on professional competence, to provide the required services.”

The statute continues:

The offerors shall be encouraged to elaborate on their qualifications and performance data or staff expertise pertinent to the proposed project, as well as alternative concepts. [emphasis supplied].

Thus, rather than engage in the competitive negotiation seeking “alternative concepts,” RPS wrote the RFP using the concept provided by BJU, buttressing the certainty that BJU would be selected.

It should be no surprise that BJU received a contract for the work for \$291,080.

This process was grossly unlawful under the Act. Indeed, the primary question to be answered on these facts is whether someone at RPS willfully perverted the procurement and thus is subject to prosecution under Code § 2.2-4377.¹

There are lots of other questions raised by this Review:

p. 1	<p>The Introduction says this Review began “[f]ollowing a media report.” Yet at p 5 we learn that RPS earlier issued an addendum to correct a similarly defective RFP at Community High.</p> <ul style="list-style-type: none"> • Why did RPS not fix this one as well? • Why did the Community RFP not prompt a review? • Following the Community RFP, why did RPS not put procedures in place to prevent such problems? • Who is accountable for this management failure?
p. 1	<p>The Introduction speaks of “criteria . . . ‘that’s very hard to meet.’”</p> <ul style="list-style-type: none"> • If the people running the schools don’t understand subject-verb agreement, how can we hope that the students ever will?
p. 1	<p>The Background section says that the School Bd. “adopted a court ordered settlement.” To the contrary, the court approved a settlement to which the School Bd. had agreed.</p> <ul style="list-style-type: none"> • If the Background section of the Review is this casual about the facts, how can we have any confidence in the body of the Review?
p. 1	<p>The Background section says that the settlement “ensured” that RPS would comply with the ADA. We’ve seen precious little ensuring so far. “Was designed to require” comes closer to the truth. See the question immediately above.</p>

¹ § 2.2-4377. Penalty for violation.

Any person convicted of a willful violation of any provision of this article shall be guilty of a Class 1 misdemeanor. Upon conviction, any public employee, in addition to any other fine or penalty provided by law, shall forfeit his employment.

p. 1	<p>The Review says RPS “received five proposals from the following vendors;” the review then lists five vendors.</p> <ul style="list-style-type: none"> • Does the Review mean to say “five proposals from each of these vendors” or, more likely, “one proposal from each of five vendors”? • What does the “five” add to that sentence aside from confusion and, probably, redundancy?
p. 1	<p>The Review says that a “Senior Purchasing Officer” notified the committee of its assignment to evaluate the proposals. The committee included a Senior Purchasing Officer.</p> <ul style="list-style-type: none"> • Was the SPO on the committee the same as the one who made the assignment? • Did either SPO read that RFP? <ul style="list-style-type: none"> ○ If so, why has the SPO not been fired? ○ If not, why has the SPO not been fired?
p. 2	<p>20% of the selection was based on minority business participation. That preference is a suspect racial classification that is subject to strict judicial scrutiny. <i>Richmond v. Croson</i>, 488 U.S. 469 (1989). This means, in short, that RPS must be able to prove that the preference is narrowly tailored to remedy past discrimination by RPS.</p> <ul style="list-style-type: none"> • Has RPS done a <i>Croson</i> study to justify the Minority Business Participation requirement? • Has RPS’s lawyer reviewed it?
p. 2	<p>The third and fourth criteria for selecting the vendor are “Basic understanding of the scope of work, familiarity of RPS, the City of Richmond and knowledge of RPS facilities” and “Ability of Architect & Engineer project team to perform the work in the required time frame.”</p> <ul style="list-style-type: none"> • How do fairly low-level, nontechnical bureaucrats obtain enough information to seriously evaluate the proposals as to these criteria?
p. 3	<p>The Review says its authors “[r]eviewed offerors’ proposal.” Aside from the bad English, see above, the reader can’t tell whether they reviewed only the BJU proposal or all the proposals.</p>

p. 4, ¶ 2	<p>The Review reports that the “ADA Office” (in fact, surely a bureaucrat in that Office) requested a cost proposal from BJU and then contacted the Purchasing Division (again, certainly someone within that Division) to find out whether the \$291K purchase order could issue to BJU (implicitly, without a competitive negotiation). CODE § 2.2-4303 is clear on this subject: “Professional services shall be procured by competitive negotiation.”</p> <ul style="list-style-type: none"> • Has the unnamed bureaucrat in the ADA office been disciplined for this egregious ignorance of the Procurement Act?
p. 4, ¶ 3	<p>The Review quotes the project description from BJU, reports that the RFP used the same language, and then quotes the RFP.</p> <ul style="list-style-type: none"> • If the language was the same in each document, why does the Review repeat it?
p. 4, ¶ 4	<p>The Review says the Purchasing Division developed the RFP! If so, the “Purchasing Division” does not know how to do its job; this is gross incompetence.</p> <ul style="list-style-type: none"> • Who is accountable for this and what has been done to discipline that person?
p. 4	<p>¶ 4 says the Purchasing division developed the RFP. ¶ 5 says the RFP was developed by the end user, presumably the ADA office. Those statements cannot both be true. In either case, somebody needs to be fired.</p>
p. 5, ¶ 6	<p>The review says the file contains no record of supervisory review of the RFP.</p> <ul style="list-style-type: none"> • Who is the employee who issued the RFP w/o supervisory review? <ul style="list-style-type: none"> ○ Has that employee been fired yet? • Who is the supervisor who runs so loose a shop that his employee, who plainly does not know the job, could issue this baldly unlawful RFP? <ul style="list-style-type: none"> ○ Has that supervisor been fired yet?
p. 5, ¶ 7	<p>The Review says the Purchasing Division has adequate written procedures.</p> <ul style="list-style-type: none"> • If the procedures are adequate, how could this unlawful RFP be issued? • In particular, what procedures did this process violate and who is accountable?

p. 5, ¶ 8	<p>The Review says that one evaluation committee member said that Criterion #1 is met if the vendor has experience anywhere within RPS. Criterion # 1 is unambiguous to the contrary: It requires “previous experience in design of an addition at Fox.”</p> <ul style="list-style-type: none"> • Who is the committee member who thought experience anywhere in RPS was sufficient? • How did this person reach that remarkable conclusion? • Again, if the people running our schools cannot understand the Mother tongue, how can we hope that the students ever will?
p. 5, ¶ 8	<p>Why does this paragraph conjoin the apparently unrelated matters of committee members listed as references and the committee member who does not understand English?</p>
p. 6	<p>The Review concludes that “poor judgment was used” in writing Criterion #1. The first criterion is a bald requirement that BJU get the job. That is plainly unlawful. “Poor judgment” is not a synonym for gross incompetence or criminal behavior.</p> <ul style="list-style-type: none"> • Do we actually pay our auditor for this kind of evasion?
p. 6	<p>The Review concludes there is no evidence that staff “willingly and knowingly” violated the Procurement Act. If the authors had read the Procurement Act they would know that “willing and knowing” is not a requirement of the Act. “Willful” violations are misdemeanors and firing offenses, CODE § 2.2-4377.</p> <ul style="list-style-type: none"> • More to the point, who is the Senior Purchasing Officer” whose fingerprints are all over this mess and what discipline has he/she suffered? Even if this all was an honest mistake, that Officer needs to find employment that is better suited to his/her obviously limited talents.
p. 6	<p>At CODE § 2.2-4375, the Act authorizes the Bd. to require employees “having official responsibility for procurement transactions in which they participated to annually submit for such transactions a written certification that they complied with the provisions of” the Act.</p> <ul style="list-style-type: none"> • Does RPS require this of its personnel? <ul style="list-style-type: none"> ○ If so do we have the certification for this Senior Purchasing Officer, the ADA Coordinator, and the RPS Construction Inspector, all of whom were on the committee? ○ If not, why not? ○ If not, why does the Audit not recommend this?

p. 8, # 4	<p>The Review recommends district-wide training in the Procurement process.</p> <ul style="list-style-type: none"> • What training is in place now? • What training did that Senior Purchasing Officer have? • How does the Manager of Procurement & Control keep his job if he doesn't see to the training of his people?
p. 8, # 3	<p>The Review recommends that future evaluation committee members be required to sign a statement of no conflict of interest. A statement of no conflict will not help if the employee doesn't know what a conflict of interest is.</p> <ul style="list-style-type: none"> • Where is the current training regarding the Conflict of Interests Act? • Assuming there is none, when shall it be offered?

I reach three conclusions:

- The author(s) of this Review and particularly the Chief Auditor who signed the cover memorandum are not friends of the English language. As to the English, the Review is an embarrassment.
- Aside from the distraction of the sloppy language, the content of the Review also is an embarrassment. The sloppy reporting leads me to conclude that the Review was performed incompetently and should be repeated by someone who knows how perform and report a review.
- The total absence of any notion of accountability in the Review and the failure of the Review to recommend accountability for the procurement process in the future are symptoms of a larger problem in RPS. As to the procurement operation, until the Board and Superintendent begin to require accountability for the actions of their subordinates, we can expect this kind of lawless behavior to persist.