

**CITY OF SANIBEL
LEGAL DEPARTMENT**



MEMORANDUM

TO: Members of City Council

FROM: Kenneth B. Cuyler *KBC*
City Attorney

DATE: July 29, 2013

**RE: Local Preference Information Relating to City Competitive Sealed Bids
and Other Procurements for Goods and Services**

The City Council has requested that I provide an opinion as to whether “local preference” criteria are legal and to provide some general information relating to local preference issues in City competitive sealed bids and other methods of procurement for goods and services.

In Florida, the case law and various Attorney General Opinions over the years have consistently held that a City has the legal authority pursuant to its Home Rule powers to adopt reasonable “local preference” criteria and implement that criteria as part of its procurement procedures for goods and services. Although some cities in the State of Florida do provide some type of local preference advantage as part of their procurement regulations, some cities do not have any local preference criteria at all. The cities that do have a local preference option vary widely with respect to how and under what conditions such local preference is used in their procurement criteria.

I reviewed the Municipal Code provisions of a number of cities in the State of Florida to determine whether those cities used local preference criteria in their procurement system. The cities of Miami, Marco Island, Fort Myers Beach and Naples do not appear to have local preference criteria as part of their regulations. The cities of Sarasota, Orlando, Daytona Beach, Tallahassee, Tampa, Fort Lauderdale, Miami Beach, Punta Gorda, Cape Coral, Fort Myers and Key West do have some form of local preference criteria. A summary of the local preference regulations for several of the cities who do have local preference criteria is as follows:

CITY OF SARASOTA

1. A “local city business” is a vendor who (1) has held a valid local Business Tax Receipt for at least one year prior to the bid proposal and (2) has a physical non-residential business address located within the City of Sarasota from which the vendor operates its business and at which it maintains full-time employees “who receive from the local business a regular paycheck from which deductions are made for employment related to payroll taxes, including, but not necessarily limited to Social Security and Medicare.”

2. The Sarasota ordinance defines “local county business” in the same way except that the business is located outside the City of Sarasota but within Sarasota County.
3. For a competitive bid, if a responsible and responsive non-local business submits the lowest price bid and the lowest bid submitted by a responsible and responsive local city business is within 5% of that lowest bid, then the lowest bidding local city business has the opportunity to submit an offer to match the price submitted by the lowest non-local business bidder. If a local city business and a non-local city business tie in a bid process, then the award is made to the local city business.
4. Sarasota’s procedure allows each local city business within 5% of the lowest non-local low bid to, in turn, match the non-local business bid. If no local city business wishes to match the low bid, then the City of Sarasota allows local county businesses within 2% of that low bid to match the low bid and so on until there are no local city businesses within 5% of the low bid and no local county businesses within 2% of the low bid.
5. For Requests for Proposals, qualifications and competitive negotiation, the city awards 10 additional points (out of 100) to a local city business and 5 additional points (out of 100) to a local county business.
6. In the event of a tie between two local city businesses or two local county businesses, the local vendor with the greatest number of full-time employees working in the City of Sarasota or Sarasota County, respectively, is awarded the contract or receives the first opportunity to negotiate as applicable.
7. The Sarasota regulations provide exceptions (cooperative purchasing agreement or piggy-back agreement; the Consultant’s Competitive Negotiation Act where applicable; where prohibited by another governmental entity; emergency or non-competitive situations) and the local preference policy can be waived on a case-by-case basis by the Sarasota City Commission.

CITY OF DAYTONA BEACH

1. For competitive bids, the Daytona Beach regulation provides: where the lowest responsive bid by a responsible bidder is submitted by a non-local vendor, and the lowest responsive bid submitted by a responsible local vendor is within 10% of that bid, then such local vendor and such non-local vendor each will have the opportunity to submit, within 5 working days of the bid opening, a best and final bid equal to or lower than the amount of the original low bid. The bid will be awarded to the bidder submitting the lowest responsive or final bid. In case of a tie between a responsible local vendor and a responsible non-local vendor, the bid will be awarded to the local vendor.

2. Where proposals for a negotiated purchase are rated by a point system, the local vendor may be granted a preference of up to 10% of the total available points. In those situations where the ranking of the most highly qualified firms does not include a local vendor, but a local vendor has made a proposal, then the highest ranked local vendor will be automatically included on the list of firms with whom the City Manager negotiates. All firms on that resulting list will be given the opportunity to submit a best and final fee proposal when the evaluation includes a price.
3. The Daytona Beach regulations specifically provide that the local preference section will not be deemed to require the granting of a local preference and nothing therein prohibits the award of a contract to a non-local vendor where such award is in the public's interest.

CITY OF ORLANDO

1. Although the City of Orlando does not appear to provide a local preference option of its own, it does have a section in its Code entitled "Reciprocal Local Preference" which provides that the city may award a preference to the lowest responsible and responsive vendor having a principle place of business in the "Metropolitan Statistical Area" (Orange, Seminole, Lake and Osceola Counties) where the vendor's principle place of business is in that area and that area grants a local preference. The City of Orlando preference granted is then equal to the preference granted by that reciprocal area.

CITY OF TALLAHASSEE

1. The City of Tallahassee defines a "local business" as "a firm, person, corporation or other business entity which is duly licensed and authorized to engage in the particular business at issue, and which has maintained a permanent place of business with full-time employees within Leon, Wakulla, Gadsden or Jefferson County, Florida, for a minimum of 6 months prior to the date bids were received for the purchase or contracted issue."
2. Under Tallahassee's regulations, a preference may be given to local businesses in an amount not to exceed 5% for purchases under \$250,000, 3% for purchases \$250,001 to \$500,000 and 2% for purchases over \$500,000. (With the amounts based on total bid price including not only the base price but any bid alterations that become applicable).
3. The Tallahassee procedures for local preference also have exceptions similar to the City of Sarasota noted above.

I have also attached sections from the City of Cape Coral, City of Punta Gorda and City of Fort Myers code provisions which set forth the local preference criteria for each of those cities. You will note that each is somewhat different from the other cities described above, as well as different from each other, but all provide a form of local contractor/vendor preference.

Although it is clear that the City has the legal authority to establish and implement reasonable local preference criteria as part of its procurement system for goods and services, the policy and business issues are more difficult. Some communities take the position that the best interests of the taxpaying public requires that the government be provided goods acquired through the lowest bid, regardless of whether the vendor is "local" or not. The lowest competitive bid from a responsible, responsive bidder generally provides the lowest available price to the government and the taxpayers. The competing view is that the taxpayers receive a benefit not only by receiving goods that are competitively priced, but the individual taxpayers also benefit when "local businesses" with local employees are able to provide the goods, even if it takes an adjustment to the local government's procurement procedures through the means of a local preference policy and criteria.

In conclusion, the Sanibel City Council is legally authorized to adopt and implement reasonable local preference criteria as part of its procedures for the procurement of goods and services. There are several State regulations dealing with procurement and the City's regulations could not be inconsistent with the State's regulations (e.g. Consultant's Competitive Negotiation Act relating to the services of architects, engineers, surveyors and landscape architects), but none would preclude a local preference policy by the City. The primary considerations with regard to local preference are policy, business and operational oriented issues that would need to be considered by the City Council with the input of City Staff.

If you have any questions regarding this Memorandum, please contact me at your convenience or we can discuss the matter as part of your August 6, 2013 Council meeting.

KBC/jg

cc: Judie A. Zimomra, City Manager

CAPE CORAL

(10) *Local contractor/vendor preference.* When the lowest responsive bid has been submitted by a non-local qualified contractor/vendor (hereafter non-local bidder), and a qualified local contractor/vendor has submitted a responsive and responsible bid, the local contractor/vendor with the lowest bid shall have the opportunity to match the bid submitted by the lowest responsive non-local bidder provided that the local contractor/vendor's bid price does not exceed the non-local bidder's bid price by more than the following percentages:

- a. Main business office in the City of Cape Coral - 10%;
- b. Regional office in the City of Cape Coral - 7.5%;
- c. Main business office in Lee County - 5%;
- d. Regional office in Lee County - 2.5%.

When a non-local bidder submits the lowest bid price, but there is a local contractor/vendor whose bid price does not exceed the percentages stated above, the Procurement Manager shall notify the local contractor/vendor in writing of its opportunity to match the lowest bid price submitted by a non-local bidder. The local contractor/vendor shall have five business days from the date of receipt of notification to match the bid submitted by the lowest non-local bidder. In the event the local contractor/vendor declines or is not able to submit a matching low bid, the local contractor/vendor with the next lowest responsive and responsible bid whose bid price does not exceed the percentages of the lowest bid price shall be notified in writing by the Procurement Manager of its opportunity to match, within five business days of receipt of notification, the lowest bid price. This procedure shall be followed until there are no more local contractors/vendors whose responsive bid is within percentages specified above.

Any contractor/vendor who desires to be considered for the local contractor/vendor must apply for such status as set forth in § 2-148(d) herein.

(Ord. 11-11, 3-28-2011)

(11) Preference for a local contractor/vendor shall not apply to any of the following purchases, contracts or situations:

- a. Goods or services provided under a cooperative purchasing agreement or piggyback.
- b. Contracts for professional services subject to the Consultant's Competitive Negotiation Act (F.S. § 287.055), except as otherwise provided herein.
- c. Purchases or contracts which are funded, in whole or in part, by a governmental entity and the laws, regulations, or policies governing such funding prohibit application of that preference.
- d. Purchases made or contracts let under emergency or noncompetitive situations exempt from competition.

e. Where the application of local preference to a particular purchase, contract or category of contracts is within the award authority of the City Manager, the City Manager may waive the local preference upon good cause shown.

f. Where the City Council is the awarding authority the City Council may waive, for good cause shown, the application of the local preference to a particular purchase, contract, or category of contracts.

PUNTA GORDA

6. LOCAL VENDOR PREFERENCE – INVITATION TO BID

6.1 ESTABLISHED

6.1.1 The City reserves the right to compare, contrast and otherwise evaluate the quality of materials, qualifications, character, responsibility and fitness of all persons, firms, partnerships, companies or corporations submitting a response to a sealed invitation to bid for the procurement for construction, commodities and/or services when making an award in the best interest of the city.

6.1.2 Whenever two or more bids are equal with respect to total price, quality, and service are received by the City by a local and non-local vendor the bid shall be awarded to the local vendor only if the local vendor is deemed a qualified local vendor.

6.1.3 When a responsive, responsible non-local vendor submits the lowest **total price** bid, and the bid submitted by one or more qualified local vendors is within five (5) percent of the **total price** submitted by the non-local vendor, then each of the aforementioned qualified local vendors shall have the opportunity to submit a best and final bid equal to or lower than the **total price** of the low bid previously submitted by the non-local vendor. Application of Local Vendor Preference shall be as follows:

6.1.3.1 Procurement shall determine if the local vendors are in fact qualified and responsive bidders.

6.1.3.2 The Procurement Manager shall invite the qualified local vendors to submit a best and final bid within five (5) City business days of being notified by the Procurement Manager in writing.

6.1.3.3 If the lowest qualified local vendor(s) submits a best and final bid that fully matches and is not lower than the **total price** of the lowest bid from the lowest non-local bidder originally submitted, then award shall be made to the lowest, qualified local vendor whose business is closest in driving proximity to the delivery or project site.

6.1.3.4 If the qualified local vendor(s) declines or is unable to match the lowest, responsive, responsible non-local vendor total bid price(s), then award will be made to the lowest overall, responsive, responsible bidder.

6.1.3.5 In the case of a tie in the best and final bid between more than one (1) qualified local vendors, contract award shall be made to the qualified local vendor within the closest driving proximity of the delivery or project site.

6.1.4 The City Council reserves the exclusive right to exercise the option to not apply the local vendor preference to a specific procurement activity, which is not an exception to this Policy.

6.1.5 Persons, firms, partnerships, companies or corporations who desire to be considered for the local vendor preference must complete an affidavit provided in the solicitation package and return it with their bid submittal package. Upon verification by the city that the affidavit is sufficient and meets the local vendor criteria, the person, firm, partnership, company or corporation will then be considered a local vendor. Only persons, firms, partnerships, companies or corporations that provide the affidavit with their solicitation will be allowed to receive a local vendor preference. Vendors shall not have the opportunity to change the application or affidavit once submitted to the city and shall have the burden of demonstrating that it meets the definition.

6.2 EXCEPTIONS

6.2.1 The local vendor preference as provided in this section shall not apply to the following contracts or purchases:

6.2.1.1 Professional services which are subject to the State of Florida Consultants Competitive Negotiations Act (F.S. § 287.055).

6.2.1.2 Purchases or contracts for which external funding is received and local vendor preference is prohibited pursuant to any laws, rules, regulations or policies.

6.2.1.3 Purchases made utilizing cooperative purchasing agreements with other governmental entities.

6.2.1.4 Purchases made utilizing inter-local agreements with other governmental entities.

6.2.1.5 Purchases made through the piggyback of state contract, national contract, or other governmental agency contracts.

6.2.1.6 Purchases made under a City Council Declaration of Emergency.

6.2.1.7 Purchases made under emergency procedure situations as set forth in the Procurement Policy.

6.2.1.8 Purchases made for items that have been deemed as a sole/single source and/or standard items utilized by the city as set forth in the Procurement Policy.

6.2.1.9 Owner direct purchase orders issued for sales tax savings.

6.2.1.10 Products or services related to information technology or equipment, which is necessary:

6.2.1.10.1 to maintain existing warranties; or

6.2.1.10.2 to maintain compatibility with existing City systems.

6.2.1.11 Additional work on a completed construction project whereby warranties may be voided if original contractor does not perform modifications, maintenance or repairs. Applicability of this clause shall be at the sole discretion of the Procurement Manager.

6.3 CONSIDERATION FOR AWARD

6.3.1 Awards of contracts and/or purchases shall be to the lowest total price, qualified local vendor that fully matches or is lower than the lowest total price non-local vendor. If the qualified local vendor declines or is unable to match the lowest total price of the non-local vendor the award will be made to the lowest, responsive and responsible vendor.

6.3.2 In determining the award of a contract, which will best serve the interest of the City, the City Council, City Manager, and Procurement Division, it shall not be limited to consideration of price, but will also consider the following:

6.3.2.1 The ability, capacity and skill of the vendor to perform under the terms of the solicitation package and/or provide the commodities and services required, including past performance, quality of performance and previous and/or existing compliance by the vendor in regards to federal, state, county and city laws, policies, ordinances, rules and regulations.

6.3.2.2 Whether the vendor can perform the contract or provide the materials or service promptly or within the time specified, without delay or interference.

6.3.2.3 The character, integrity, reputation, judgment, experience, and efficiency of the vendor as reflected in credit reports, better business reports or other records or reports, including sufficiency of the financial resources.

6.3.2.4 The quality, availability, and adaptability of commodities, equipment, or contractual service to the particular use required.

6.3.2.5 The ability of the bidder and location of the business to provide future maintenance and service for the purchase of the equipment or material, and financial impact upon the city to receive future maintenance or service.

6.3.2.6 Whether the vendor is in arrears to the city on a debt or is a debtor or is a defaulter or surety to the city, or whether the vendor has delinquent taxes or assessments.

6.4 REMEDIES AND APPEALS

The local vendor designation shall not be considered as a basis for any formal protests of contract awards under the formal procurement process of the city. If a local vendor designation is denied by the city, the applicant may then appeal such decision to the Procurement Manager for review and further consideration, and if denied by the Procurement Manager, the applicant may appeal such decision to the City Council, who shall hear such appeal at a regular public meeting, and whose decision shall be final. The appeal process shall in no way delay the award of a contract or receipt of materials and/or services. A contract recommendation or award to a qualified local vendor shall not be considered as a basis for any Formal Protests of contract awards under the City's Protest Policy.

6.5 PURVIEW AND ADMINISTRATION OF THIS POLICY

The Procurement Division shall be responsible for developing, implementing and maintaining administrative procedures in support of this Policy. This local preference section is being added to the Procurement Policy in support of the local economy during difficult economic times in Charlotte County. On or about one year of the effective date and annually thereafter, the Procurement Division will provide the City Council with an update of the results and impacts to date of this Local Preference Policy. The City Council shall decide to continue or cancel the Local Vendor Preference on an annual basis.

FORT MYERS

DIVISION 2. LOCAL VENDOR PREFERENCE

Sec. 38-71. Definitions.

Sec. 38-72. Established.

Sec. 38-73. Exceptions.

Sec. 38-74. Consideration for award.

Sec. 38-75. Remedies and appeals.

Sec. 38-76. Supplemental authority.

Secs. 38-77—38-91. Reserved.

Sec. 38-71. Definitions.

The following words, terms and phrases, when used in this division, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Business location means a permanent office or other site where a local business conducts, engages in or carries on all or a portion of its business; has personnel, equipment and materials within the boundaries of the county sufficient to constitute a present ability to perform the service and/or provide the goods. Business stationery and business cards must make a specific reference to a county address. A post office box or a location at a postal service center shall not constitute a business location.

City business means any person, firm, partnership, company or corporation who possesses a current city occupational license and is authorized to engage in the particular business for which a proposal is submitted, and whose principal place of business, in the sole opinion of the city, is located within the city.

County business means any person, firm, partnership, company or corporation which is duly licensed and authorized to engage in the particular business for which a proposal is submitted, and whose principal place of business, in the sole opinion of the city, is located within the boundaries of the county.

General services means support services performed by an independent contractor or individual requiring specialized knowledge, experience and/or expertise.

Goods includes, but is not limited to, supplies, equipment, materials and printed matter.

Local business means a business located within the county.

Local vendor means any persons, firms, sole proprietorships, partnership, companies, or corporations, located within the city or county, offering to contract with the city for goods and/or services.

Low bid means a vendor qualified to perform the work required under the invitation to bid, request for proposal, or quotation, meeting all conditions and has submitted the lowest price in the bid response, which shall also include the consideration as identified under consideration for award.

Professional services means any services where the city is obtaining advice, instruction or specialized work from an individual firm or corporation specifically qualified in a particular area. Such term does not include those services procured pursuant to F.S. § 287.055.

Qualified local business means a city or county business satisfying the requirements under the bid, request for proposal, or quotation guidelines and consideration for award to perform the services or goods requested.

(Laws of Fla. ch. 57-1326, § 82; Code 1991, § 7-52; Ord. No. 3054, § 1, 2-20-2002)

Cross reference— Definitions and rules of construction, § 1-2.

Sec. 38-72. Established.

- (a) The city shall give a five percent preference to qualified city businesses and a three percent preference to qualified county businesses who respond to invitations to bid, requests for proposals and quotations for the procurement of general services, goods or professional services, except where federal or state law mandates to the contrary. No business shall be qualified to receive a preference amount that exceeds five percent.
- (b) The city reserves the right to compare, contrast and otherwise evaluate the quality of materials, qualifications, character, responsibility and fitness of all persons, firms, partnerships, companies or corporations submitting formal bids, requests for proposals, and quotations for the procurement for goods and/or services when making an award in the best interest of the city.
- (c) City staff outside the centralized purchasing division of the city are not required to award a local vendor preference on purchases made on items within their purchasing authority.
- (d) The city council may award, at their discretion:
 - (1) A local vendor preference in the amount of five percent or \$25,000.00, whichever is less, on purchases in excess of \$25,000.00 to qualified city businesses; and
 - (2) A local vendor preference in the amount of three percent or \$25,000.00, whichever is less, on purchases in excess of \$25,000.00 to qualified county businesses.
- (e) Local vendor preference awards will be made to responsible qualified local businesses. The local vendor preference may be waived if the cost of the award would exceed the budget of the city for the general services and/or goods requested.
- (f) The city council reserves the exclusive right to exercise the option as to whether or not to apply the local vendor preference to any procurement.
- (g) The method outlined for tie bids in the purchasing policies and procedures manual will be used to determine the final award in the event two or more formal bids, requests for proposals, or quotations are received and are equal after calculating the appropriate local vendor preference.
- (h) Persons, firms, partnerships, companies or corporations who desire to be considered for the local vendor preference must complete an application and affidavit provided in the solicitation documents and return it with their bid, request for proposal, or quotation. Upon a finding by the city that the application and affidavit is sufficient and meets the local vendor criteria, the person, firm, partnership, company or corporation will then be considered a local vendor. Only persons, firms, partnerships, companies or corporations that provide the application

and affidavit with their solicitation will be allowed to receive a local vendor preference. Vendors shall not have the opportunity to change the application or affidavit once submitted to the city and shall have the burden of demonstrating that it meets the definition.

(Laws of Fla. ch. 57-1326, § 82; Code 1991, § 7-52; Ord. No. 3054, § 1, 2-20-2002; Ord. No. 3439, § 39, 1-22-2008)

Sec. 38-73. Exceptions.

The local vendor preference as provided in this section shall not apply to the following contracts or purchases:

- (1) Professional services which are subject to the State of Florida Consultants Competitive Negotiations Act (F.S. § 287.055).
- (2) Purchases or contracts for which funding is received and local vendor preference is prohibited pursuant to any laws, rules, regulations or policies.
- (3) Purchases made utilizing cooperative purchasing agreements with other governmental entities.
- (4) Purchases made under emergency procedure situations as set forth in the purchasing policy and procedures manual, on file in the city clerk's office.
- (5) Purchases made for items that have been deemed as a single source and/or standard items utilized by the city.

(Laws of Fla. ch. 57-1326, § 82; Code 1991, § 7-52; Ord. No. 3054, § 1, 2-20-2002)

Sec. 38-74. Consideration for award.

Awards of contracts and/or purchases shall be to the lowest, most responsible bidder and/or the lowest, most qualified local vendor. In determining the award of a contract which will best serve the interest of the city, the city council, city manager, and purchasing division shall not be limited to consideration of price, but will also consider the following:

- (1) The ability, capacity and skill of the bidder to perform under the terms of the solicitation documents and/or provide the goods and services required, including past performance, quality of performance and previous and/or existing compliance by the vendor in regards to federal, state, county and city laws, ordinances, rules and regulations.
- (2) Whether the vendor can perform the contract or provide the materials or service promptly or within the time specified, without delay or interference.
- (3) The character, integrity, reputation, judgment, experience, and efficiency of the vendor as reflected in credit reports, better business reports or other records or reports, including sufficiency of the financial resources.
- (4) The quality, availability, and adaptability of supplies, equipment, or contractual service to the particular use required.
- (5) The ability of the bidder and location of the business to provide future maintenance and service for the purchase of the equipment or material, and financial impact upon the city to receive future maintenance or service.
- (6) Whether the vendor is in arrears to the city on a debt or is a debtor or is a defaulter or surety to the city, or whether the vendor has delinquent taxes or assessments.

(Laws of Fla. ch. 57-1326, § 82; Code 1991, § 7-52; Ord. No. 3054, § 1, 2-20-2002; Ord. No. 3439, § 40, 1-22-2008)

Sec. 38-75. Remedies and appeals.

The local vendor designation shall not be considered as a basis for any formal protests of contract awards under the formal procurement process of the city. If a local vendor designation is denied by the city, the applicant may then appeal such decision to the purchasing manager for review and further consideration, and if denied by the purchasing manager, the applicant may appeal such decision to the city council, who shall hear such appeal at a regular public meeting, and whose decision shall be final. The appeal process shall in no way delay the award of a contract or receipt of materials and/or services.

(Laws of Fla. ch. 57-1326, § 82; Code 1991, § 7-52; Ord. No. 3054, § 1, 2-20-2002)

Sec. 38-76. Supplemental authority.

This section shall be deemed to provide an additional and alternative method for the procurement of goods and/or services for the city and shall be regarded as supplemental and additional to the powers conferred by other laws, and shall not be regarded as a decline of any city powers now existing or which may hereafter come into existence.

(Laws of Fla. ch. 57-1326, § 82; Code 1991, § 7-52; Ord. No. 3054, § 1, 2-20-2002)

Secs. 38-77—38-91. Reserved.