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Kirkland & Ellis
Dec 17, 2019 20:41

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December 17, 2019

Subject: Updated Revised Reply Instructions for the Project Scampi Invitation to Negotiate

As described herein, JEA will be requesting updated Revised Replies in connection with JEA's Invitation to Negotiate #127-19, as amended from time to time (the "ITN"). All communications regarding this process shall be directed to the Designated Procurement Representatives. Capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the ITN or the JEA ITN Process Letter dated October 29, 2019 (the "October Process Letter").

The purpose of this letter is to outline the procedures that will be used for each Respondent to submit an updated Revised Reply in connection with its proposed strategic alternative (the "Proposed Transaction"). You have been provided access to the virtual data room (the "VDR") that includes certain materials (collectively, the "Due Diligence Materials") to support the due diligence to be conducted by the Respondents. All information provided to you in connection with the Proposed Transaction, is provided to you on a strictly confidential basis and its existence and contents, as well as any discussion held in connection with the ITN, are subject to the duly executed confidentiality agreement by and between you and JEA (the "Confidentiality Agreement").

Updated Revised Reply Procedures

We are pleased to confirm the procedures for the Respondents to submit an updated Revised Reply:

- A draft of the Asset Purchase and Sale Agreement (the "APA") has been provided in the VDR and it is anticipated that each of the proposed associated ancillary agreements and documents (collectively with the APA, the "Agreements") will be provided the week of December 16, 2019. **Please submit clean electronic versions of the Agreements in a form that you are prepared to execute (i.e., with specific revisions rather than conceptual comments) and clearly marked versions of the Agreements reflecting your proposed changes by no later than January 8, 2020 at 12:00 PM ET.** The Designated Procurement Representatives will be in contact with the Respondents to arrange a conference call on December 19, 2019 or December 20, 2019 with Pillsbury Winthrop Shaw Pittman LLP, counsel to JEA ("Pillsbury"), if desired by the Respondents, to conduct an overview of the Agreements and answer questions from the Respondents. To the extent possible, Respondents should submit questions in advance of such call. Following receipt and evaluation of these submissions, JEA may seek clarification of your proposed changes to the Agreements. Please note that the extent of your proposed changes to the Agreements will be taken into account in JEA's evaluation of your Proposed Transaction.
- To the extent your Proposed Transaction does not involve the purchase of JEA's assets, please submit a detailed term sheet (an "Alternative Structure Term Sheet") describing the structure of your Proposed Transaction by **no later than January 6, 2020 at 12:00 PM ET.** JEA will review each Alternative Structure Term Sheet (including by conducting conference calls with applicable Respondents) and will seek to provide feedback to such Respondents on or about January 10, 2020. Respondents submitting an Alternative Structure Term Sheet should indicate that, following such feedback, they will be prepared to provide draft definitive documentation reflecting their Proposed Transaction by **no later than January 17, 2020.**
- **The remaining elements of your updated Revised Reply, as outlined below, must be submitted no later than January 15, 2020, at 12:00 PM ET.** Each component of your updated Revised Reply must be signed by an authorized representative and submitted via email on the dates specified above to:

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JEA's negotiation team (the "Negotiation Team") will be responsible for reviewing the updated Revised Replies and conducting negotiations with the Respondents throughout this negotiation phase of the ITN process. At any time, the Negotiation Team may seek clarification of the information provided in the updated Revised Replies. An additional letter regarding submission of a best and final offer (the "BAFO") will be issued to those Respondents invited to continue to participate in the process after the updated Revised Replies have been reviewed. The extent of negotiations conducted by the Negotiation Team with any Respondent between the submission of the updated Revised Replies and the BAFO will be solely determined by the Negotiation Team.

In order to enable the Negotiation Team to review the updated Revised Replies on a comparable basis, your updated Revised Reply must be submitted in writing and must comply with the requirements set forth in this letter and contain all material terms of your updated Revised Reply, including, but not limited to, the following:

- i. **Identification of the Respondent:** Please provide the full name and identity of the Respondent and a description of the principal business(es), operational and/or financial qualifications (including market capitalization, net worth, fund specifications (e.g., total capital, un-invested capital, fund duration, etc.), credit ratings, as applicable, capital duration, etc.), major shareholders, members or limited partners in excess of 5.0% (direct and indirect, including, but not limited to, ultimate parent), location of headquarters and type of entity or organization. Please provide a complete schedule of assets and operations in Florida. If the Respondent is a special purpose entity or a controlled subsidiary, in addition to the information provided above, please identify the controlling person(s) of such entity and list any other direct or indirect co-owners and percentages of consideration expected to be contributed by each co-owner. To the extent you intend to partner with a third party in connection with the Proposed Transaction, please notify the Designated Procurement Representatives as soon as possible (if you have not done so already). JEA will consider whether to grant consent under the Confidentiality Agreement to engage in partnering discussions.
- ii. **Gross Proceeds:** In order for JEA to determine the highest and best value to the constituents and customers of JEA, the Respondents are requested to submit updated Revised Replies indicating the amount of gross proceeds in U.S. dollars (the "Gross Proceeds") to be paid in cash at closing, expressed as a specific figure and not a range, that the Respondents would be prepared to offer JEA. We ask that the Respondents provide the Gross Proceeds using the following assumptions:
 - a) **Rates:** The Respondents should assume that the Committed Rates represent the maximum acceptable rates to satisfy the Minimum Requirements set forth in the ITN. Rates during the Committed Rate Stability Period are an opportunity for a Respondent to differentiate itself relative to other Respondents, and JEA will take into account the Respondents' ability to offer lower rates to customers of the Electric System and Water and Wastewater System in evaluating the updated Revised Replies;
 - b) **Rights of First Refusal:** The Respondents should provide the Gross Proceeds assuming two scenarios: (i) the rights of first refusal under the interlocal agreements between JEA and each of Nassau County and St. Johns County (as provided in the VDR in folder 4), the right of first refusal with respect to Plant Scherer #4 (as provided in the VDR in folder 4), and the right of first refusal with respect to the SJRPP Blount Island Agreement (as provided in the VDR in folder 4) are each exercised and (ii) each of such rights of first refusal ("ROFRs") are not exercised. The Respondents should make clear the impact of

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each of the ROFRs on the Gross Proceeds and assume that the APA (as applicable) will include an adjustment to the Purchase Price to the extent one or more of the ROFRs is exercised.

- c) Valuation Date: The Gross Proceeds should reflect a valuation date as of September 30, 2020;
- d) Debt / Other Liabilities: The Gross Proceeds should assume assets are acquired on a cash free, debt-free basis;
- e) Tax Step-Up: The Gross Proceeds should assume there is a tax step-up; and
- f) Working Capital: The Gross Proceeds should assume the Agreements address the transfer of assets and liabilities of JEA, including restricted cash; there will be no closing or post-closing adjustment for working capital.

iii. **Minimum Requirements:** Please provide an overview of the Proposed Transaction, including an overview of major terms, conditions and significant negotiation points that may impact Gross Proceeds. Specifically, identify how the Proposed Transaction allows JEA to achieve, or exceed, the following minimum requirements set forth in the ITN:

- Financial
 1. Greater than \$3 billion of value to the City of Jacksonville ¹
- Customers
 1. Greater than \$400 million of value distributed in accordance with the APA;
 2. At least three years of contractually guaranteed base rate stability for customers
- Environmental
 1. Commitment to develop and provide the City of Jacksonville and the Duval County Public School system with 100% renewable electricity by the year 2030 ²
 2. Commitment to develop and provide 40 million gallons per day of alternative water capacity for Northeast Florida by the year 2035 ³
- Community Impact
 1. Protection of certain employee retirement benefits; ^{4 5}
 2. Maintenance of substantially comparable employee compensation and benefits for three years;
 3. Retention payments to all full-time employees of 100% current base compensation ⁶

¹ Please see Addendum 4, Attachment 14 – Net Proceeds Calculation of the ITN for additional detail on this calculation.

² Renewable electricity and alternative water to be provided at new or existing tariffs at a price equal to or less than the applicable tariff rate.

³ Renewable electricity and alternative water to be provided at new or existing tariffs at a price equal to or less than the applicable tariff rate.

⁴ Certain employee-related minimum requirements are subject to collective bargaining, as applicable.

⁵ Jacksonville City Council passed legislation on September 24, 2019 related to addressing this ITN requirement.

⁶ Certain employee-related minimum requirements are subject to collective bargaining, as applicable.

4. Commitment to new headquarters and employees in downtown Jacksonville, contributing to the economic development of the community¹

The Respondents should assume that the above requirements were established to provide a minimum acceptable threshold for consideration and that updated Revised Replies should reflect the comprehensive nature of this opportunity and the competitiveness of this ITN process. With respect to the value to customers described above, such value is intended to be funded with a portion of the Gross Proceeds. However, if the Respondents have other proposals for how to deliver such value, the Respondents should specify such proposals in as much detail as possible.

- iv. **Financing Sources:** The updated Revised Reply must include a detailed description and evidence of your committed funding sources to complete the Proposed Transaction, including cash on hand, credit lines and draft of any debt and / or equity commitment letters, as applicable, as well as the timing and process required to finalize all funding arrangements. BAFOs will require executed commitment letters from the Respondents' sources of funds. Your updated Revised Reply must expressly confirm that the consummation of the Proposed Transaction will not be contingent on any financing condition.
- v. **Internal Approvals Process:** Your Revised Reply should include a statement regarding the level of review, authorization and approval within your organization that the Proposed Transaction has received to date and an indication of any anticipated need (and associated timing) for further internal authorizations, approvals or waivers (including committee, board or shareholder approvals) and any other material conditions or time constraints related to closing.
- vi. **Regulatory / External Approvals and Conditions:** Please describe any third-party consents, approvals, notices or conditions (including regulatory or governmental approvals) that you believe are required to complete the Proposed Transaction (including, but not limited to, the procedures for obtaining all necessary government approvals and satisfying government conditions, including regulatory and, if applicable, antitrust and/or CFIUS processes). As part of your updated Revised Reply, the Respondents should include a comprehensive assessment of the Federal Energy Regulatory Commission's review of the Proposed Transaction under Section 203 of the Federal Power Act ("FPA"). The Respondent should address whether FERC will conclude that the Proposed Transaction is consistent with the public interest by addressing its effect on (i) competition; (ii) rates; and (iii) regulation. In addition, the Respondent should also discuss whether FERC will find that the Proposed Transaction will result in inappropriate cross-subsidization or pledge or encumbrance of utility assets. To the extent the Proposed Transaction is not consistent with FPA Section 203, the Respondent should detail specific actions that will be required to mitigate any potential challenges and facilitate the necessary FERC approvals. In addition, please provide an indication of expected timing to obtain, and your previous experience in obtaining, any such approvals or to satisfy such notices or conditions and what commitments you would make to ensure expeditious completion of the Proposed Transaction. You should highlight any risks to satisfying such conditions or obtaining such necessary approvals and the strategies you intend to implement to mitigate these risks. Please identify any other material impediments to promptly completing the Proposed Transaction.
- vii. **Advisors / Contact List:** Please provide the names and contact information of any financial, legal, consultant, or other advisors who you have engaged or plan to engage regarding the Proposed Transaction. Additionally, please provide a contact list of those persons within your organization who are involved in the Proposed Transaction and with whom the Negotiation Team can discuss your updated Revised Reply.
- viii. **Due Diligence:**

¹ JEA's new headquarters is currently in the initial stages of development in downtown Jacksonville. The process goal is a commitment to the current downtown headquarters project.

- Question process: The following procedure should be followed for submitting due diligence questions:
 1. Using the template provided by the Designated Procurement Representatives, you may submit questions that support your due diligence efforts
 2. JEA will respond on an ongoing basis
 3. If you would like to request follow-up conference calls with JEA to conduct due diligence on specific subject matter areas, please submit such requests through the template referenced above and JEA will do its best to accommodate such requests on a timely basis. Questions must be received in writing from Respondents at least two days prior to any due diligence conference call
 4. Please note that the deadline for submitting due diligence questions is 12:00 PM ET on Tuesday, January 7, 2020
- Ongoing due diligence:
 1. For those Respondents with whom JEA elects to continue negotiations after submission of updated Revised Replies, site visits will be made available during the week of January 20, 2020
 2. Please confirm whether your updated Revised Reply is subject to any further due diligence, including any confirmatory due diligence items
- ix. **Contingencies / Conditions:** Based on feedback received during the management presentations conducted with the Respondents this month, we recognize that our intention to recommend a Respondent for award by the end of January 2020 produces a proposed timeline for the ITN process may be viewed as limited in duration. We understand that Respondents may include certain contingencies or conditions in their updated Revised Replies (including, for example, remaining confirmatory due diligence), and we ask that the Respondents clearly specify any such contingencies or conditions that are driven by the proposed timeline. While the existence and extent of such contingencies and/or conditions will be taken into account in evaluating Revised Replies, inclusion of such contingencies and/or conditions in the Revised Replies will not in and of itself, prevent a recommendation **for** a Respondent to which an award should be made under this ITN process.

Please note that the Respondents should assume that (i) the Proposed Transaction shall not be contingent on approval of tariffs, rate proceedings or similar regulatory administration, other than those required to establish the Committed Rates (or initial rates) under Florida law and (ii) the Proposed Transaction will not include any purchase price adjustments or similar mechanism relating thereto. Updated Revised Replies should assume that the Respondent will bear the full risk of any regulatory requirements beyond the Committed Rate Stability Period.
- x. **Other Information:** Please include any other information that you deem relevant to the Negotiation Team's assessment of your updated Revised Reply or that you believe would be helpful to the Negotiation Team in distinguishing your organization and its capabilities to consummate the Proposed Transaction.

Any omission or deviation from these requirements should be explained in full and will be taken into account in JEA's evaluation of your Proposed Transaction.

Coordination

To the extent that the Respondent is awarded the contract contemplated by the ITN, the successful Respondent is expected to work with JEA and its advisors to develop a comprehensive transition plan that will detail the coordinated communication and efficient transfer of JEA's assets, operations and customers to the Respondent. The Respondent and JEA will work collaboratively to address all necessary closing conditions and communications with the Board of Directors, the Jacksonville City Council, its employees, vendors, State and local community leaders, and JEA's customers. The Respondent should confirm your understanding of JEA's objectives and willingness to work with JEA to ensure a clear, transparent path to close while minimizing any inconvenience or impact to JEA's customers. Additionally, the Respondents should provide your preliminary views related to the communication of the Proposed Transaction to JEA's key stakeholders and customers.

General

Neither this letter nor the release of the Due Diligence Materials or any other information to you or your representatives constitutes an offer to sell or an invitation to purchase or tender for any securities or any of the businesses or assets of JEA or any of its affiliates or to enter into any other transaction or commercial agreement. JEA, its advisors and their respective affiliates and representatives expressly disclaim any and all liability for all statements or information in this letter, the Due Diligence Materials and any other materials furnished, made available or communicated to you or your representatives. Nothing in this letter, the Due Diligence Materials or any other materials furnished, made available or communicated to you or your representatives will impose any obligation upon JEA, its advisors or any of their respective representatives or affiliates to provide any specific information to any party. By submitting an updated Revised Reply, you acknowledge that you are relying on your own independent investigation and evaluation of the Proposed Transaction and that you accept the sale process as set out in this letter. JEA's interpretation of the procedures, terms and conditions set forth in this letter and the provisions of any other materials furnished (excluding the terms and conditions of the Agreements), made available or communicated to you or your representatives shall be final and binding on all of the Respondents.

JEA expressly reserves the right, in its sole discretion and without giving prior notice or reasons therefor (and without liability on the part of JEA or its representatives or affiliates), at any time and in any respect, to amend, waive, suspend or terminate the procedures, terms and conditions by which you or other Respondents submit updated Revised Replies or by which JEA may pursue negotiations with you or other Respondents; to reject or accept any updated Revised Reply for any or no reason (including, without limitation, rejecting any updated Revised Reply as a result of any breach of the Confidentiality Agreement or failure to comply with this letter); to enter into final definitive agreements regarding the Proposed Transaction with any person at any time or abandon the process without prior notice to you or any other person; to negotiate with one or more persons with respect to the Proposed Transaction (regardless of whether such persons have previously received an invitation to submit an updated Revised Reply) by any means or process determined by JEA in its sole discretion, and to exercise any other right reserved to JEA by the terms of the ITN. If you are not invited to proceed in this process, you will be required to return or destroy all Evaluation Material (as such term is defined under the Confidentiality Agreement) in accordance with the Confidentiality Agreement.

JEA expressly reserves the right, in its sole discretion, to terminate or suspend discussions with you and accept any updated Revised Reply or other reply or alternative at any time, without any legal obligation or liability of any kind whatsoever to you or your representatives or affiliates. In no circumstances will JEA, its advisors or any of their respective affiliates or representatives have any liability in respect of any loss whatsoever that may result from your participation in, or exclusion from, the process described in this letter or any departure from the procedures contemplated herein, and you shall not be entitled for any reason to be reimbursed for any costs, expenses, losses or other liabilities incurred by you or your representatives or affiliates in connection with or in reliance upon the foregoing procedures or this process. No acceptance or selection by JEA of any Respondent or other reply or alternative shall be binding on JEA or its affiliates or representatives. JEA will only be subject to a legal obligation in relation to the Proposed Transaction upon the execution of definitive and binding written agreement(s) by the parties

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thereto, and, notwithstanding anything to the contrary therein, no legal obligation shall arise as a result of any updated Revised Replies, replies, alternatives, indications of interest, letters of intent, term sheets, or any other preliminary written agreements (whether or not executed), nor from any written or verbal acceptance of any of the foregoing.

All aspects of the process, including, but not limited to, the existence and contents of this letter, the CIP, the Due Diligence Materials and any additional or other due diligence materials or information obtained from JEA or any of its representatives, all updated Revised Replies, the existence of any updated Revised Replies, your involvement in this process and all discussions or negotiations with JEA and its advisors or its or their representatives are subject to the terms and conditions of the Confidentiality Agreement, which remains in full force and effect. If you do not wish to submit an updated Revised Reply, please inform us immediately and return or destroy all Evaluation Material in accordance with the Confidentiality Agreement. Your determination not to proceed and your return or destruction of the Evaluation Material in no way limits your obligations set forth in the Confidentiality Agreement.

This letter shall be governed by and construed in accordance with the laws of the State of Florida. Your participation in the process outlined above shall constitute your agreement with the terms of this letter.

Communications

The Respondents should direct all communications regarding any aspect of the Proposed Transaction to the JEA Designated Procurement Representatives as outlined in this letter and the ITN. As a reminder, under no circumstances should you make any contact, directly or indirectly, with the management, directors, employees, customers, suppliers or representatives of JEA, its advisors or their affiliates or representatives, or any regulatory agencies (except as expressly permitted), credit rating agencies or any other person with respect to this process or the Proposed Transaction.

Thank you again for your interest in the Proposed Transaction. If you have any questions regarding the Proposed Transaction, the process outlined in this letter or information to be provided in your updated Revised Reply, please do not hesitate to contact the Designated Procurement Representatives directly.

Your interest in the ITN process and your observance of the foregoing is appreciated. We look forward to working with you.

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