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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

May 18, 2007

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Re: SUNY-SB Procurement for
Environmental Services SF-20070098

Dear Madam and Sirs:

This Office has completed its review of the above-referenced procurement conducted by the State University of New York at Stony Brook (hereinafter "SUNY-SB") for environmental services and the bid protest filed by Trade-Winds Environmental Restoration, Inc., (hereinafter "Trade-Winds") with respect thereto. Since SUNY-SB has already entered into a proposed contract with Envirospect resulting from this procurement, the Comptroller has reviewed the issues raised in the Protest filed by Trade-Winds as part of the review of the proposed contract.

As set forth in further detail below, our review of the procurement record reveals that the evaluation methodology used by SUNY-SB to award the contract to Envirospect was flawed in that it did not have a reasonable relationship to the cost of the services being procured. As a result, we are returning unapproved the SUNY-SB contract with Envirospect and directing SUNY-SB to conduct a new procurement for the required services. In reaching our determination, this Office has considered all documentation

contained in the procurement record, including the correspondence and submissions of the parties.

The Comptroller is, generally, required by section 112(2) of the State Finance Law to approve all State contracts which exceed \$50,000 in amount before such contracts become effective. However, under the authority of section 355(5) of the Education Law, a higher threshold with respect to Comptroller approval of contracts let by the State University has been established, and the threshold for SUNY-SB contracts at the time of the procurement was \$150,000. Because the value of the proposed SUNY-SB contract exceeds \$150,000 it is subject to this Office's review.¹

The contract was to be awarded to the "lowest responsible, qualified bidder" (Solicitation, pg. 6). The proposal submitted by Envirospect offered the lowest price for the required environmental services. Trade-Winds was the second low bidder with a cost approximately \$110,000 higher than that of Envirospect.² The crux of Trade-Wind's protest is that it is, in fact, the low bidder. Specifically, Trade-Winds asserts that they bid lower in every category but one³ and "in mathematical terms . . . the additional money spent [on the higher priced categories] will be clearly offset by the savings on all the other popular services used on the contract".⁴

Because the value of this contract exceeds the threshold established under section 355(5) of the Education Law, it is governed by section 163(4) of the State Finance Law which requires that contracts for services be awarded on the basis of best value. In this case, the agency has properly equated best value to lowest cost.⁵ We believe, however, that the requirements of section 163 implicitly require that the evaluation methodology used by the procuring agency in determining cost must have a reasonable relationship to the anticipated costs of the contract.⁶ It is clear based upon our review of the evaluation methodology used by SUNY-SB, this evaluation methodology did not bear a reasonable relationship to the cost of the services being procured.

Under the evaluation methodology, the total cost for each proposal was calculated by multiplying the annual estimated number of hours for each category of service by the

¹ The present threshold is \$250,000.

² The third and fourth place bidders, Action Remediation and Apex Companies, LLC, submitted significantly higher bids.

³ We note that there are actually three hourly rates bid by Trade-Winds which are higher than the rates offered by Envirospect. However, because our analysis is based on the evaluation methodology, this fact is not relevant to our analysis.

⁴ See Trade-Winds letter dated December 18, 2006 (correspondence from Joseph Caligiuri to Anthony Perez, Contracts Officer, SUNY-SB).

⁵ While agencies must normally consider both technical merits and cost in making a best value award, in this case, in light of the nature of the services and the detail of the specifications, we are satisfied that equating best value to lowest price constitutes a satisfactory "cost benefit" award (Transactive Corp v New York State Dept of Social Services, 236 AD2d 48 [1997] aff'd on other grounds 92 NY2d 579 [1998]; SF-20020035 and SF-20010084).

⁶ Section 160 (5) of the State Finance Law states: "Costs' as used in this article shall be quantifiable and may include, without limitation, the price of the given good or service being purchased..."

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hourly rate bid for said category. SUNY-SB stated that it based its calculation of the number of estimated hours to be utilized for each category on historical data with respect to the use of the prior contracts and purchase orders in addition to the projected use by two campuses which, while not covered by the prior contracts, will require services under this contract.⁷

The evaluation methodology provided for the evaluation of proposed charges in the following categories utilizing the listed number of estimated hours: (i) assessment services (500 hours); non-emergency remediation services (5000 hours); (iii) emergency remediation services (1,000 hours); (iv) non-emergency tank truck with operator for petroleum, sewage and chemical cleanup (1,000 hours); (v) emergency tank truck with operator for petroleum, sewage and chemical cleanup (200 hours); (vi) services over and above (500 hours); (vii) bird spike services (200 hours); and (viii) bird tape services (200 hours).

As noted earlier, it is our view that, while the hours used to evaluate proposals need not mathematically track historic usage, such hours must have a reasonable relationship to historic patterns of use, except where the agency can document that there is some reasonable basis to believe that there will be major changes in future usage. In this case, we are satisfied that the agency used reasonable estimates for several major categories (non-emergency remediation, assessment services and bird spike services). With respect to the remaining categories, however, there are, as discussed below, significant unexplained discrepancies between the levels of historical usage and the weight given such categories for evaluation purposes, which materially affected the outcome of this procurement.

Under the evaluation methodology used by SUNY-SB, the estimated use of the non-emergency tank truck with operator for petroleum, sewage and chemical cleanup services was set at 1,000 hours annually. This estimates that eleven percent (11%) of the contract will utilize these services.⁸ Historically, however, the usage for this category has only been 5.3 hours annually, which would not justify any appreciable weight being ascribed to such category. As a result, we requested that SUNY-SB provide us with an explanation for this estimate and how they determined that such estimate was fair and reasonable. While SUNY-SB in its response suggests that there may be more usage of this category in the future because of issues concerning raw sewage at the Southampton campus, SUNY-SB has not provided any concrete basis for ascribing such a high estimate to this category. Indeed, the use of such a large number of estimated hours in the award methodology is contrary to the representations apparently made by SUNY-SB at the pre-bid meeting. Specifically, according to the response to this protest filed by Envirospect's attorney,⁹ it appears that SUNY-SB made it clear at the pre-bid meeting

⁷ One new campus has thirty buildings including 11 dormitories, and the second is a research and development campus with 438 acres with one building and plans for expansion.

⁸ We calculated this percentage by dividing the 1,000 hour estimate for this category by the total of all the estimates used for all evaluation purposes (8,600 hours).

⁹ See, Envirospect's letter in opposition to the protest (correspondence dated March 27, 2007 from Steven R. Zimmer, Esq., to Anthony Perez, Contracts Officer, SUNY-SB).

that: (i) the tank truck and operator were to be utilized incidentally to work as part of the air conveyance systems; (ii) hydraulic spills that occur would be less than five gallons and inaccessible by truck and would be cleaned by labor rather than trucks or heavy equipment;¹⁰ and (iii) the University had a separate contract for spill response already in place.¹¹

Similarly, while the evaluation methodology reflected estimated utilization for the emergency tank truck with operator at 200 hours annually and for emergency remediation services at 1,000 hours annually, the historic usage of these services was minimal,¹² and SUNY-SB has not provided any significant justification for projecting substantial increases in these categories.

Accordingly, based upon our review of this matter, we conclude that the evaluation methodology with respect to these three categories afforded substantial weight to these categories in the evaluation methodology despite the fact that there was no apparent basis for such weight based upon either historic usage patterns or projected new needs. This problem is compounded by the fact that, in this case, Trade-Winds was the low bidder in all of the categories other than the three categories which were afforded far greater weight than justified, and therefore would, in all likelihood, have been the winning bidder if a proper evaluation methodology had been utilized. This fundamental flaw in the procurement process, which altered the outcome of the procurement, precludes us from approving the contract with EnviroSpect and requires that SUNY-SB undertake a new procurement.¹³

Although moot at this point we will address the prevailing wage issue raised in the protest. This Office has consistently held that where work is covered by Articles 8 and 9 of the Labor Law, contractors must pay their employees the prevailing wage rates (including supplements); however, a bidder is not, as a matter of law, precluded from bidding a rate below the prevailing wage.¹⁴ Therefore, although a potential vendor is

¹⁰ Historical data shows that hydraulic oil spills less than five gallons are cleaned under the rate bid in the "services over and above" category and not the tank truck with operator category.

¹¹ In addition, oil spills greater than 5 gallons or where ground water may have been affected are managed by the Department of Environmental Conservation. See Correspondence dated March 5, 2007 from Anthony Perez, Contracts Officer, SUNY-SB to Bill Hughes, OSC Bureau of Contracts.

¹² With respect to the emergency tank truck with operator, SUNY-SB provided historical data showing 2.47 annual hours of usage and identified two other emergency incidents for which the tank truck was used (without providing any number of hours). With respect to the emergency remediation services, the historic data provided by SUNY-SB reflected 18 annual hours of usage.

¹³ Because section 163(7) of the State Finance Law requires that the evaluation methodology be fixed prior to the initial receipt of offers, the statute precludes the agency from now adopting a more appropriate evaluation methodology (i.e. one affording appropriate weight to the three disputed categories) and making an award on such basis.

¹⁴ In cases where a bid is below prevailing wage this Office requires the procuring agency to gather further information. Specifically, the agency must inquire of the vendor if he or she will in fact pay prevailing wage to any employee engaging in activities covered by the Prevailing Wage Law. When warranted, the Department of Labor is contacted to verify that no complaints have been filed and the vendor is not the subject of an investigation concerning violations.

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required to pay prevailing wage to its employees, the vendor is not required to bid prevailing wage in its offer.

Based upon the foregoing, this Office has determined that the protest by Trade-winds should be upheld, and we are today returning the contract unapproved to SUNY-SB, which, in any new procurement for the environmental services, must utilize an evaluation methodology that reasonably accounts for the discernible actual cost of the services being procured.

Sincerely,

A handwritten signature in black ink, appearing to read "Charlotte Breeyear". The signature is written in a cursive, flowing style.

Charlotte Breeyear
Assistant Director
Bureau of Contracts

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