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STATE COMPTROLLER



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STATE OF NEW YORK  
OFFICE OF THE STATE COMPTROLLER

July 29, 2009

Sharon Aphilz  
Director of Business Office Management  
NYS Office of Parks, Recreation and Historic Preservation  
Empire State Plaza  
Agency Building 1  
Albany, NY 12238

John A. Rupp, Esq.  
Textron Inc.  
40 Westminster Street  
Providence, RI 02903

Bernie Jorgenson  
Satch Sales  
63 Broadway  
Menands, NY 12204

Dear Ms. Aphilz, Messrs. Rupp and Jorgenson:

Re: Bid #ALB-09-ADM-00002  
Golf Carts, James Baird State Park  
Golf Course, OSC SF-2009020

This letter of determination is in response to the appeal (hereinafter "Appeal")<sup>1</sup> filed by Textron Inc. (hereinafter "Textron") of the protest determination of the New York State Office of Parks, Recreation and Historic Preservation (hereinafter "Parks") regarding the above-referenced procurement which resulted in an award by Parks to Satch Sales Mobile Solutions (hereinafter "Satch").

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<sup>1</sup> Although Textron's submission to this Office, dated May 22, 2009 was denoted as a "protest," this submission is in fact an appeal of Park's determination to deny the agency protest filed by Textron.

This Office has reviewed the issues raised in the Appeal as part of our review of the contract<sup>2</sup> award made by Parks to Satch. In our review, this Office considered: (i) the procurement record submitted by Parks with the Parks/Satch contract;<sup>3</sup> (ii) the Appeal dated May 22, 2009 and Textron's supplemental filing dated May 26, 2009; (iii) Park's response to the Appeal dated June 12, 2009; (iv) Satch's response to the Appeal dated June 14, 2009; (v) Textron's email dated June 24, 2009 from John Rupp with corresponding attachments; (vi) Satch's email dated June 30, 2009 from Bernie Jorgensen with corresponding attachments; and (vii) email correspondence between this Office and Parks concerning the relative weights of the golf carts. As detailed below, we have determined that the issues raised in the Appeal warrant overturning the award made by Parks to Satch. As a result, we are returning the Parks/Satch contract unapproved, and are hereby directing Parks to take further action with respect to this procurement consistent with this determination.

### **Background**

On March 9, 2009 Parks advertised Bid Number ALB-09-ADM-00002 for the purchase of 50 new electric powered golf carts. The Invitation for Bids (hereinafter "IFB") included a sheet entitled "Golf Cart Specifications James Baird Golf Course", which provided that the golf carts must be equal to or better than 2009 Club Car Precedent Electric I2 (hereinafter "Club Car Precedent"). Parks issued corrections to the specifications dated March 17, 2009 by an addendum to all bidders that stated: "Bid should read reference 2009 club car precedent electric I2 or equal..." The specifications attached to the addendum were the specifications for the electric Club Car Precedent that included a ladder-style aluminum box beam frame and a cart dry weight of 495 lbs. The IFB provided that the "[a]ward shall be made by grand total."<sup>4</sup>

Three bids were received by the proposal due date of March 30, 2009. The bidders and grand totals were: (i) E-Z-GO, (Textron), at \$181,200.00; (ii) W&B Golf Carts Inc., (Yamaha), at \$184,750.00; and (iii) Satch Sales, (Club Car), at \$187,500.00. The low bid of E-Z-GO and the second low bid of Yamaha were rejected by Parks on the basis that the proposed carts were non-responsive to the specifications. That is, Parks found that the carts proposed by these two bidders were not equal to the Club Car Precedent.

Parks issued a notice of award recommendation on April 8, 2009 stating that the bid of Satch in the amount of \$187,500.00 was selected for award. The Parks/Satch contract was received by this Office for review on May 15, 2009.

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<sup>2</sup> This is a purchase order subject to the approval of this Office.

<sup>3</sup> We note that the procurement record contained agency level protests from Textron, the low bidder and W&B Golf Carts, the second low bidder, and Park's responses thereto.

<sup>4</sup> Consistent with the method of award in the General Information, the Golf Cart Specifications page of the IFB states the method of award as follows: Bid to be awarded to the lowest responsive and responsible bidder based on Grand Total; *see also*, SFL § 163(10).

### Procedure and Comptroller's Authority

Under Section 112 of the State Finance Law ("SFL"), before any contract made for or by a state agency, which exceeds fifty thousand dollars (\$50,000) in amount, becomes effective it must be approved by the Comptroller.<sup>5</sup> In carrying out the aforementioned responsibilities under section 112, this Office has issued Contract Award Protest Procedures that govern the process to be used when an interested party challenges a contract award by a State agency.<sup>6</sup> Such procedures provide for separate procedures depending on whether the procuring agency has provided for an agency level protest procedure. In this case, Parks did provide for such a procedure, Textron filed a protest with Parks, which was denied, and Textron then filed an appeal with the Comptroller.

### Analysis

It appears that Club Car, E-Z-GO and Yamaha are three major manufacturers of golf carts,<sup>7</sup> who would be likely to bid on this procurement.<sup>8</sup> Indeed, the only proposals received by Parks were from these three manufacturers.<sup>9</sup> Since Parks found that the other two manufacturers' products were not the equal of the Club Car Precedent, the Parks specification effectively eliminates competition for this procurement. The issue presented by this Appeal is whether this is legal and appropriate. The lead case in this area is Gerzof v. Sweeney, 16 N.Y.2d 206, 264 N.Y.S2d 376 (1965), wherein the Court of Appeals reviewed contract specifications issued by a village for the purchase and installation of a generator/electric power equipment that were drawn in such a way that only one manufacturer could meet them. In upholding the challenge to the contract award under such specifications, the Court of Appeals stated "[s]uch a scheme or plan is illegal in the absence of a clear showing that it is essential to the public interest." Gerzof at 381; *See also* J. I. Company v. Town of Vienna, 105 A.D.2d 1077 (4<sup>th</sup> Dept. 1984).

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<sup>5</sup> SFL §112(2).

<sup>6</sup> *See* Comptroller's G-Bulletin G-232.

<sup>7</sup> There is a fourth manufacturer, Columbia Par Car, that appears to have a significantly smaller market share. It also appears to have a steel frame, and, therefore, would be excluded by the brand name specifications utilized by Parks.

<sup>8</sup> To verify this conclusion, we asked Parks to provide a list of its golf courses and the manufacturers of the carts currently in use at those courses. These three companies are the sole manufacturers of carts in use on Park's courses in New York State with the following breakdown:

1. Club Car: Indian Hills, Bethpage, Montauk Downs, Sag Harbor, Saratoga Spa, James Baird, Dinsmore, and St. Lawrence.
2. E-Z-GO: Battle Island, Green Lakes, Bonavista, Beaver Island, and Rockland Lake.
3. Yamaha: Chenango, Pinnacle, Soaring Eagles, Spingbrook Greens, Sunken Meadow, Saratoga Spa, and Wellesley Island.

<sup>9</sup> The carts were: (i) Club Car, Precedent I2; (ii) E-Z-GO, RXV; and (iii) Yamaha, the Drive.

Therefore, consistent with the holding in Gerzof v. Sweeney, supra, in order to justify this specification, and the award thereunder, Parks must demonstrate that the requirements are supported by a compelling public interest.<sup>10</sup>

In its responses to the issues raised in the agency level protest and the Appeal, Parks asserts the position that the specifications for the Club Car Precedent cart were utilized because of the benefits afforded by the Club Car Precedent. Specifically, Parks asserts that the Club Car Precedent is lighter, resulting in less turf compaction and, therefore, less seeding and maintenance costs over time. Parks states that this is particularly important at the James Baird golf course because the irrigation system is limited and antiquated causing the fairways and surrounding rough to burn out on a regular basis. In addition, Park states that the Club Car Precedent uses an aluminum frame which, in addition to being lighter, has a longer life span as compared to steel framed carts that, regardless of the corrosive protection of the steel frame, will eventually rust resulting in greater upkeep and lower [trade-in and] resale values. In light of these factors, Parks concludes that Club Car Precedent is constructed in a way that makes it clearly the preferable choice.

### Cart Weight

Preliminarily, we note that, since Parks' justification for the weight advantage of the Club Car Precedent is based upon "turf compaction", in our opinion, the relevant weight is the operating weight, i.e. the weight of the carts with their normal complement of batteries, since without the batteries, the carts will not move and therefore will not compact the turf at all.

There is a factual dispute as to the actual operating weight of the E-Z-GO cart. In its Appeal, E-Z-GO asserts that the dry weight of its cart is 571 pounds (resulting in an operating weight of 883 pounds when the weight of the batteries is included), whereas Parks and Satch assert, based upon the weight listed in specification included in the proposal for the E-Z-GO cart, that the E-Z-GO cart's dry weight is 635 pounds (resulting in an operating weight of 947 pounds). The weight of the Club Car Precedent, which is not in dispute, is 873 pounds. If we were to accept E-Z-GO's assertion in its appeal, this would mean that the actual weight difference is only 10 pounds (or just over 1%), whereas if we were to accept Parks' assertion the weight difference would be 74 pounds (or approximately 8.5%).<sup>11</sup> In either event, we would require documentation that such modest weight differentials significantly impact upon turf compaction. As discussed below, however, we need not conclusively resolve this factual dispute, or the effect of the relative weights of the E-Z-GO and Club Car Precedent carts on turf compaction.

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<sup>10</sup> This Office has previously identified four issues that need to be addressed when determining whether a particular product or service meets a compelling public interest. They are: (i) is the product/service unique; (ii) Are the benefits from the product/service unique; (iii) is the price paid reasonable in comparison with other products/services when the particular benefits are concerned; and (iv) was the procuring agency operating in good faith? In addition, an agency may be required to provide justification for a sole source procurement. See Opns St Comp., No. 83-105; SF-0898/055; and SF-0996/076.

<sup>11</sup> These percentages would be significantly reduced if the weight of golfers and bags were included.

Based upon the documentation provided to this Office in the procurement record and the submission of the parties to the protest, it appears that the Yamaha cart is, in fact, lighter than the Club Car Precedent. The specifications accompanying the Yamaha proposal indicate that the dry weight of the Yamaha cart is 536 pounds. The web site for the battery manufacturer, Trojan indicates that each 12 volt Trojan T1275 battery (the battery listed in the Yamaha specifications and owners manual) weighs 82 pounds, resulting in a total operating weight of 864 lbs – 9 pounds less than the operating weight of the Club Car Precedent. Therefore, there would be no basis for Parks to make a determination that the Yamaha cart is not the equal of the Club Car Precedent with respect to the weight issue. As a result, even assuming that Parks could prove that E-Z-GO cart was not the equal of the Club Car Precedent because of its weight and that this weight difference and the effect of such difference on turf compaction justified such a brand name procurement, unless Parks can justify the requirement for an aluminum frame, it could not justify an award to Satch.<sup>12</sup>

### **Frame**

As noted previously, Parks other justification for the Club Car Precedent specification is its aluminum frame, in contrast to the steel frame used by the other major manufacturers. Parks asserts that the aluminum frame will result in less rusting of the frame and therefore cost savings through lower maintenance costs and higher resale or trade in value. The E-Z-GO and Yamaha carts were deemed non-responsive because their frames are not aluminum. The Yamaha frame is a steel frame protected with a multi-step full-immersion phosphate treatment, electro-deposition epoxy-based coating and an electrostatically applied polyester/urethane powder topcoat. The E-Z-GO cart has a welded steel frame protected with a DuraShield™ powder coat.

Parks has not provided any empirical evidence to support its assertion. Furthermore, because the specifications effectively eliminate any competition, Parks must show a compelling justification for such requirement. We believe it is difficult to meet this heavy burden where the asserted advantage is based upon claimed cost savings. Rather, in such circumstances, we believe that an agency should, to the extent that it can prove and measure such savings, include such cost savings in the cost evaluation methodology.<sup>13</sup> Specifically, for example, Parks could reduce the cost of each cart by its

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<sup>12</sup> Parks in its e-mail dated July 22, 2009, in response to an e-mail from this Office concerning the weight issue, concedes that the operating weight of the Yamaha cart is, in fact, 9 pounds less than that of the Club Car. In this e-mail, Parks for the first time asserts several other purported advantages of the Club Car. Some of these asserted advantages (e.g. the bumper system and service locations) were not part of the bid specifications, and therefore would provide no basis for finding the E-Z-GO or Yamaha carts non-responsive. With respect to the remaining assertions concerning the purported advantages of the Club Car contained in the e-mail, Parks does not provide empirical evidence that would establish the compelling public interest required for such a restrictive specification. Furthermore, most of these asserted benefits should be reflected in a higher resale or trade-in value, which, as noted in the text, could be factored into the cost evaluation – if Parks can document a valid and objective method of determining such value.

<sup>13</sup> See, definition of “costs” in SFL § 160(5). Indeed, the provisions of section 160(5) state that “costs” must be “quantifiable”, thus requiring an agency that wishes to justify a procurement on the basis of cost savings, to actually calculate such savings and factor such savings into the determination of lowest price or, where applicable, best value. Implicitly, this provision would seem to preclude the use of asserted, but not

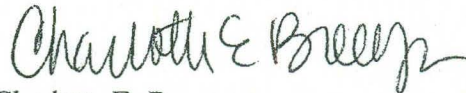
projected trade in or resale value (assuming that there is a valid and objective method of determining such value) and could add to the cost of each cart the reasonably expected maintenance costs for such cart (again assuming that there is a valid and objective method to determine such costs). Such an approach would, consistent with Gerzof v Sweeney, maintain a competitive process, while assuring that the public interest is best served. However, because the specifications issued by Parks did not provide for the inclusion of such costs (see SFL § 160(6)) it cannot do so as part of this procurement, but could do so as part of a re-bid – assuming that it can establish a valid and objective method for measuring such elements of cost.

Accordingly, we do not believe that the asserted benefits of an aluminum frame (which have not been empirically established) provide the required compelling justification for a brand name procurement that effectively eliminates competition.

**Conclusion**

Therefore, we are returning the Parks/Satch contract unapproved.

Sincerely,



Charlotte E. Breeyear  
Director, Bureau of Contracts

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cc: W&B Golf Carts  
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quantified, cost savings to justify brand name specifications that act to limit competition to a single product.