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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

August 12, 2011

Ms. Cindylou Dixon
Senior Attorney
NYS Department of Environmental Conservation
625 Broadway
Albany, New York 12233

Re: Tallapoosa West Salt Marsh
Restoration Project
Contract No. D008070

Dear Ms. Dixon:

I write in regard to Biltwel General Contracting Corp.'s appeal to this Office regarding the above referenced procurement. In March 2011, your agency rejected Biltwel's bid as non-responsive. Biltwel protested Department of Environmental Conservation's (DEC) determination in a letter dated April 6, 2011. Thereafter, DEC denied the protest on the basis that Biltwel did not possess sufficient experience with tidal marsh or wetland restoration (DEC letter, dated April 20, 2011). The DEC again noted that it found Biltwel to be "non-responsive to the specific project requirements" (DEC letter, dated April 20, 2011). Biltwel then appealed DEC's decision to this Office in a letter dated May 4, 2011.

Upon review of the procurement record and the papers submitted in conjunction with the Appeal, this Office has concluded that the bid specifications relating to "Qualifications of Bidders" are ambiguous and could have been interpreted in different ways by potential bidders. In light of this ambiguity, and the fact that the apparent low bidder was rejected on the basis that it did not meet the requisite qualifications, this Office has determined that DEC must conduct a new procurement if it wishes to pursue the project at issue. Therefore, we are returning the contract as non-approved.

At the outset, we note that the standard for awarding a contract for public work, such as the contract in question, is whether the apparent low bidder is "responsible and reliable," not whether the bidder is "responsive" (*compare* Public Buildings Law §8[6] *with* State Finance Law §163[3][a][11]). Clearly, however, a bidder on a project subject

to section 8(6) must be responsive to the specifications, and must be disqualified if non-responsive to a material specification requirement. Further, we note that a determination of bidder non-responsibility can be made only after affording the bidder due process (*see Matter of LaCorte v County of Rensselaer*, 80 NY2d 232, 236-237 [1992]; *Schiavone Constr. Co. v Larocca*, 117 AD2d 440, 442-443 [3d Dept 1986]). Notwithstanding this, because DEC's March 9 letter to Biltwel expressly states that it had determined Biltwel to be "non-responsive," and because Biltwel was not provided with an opportunity to be heard on any issue related to its responsibility, we conclude that DEC's determination rested on Biltwel's non-responsiveness, and not the bidder's non-responsibility. As such, this Office has not analyzed the underlying issue of whether Biltwel is qualified to perform under the contract and asserts no opinion on such issue at this time. Our decision to return the contract as not approved rests solely on the lack of clarity in the bid specifications.

The overarching concern in any state procurement is that the competitive process be fair (*see e.g., Conduit and Foundation Corp. v Metropolitan Transp. Auth.*, 66 NY2d 144, 148 [1985]; *see generally* State Finance Law § 163 [2]). The strong public policy behind competitive bidding is to promote the public interest by "fostering honest competition in order to obtain the best work or supplies at the lowest possible price" (*Sinram-Marnis Oil Co. v New York*, 74 NY2d 13, 18 [1989], quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 192-193 [1968]). By establishing a bid specification that is ambiguous, a procuring agency compromises this policy in that parties are prevented from bidding intelligently and, moreover, may be deterred from bidding in the first instance (*see Sagamore Auto Body, Inc. v County of Nassau*, 104 AD2d 818, 821 [2d Dept 1984]).

In its March 9 letter to Biltwel, DEC stated that "in accordance with the Supplementary Instructions to Bidders, [DEC] has determined that [Biltwel's] proposal is Non-Responsive to the project requirements and therefore [Biltwel's] bid is being rejected." The Supplementary Instructions cited by DEC state that DEC will examine and evaluate "the bid as responsive by considering the contractors understanding of: the overall project scope, estimated cost, utilization of proposed sub-contractors and expertise in completing similar contracts." In the April 20 letter from DEC to Biltwel, DEC again asserted that Biltwel was "non-responsive to the specific project requirements." Upon receipt of Biltwel's appeal to this Office, our Legal Division followed up with DEC to request that its answer to the Appeal identify the specific project specification that was not met by Biltwel. In DEC's answer, which was transmitted to this Office on June 10, 2011, DEC again pointed to the Supplementary Instructions to Bidders as support for the assertion that DEC had properly found Biltwel's bid to be non-responsive.

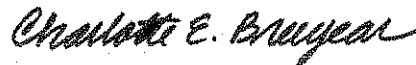
In our view, a determination of bidder responsiveness should reflect an objective assessment of whether a bidder meets a specific requirement of the specifications. In this case, such an assessment could not be done because the Supplementary Instructions do not contain a minimum requirement with respect to an offerer's experience in completing

similar past projects (*compare Kandel v Greene*, 236 App Div 607, 610-611 [3d Dept 1932]). Rather, those Instructions merely set forth a broad range of subjective factors that DEC may consider in evaluating whether a bid is responsive. In terms of communicating what experience is necessary for a bidder to be deemed responsive, this statement could be interpreted in different ways, since it did not articulate with specificity what type of experience, and how much experience, was required. While some offerers may have read that section and concluded that a particular number (or type) of past projects would not suffice, other offerers with even less experience (like, perhaps, Biltwel) may have read that same paragraph and come to the opposite conclusion. Indeed, Biltwel argued in its agency-level protest, as well as in its Appeal to this Office, that it does possess enough relevant past experience to perform the job. However, because the standard set forth in the Supplementary Instructions does not contain a minimum specification in this regard, there is no way for this Office to determine whether Biltwel was properly found to be non-responsive on that basis.

While we note that the factors set forth in the Supplementary Instructions are properly to be considered in DEC's determination of whether the apparent low bidder is "responsive and reliable," in order for bidders to have a consistent understanding of what DEC required in terms of past experience, the IFB should have included a clear and unambiguous standard to this effect, so as to have ensured that the procurement was fair. Because the IFB did not, we believe that, if DEC wishes to pursue this project, reissuance of a revised IFB is necessary. To the extent that DEC believes some minimum experience is necessary, the revised IFB should articulate specifically what type of, and how much, experience is required, and whether the experience requirement can be satisfied based upon the experience of a sub-contractor.

In light of the foregoing, we are constrained to return this contract non-approved. Please feel free to call me if you have any further questions.

Sincerely,



Charlotte E. Breeyear
Director, Bureau of Contracts

CEB:arr

cc: Saeid Jalayer, President, Biltwel General Contracting Corp.
E. Galvin, President, Galvin Bros., Inc.