

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In the Matter of the Bid Protest filed by Land Remediation, Inc. with respect to the procurement of conducted by the New York State Department of Environmental Conservation

**Determination
of Bid Protest**

SF- 20120127

Contract Number – D008466

August 14, 2012

This Office has completed its review of the above-referenced procurement conducted by the New York State Department of Environmental Conservation (DEC) and the bid protest (Protest) filed by Land Remediation, Inc. (LRI) with respect thereto. As outlined in further detail below, we have determined that the grounds advanced by the protestor do not provide a sufficient basis to withhold our approval of the contract under State Finance Law § 112. The Protest, therefore, is denied.

BACKGROUND

Facts

On January 2, 2012, DEC advertised for bids on the remedial construction project at the former Paulson-Holbrook inactive hazardous waste site. Bids were due on February 9, 2012. TMC Environmental (TMC) was the apparent low bidder, but subsequently retracted its bid. Consequently, DEC awarded the contract to the second lowest bidder, Sealand Enviro, LLC (Sealand). On March 28, 2012, LRI, the third lowest bidder, filed a protest with DEC challenging the award of the contract to Sealand. DEC denied the protest on April 10, 2012 and on April 23, 2012, LRI appealed the denial to this Office.

Procedures and Comptroller's Authority

Under Section 112(2) of the State Finance Law (SFL), before any contract made for or by a state agency, which exceeds fifty thousand dollars in amount, becomes effective it must be approved by the Comptroller.

In carrying out the contract approval responsibility prescribed by SFL §112, this Office has issued Contract Award Protest Procedures governing the process to

be used when an interested party challenges a contract award by a State agency.¹ These procedures govern initial protests to this Office of agency contract awards and contract awards made by this Office and appeals of agency protest determinations. Because there was a protest process engaged in at the agency level, the Protest is governed by this Office's procedures for protest appeals (Section 4 of the OSC Contract Award Protest Procedures).

In the determination of the Protest, this Office considered the following correspondence/submissions from the parties (including the attachments thereto):

- a. LRI's March 28, 2012 Agency Protest to DEC;
- b. DEC's April 10, 2012 Protest Determination;
- c. LRI's April 23, 2012 Protest Appeal to this Office;
- d. Sealand's May 18, 2012 Answer to the Protest Appeal;
- e. DEC's May 21, 2012 Answer to the Protest Appeal;
- f. LRI's May 23, 2012 Reply; and
- g. DEC's July 12, 2012 Response to OSC's July 3, 2012 Letter.

ANALYSIS OF BID PROTEST

Protest to this Office

In the Protest, LRI challenges the procurement conducted by DEC on the following grounds:

1. Sealand's bid was nonresponsive to the requirements in the bid documents;
2. Sealand's subcontractor's proposed technology was nonresponsive to the technology requirements in the bid documents;
3. Sealand's subcontractor's equipment is unable to achieve the design depth required by the bid specifications;
4. Sealand's subcontractor's mix design was nonresponsive to the bid specifications;
5. Sealand's subcontractor is not proposing a colloidal mixer as required by the bid specifications;
6. Sealand would exceed the 40% subcontracting limitation on contract performance; and
7. DEC improperly allowed Sealand to "switch" subcontractors after submitting its bid.

Response to the Protest

¹ Comptroller's G-Bulletin G-232.

In its Answer, DEC contends the Protest should be rejected and the award upheld on the following grounds:

1. Sealand's bid was responsive because the bid documents did not specify augers as the only equipment for use on the project and Sealand is proposing to use the ISS technology required by the bid documents;
2. Sealand's subcontractor is supplying equipment and not technology. Its equipment must be able to implement the ISS technology proposed by Sealand. After reviewing the work plans submitted by Sealand, it appears that the equipment proposed by Sealand's subcontractor has the capability to achieve the performance standards required by the bid documents;
3. Sealand's subcontractor's equipment is in fact, able to achieve the design depth required by the bid specifications;
4. Sealand's subcontractor's mix design was responsive to the bid specifications. In its work plans, Sealand describes the approach to mixing grout. The work plans were reviewed and demonstrate that sufficient equipment would be used to implement the ISS work with respect to achieving the objectives of the contract documents;
5. The bid specification does not call for "colloidal mixing" but rather that the resulting grout be a colloidal suspension;
6. Sealand is only subcontracting 34% of the work on the project and therefore, will not be exceeding the 40% subcontracting limitation. However, a higher subcontracting percentage may be permissible if approved, in writing, by DEC; and
7. Sealand was not allowed to "switch" subcontractors. Bidders were required to identify potential subcontractors which may be used to complete the Contract work.

In its Answer, Sealand contends the Protest should be rejected and the award upheld on the following grounds:

1. Sealand's bid fully complied with the bidding documents for the project;
2. The means and methods set forth in the work plans, including the equipment proposed by Sealand's subcontractor, satisfy the requirements of the contract documents. Sealand's subcontractor's LTC Dual Axis Blender satisfies the bid specification that an "augur" be used to perform the ISS work;
3. The means and methods set forth in Sealand's work plans detailing Sealand's subcontractor's design depth capabilities satisfy the contract specifications concerning design depth for the project;

4. The actual project requirements are set forth in the contract specifications, and Sealand's subcontractor's mix design and methods comply with those specifications;
5. Sealand's subcontractor's grout mixing plant meets the contract specifications in every respect;
6. Sealand expects to meet the contractual requirement limiting subcontractor performance to 40% of the project; and
7. In its work plans, Sealand properly identified two ISS subcontractors for DEC's approval. DEC subsequently approved both ISS subcontractors.

DISCUSSION

Responsiveness of Sealand's Bid

LRI asserts that Sealand's bid (including the technology, equipment, mix design and mixer proposed by its subcontractor) was nonresponsive to the requirements in the bid specifications pertaining to the equipment to be used by the contractor. Specifically, LRI asserts that Sealand's bid does not propose the use of an auger, auger mixing or the appropriate process to create the grout mixture. When DEC initially responded to this contention, DEC stated that the specific in-situ stabilization ("ISS") technology is what is required by the contract documents and that these documents did not specify that only designated equipment could be used on the project, but rather outlined general equipment that could be used to achieve the required performance criteria specified in the contract documents. DEC also stated that it had not reviewed the work plans submitted with Sealand's bid for technical compliance with the contract documents and did not plan on doing so until after the contract was approved by this Office.

In light of the issues raised in the Protest, this Office determined that it was appropriate that DEC review Sealand's work plans for technical compliance with the contract documents to resolve the issues raised by the protester. Therefore, on July 3, 2012, Charlotte Breeyear, the Director of the Bureau of Contracts, wrote to DEC, copying all parties to the Protest asking, among other things, whether Sealand's work plans had been approved, and if not, that DEC review the work plans. Ms. Breeyear also asked DEC to specifically address how the work plans did, or did not, comply with the performance specifications relating to the ISS technology and ISS Pilot Study, the grout mixture process and the equipment that would be used to accomplish the ISS. DEC responded on July 12, 2012, advising that it had reviewed Sealand's work plans and determined that the work plans comply "with the project performance specifications set forth in the bid package and contract documents." DEC also stated that Sealand's work plans "demonstrated to DEC's satisfaction that Sealand understands this

technology and, based on all requirements of the Contract Documents, has sufficient experience in environmental remediation work to complete the project as specified in the Contract Documents.” DEC further stated that Sealand has “sufficient equipment, personnel and experience to implement the ISS work with respect to achieving the objective of the Contract documents.”

As part of this Office’s review of the Protest, we noted upon review of the entire procurement record that the original low bidder, TMC, withdrew its bid because during a pre-award performance review, DEC discovered that TMC was proposing to use different mixing equipment than that provided for in the bid specifications. We asked DEC to explain why such review was conducted pre-award since DEC had indicated that this type of pre-award review of the bidders work plans typically was not conducted until after contract approval. DEC responded by saying that the issue with the TMC bid did not relate to equipment, but rather to the technology that was being proposed. Specifically, TMC was proposing an entirely different technology (i.e., ex-situ stabilization) rather than the ISS technology required by the bid specifications. Accordingly, DEC determined that TMC’s proposal did not comply with the bidding specifications, and after informing TMC of this, TMC determined that it would not be able to comply with the bidding requirements and withdrew its bid. Unlike TMC, it is uncontested that Sealand proposes to use the ISS technology required by the bid specifications.

In exercising the broad authority to review and approve State contracts, the Comptroller generally gives significant deference to agency determinations regarding factual issues that are within an agency’s area of expertise. As the State agency charged with protecting and preserving the State’s natural resources and lands, DEC possesses expertise in remedial construction and removal of hazardous waste. Therefore, since the factual determinations by DEC with regard to the responsiveness of Sealand’s bid are within its area of expertise and are supported in the procurement record, we defer to DEC and uphold its determination that Sealand’s bid was responsive to the bid specifications.

Subcontracting Limitation

LRI asserts that Sealand does not have the ability to self-perform 60% of the work on the project. Therefore, LRI maintains that Sealand would be subcontracting greater than 40% of the project, the limitation established by DEC in the bid documents. DEC initially responded to this assertion by claiming it had the discretion to increase the percentage of subcontracting when it is deemed advantageous to the agency. We disagree. DEC advertized this project in the Contract Reporter specifically stating that subcontracting was limited to 40%. As

a result, potential bidders may have refrained from bidding on this project because of their inability to self-perform at least 60% of the work. Consequently, a decision by DEC to waive this requirement after receiving bids would prejudice those potential bidders who did not bid based upon the advertised requirement. However, notwithstanding our disagreement with DEC as to its discretion to waive the advertised bid requirement, DEC has verified to us that Sealand will be subcontracting only 34% of the work under the contract and, therefore, Sealand will satisfy the subcontracting limitation.

Sealand's Alteration of its Bid

LRI asserts that DEC unlawfully permitted Sealand to switch subcontractors after awarding the contract to meet the technical requirements of the contract. Section 5.8.1 of the solicitation specifically states that the "Contractor shall not employ any subcontractor, Supplier or other person or organization whether initially or as a *substitute*, unless first approved by the Department" (emphasis added). While it is unclear whether Sealand attempted or plans to substitute subcontractors, it is clear based on Section 5.8.1 that bidders are not prohibited from doing so as long as they receive approval from DEC.

CONCLUSION

Based on the above, we find that the issues raised in the Protest are not of sufficient merit to overturn DEC's award of the Contract. The Protest, therefore, is denied and the DEC/Sealand contract is approved.