



City of Austin

Purchasing Office

P.O. Box 1088, Austin, TX 78767

May 4, 2018

Delivered by Email: agregory@texasdisposal.com
And U. S. Postal Service

Texas Landfill Management, LLC
ATTN: Adam Gregory
P.O. Box 17126
Austin, TX 78760
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**Subject: Protest Decision – RFP 2200 CDL2003REBID, Beneficial Reuse of Biosolids,
from Texas Landfill Management, LLC**

Dear Mr. Gregory:

I have reviewed the protest filed by you on behalf of Texas Landfill Management, LLC concerning the award recommendation for RFP 2200 CDL2003REBID. After bringing in an independent Hearing Officer and taking into consideration the Hearing Officer's recommendation, for the reasons set forth below I find that there are no legal or procedural grounds to grant the protest. I do however find limited factual grounds that should be addressed by staff. For this reason, the protest is sustained in part. This decision is final.

Dates and Facts

- On October 9, 2017, the City of Austin's Purchasing Office (Purchasing) published Solicitation no. RFP 2200 CDL2003REBID, for Beneficial Reuse of Biosolids (Solicitation). Available online: https://www.ci.austin.tx.us/financeonline/vendor_connection/Solicitation/closed_Solicitations.cfm.
- On November 16, 2017, Proposals in response to the Solicitation were received and opened, one of which was from Texas Landfill Management, LLC (TLM). (Attached)
- On November 27, 2017, Purchasing notified TLM of the award recommendation to Synagro of Texas-CDR Inc. (Attached).
- On November 30, 2017, TLM submitted a timely notice of its intention to file a protest (Attached).
- On December 11, 2017, Purchasing received a timely protest from TLM (Attached).
- On December 20, 2017, Purchasing notified TLM that Purchasing was referring the protest to an independent Hearing Officer to conduct a protest hearing.
- On January 8, 2018, TLM sent a letter to Purchasing complaining about the assigned hearing officer and requesting a different hearing officer be assigned to hear the protest (Attached).
- On January 23, 2018, Purchasing notified TLM of the assignment of a new hearing officer (Attached).
- On February 9, 2018, the independent Hearing Officer presided over a protest hearing in this matter, with representatives from TLM and applicable City staff in attendance. See Sign-in Sheet (Attached). At the hearing, TLM submitted two additional documents associated with its protest. (Attached)
- On February 23, 2018, the independent Hearing Officer issued a recommendation to the Purchasing Officer concerning this protest (Attached).

Additional Protest Documents

The additional protest documents submitted by TLM at the February 9, 2018, were received well beyond the protest due date set forth in the Solicitation. Because staff did not know if these additional documents contained any new information upon which TLM was basing its protest, staff were not able to object to the submission of these documents. Staff reviewed the documents following the hearing. One document bore the Solicitation's title and was a presentation, providing an overview of TLM's proposal. The other document was entitled, "Decision of the Independent Hearing Examiner" and included a set of proposed findings of facts, analysis and conclusions. This document was prepared by TLM but included no indication that it was prepared by TLM and not by the hearing officer.

In reviewing these documents, I do not find there to be any new grounds identified by TLM within 14 days prior to the date of the documents' submission. As these documents were submitted well after the due date for protests as set forth in the Solicitation, I find these documents were untimely and therefore should not have been considered.

Hearing Officer's Recommendation

After reviewing each of the claims in TLM's protest, the Hearing Officer concluded that portions of TLM's response were overlooked or read in piecemeal fashion. The Hearing Officer went on to recommend that the Evaluation Committee (Committee) be reformed, ideally with all new members, to re-review and re-score TLM's response. While the Hearing Officer's analysis is much appreciated I cannot concur with all the Hearing Officer's conclusions or recommendation as stated.

In the Hearing Officer's analysis, instead of reviewing the protest for legal, factual or procedural errors, the Hearing Officer chose to conduct his/her own evaluation of each of the disputed elements of TLM's proposal and contrast the Hearing Officer's subjective conclusions with those of the Committee. Although this standard of review is not improper per se, I find this approach is uncommon in settling procurement protests as it has the effect of adding another source of subjectivity to the dispute. I find this approach to be inappropriate in this instance. By making subjective observations on TLM's proposal the Hearing Officer's findings are rendered arguable to either party. Worse, if these subjective observations are outside the Hearing Officer's area of expertise, the Hearing Officer also risks making technically inaccurate observations.

In this case, some of the Hearing Officer's evaluation conclusions supported the Committee's findings on some weaknesses and supported TLM's findings on other weaknesses. As a result, instead of helping to resolve the dispute, the Hearing Officer's findings may have unintentionally complicated the protest's resolution and by extension the delay in this decision.

Claim 1 – Unfounded deduction of points from qualitative evaluation categories

TLM

In its first protest claim, TLM takes exception to all weaknesses identified by the Evaluation Committee associated with three (3) of the Solicitation's five (5) evaluation criteria. While disputing each of these weaknesses, TLM also disputes the point deductions associated with these weaknesses. For each weakness noted by the Committee, TLM points to multiple citations in its proposal where the contents associated with the weaknesses is found. TLM goes on to accused City staff of intentionally misunderstanding TLM's proposal and/or deliberately attempting to punish TDS (Texas Disposal Systems, the parent company of TLM).

Hearing Officer

The Hearing Officer's analysis and conclusions examines this claim by conducting an evaluation of TLM's proposal under these three criteria. On a weakness-by-weakness basis, the Hearing Officer's evaluation

concurrent with five (5) of the weaknesses and disagreed with four (4) of the weaknesses noted by the Committee. I did not see that the Hearing Officer conveyed a finding on the final weakness concerning the lack of product descriptions in TLM's marketing plan.

Claim 1 – City's Response

Background

The Committee evaluated TLM's proposals for these three criteria in accordance with the Solicitation's requirements and instructions. Based on these strengths and weaknesses, the Committee scored TLM's proposal for these three criteria as follows.

- Business capacity and experience (TLM scored 13 of 20 points)
 - Strengths: Composting and bagging experience. Established retail outlets and brand recognition.
 - Weaknesses: Lack of recent large municipal biosolids projects. Lack of organizational structure and personnel to bring online multiple comparably sized operations simultaneously. Did not demonstrate adequate experience specific to biosolids composting.
- Proposed solution and schedule (TLM scored 12 of 20 points)
 - Strengths: Good odor and fire control plans. 24 hour fire watch if needed. Good mobilization schedule.
 - Weaknesses: Spill response plan not included. Detailed scientific information instead of site and operation plans; not site specific. Did not adequately demonstrate an understanding of the current site layout. Lack of details provided on material volumes onsite and/or produced.
- Marketing plan (TLM scored 15 to 17 points)
 - Strengths: Existing retail outlets. Existing marketing structure. Designated and developed marketing department.
 - Weaknesses: No information on marketing current products produced at municipal facilities. No details on supply and demand or lessons learned. No product descriptions given on specific City of Austin biosolids products, and how these products will be incorporated into the current product portfolio.

Discussion

As it pertains to these three criteria, there appear to be no disagreement among the parties as to the contents of TLM's proposal. The parties do not agree however over the interpretation of these contents and whether any of these contents constitute a weakness. In evaluating its own proposal, TLM contends that all the contents required in the Solicitation were addressed in its proposal and that this content refutes the weaknesses identified by the Committee. In part, the Hearing Officer's evaluation concurred with TLM's findings.

In reviewing the Committee's findings, I do not find they missed or overlooked any of TLM's proposal contents concerning these three criteria. In discussing this claim with the Committee, the Committee described their deliberative process and their evaluation findings based on the presence, absence and/or sufficiency of the contents within TLM's proposal. The Committee also described their point allocation approach which I found to be both logical and consistently applied.

The Committee summarized their consensus findings into a series of statements regarding each proposal's strengths and weaknesses. These summary statements used both categorical language, describing the presence or absence of certain content, and gradated language, describing the degree to which content was present or missing. While these statements are semantically similar, a categorical weakness statement leaves the reader to believe something is missing while a gradated weakness statement causes the reader to believe something was suboptimal. Some examples of the Committee's categorical statements included.

- Spill response plan not included.
- Lack of details provided on material volumes onsite and/or produced.
- No information on marketing current products produced at municipal facilities.
- No details on supply and demand or lessons learned.
- No product descriptions given on specific City of Austin biosolids products...

It is well within the Committee's purview to make both categorical and gradated statements of findings and clearly the Committee intended some of these statements to be categorical, e.g., TLM's proposals did not include a spill response plan. Based on the Committee's explanations however, at least one these categorical statements of weakness were used to describe the gradated weaknesses in TLM's proposal.

By using one or more categorical statements when the Committee intended to describe a gradated weakness, the Committee's language suggested TLM's proposal was missing certain content when, according to the Committee, this content was either incomplete or insubstantial. Although I do not see that the competition was impacted by these choices of language, I find this language selection to be technically incorrect. For this very narrow reason, I find there to be procedural grounds to sustain this claim in part.

**Claim 2 – Improper distribution of points in the quantitative "Pricing" category
due to failure to consider the full benefits of the TLM pricing proposal.**

TLM

In its second claim, TLM argues that the allocation of points to the other respondents' higher cost proposals failed to adequately reflect the full extent of the financial benefit to the City in TLM's proposal. Although TLM received the highest score possible (40 points), TLM contends that had the City included the value of the other services proposed by TLM, that the scores for the other offerors would have been lower.

Hearing Officer

Although the Hearing Officer adds further subjective observations of TLM's proposal noting, "TLM's optional offer did show substantial savings for the grinding services...", ultimately the Hearing Officer concluded there was no evidence to support this claim and that TLM's optional services were not included in the factors to be evaluated.

Claim 2 – City's Response

Background

The final version of the Solicitation's Cost Proposal Form stated the following.

"1. REQUIRED PRICING

...The pricing provided for line items 1-2 will be used to evaluate "Proposed Cost".

2. OPTIONAL ADDITIONAL SERVICES OR PRODUCTS

...The information and pricing provided in the list below will not be used to evaluate "Proposed Cost"

RFP 2200 CDL2003REBID, ATTACHMENT I, Cost Proposal Form

Discussion

In its proposal, TLM's additional services were included in the Cost Proposal Form, section 2. The fact that optional additional services would not be included in the evaluation of Proposed Cost was known or should have been known to TLM prior to the Solicitation's due date. The Solicitation was otherwise clear that any pricing in this section would not be evaluated. On this second claim, I do not see any legal, factual or procedural errors occurred. This claim of the protests is denied.

Claim 3 – Removal of the “Local Business Presence” scoring criteria.

TLM

In its third and final claim, TLM argues that the City failed to insert a modified version of the City’s current Local Business Presence criteria into the Solicitation, in the manner as recommended by the City Council’s Waste Management Policy Working Group.

Hearing Officer

The Hearing Officer concluded that it was uncontroverted that the Solicitation was issued without the Local Business Factor.

Claim 3 – City’s Response

Background

The Solicitation was published with the City’s standard Local Business Preference criteria included. After learning of public comments concerning the Solicitation, that there were concerns with how the City’s standard Local Business Preference criteria, staff conferred with City leadership and subsequently removed the Local Business Preference criteria from the Solicitation via Addendum three (3).

Discussion

The fact that Local Business Preference criteria was removed and would not be used in the evaluation of proposals was known or should have been known to TLM prior to the Solicitation’s due date. In its proposal, TLM signed Addendum three (3), wherein the Local Business Preference criterion was removed. On this third claim, I do not see any legal, factual or procedural errors occurred. This claim of the protests is denied.

Other concerns raised in the Protest

In regard to the other concerns raised in TLM’s protest, taking into consideration feedback from the Hearing Officer and from the Committee I conclude the following.

- The subject matter experts who reviewed the responses are likely very familiar with the Hornsby Bend site and felt no need to visit during the evaluation period.
- There was no evidence that the City diverted from its usual pattern in evaluating of the proposals.
- The scoring process for this Solicitation required all evaluators to agree on the score, making it unlikely that the entire panel worked in unison to achieve an unfair result.
- There was no statement, document, email, or even an overheard remark to suggest that the City acted, or had reason to act, other than impartially toward TLM’s proposal.

Conclusion

For the reasons set forth above, although I find there are no legal or factual grounds to grant the protest, I do find there to be limited procedural grounds to sustain the protest in part. This decision is final.


As mentioned earlier, although I appreciate the analysis and recommendation, I do not concur with the Hearing Officer’s recommendation to have the Committee re-evaluate TLM’s proposal. As I find the Committee evaluated and scored TLM’s proposal properly, simply re-evaluating the proposal would not resolve the protest – as there would be no grounds to direct the Committee to conduct the evaluation or score the proposals differently, only to be more precise in their language choice when describing the proposal’s weaknesses. Further, I also do not concur with the Hearing Officer’s recommendation to form a new evaluation committee to re-evaluate and re-score TLM’s proposal. This recommendation is inconsistent with the City’s historical practices and would result in differential treatment of the offerors’ proposals.

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To resolve this matter and to preserve the competition thus far, I am directing staff to set aside the current award recommendation and to utilize an additional procedural step concerning Best and Final Offers as described within the Solicitation.

If you have any questions in this regard, please contact me by phone at 512-974-2050 or by e-mail at james.scarboro@austintexas.gov. Thank you for your interest in doing business with the City of Austin.

Sincerely,



James Scarboro
Purchasing Officer

cc: Danielle Lord, Procurement Manager
Shawn Willett, Deputy Procurement Officer
Chris Weema, Assistant City Attorney

Attachments:

- A. Solicitation RFP 2200 CDL2003REBID, for Beneficial Reuse of Biosolids
- B. Proposal in response to RFP 2200 CDL2003REBID, submitted by Texas Landfill Management, LLC, dated November 16, 2017
- C. RFP 2200 CDL2003REBID Award Recommendation, dated November 27, 2017
- D. Notice of intent to protest, submitted by Texas Landfill Management, LLC, dated November 30, 2017
- E. Protest, submitted by Texas Landfill Management, LLC, dated December 11, 2017
- F. Letter to Texas Landfill Management, LLC, referring the protest to an independent hearing officer, sent by the Purchasing Office, dated December 20, 2017
- G. Letter of complaint concerning the assigned hearing officer and request for a new hearing officer, submitted by Texas Landfill Management, LLC, dated January 8, 2018
- H. Letter notifying TLM of the assignment of a new hearing officer, sent by the Purchasing Office, dated January 23, 2018
- I. Hearing Sign-In Sheet, dated February 9, 2018
- J. Additional Protest Document, Protest Presentation, submitted February 9, 2018
- K. Additional Protest Document, Proposed Protest Decision, submitted February 9, 2018
- L. Hearing Officer's recommendation, regarding protest from Texas Landfill Management, LLC, dated February 9, 2018