

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND)	
)	Case No.: 2011- 135
In the Matter of:)	
)	
Protest of The Clearwater Group)	
)	DECISION
)	
Department of Transportation)	
RFP No. 10322)	Posting Date: October 17, 2011
Annual Best Management Practice)	
For Maintenance of Water Quality)	Mailing Date: October 17, 2011
<u>At Pre-Treatment Units</u>)	

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from the Clearwater Group requesting an administrative review under the provisions of Section 11-35-4210(1)(b) of the South Carolina Consolidated Procurement Code (Code).

By way of background, the South Carolina Department of Transportation (SCDOT) issued the above-referenced Request for Proposals (RFP) to procure annual best management practice (BMP) for maintenance of water quality at pre-treatment units. On August 23, 2011, SCDOT issued a Notice of Intent to Award to Green Site Services, Inc. (Green Site) On September 2, 2011, The Clearwater Group filed a protest alleging: (1) It is impossible to truly fulfill the contract requirements for the price of \$134,956 per year, (2) Green Site is not qualified to complete the work according to the Occupational Safety and Health Administration (OSHA) requirements for confined space, and (3) misleading information provided by SCDOT in the solicitation regarding the term of the contract and the inventory of SCDOT structural controls. (See attached protest letter.) In response to the protest, SCDOT suspended its intent to award on September 6, 2011, assuring that Green Site did not begin performance under the contract. (Ex. 4)

A hearing was held on the protest letter on October 6, 2011. However, pursuant to Section 11-35-1520(7) of the Code and Regulation 19-445.2085(C) of the South Carolina Budget and Control Board, the CPO has issued a Written Determination canceling the intent to award issued by SCDOT in its entirety. Therefore, the protest of The Clearwater Group is declared moot and dismissed.



R. Voight Shealy
Chief Procurement Officer for Goods and Supplies

October 17, 2011
Columbia, South Carolina.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).



August 29, 2011

Chief Procurement Officer
Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
Facsimile: 803-737-0639
Email: protest-mmo@mmo.state.sc.us

Re: The Clearwater Group, Inc. Protest of SCDOT Intent to Award RFP10322, Posting Date 8/23/2011 to Green Site Services, Inc.

As an actual bidder, the undersigned grounds of protest and request for relief constitutes a Bid Protest pursuant to SC Code of Laws Ann. §11-35-4210 on behalf of The Clearwater Group, Inc. ("CWG"), a South Carolina Corporation, in opposition of SCDOT Intent to Award RFP10322 to Green Site Services, Inc. ("GSS"), a South Carolina Corporation. Condor Environmental, LLC ("Condor") is the incumbent contractor. Condor is in the process of separating into two companies and the stormwater services portion of Condor will become part of CWG when that division is finalized. Gene McCall is currently Vice President of Condor and is President of CWG.

GROUND OF THE PROTEST

PRICE

It is impossible to truly fulfill the contract requirements for the price of \$134,956.00 per year. As the incumbent contractor, Condor, and now key personal from Condor moving to CWG, we are fully aware of the actual costs of this scope of work (including equipment, labor, disposal, etc.), and can assure SCDOT that the work specified in the contract cannot be properly fulfilled for the amount submitted by GSS.

GSS principal, Patrick Farrell is also fully aware of this impossibility. As a former employee of Condor, Farrell was involved in preparing the costs for Condor's original bid submittal for the current

08/29/11

contract. Though Mr. Farrell conducted no work towards fulfilling the requirements of the current contract, as he left Condor before the SCDOT work began, GSS is fully aware of the actual costs of this scope of work, and by submitting an offer of \$134,956.00 is intentionally attempting to mislead SCDOT.

QUALIFICATIONS AND EXPERIENCE

In response to question number eleven (11) in the Amendment #1, "Are there any confined space requirements?" SCDOT states "OSHA regulations apply. If an employee enters space that is defined by OSHA as confined space, then the requirements do apply." In order to fulfill the requirements of the contract, specifically the cleaning of engineered water quality devices, the contractor must physically enter the devices (all of which are OSHA confined spaces). In order to comply with OSHA standards, the contractor must be trained in confined space entry. Furthermore, in order to operate in compliance with OSHA confined space standards, there must be a minimum of three (3) trained individuals (an entry supervisor, an attendant, and an authorized entrant) onsite. Upon information and belief, GSS intends to clean the engineered devices without confined space entry using one employee. As such, GSS either cannot properly perform cleaning of the engineered devices, since it does not intend to enter the devices or it cannot perform this scope of work within the law.

MISLEADING INFORMATION

Term of the Contract. Throughout the solicitation process, CWG operated under the proper understanding that the "term of the contract" was one (1) year, with the option for two (2) renewals, totaling a potential for three (3) years. Also, knowing that the current annual contract amount was significantly higher than a third of \$500,000 and given the recent addition of twenty two (22) stormwater ponds for which the initial cleaning has not been approved by SCDOT, CWG reasonably interpreted the \$500,000.00 value referred to in RFP10322, to mean the not to exceed annual value for the contract. Several references in the original RFP and in the Amendment #1 give conflicting and

The ClearWater Group, Inc.

P.O. Box 3027, Greenville, SC 29602
112 Manly Street, Greenville, SC 29601

o. 864-242-6644
f. 864-370-1551

08/29/11

misleading information with regard to the term of the contract and whether the \$500,000.00 amount was intended to be for one (1) year or for the full three (3) years.

First, on page four (4) of the RFP, the initial reference to the value of the contract is made: "[t]he total potential value of contract shall not exceed five hundred thousand (\$500,000.00)." This is followed by the clause "MAXIMUM CONTRACT PERIOD – ESTIMATED (January 2006): Start Date: From 11/1/2011 End Date: 10/31/2014. Dates provided are estimates only. Any resulting contract will begin on the date specified in the notice of award. See clause entitled 'Term of Contract – Effective Date / Initial Contract Period'." The reference at the end of this clause to an "initial contract period" leads the reader to believe that the "initial contract period" is different and separate from the term "maximum contract period." However, upon searching the RFP, it is discovered that there is no clause entitled "Term of Contract – Effective Date / Initial Contract Period."

Next, on page sixteen (16) of the RFP, in the clause entitled "TIMELY COMPLETION", it reads "Please note that the term of the second contract will terminate October 31, 2012." This is a clear indication that the contract term is one (1) year and the reasonable bidder would assume that the "potential value" of \$500,000.00 applies to the one (1) year duration.

On page twenty seven (27) of the RFP, the clauses entitled "TERM/OPTION TO EXTEND – INITIAL CONTRACT PERIOD" and "TERM OF CONTRACT – OPTION TO RENEW" are in direct conflict with one another and generally confuse the issue of what the "term" of the contract is intended to be. Beginning with the clause "TERM/OPTION TO EXTEND – INITIAL CONTRACT PERIOD", it is stated again that the initial contract period is "One (1) year from the date of award." The clause then indicates that at the conclusion of the initial contract term, unless either party elects otherwise, the contract shall "automatically extend" in one year increments for no more than "three (3) additional one year periods." What this first indicates is that the contract period is one year. It also (presumably erroneously) indicates that the total potential duration of the contract could be four (4) years ("three (3) additional one year periods"). Moving on to the next clause, "TERM OF CONTRACT – OPTION TO RENEW", it is

stated that at the "end of the initial term", the contract shall be automatically renewed for a one year period, and after each renewal year the same shall be the case, until the contract expires, which at the latest shall be "the last date stated on the final statement of award." These two clauses attempt to address the same issue but neither clearly states the duration and the potential duration of the contract period.

The confusing nature of the RFP's explanation of contract term duration is evidenced in the Amendment #1, by the fact that a bidder asked the question (#6) "Is the budget of \$500,000.00 for one year or a combination of 3 years?" This is a straight forward question, with what should be one of only two potential answers; one (1) year or three (3) years. However, page 27 of the RFP clearly states that the Term of Contract is for One (1) year.

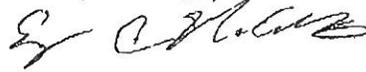
Inventory. CWG has full knowledge of the number, size and location of all BMP's in the SCDOT inventory. On page five (5), the RFP incorrectly states that there are "87 known structural controls." In fact, there are a total of one hundred sixteen (116) known structural controls. SCDOT acknowledged that all one hundred sixteen (116) of the controls are part of the contract inventory by including them all in a spreadsheet attachment to the Amendment #1, responding to question one (1) regarding physical locations of all the BMP's.

SCDOT further provided incorrect information regarding the pond inventory in responding to question thirteen (13) of the Amendment #1; "What is the average size of the retention ponds?" SCDOT responds "Average size is about 1 acre. Largest may be slightly less than 2 acres." This is extremely misleading, in that several of the ponds in the inventory are greater than two (2) acres in area. In fact, several ponds exceed two (2) acres in size and one pond is more than fifteen (15) acres in area.

RELIEF REQUESTED

CWG requests that the Chief Procurement Officer instructs SCDOT to revoke its Intent to Award RFP 10322 to GSS, and issue the award to The Clearwater Group, Inc. as the responsive bidder.

Respectfully Submitted,



THE CLEARWATER GROUP, INC.
Eugene C. McCall, Jr., President