

# MOYE, O'BRIEN, PICKERT & DILLON, LLP

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June 11, 2018

## VIA ELECTRONIC MAIL

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**RE: Carr & Collier/City of Winter Garden**  
**Subject: Western Storage, Pumping & Transmission Facilities**  
**Project/Contract-PN 15009; 6/4/2018 Notice of Recommendation to**  
**Award; Written Protest**

## WRITTEN PROTEST

Dear Ms. Bollhoefer:

As previously advised by email, this firm has the privilege of representing Carr & Collier, Inc. ("Low Bidder"), the low responsive and responsible bidder with respect to the above-referenced contract/project (the "Project/Contract"). In accordance with, *inter alia*, Section III.F. of the City's Purchasing Manual (setting forth the City's "Bid Protest Procedures") and Article 29 of the Project/Contract Instructions to Bidders ("ITB"), *see* Project Manual Section 00100), Low Bidder protests the June 4, 2018 "Notice of Recommendation of Award" (the "City's 6/4/2018 Decision," copy attached) of City of Winter Garden ("City"), whereby the City proposes to award the Project/Contract to the second-low bidder, TLC Diversified, Inc. This protest is timely, and the bid protest fee required under Section III.F.2. of **the City's Purchasing Manual[get corresponding Project Manual references]** was delivered to your office earlier today.<sup>1</sup> In

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<sup>1</sup> This protest also satisfies the requirement under Section III.F.1. of the City's Purchasing Manual that a bid protest be in writing. Florida law expressly recognizes electronic records,

accordance with Section III.F.3. of the City's Purchasing Manual, Low Bidder will provide notice hereof to all other Project/Contract bidders/responders within three business days hereafter.

## **I. BREAKDOWN OF PROTEST**

Pursuant to the corresponding subsections of Section III.F.i.-v. of the City's Purchasing Manual:

- i. The contact information for low bidder is care of the undersigned, whose contact information is set forth above;
- ii. The IFB number and title are ;
- iii. The factual bases upon which this protest is based are set forth below;
- iv. All statutes, laws, ordinances, or other legal authorities supporting this protest are set forth below; and
- v. The relief to which Low Bidder is entitled are set forth below (see specifically section VI below.

## **II. BACKGROUND**

Low Bidder is a Florida corporation located 1410 Emerson St. Leesburg, FL 34748. Formed in 2005, Low Bidder is licensed by the State of Florida as a Certified General Contractor and as a Certified Underground Utility and Excavation Contractor.

The Project/Contract consists of construction, on City land, of a remote storage and pumping facility as part of the City's potable water and public access reuse systems. It includes:

- 2-MG and 1-MG prestressed reinforced concrete ground storage tanks;
- a high service pump station;
- an electrical room and chemical storage and feed systems housed in a concrete

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including those transmitted by email, as legally effective and enforceable writings. See, e.g., “[a] record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form,” and “[i]f a provision of law requires a record to be in writing, an electronic record satisfies such provision.” Additionally, neither the Code of Ordinances, City of Winter Garden, Florida (“City Code”) nor the Project/Contract's bid/solicitation documents provide otherwise.

masonry building;

- 16” potable water and 20” reclaimed water transmission pipelines from the new facility to the intersection of Williams Road and Amber Sweet Lane;
- a 16” metered connection with the Water Conserv II reclaimed water distribution system;
- a new access roadway with asphalt pavement and stormwater systems is to be installed from Williams Road, down Amber Sweet Lane and a 60’ roadway parcel, and onto the new facility site; and,
- associated/miscellaneous construction, such as temporary erosion and sediment control, grading, sodding, and landscaping.

On May 17, 2018, the bids for the Project/Contract were opened. Low Bidder’s bid was the low bid, at \$7,077,730.00. TLC Diversified’s bid was the second-low, at \$7,164,777.00.

On June 1, 2018, TetraTech issued its recommendation (“TetraTech’s Recommendation,” discussed more below) that the Project/Contract be awarded to TLC Diversified, the second-low bidder, rather than to Low Bidder. Low Bidder did not receive a copy of TetraTech’s Recommendation until

On June 4, 2018, the City issued its 6/4/2018 Decision adopting TetraTech’s Recommendation, and giving notices of the City’s intent to award the Project/Contract to TLC Diversified, not to Low Bidder.

### **III. BASES OF PROTEST**

In the public procurement and funding context, an arbitrary decision is one that is not governed by a fixed rule or standard, or one where the public entity fails to follow its own standards. *See, e.g., Youth Crime Watch of America v. Dep’t. of Health and Rehabilitative Svcs.*, 619 So. 2d 405, 406 (Fla. 3<sup>d</sup> DCA 1993); *Procacci v. Dept. of Health and Rehabilitative Svcs.*, 603 So. 2d 1299, 1300 (Fla. 1<sup>st</sup> DCA 1992). The City failed to follow its own standards for evaluating the Project/Contract bids. A public entity cannot modify or change the criteria for bid award after the bids are submitted in a manner that favors one bidder over the other bidders. *See, e.g., Central Florida Equip. Rentals of Dade County, Inc. v. Lowell Dunn Co.*, 586 So.2d 1171 (Fla. 3<sup>d</sup> DCA 1991); *City of Opa-locka v. Trustees of the Plumbing Industry Promotion Fund*, 193 So.2d 29 (Fla. 3<sup>d</sup> DCA 1966); *City of Miami Beach v. Klinger*, 179 So.2d 864, 866 (Fla. 3<sup>d</sup> DCA 1965). In awarding the Project/Contract to TLC Diversified instead of to Low Bidder, the City has arbitrarily changed the criteria under the bid documents. That is not allowed.

Subject to Section IV below, Low Bidder protests the City’s 6/4/2018 Decision on the

grounds that it, and the TetraTech Recommendation upon which it is based, arbitrary and capricious.

1. In its Recommendation, TetraTech concluded that “the projects listed by [Low Bidder] do not sufficiently demonstrate recent experience with potable water and reclaimed water pumping and storage facilities of a similar nature, size and complexity of the” Project/Contract. That conclusion is arbitrary and capricious. The bid documents require that the low apparent bidder submit, upon the City’s request, its qualifications to perform for the Project/Contract, which it was never allowed the opportunity to do.

2. In its Recommendation, TetraTech concluded that “[t]he price amounts listed in the bid form summary table do not appear to be balanced , specifically, the offsite sitework, stormwater, and asphalt pavement (bid items 13 and 14) when compared to the Engineer 's Opinion of Cost.” That conclusion is arbitrary and capricious because, *inter alia*, the bid documents nowhere require that bids be balanced. On the contrary, the bid documents require that the low apparent bidder submit, upon the City’s request, a schedule of values reflecting its proposed cost breakdown for the Project/Contract, which is then subject to approval by the City.

#### **IV. RESERVATION OF RIGHT TO SUPPLEMENT/AMEND**

As previously advised, Low Bidder has submitted a request to the City for public records relating to the Project/Contract and critical to this protest, which the City has advised could not be complied with prior to the deadline for filing this protest. Accordingly, this protest must be considered tentative, and is subject to supplementation and/or amendment after receipt of the requested public records.

The legal and factual grounds for Low Bidder’s protest cannot be fully known much less vetted and briefed until we receive the requested records. In the meantime, suffice it to say that the tentative/conditional grounds for Low Bidder’s protest, again, subject to amendment and supplementation, are (1) that the City acted arbitrarily and capriciously in declaring Low Bidder non-responsible and in expressing its intent to award instead to Second-Low Bidder, and (2) that City’s Decision is based upon inaccurate or incomplete facts or conclusions.

#### **V. MOOTNESS**

Because Low Bidder’s protest involves questions of bidder responsibility and not of responsiveness, the issues raised herein will not be rendered moot by any decision to re-bid or re-solicit the Project/Contract, inasmuch as the same issues raised herein are likely to arise in any such re-bid/re-solicitation.

#### **VI. RELIEF REQUESTED**

The relief requested by Low Bidder and to which it is factually and legally entitled is as

follows:

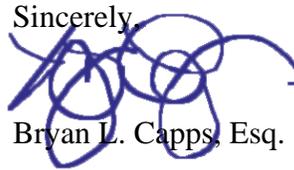
1. That the City continue coordinating with Low Bidder to produce the public records requested by Low Bidder relating to the Project/Contract as soon as practicably possible;
2. That the City stay, and proceed no further with, award of the Project/Contract to TLC Diversified pending resolution of this protest, as provided under Section III.F.4. of the City's Purchasing Manual;
3. That, in compliance with that stay, the City remove the Project/Contract from any agenda for, or discussion/consideration at, the City Commission's June 14, 2018 6:30 PM meeting (as referenced in the City's 6/4/2018 Decision) or any other, pending resolution of this protest, again as provided under Section III.F.4. of the City's Purchasing Manual;
4. That the City Manager or his designee investigate, review, consider, and attempt, in good faith, to resolve this protest, as provided under Section III.F.5. of the City's Purchasing Manual;
5. That, subject to Section V.1 above<sup>1</sup> above and Section VII below, the City Manager or his designee coordinate with Low Bidder to schedule a protest meeting, as provided under Section III.F.6. of the City's Purchasing Manual
6. That the City overrule and/or reverse its 6/4/2018 Decision, and award of the Contract to Low Bidder instead;
7. That the City Manager award the subject contract to Low Bidder;
8. That, in the event of denial or rejection of this protest, the City Manager furnish a promptly issue a written decision stating the reason for the action taken, as provided under Section III.F.4. of the City's Purchasing Manual;
9. That Low Bidder's bid protest fee be returned to it as provided under Section III.F.2. of the City's Purchasing Manual;
10. That the City Manager promptly and timely advise Low Bidder of any additional documentation or information the City Manager requires or deems necessary to fully consider this protest and to grant the relief requested; and,
11. That the City and/or City Manager grant Low Bidder such further relief as is

Michael Bollhoefer, City Manager  
June 11, 2018  
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necessary and appropriate.

**VII. NOTICE OF UNAVAILABILITY**

Please be advised that the undersigned counsel will be absent from the State between end of business (5:00 PM) Friday June 16, 2018 and Tuesday June 26, 2018 on a long-planned vacation, and respectfully requests that no meetings, hearings, or other events be scheduled herein during that period.

Sincerely,  
  
Bryan L. Capps, Esq.

BLC/st  
Encl.