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May 21, 2009

Keith Ryskoski, Superintendent
Stillwater Area Public Schools
Independent School District 834
1875 South Greeley Street
Stillwater, Minnesota 55082

Dear Superintendent Ryskoski,

The Office of the State Auditor (OSA) received concerns regarding the bidding procedure used for the Rutherford roofing project undertaken by the Stillwater Area School District (the District) in 2008. The concerns fall generally into the following four categories:

1. The lack of an architect's certification or signature in the specifications;
2. The failure of the warranty to meet the specifications;
3. The likelihood of proprietary specifications restricting the pool of contractors; and
4. The lack of review and comment by the Minnesota Department of Education.

The purpose of this correspondence is to inform you of the results of our review of these issues. In addition, we make recommendations to help avoid such problems in the future. The review was based on documents provided to us and on discussions with individuals involved with the project.

1. The lack of an architect's certification or signature in the specifications

Concern was expressed that no architect's signature or certification appears in the bidding specifications. Minnesota Statutes § 326.12, subd. 3, requires that a specification for a building project be signed by the licensed person preparing the specification or by the licensed person under whose direct supervision the specification was prepared.¹ With certain exceptions, Minnesota Rules part 1800.5200, subpart 1, requires a licensed

¹ The subdivision provides in relevant part: "Each plan, drawing, *specification*, plat, report, or other document which under sections 326.02 to 326.15 is prepared by a licensed architect, licensed engineer, licensed land surveyor, licensed landscape architect, licensed geoscientist, or certified interior designer *must bear the signature of the licensed or certified person preparing it, or the signature of the licensed or certified person under whose direct supervision it was prepared.* . . . The required signature and certification must appear on all pages of plans and drawings that must be signed, but only on the first page of specifications, plats, reports, or other documents that must be signed." Minn. Stat. § 326.12, subd. 3 (emphases added).

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architect or engineer to prepare and certify specifications for building alterations or renovations.²

The OSA obtained a document with attachments entitled “General Instructions to Bidders and Specifications for Roof Project,” (the specifications) dated March 14, 2008. The document identifies BWBR Architects, Inc., as the “architect” of the project.³ There is no signature or certification on any of the pages of the document. BWBR explained: “Since BWBR did not prepare the drawings and technical specifications, nor provide construction oversight we did not sign the bidding/construction documents.”⁴

The statute and rule appear to require that the signature of an architect or engineer be on the first page of these specifications. The signature must be the signature of the licensed person preparing the specifications or of the licensed person under whose direct supervision the specifications were prepared. We recommend that the District comply with Minnesota law and obtain any required signature on specifications for future building projects.⁵

2. The failure of the warranty to meet the specifications

The bid specifications require a thirty-year warranty from the manufacturer. The warranty originally provided to the District by The Garland Company, a roofing material manufacturer, was a twenty-five year warranty. An additional five years could be added on, but only after the manufacturer inspects the roof, the District completes any repairs, and a new “warranty fee” is established and paid.⁶

The District corrected this issue by obtaining a new thirty-year warranty from the manufacturer.⁷ We recommend that, in the future, the District set up a system, such as a checklist or calendar, to ensure timely and complete performance of all contractual terms, including warranties.

² Minn. Rules part 1800.5200, subpart 1, provides: “Plans and specifications for the erection, enlargement, alteration, or remodeling or renovation of any building, structure, or other work shall be prepared and certified by an architect or engineer licensed and practicing pursuant to Minnesota Statutes, sections 326.02 to 326.15, except as set forth in subparts 2 to 4.” It is our understanding that the exceptions do not apply in this situation.

³ The name of an architectural firm (BWBR) was placed on the front page of the specifications. Using the name of an architect, i.e., “BWBR Architects,” on the specifications would seem to indicate involvement and approval of the project by the architects named, an involvement that in this case was denied by BWBR architects.

⁴ E-mail dated 3-10-2009 from Steve Erickson of BWBR Architects.

⁵ It is our understanding that the School District changed the procedure it uses to obtain bids for building projects. We have not reviewed any new procedures.

⁶ The warranty was signed by the District on 12-3-08.

⁷ The warranty was signed by the District on 3-18-09.

3. The likelihood of proprietary specifications restricting the pool of contractors

A concern was raised that the specifications were drafted to favor Garland products and to exclude equivalent products of other manufacturers. Minnesota law forbids this practice: “When any county, city, town, or school district calls for bids for the purchase of supplies or equipment, specifications shall not be so prepared as to exclude all but one type or kind but shall include competitive supplies and equipment.”⁸

The Garland Company was involved in both sides of the School District contract. The specifications used by the District for this roofing project were drafted by The Garland Company. Five pages of the specifications were a Manufacturer’s Checklist that bidders were required to submit with their bids. Only contractors using Garland products submitted bids, and each bid included a Roofing Manufacturer Check List completed by a Garland representative. After the bids had been submitted, The Garland Company helped the District evaluate the bids.

Item 29 of the Manufacturer’s Checklist states: “*Failure to comply with all particulars as outlined herein, shall be considered as reason for rejection of bid.” In this way, the District gave notice to all potential bidders that certain information was required and failure to provide it would be a reason to reject the entire bid.

The Manufacturer’s Checklist requires potential bidders to provide responses to 30 requests for information. A concern was raised that The Garland Company uses these requests as a way to minimize competition. The requests appear so onerous that even The Garland Company did not fully respond to them.⁹ When no bid fully complied with the specifications, the District ignored the notice regarding the consequences for failing to comply with the specifications.

Certain additional information was requested only if the bidder was proposing an alternative to the Garland product. Several of these requests appear onerous, including requirements that the bidder:

- Identify at least five hot asphalt applied modified applications within a 75-mile radius which have been installed for at least five years;¹⁰ and

⁸ Minn. Stat. § 471.35.

⁹ For example, we received no evidence that The Garland Company provided: 1) the financial statements of the roofing material manufacturer; or 2) a list and details of all “judgments, claims, arbitration proceedings or suits pending or outstanding against your organization or its officers.” See Manufacturer’s Checklist items 8 and 10.

¹⁰ See Manufacturer’s Checklist item 18. The Roofing Manufacturer Check List actually submitted by the bidders used a radius of 100 miles. See Roofing Manufacturer Check List item 7.

- Submit an “Ultra-violet microscopy analysis photograph showing a sample . . . used in the ‘**exact**’ specified membrane for this particular roofing project.”¹¹

In addition, the specifications require materials to be approved prior to the scheduled opening date, that is, within two weeks of the date the specifications became available.¹²

The information requested and the timeframe in which it had to be produced may have had an anticompetitive effect. It may have prevented contractors from using equivalent materials in their bids, as none did.

To encourage competition and increase the number of bids submitted for any future building project, the District should consider implementing one or more of the following recommendations:

- Do not permit manufacturers to draft the District’s bid specifications.
- Use a manufacturer’s bid specification to establish a standard by which equivalency can be measured.
- Reject all bids not in conformance with stated requirements contained in the specifications if potential bidders are told nonconformance will lead to a rejection of their bid.
- Forbid any entity that has a financial stake in the outcome of the process from reviewing the bids with or on behalf of the District.
- Permit the use of any material or product that is certified by an engineer to be equivalent to that identified in the specifications.

4. Lack of review and comment by the Minnesota Department of Education

Concerns were received asserting that the School District had failed to present building plans to the Minnesota Department of Education for review and comment as required by Minn. Stat. § 123B.71, subd. 8. That subdivision requires, under certain circumstances, review and comment by the Minnesota Commissioner of Education before construction bids are solicited.¹³

¹¹ Emphasis in original. See Manufacturer’s Checklist item 24. The Roofing Manufacturer Check List actually submitted by the bidders also contained a requirement that those using alternative manufacturers have a full-time representative with at least five years of field experience in all phases of built-up roofing that lives within a 75-mile radius of the proposed project. See Roofing Manufacturer Check List item 8.

¹² Specifications, pages 13-14.

¹³ The subdivision provides in relevant part: “A school district, a special education cooperative, or a cooperative unit of government, as defined in section 123A.24, subdivision 2, must not . . . solicit bids for new construction, expansion, or remodeling of an educational facility that *requires an expenditure in excess of \$500,000 per school site* prior to review and comment by the commissioner.” Minn. Stat. § 123B.71, subd. 8 (emphasis added).

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The review and comment procedure required by this subdivision applies only to construction that exceeds \$500,000 per site. In this instance, the District bid out three roofing projects at the same time: Oak Park, Rutherford and Stillwater Area Senior High. We were told that separate budgets were not prepared by the District. The successful bidder, Peterson Brothers, prepared a Statement of Values that estimated the cost of the Rutherford project at \$493,200 or \$6,800 less than the cost required for Department of Education comment and review.

The District indicated that, in hindsight, a budget for the Rutherford roof, prepared with comment and review by the Department of Education, would have been a good idea. We agree, but cannot conclude that Minn. Stat. § 123B.71, subd. 8, was violated. We also remind the District that under Minn. Stat. § 123B.71, subd. 1, a school district is required to consult with the Commissioner of Education before developing specifications to improve a building when the estimated cost exceeds \$250,000.

We thank the District for its cooperation during our review. We consider our review of this matter closed.

Sincerely,

/s/Celeste Grant

Celeste Grant
Deputy State Auditor/General Counsel

cc: Roland Buchman
George Hoepfner, Board Chair
The Honorable Dan Skogen, Minnesota Senate
The Honorable Mark Murdock, Minnesota House of Representatives
Alice Seagren, Minnesota Commissioner of Education