



## State of New Jersey

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July 8, 2016

Via Electronic Mail [[lforbes@kentmcbride.com](mailto:lforbes@kentmcbride.com)] and USPS Regular Mail

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RE: Protest of Notice of Award of State Contract #T2435  
RFP #14/15-X-22848 Environmental Emergency Response Services: NJDEP & Statewide

Dear Mr. Forbes:

This is in response to your letter dated and received February 17, 2016, referencing the subject Request for Proposal (RFP) and regarding the intended award of the subject contract by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division). On behalf of Ken's Marine Service, Inc. (Ken's Marine), you protest the slated award of Contract No. T2435 to Allstate PowerVac, Inc. (Allstate) and Atlantic Response, Inc. (Atlantic), submitting that Ken's Marine's proposal was responsive to the requirements of the RFP, "any bid defect was minor and/or inconsequential and constituted a waivable bid defect," and that Ken's Marine was entitled to an award of contract.<sup>1</sup>

I have reviewed the record of this procurement, including, but not limited to, the RFP, the two prior Final Agency Decisions related to RFP # 14-X-22848 issued on November 10, 2015, relevant statutes, regulations, and case law, and the proposal submitted by Ken's Marine. This review has provided me with the information necessary to evaluate the facts of this matter and to render an informed determination on the merits of Ken's Marine's protest without an in-person presentation. N.J.A.C. 17:12-3.2(d)(1).

### 1. Background

By way of background, the Bureau issued the subject RFP on behalf of the New Jersey Department of Environmental Protection (NJDEP) on March 18, 2014, to solicit proposals for statewide environmental emergency response services, encompassing "response, cleanup, removal, transportation, storage, treatment, disposal, detection, inspection, and investigation of petroleum discharges, hazardous substance discharges, asbestos, low level radioactive materials, solid waste, explosives, and highly reactive substances" as needed throughout the State of New Jersey. RFP § 1.1, *Purpose and Intent*. The

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<sup>1</sup> In a March 2, 2016 supplement to your letter of protest, you also note that it appears Qualified Spill Response, Inc. (Qualified Spill), a bidder and protester against Ken's Marine's previous intended award, is either "out of business or in the process of winding down [its] business." This information has no bearing on the intended award of Contract #T2435 or Ken's Marine's protest, as Qualified Spill was never an intended awardee to the subject contract.

Bureau intended to award contracts to up to six responsible bidders, covering the north and south regions, whose proposals, conforming to the RFP, are most advantageous to the State, price and other factors considered. Ibid.

The Bureau received seven proposals by the proposal submission deadline date of April 21, 2014, and, following a review by the Evaluation Committee<sup>2</sup> (Committee), issued a Notice of Intent to Award (NOI) on July 10, 2014, to Ken's Marine, Allstate, Atlantic, and Clean Venture, Inc. (Clean Venture). Following the NOI, the Division received two protests challenging the intended awards from Qualified Spill and Atlantic on July 23, 2014 and July 22, 2014, respectively. I issued two final agency decisions on November 10, 2015, addressing the merits of the protests. Those decisions held that the intended awards to Ken's Marine and Clean Venture could not stand due to each bidder's proposal containing material deviations from the requirements of the RFP and directed the Committee to reevaluate the proposal submitted by Qualified Spill.<sup>3</sup>

Specifically, regarding Ken's Marine's proposal, I found in my November 10, 2015 decision addressing Atlantic's protest:

. . . RFP Section 4.4.4.4(H), *Personnel Requirements*, required a bidder's proposal to identify a New Jersey licensed company with a Type A license, one asbestos worker with a Supervisor's Permit, and one asbestos worker with an Asbestos Worker Permit to perform work under this contract. This Section of the RFP further specified: "The license/permits shall be in good standing and effective at the time of proposal submission and a copy of the license/permits shall be submitted with the proposal."

A review of Ken's Marine's proposal shows it named Nova Development Group (Nova) . . . slated to perform the asbestos remediation work. A review of the New Jersey Department of Labor and Workforce, Office of Asbestos Control and Licensing (OACL) records show that Nova's Type A license lapsed on January 7, 2014, and was not renewed. Therefore, it was not valid at the time of proposal submission on April 21, 2014. In Ken's Marine's letter of reply to this protest, it noted that it had recently learned that Nova terminated its New Jersey license and requested to substitute a different subcontractor to perform asbestos work. Although Ken's Marine cites to RFP Section 5.7, *Substitution or Addition of Subcontractor(s)*, which permits a contractor to "submit a written request to substitute or add a subcontractor," this section only applies to contractors, not bidders. A bidder is not permitted to request such a substitution, as, in this case, a bidder was required to include a company with a valid Type A license at time of proposal submission.

Following issuance of the November 10, 2015 decisions, the Committee reconvened and evaluated Qualified Spill's proposal and prepared an Amended Evaluation Committee Report. Based on the Committee's evaluation, the Bureau issued an amended NOI on February 2, 2016, and, due to a minor administrative error, again on February 19, 2016, advising all bidders of the intent to award the subject contract to Allstate (primary vendor) and Atlantic (alternate vendor). This protest from Ken's Marine followed.<sup>4</sup>

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<sup>2</sup> The Evaluation Committee was comprised of representatives from the Bureau and NJDEP.

<sup>3</sup> Ken's Marine requested a temporary stay of the award of the subject contract, which request was denied by the Division on December 10, 2015, as premature. Ken's Marine's application for leave to file an emergent motion was denied by the Superior Court of New Jersey Appellate Division on December 21, 2015.

<sup>4</sup> Allstate also submitted an unsolicited response to Ken's Marine's protest on May 11, 2016.

## II. Ken's Marine's Proposal Contained a Material Deviation

Ken's Marine submits in its February 17, 2016 letter of protest that its proposal was "fully responsive, that any bid defect was minor and/or inconsequential and constituted a waivable bid defect, and, as such, [it] is entitled to [an] award[.]" Ken's Marine concedes that Nova, its named asbestos remediation subcontractor, allowed its New Jersey Type A license to "lapse due to lack of New Jersey work,"<sup>5</sup> but states that Nova did possess "an Asbestos Handling License with the State of New York." Ken's Marine included copies of the New York license issued to Nova, valid February 12, 2014 to February 28, 2015, in support of its statement. Ken's Marine also states that Nova currently possesses a valid New Jersey type A license and included a copy of the license as an attachment to its letter of protest.

The RFP set forth specific requirements that must be met by all bidders submitting proposals in response to the subject solicitation. Concerning the need for licensed asbestos personnel, the RFP specified the following:

### 4.4.4.4 PERSONNEL REQUIREMENTS

The bidder shall provide personnel with the appropriate qualifications and experience to perform work under this contract. The personnel categories and required qualifications are identified in this section. Any change in these personnel requires written approval from the SCM.

The bidder shall have the following numbers of individuals as employees of the Contractor at the time of proposal opening and throughout the duration of the contract: 1) One (1) Project Manager; 2) Two (2) Supervisors; 3) Five (5) Laborers; and 4) Three (3) Heavy Equipment Operators.

At the time of proposal opening all personnel other than those noted in the preceding paragraph may be employed by the Contractor or may be a subcontractor. Any and all personnel categories listed below may be needed for a site-specific engagement at any time. As knowledge of the site evolves, the personnel needs may change.

....

The required Personnel are:

....

H. Licensed Asbestos Personnel;

**With its proposal the bidder is required to identify one (1) New Jersey licensed company with a Type A license, one (1) asbestos worker with a Supervisors Permit, and one (1) asbestos worker with an asbestos worker permit. The supervisor shall not be listed twice. The license/permits shall be in good standing and effective at the time of proposal submission and a copy of the license/permits shall be submitted with the proposal. The Contractor shall inform the Contract Manager in writing if the license expires, is suspended, or is revoked and shall propose a replacement for approval.**

Duties/Responsibilities – The asbestos workers shall have the ability to perform the tasks described in Section 3.0 of the RFP.

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<sup>5</sup> The Affidavit of Todd R. Grant, president of Nova, included with Ken's Marine letter of protest, also certifies that on April 21, 2014, "Nova did not possess a valid new Jersey Type A license[.]"

**Qualifications – The firm shall have a NJ Asbestos Company Type A license; the asbestos supervisor shall have a NJ Asbestos Supervisor Permit; and the asbestos worker shall have a NJ Asbestos Worker Permit.**

[(Emphasis added.)]

A review of Ken's Marine proposal submitted in response to the subject solicitation reveals it included Nova on its *Subcontractor Utilization Plan* to provide "asbestos" services. However, Nova failed to possess a valid New Jersey Asbestos Company Type A license at the time of proposal submission. A review of the OACL records confirmed that Nova did not possess the requisite Type A license at the time of proposal opening.<sup>6</sup> Additionally, Ken's Marine's proposal failed to include an asbestos worker with a New Jersey Supervisors Permit and an asbestos worker with a New Jersey Asbestos Worker Permit.

My November 10, 2015 decisions found this deviation to be material in nature and hence non-waivable. Ken's Marine argues that Nova's lack of a valid New Jersey Asbestos Company Type A license should be considered a waivable, non-material defect, as Nova possessed a valid New York license and currently possess a valid New Jersey license. While it appears that Nova was properly licensed in New York at the time of proposal opening (April 21, 2014), the RFP specifically required the named subcontractor possess a "NJ Asbestos Company Type A license" that was "in good standing and effective at the time of proposal submission." The Division is unable to accept a New York license in the place of a New Jersey license: first, the RFP was clear in requiring the appropriate New Jersey licenses; and second, as advised by the Department of Labor and Workforce Development, Office of Occupational Health and Safety, Asbestos Control and Licensing, the agency responsible for issuing asbestos licenses, asbestos abatement in New Jersey must be performed by an asbestos contractor with a New Jersey asbestos abatement license. See N.J.S.A. 34:5A-32 et seq.

As noted in my November 10, 2015 decision, "[i]t is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived." Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 314 (1994) (internal quotation omitted). "Deviations from material specifications risk transgressing the duty to avoid favoritism, corruption, and the like." Barrick v. State, 218 N.J. 247, 259 (2014). Thus, "[r]equiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract." Ibid. New Jersey courts have developed a two-prong test to consider "whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity." Twp. of River Vale v. R. J. Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). The two-prong test requires a determination of

first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[Meadowbrook, *supra*, 138 N.J. at 315 (internal quotation omitted) (affirming the two-prong test established in River Vale, *supra*, 127 N.J. Super. at 216).]

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<sup>6</sup> An individual's asbestos Supervisors Permit or Workers Permit is not linked to a specific company. Therefore, without identifying the individuals, it is impossible to confirm whether or not Ken's Marine possessed the required personnel with appropriate permits. Nonetheless, an individual with a Supervisors Permit or Workers Permit would not be permitted to work for a company lacking the required NJ Asbestos Company Type A license.

Under the two-prong River Vale test, first, Ken's Marine's proposal deviated from the mandatory terms of the RFP by failing to have a NJ Asbestos Company Type A license and by failing to have the required personnel with the mandatory permits. Ken's Marine does not dispute this fact. By failing to meet these mandatory requirements Ken's Marine could not provide the State with the requisite assurance that it could perform the tasks required by the RFP. Second, to waive the requirements to have a NJ Asbestos Company Type A license and the mandatory personnel would unlevel the playing field, as other bidders did meet this RFP specification and possessed and submitted all required licenses and permits. Moreover, other potential bidders that met all other RFP specifications, except those related to the NJ Asbestos Company Type A license and the mandatory personnel requirements, might have been deterred from bidding.

Ken's Marine submits that such an irregularity is a waivable, non-material deviation from the terms of the RFP and relies on T.N. Ward, Inc. v. S. Jersey Transp. Auth., A-3900-09T4 (App. Div. Octo. 26, 2010 ) (slip op.).<sup>7</sup> The T.N. Ward case is not only clearly distinguishable, but actually supports the findings and conclusions herein. In T.N. Ward, the specifications for a publicly bid contract required either a bidder or its named subcontractor for "structural steel work" to be certified by the American Institute of Steel Construction (AISC). (slip op. at 12, 13). T.N. Ward protested the intended award to a bidder who listed two subcontractors for structural steel work, where only one of the proposed contractors was AISC certified. (slip op. at 14). The court upheld the award, holding that the intended awardee had satisfied the requirement "to list an AISC certified [sub]contractor"<sup>8</sup> and it was reasonable to infer that the AISC certified subcontractor "would perform the structural steel fabrication and erection aspect of the structural steel work[.]" (slip op. at 14, 15). The court also found that "[e]ven if this were not the case," the intended award was valid "because a listed subcontractor could further subcontract an aspect of the work requiring AISC certification to an AISC certified sub-subcontractor." Ibid.

As opposed to the intended awardee in T.N. Ward, Ken's Marine did not offer, in its timely submitted proposal, an alternate asbestos remediation subcontractor that held the requisite New Jersey Type A license. While it is unclear whether the T.N. Ward court's statement that "a listed subcontractor could further subcontract an aspect of the work" meant that the solicitation allowed a subcontractor to further subcontract, here the subject solicitation did not allow for such an action. As instructed in RFP Section 4.4.1.3, *Subcontractor Utilization Plan*: "All bidders intending to use a subcontractor shall submit a completed Subcontractor Utilization Plan." The *Subcontractor Utilization Plan* form further instructed bidders to "list all businesses to be used as subcontractors[.]" and as noted previously, the RFP specified, "[w]ith its proposal the bidder is required to identify one (1) New Jersey licensed company with a Type A license, one (1) asbestos worker with a Supervisors Permit, and one (1) asbestos worker with an asbestos worker permit." RFP § 4.4.4.4(H). Although certain subcontracting needs were not part of the solicitation and may be solicited by the contractor "based on each site specific engagement," asbestos remediation was not such a category. RFP §3.3.1, *Subcontracting*.

Ken's Marine also asserts that, as the incumbent T2435 contractor, it responded "to over 550 environmental emergencies" and "just 2 of those environmental emergency responses required the use of an asbestos subcontractor." Therefore its "bid irregularity" should be considered minor and waivable.

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<sup>7</sup> T.N. Ward is an unpublished case and therefore has no precedential value.

<sup>8</sup> Although T.N. Ward refers to the "general contractor" and its listed "contractors," in that case the term "general contractor" refers to the "bidder" and "contractors" refer to "subcontractors." See (slip op. at 13) ("[i]n its subcontractor declaration form, Hunter listed two structural steel subcontractors . . . [but] did not specify the work each of these subcontractors would perform). Furthermore, the governing statute in T.N. Ward, N.J.S.A. 52:32-2, provides "where a single over-all contract is to be awarded, the bidder 'shall set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified . . .'" (slip op. at 17); N.J.S.A. 52:32-2(b).

This argument is without merit. Because the subject solicitation will result in a contract to be used on an as-needed basis responding to unforeseen environmental emergencies, previous usage is irrelevant: the need and type of services will vary from year to year. Furthermore, whether a deviation from the terms of the RFP is considered waivable or non-waivable is not dependent on amount of usage; rather, as discussed above, it is determined based on whether or not the deviation was material. Here, the deviation is clearly material and therefore, non-waivable.

Next, Ken's Marine contends it was contrary to New Jersey law for the Division to reject Ken's Marine's request to substitute Nova for a "New Jersey licensed asbestos remediation contractor after Contract award." This reflects a misunderstanding of the State procurement process.

In Ken's Marine September 17, 2014 response to the letters of protest, it requested permission to substitute an asbestos remediation contractor. However, this request was made for the purposes of proposal evaluation, not "after contract award." As noted above and in the November 10, 2015 final agency decision, RFP Section 5.7, *Substitution or Addition of Subcontractor(s)*, permits a contractor, not a bidder, to "submit a written request to substitute or add a subcontractor." Ken's Marine submits this language "is purely semantical[;]" however, the distinction between a "contractor" and a "bidder" is significant in this section and throughout the RFP and cannot be simply disregarded by the Division. The Division must follow the language and requirements of the RFP, which defines a contractor as "[t]he bidder awarded a contract resulting from this RFP[;]" and a bidder as "[a]n individual or business entity submitting a proposal in response to this RFP." RFP §2.1, *General Definitions*. To allow a bidder to substitute a subcontractor to cure a material deviation in its proposal after bid opening otherwise would unlevel the bidder playing field in favor of one bidder against all others. In short, a bidder cannot be granted such a substitution or to supplement its proposal in this way.<sup>9</sup>

Furthermore, for the same reason, Ken's Marine was not permitted to supplement its proposal by adding a subcontractor. As expressed in RFP Section 6.6, *Oral Presentation and/or Clarification of Proposal*: "Clarifications cannot correct any deficiencies or material omissions or revise or modify a proposal, except to the extent that correction of apparent clerical mistakes results in a modification." As further explained in the Division's governing regulations, "The process of clarification is not an opportunity for a bidder to revise or modify its proposal, and any response or portion of a response by a bidder to the Division's written request for clarification that attempts to revise or modify its proposal shall be given no effect." N.J.A.C. 17:12-2.7(e). Our courts have further distinguished a permitted clarification and prohibited supplement: "In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP." In re Protest of Award of On-Line Games Prod. & Operation Servs., Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995). In this case, Ken's Marine is attempting to modify/alter its proposal by adding a subcontractor, an alteration which is clearly impermissible under the express terms of the RFP.

Finally, Ken's Marine asserts that the Division is failing to exercise "sound business judgment" by awarding the subject contract to Allstate and Atlantic, "which ranked below Ken's Marine in terms of technical scores." Ken's Marine assumes too much. That Ken's Marine's proposal was included in the initial evaluation and scored higher than those intended to receive the contract award does not alter or curtail the Division's discretion to determine to either award the contract to those bidders whose proposals (conforming to the specification) were most advantageous to the State, price and other factors considered, or to reject all bids in the public interest. N.J.S.A. 52:34-12(a). I find that award to Allstate

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<sup>9</sup> Ken's Marine also states that it "was not bound to use Nova as its asbestos abatement subcontract . . . under the [c]ontract[.]" As explained, a contractor, not a bidder, may request "to substitute or all a subcontractor." RFP § 5.7. Such opportunity it not afforded to bidders.

and Atlantic, which both received technical scores of "very good" from the State's technical experts and were ranked first and second in price, to be sound business judgment and within my discretion.<sup>10</sup>

The courts have long acknowledged the discretion vested in the Director in N.J.S.A. 52:34-12, which permits an exercise of business judgment on behalf of the State. Keyes Martin & Co. v. Dir., Div. of Purchase & Prop., 99 N.J. 244, 252, 260 (1985); In re Jasper Seating Co., Inc., 406 N.J. Super. 213, 222 (App. Div. 2009). No one else's judgment, even the court's, can be substituted. Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 549 (1966). The only basis to overturn that exercise of business judgment would be a finding of bad faith, corruption, fraud or a gross abuse of discretion. Ibid. Ken's Marine does not allege bad faith, corruption or fraud, but in essence, a gross abuse of the discretion afforded to the Director to make a business decision. The award to Allstate and Atlantic is not a gross abuse of that discretion, but rather is based upon business judgement as noted above.

Furthermore, because Ken's Marine's proposal was deemed non-responsive, it should not have been included in the Evaluation Committee's scoring and was erroneously included in the initial evaluation. As noted in the Division's governing regulations:

Proposals shall be evaluated by the Division for compliance with the provisions of N.J.A.C. 17:12-2.2 and by the evaluation committee or the assigned Division staff member for responsiveness to the material requirements of the RFP. A proposal that is not compliant with the provisions of N.J.A.C. 17:12-2.2 or responsive to the material requirements of the RFP shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.

[N.J.A.C. 17:12-2.7(2)(c).]

Therefore, whatever technical scores Ken's Marine would otherwise have received, its proposal could not be considered for award of contract.

Based on the foregoing, I must deny Ken's Marine's protest and request for inclusion on the subject contract and reject its assertion that the contract should not have been awarded to Allstate and Atlantic. This is my final agency decision.

Sincerely,



Jignasa Desai-McCleary  
Director

JD-M:DF

c: P. Michaels  
L. Spildener  
K. Anderson-Thomas

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<sup>10</sup> Allstate and Atlantic were both fully responsive to the terms and requirements of the RFP. Allstate earned an average technical score of 788 and Atlantic an average technical score of 765, both of which are in the "very good" range. The Committee determined both bidders presented a solid understanding of the objectives of the RFP, indicated a very good comprehension of the Scope of Work, and proposed appropriate personnel to accomplish the tasks of the RFP.