



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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September 1, 2016

Via Email [lforbes@kentmcbride.com] and USPS Regular Mail

Lance S. Forbes, Esq.
Kent/McBride
1040 Kings Highway North, Suite 600
Cherry Hill, NJ 08034

Re: Protest of Award of Contract #T2435
RFP# 14/15-X-22848 *Environmental Emergency Response Services: NJDEP and Statewide*

Dear Mr. Forbes:

This letter is in response to your correspondence dated August 17, 2016, submitted on behalf of Ken's Marine Service, Inc. (Ken's Marine) to the Division of Purchase and Property (Division) and regarding the subject RFP. In that letter, you indicate Ken's Marine "would like to protest the award of the contract to Allstate Power Vac, Inc." (Allstate).¹ For the reasons that follow, this protest is without merit and the requested relief is denied.

The procedural history of this procurement is as follows. The subject RFP was issued by the Procurement Bureau (Bureau) of the Division on March 18, 2014, with a proposal opening date of April 21, 2014. Following evaluation of the proposals, the Bureau issued an initial Notice of Intent to Award Letter (NOI-1) on July 10, 2014. NOI-1 indicated the intent to award the subject contract to Ken's Marine, Allstate, Atlantic Response, Inc. (Atlantic Response), and Clean Venture, Inc. (Clean Venture). Qualified Spill Response, Inc. (Qualified Spill) and Atlantic Response submitted protests to the NOI-1 on July 23 and 24, 2014, respectively. The Division's November 10, 2015 final agency decisions rescinded the intended awards to Ken's Marine and Clean Venture, upheld the awards to Allstate and Atlantic Response, and remanded the evaluation of Qualified Spill's proposal to the Bureau for further evaluation. Following issuance of these final agency decisions, Ken's Marine requested the Division issue a temporary stay of the award of contract T2435. On December 19, 2015, this request was denied as premature. Thereafter, Ken's Marine submitted an application for permission to file an emergent motion with the New Jersey Superior Court, Appellate Division, to stay the award of contract. That application was denied by the court on December 21, 2015, reasoning "there is presently no emergency or threat of irreparable injury."

¹ Allstate submitted a response to the letter of protest on August 22, 2016. Ken's Marine submitted an unsolicited response to Allstate's letter on August 25, 2016.

The Bureau issued a second NOI (NOI-2) on February 2, 2016, and, due to an administrative error, an amended NOI-2 on February 19, 2016, indicating an intended award to Allstate and Atlantic Response. Ken's Marine submitted a protest to this NOI-2 on February 17, 2016, and a supplement to its letter of protest on March 2, 2016. The Division's July 8, 2016 final agency decision denied Ken's Marine protest and upheld NOI-2. Accordingly, the Bureau was directed to continue with award of contract.

On July 15, 2016, Ken's Marine requested the Division stay the award of contract, which was denied in a July 21, 2016 final agency decision. In accordance with N.J.A.C. 17:12-3.3(c), the Bureau awarded the contract to Allstate and Atlantic Response on July 26, 2016. Thereafter, Ken's Marine filed an application for permission to file an emergent motion with the Appellate Division on July 28, 2016. On July 29, 2016, the Appellate Division granted Ken's Marine permission to file an emergent motion and issued a temporary stay of contract until August 5, 2016. Upon receiving this order, the Bureau took no further actions concerning contract #T2435. Ken's Marine filed its motion for temporary stay pending appeal, as well its notice of appeal, brief and appendix, on August 3, 2016. The State filed a brief in opposition to the motion on August 5, 2016.

On August 8, the Appellate Division denied Ken's Marine motion for a stay pending appeal, stating that Ken's Marine "failed to demonstrate the necessary predicates for the issuance of the stay, in particular, that the applicant has a reasonable probability of success on the merits." See, e.g., Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). The court also vacated its prior July 29, 2016 order staying the award.

Now, five months after the conclusion of the protest period, Ken's Marine seeks to protest the award of contract T2435 to Allstate² and asserts that "Allstate failed to submit a mandatory material RFP requirement that was overlooked and/or waived by the Evaluation Committee." Specifically, Ken's Marines states that Allstate:

. . . identified Stevan Lazarevich as either an asbestos worker with a Supervisor's Permit or an asbestos worker with a worker permit, as well as Jose Vimos-Yeppez as qualifying the same. **However, Mr. Jose Vimos-Yeppez (sic) certification by the State of New Jersey Department of Labor & Workforce Development, Asbestos Control and Licensing indicated, at the time of bid submission and on or before bid opening on April 21, 2014, that his certification had expired—effective March 15, 2014.** . . . As provided in the RFP, "[t]he supervisor shall not be listed twice."

[(Emphasis in original.)]

Concerning asbestos licensing, RFP Section 4.4.4.4, *Personnel Requirements*, specified the following:

² N.J.A.C. 17:12-3-3(a) provides that bidders may submit a written protest concerning either the "[n]otice of award of contract(s) or of intent to award contract(s) pertaining to the subject procurement." (Emphasis added). Here, Ken's marine filed a protest concerning the notice of intent to award on February 17, 2016. The protest period for the within procurement first expired on February 17, 2016, and was subsequently extended to March 4, 2016. No further extensions were granted and therefore, Ken's protest is long out-of time. See N.J.A.C. 17:12-3.3 (providing that such protests are to be filed within 10 business days of notice of intent to award or at a time set by the Director where public exigency warrants such extension or shortened time period). While this procedural deficiency alone is grounds to dismiss Ken's Marine's attempted protest outright, the Division will nevertheless address Ken's substantive arguments for sake of completeness and finality.

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.

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.

The Hearing Unit's review of Allstate's proposal shows Allstate included a *Subcontractor Utilization Plan* Form that listed Lew Corporation as providing asbestos services. In its technical proposal under the heading "Sub-Contractors," Allstate further clarified how it would fulfill the RFP requirements related to asbestos abatement:

Allstate Power Vac, Inc. will manage asbestos abatement with our Subcontractor Lew Corp, work will be performed by Supervisor- Stevan Lazarevich, Laborer- Jose Vimos-Yepez.

[Allstate's Proposal, Volume 2, Section 2 *Technical Proposal*.]

Thus, it is clear from Allstate's technical proposal that Mr. Lazarevich would act as the supervisor and Mr. Vimos-Yepez would be the asbestos worker. Allstate provided a copy of the licenses for both Mr. Lazarevich, valid May 21, 2013 through May 21, 2014, and Mr. Vimos-Yepez, valid March 15, 2013 to March 15, 2014. However, a review of the New Jersey Department of Labor and Workforce Development (DOL-WD) Asbestos Control and Licensing's records shows that Mr. Vimos-Yepez was in fact properly licensed with a valid asbestos worker's permit at the time of proposal opening. A copy of this license as provided by DOL-WD is attached to this decision. While the proof of licensure included with the proposal showed an expiration date of March 15, 2014, this license had been renewed and was valid March 16, 2014 to March 16, 2015.

While Mr. Vimos-Yepez's most up-to-date license was not on file with the Division at proposal opening, Allstate did in fact identify a licensed asbestos worker with an asbestos worker permit that was valid at the time of the proposal opening on April 21, 2014. Allstate's failure to submit in its proposal Mr. Vimos-Yepez's most up-to date license, which would have been up for renewal approximately one month prior to bid submission and likely during the time period the proposals were being prepared, is a minor discrepancy that may be waived. Mr. Vimos-Yepez held a valid license at the time of proposal opening and that satisfied the material requirements of the RFP. The validity of his license at the time of proposal opening is not in question.

"It 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) (quoting Terminal Constr. Corp. v. Atlantic Cnty. Sewage Auth. 67 N.J. 403, 411

(1975). "This rule, however, does not apply to minor or inconsequential conditions. Public contracting units may resolve problems arising from such conditions in a sensible or practical way." Terminal Constr. Corp., supra, 67 N.J. at 411. "Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding." Id. at 412. As reiterated by our Supreme Court, "[t]he public interest underlies the public-bidding process in this State." Barrick v. State, Dep't of Treasury, 218 N.J. 247, 258 (2014).

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 quotations omitted) (affirming the two-prong test established in River Vale, supra, 127 N.J. Super. at 216).]

Supporting this outcome, the Appellate Division, in an unpublished decision, has previously held that when a bidder was "unquestionably registered throughout the bidding process, although it failed to include proof . . . by way of the current Certificate," there was no material deviation from the RFP and the court deemed the omission "a minor discrepancy or technical omission that was properly the subject of a waiver." Suburban Disposal, Inc. v. Twp. of Aberdeen, A-3176-12T3, 2014 N.J. Super. Unpub. LEXIS 1186 (App. Div. May 23, 2014).

Here, the license validity of Mr. Vimos-Yepetz's asbestos worker permit was easily verified by accessing the State's DOL-WD Asbestos Control and Licensing records. This review showed that Mr. Vimos-Yepetz was indeed properly licensed throughout the solicitation process, including on the critical date of proposal opening. Thus, the first prong of the materiality test is not met because Allstate's failure to provide proof of an up-to-date license did not deprive the State of assurance that the contract would be entered into, performed, and guaranteed. Mr. Vimos-Yepetz held a valid license at the critical time and this fact was verifiable by the State. In regard to the second prong, Allstate was not placed above other bidders or given any kind of advantage in the procurement process as Mr. Vimos-Yepetz was properly licensed at the time of proposal opening as required by the RFP of all bidders.

I note further that this situation differs significantly from that situation which underlies the Division's July 8, 2016 final agency decision in this matter, wherein there was a material omission in Ken's Marine's proposal. Ken's Marine has acknowledged that Nova Development Group, its listed subcontractor slated to perform asbestos remediation work, held no Type A license as of the proposal opening date, which was a requirement set forth in the RFP. In the facts before me, Allstate's proposal identified subcontractors which, in fact, held the appropriate and valid licenses on the date of proposal opening.

I therefore deny Ken's Marine's protest and uphold the award of contract #T2435. This is the Division's final agency decision.

Sincerely,



Maurice A. Griffin
Chief Hearing Officer

MAG: DF

c: P. Michaels
L. Spildener
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Lou Galasso III, Allstate Power Vac

Aug 22 2016 11:42AM NJ Asbestos Control 609.633.0664

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STATE OF NEW JERSEY
DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT
ASBESTOS CONTROL AND LICENSING

JOSE VIMOS-YEPEZ



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JOB TITLE		CLASS	
PERMIT		DATE OF BIRTH	
M	506	4	2
SEX	HEIGHT	WEIGHT	EYE COLOR
03/16/2014		03/16/2015	
ISSUE DATE		EXPIRES DATE	

MAR 19 2016