



State of New Jersey

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February 27, 2014

Via Fax [908-789-8922] and USPS Mail

Emanuel Hedvat, President
Chemtech Consulting Group, Inc.
284 Sheffield Street
Mountainside, NJ 07092

Subject: RFP 14-X-23322 - Protest of Scheduled Award of Contract T1973
USEPA Contract Laboratory Program Analysis - NJDEP

Dear Mr. Hedvat:

This letter is in response to your letter of protest dated January 17, 2014, by which, on behalf of Chemtech Consulting Group, Inc. ("Chemtech"), you challenge the announced intent of the Procurement Bureau, the unit of the Division of Purchase and Property ("Division") which conducts advertised, competitive procurements, to award the subject contract to TestAmerica Laboratories, Inc. ("TAL"). Your letter contends that the Procurement Bureau's explanation of the circumstances which rendered Chemtech and its proposal ineligible for an award of the subject contract, i.e., that Chemtech did not meet all mandated certification requirements set forth in the Request for Proposal ("RFP"), is inaccurate. Additionally, your letter asserts that your search of the public record revealed no evidence of TAL's certification for Method 1020B (Setaflash Ignitability), one of the RFP-required certifications the Procurement Bureau cited as cause for Chemtech's ineligibility. You request that the cited preclusive deficiencies be deemed of minor consequence in order that the State can benefit from Chemtech's proposal. In closing, you advise of your belief that the RFP specifications favored one laboratory and disfavored others.

A review of the subject procurement records and consideration of information provided by the Procurement Bureau staff member conducting the subject procurement, relative to the points of protest presented in Chemtech's letter, have provided the information necessary for me to render an informed final agency determination on this matter. Here then is my final agency decision concerning Chemtech's challenge of the Procurement Bureau's announced intent to award the subject contract to TAL.

Chemtech first contests the Procurement Bureau's determination that Chemtech was ineligible for an award of contract because it was not, on the date the RFP established as the deadline for proposal submission, certified to perform contract work involving United States Environmental

Protection Agency Certified Laboratory Program (“USEPA CLP”) Analyses parameters PCB 1262 and PCB 1268 and Method 1020 (Setaflash Ignitability). These certifications are expressly required by New Jersey Administrative Code provisions that establish specific requirements for the Environmental Laboratory Certification Programs of the New Jersey Department of Environmental Protection (“NJDEP”) and expressly set forth within RFP Sections 1 (*Information for Bidders*) and 4 (*Proposal Preparation and Submission*) and the RFP’s Revised Appendix 1 document dated September 2013. The second paragraph of RFP Subsection 1.1, *Purpose and Intent*, advised bidders as follows:

Bidders responding to this RFP shall be qualified under the Regulations Governing Laboratory Certification and Environmental Measurements, N.J.A.C. 7:18 to perform USEPA Contract Laboratory Program analytical services for the NJDEP and specific United States Environmental Protection Agency (USEPA) SW-846 methods for waste analyses.

Concerning this eligibility requirement, RFP Subparagraph 4.4.2.2, *Required Environmental Laboratory Certifications/Accreditations*, advised bidders as follows:

Bidders shall hold all the laboratory certifications/accreditations specified at the time of Bid Proposal submission in order to be eligible for contract award. Bidders submitting bids and not holding all the required certification/accreditations shall be deemed non-responsive. Corporations with multiple laboratories shall submit one bid encompassing all the laboratories under corporate control that shall perform work under the contract.

At the time of the bid opening, the laboratory shall have the NJDEP Environmental Laboratory Certifications or New Jersey Primary NELAP Accreditations or New Jersey Secondary NELAP Accreditations as specified in Appendix 3. New Jersey Secondary NELAP Accreditations is not acceptable USEPA CLP analyses. NJDEP Secondary NELAP accreditation is acceptable for SW-846 analyses. Each Bidder shall identify the laboratories that shall be performing work.

NJDEP issues Environmental Laboratory Certification under the authority of the Regulations Governing Laboratory Certification and Measurements, NJAC 7:18. NJDEP also issues NJDEP Primary NELAP Accreditation for Environmental Laboratories and these accreditations may be substituted for NJDEP Environmental Laboratory Certifications. If a Bidder has any question concerning NJDEP Environmental Laboratory Certification or NELAP Accreditation needed to perform analytical work, he should contact:

New Jersey Department of Environmental Protection
NJDEP - OQA
401 East State Street
P.O. Box 420, Mail Code 401-02D
Trenton, New Jersey 08625-0420
Phone: (609) 292-3950
Fax: (609) 777-1774

Bidders are advised that laboratory certification or NELAP primary or secondary accreditation issued by another State will not satisfy the environmental laboratory certifications/accreditations for USEPA CLP analyses. For SW-846 analyses, secondary and NELAP accreditation from another state is allowed but the laboratory shall hold a secondary NELAP accreditation [sic] with the NJ DEP to be acceptable. At the time of Bid Proposal submission, each laboratory for [a] multiple Laboratory Bidder shall hold all of the required certifications. Bidders shall satisfy the laboratory certification/accreditation requirements if its laboratory (or in the case of a Multiple Laboratory Bidder, laboratories) hold a mix of the following:

NJDEP Environmental Laboratory Certification
NJDEP Primary NELAP Accreditation

Laboratories that are in the applied status as of the date and time of Bid Opening, are not eligible for contract award, and shall be rejected as non-responsive to the RFP.

If a Multiple Laboratory Bidder's laboratories are a mix of CLP certified/accredited and non-CLP certified/accredited laboratories, only the CLP certified/accredited laboratories shall be authorized to perform the CLP work under this contract.

If a Multiple Laboratory Bidder's laboratories are a mix of SW-846 certified/accredited and non-SW-846 certified/accredited laboratories, only the SW-846 certified/accredited laboratories shall be authorized to perform the SW-846 work under this contract.

In line with standard proposal evaluation protocol, the Procurement Bureau's review of proposals began with a determination of whether the proposals contained deviations or deficiencies. If the evaluation had discerned no deviation or deficiency, Chemtech's proposal would have been deemed conforming and eligible for further consideration. Finding the aforementioned deviation, the decision to be made was whether the flaw was material or if the flaw could be waived as a minor matter. In this regard, the Procurement Bureau made its determination based upon the answer to the following two-prong inquiry established by case law¹: whether

[t]he effect of a waiver would be to deprive [the agency] 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.

The RFP unequivocally established the requirement for bidders to be certified for all specified analyses at the time of proposal submission. In order to comply with governing administrative rules and as necessary to ensure testing program integrity and effectiveness, the RFP-specified certifications were deemed to be essential for conducting the analyses to be performed under the T1973 contract. To ensure that contract performance will be in accord with the rules and

¹ The following quotation was extracted from Twp. of River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974).

contract provisions, the evaluation of proposals was based upon the bidder's attainment of the cited certifications, and not upon a presumption of favorable outcomes of a laboratory's applications for such certifications. Because this core element of the RFP is essential for contract performance, timely certification was, and is, a material requirement not subject to waiver.

The record of this procurement reveals that NJDEP's review of its certification/accreditation database on November 27, 2013, the date designated by RFP Addendum #2 as the revised proposal submission deadline, discerned that Chemtech was not certified for the following RFP-required analyses: PCB 1262, PCB 1268 and Method 1020B (Setaflash Ignitability), thus precluding Chemtech's eligibility for an award of the subject contract. Further review by this office in response to this point of protest reveals that Chemtech's applications for the PCB 1262 and PCB1268 certifications had been received by NJDEP only a few days prior to November 27, 2013, allowing insufficient time for NJDEP's procedural review of Chemtech's applications. For the record, NJDEP has advised that no such application for Method 1020B certification has been received from Chemtech to date.

Based upon these findings and circumstances, I must deny your request for reversal of the Procurement Bureau's determination that Chemtech is not eligible for an award of the T1973 contract.

Chemtech next contends that its search of OQA's public website found no evidence that TAL, the intended contract awardee, was timely certified for Method 1020B (Setaflash Ignitability), which, if true, would render TAL ineligible for the scheduled award of contract.

A review of TAL's proposal has affirmed the Procurement Bureau's pronouncement that TAL had met the RFP requirement for Method 1020B certification by citing the Method 1020B certification attained in 1997 and continuously held to date by TAL's Edison, New Jersey laboratory, a permissible condition in line with the provisions of RFP Subparagraph 4.2.2.2, as previously quoted herein, and with the Procurement Bureau's RFP Addendum #2 response to questions posed during the RFP-established Electronic Question and Answer ("Q and A") period.

Based upon this finding, I deny your claim of a material deficiency of TAL's proposal and sustain the Procurement Bureau's determination that TAL's proposal was compliant with the cited RFP requirements for Method 1020B certification.

Having addressed Chemtech's expressed challenges concerning the scheduled award, I will now attend to Chemtech's suggestion that the subject RFP was compiled for the benefit of a particular laboratory and thus to the detriment of other laboratories. I first note that such a specification challenge is now untimely. Nonetheless, without specific indications of factors that might support Chemtech's inference, I discussed Chemtech's general concern with Michael Pappas, the Procurement Bureau's Procurement Specialist who conducted the subject procurement, and with Kathleen Grimes, who represented NJDEP in the proposal evaluation process and who is scheduled to continue serving as the T1973 Contract Manager. These individuals have advised that, as with past procurements of this contract, the subject RFP provided that, in order to comply

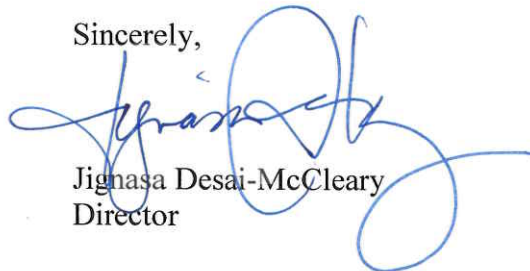
with certain NJDEP administrative code requirements for laboratories conducting the work of this contract, bidders had to secure, and, if awarded a contract, must maintain essential certification and/or accreditation requirements so the State will have the assurance that all contract actions will be done in compliance with the pre-set provisions of the governing administrative codes governing laboratory testing programs. Thus, any laboratory contemplating participation in the competition for the award of the T1973 contract should have maintained, or timely secured, the mandated certifications/accreditations.

The procurement record establishes that all prospective bidders had 41 days, i.e., from October 18, 2013 when the bidding opportunity was announced and the RFP was made available to them on the Division's website, until 2:00 p.m., November 27, 2013, to attain the required certifications. NJDEP advises that Chemtech's application documents for PCB 1262 and 1268 certifications were logged in on November 22, 2013, i.e., on the original proposal submission deadline date and only five days prior to the revised deadline for proposal submission. For the record, NJDEP advises that its Office of Quality Assurance staff reviewed Chemtech's applications in accord with its standard procedure and timeframe. The Procurement Bureau, having received no further questions or challenges from prospective bidders concerning the five-day extension of the proposal submission deadline, reasonably and properly held to it. Considering these circumstances I find no substantive cause to rescind or otherwise alter the scheduled award of contract.

Based upon the determinations set forth above, I sustain the scheduled award of the subject contract to TAL. This is my final agency decision on this matter. Accordingly, the Procurement Bureau is directed to proceed promptly with the award of contract.

While this decision is understandably disappointing to Chemtech, I sincerely appreciate Chemtech's efforts to achieve the award of this contract. I trust that Chemtech will apply the information garnered from this experience and decision and continue to participate in procurement opportunities offered by the Division's Procurement Bureau.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jignasa Desai-McCleary", with a large, stylized flourish extending to the right.

Jignasa Desai-McCleary
Director

JD-M:RW

- c: L. DuBois
- E. Mackay
- J. Wallace
- R. Hambrecht
- M. Pappas