



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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November 10, 2015

Via Electronic Mail [rick@hazmatspillresponse.com] and USPS Regular Mail

Rick Pulyer, Vice President
Qualified Spill Response, Inc.
321 Spicer Avenue
South Plainfield, NJ 07080

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

Dear Mr. Pulyer:

This is in response to your letter received July 23, 2014, 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). In your letter, you protest the slated award of Contract T2435 to Ken's Marine Services, Inc. (Ken's Marine), Allstate PowerVac, Inc. (Allstate), Atlantic Response, Inc. (Atlantic), and Clean Venture, Inc. (Clean Venture), contending that the proposal submitted by Qualified Spill Response, Inc. (Qualified Spill) was evaluated erroneously and that the proposals submitted by the intended awardees all contained numerous deficiencies. As such, you request the Notice of Intent to Award Letter be rescinded and all proposals be reevaluated.

I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law, and the proposals submitted by Qualified Spill and the intended awardees. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of Qualified Spill's protest.

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

The Bureau received seven proposals by the proposal submission deadline date of April 21, 2014.

The Evaluation Committee¹ (Committee) determined all seven proposals to be responsive and reviewed the submissions for compliance with the RFP. The proposals were reviewed and given technical scores before pricing was revealed. Technical scores were based on the requirements set forth in RFP Section 6.7.1, *Technical Evaluation Criteria*: personnel; experience of firm; ability of firm to implement and perform the scope of work based on the technical proposal; and overall ability of the bidder to undertake and successfully perform the technical requirements of the scope of work as demonstrated by the technical proposal. Assigned scores in these categories were then multiplied by the criterion weight to produce a weighted score for each criterion and added together to produce the overall weighted technical score.

Following this review, the Committee determined Ken's Marine, Allstate, Atlantic, and Clean Venture to be the bidders submitting the highest ranked proposals. Thereafter, the Committee requested a Best and Final Offer (BAFO) from these bidders pursuant to RFP Section 6.8, *Negotiations and Best and Final Offer (BAFO)*.² The Committee unanimously recommended the following bidders to receive a statewide service contract in the following order:

Bidder	Technical Rank	Technical Score	Price Rank	Total BAFO cost
Ken's Marine	1	813	2	\$1,499,527.50
Allstate	2	788	1	\$1,365,443.00
Atlantic	3	765	3	\$1,625,958.00
Clean Venture	4	565	5	\$2,400,945.18

The Committee ranked Qualified Spill fifth technically with a score of 184 and fourth in pricing, with a total estimated cost of \$1,645,525.20.

In its letter of protest,³ Qualified Spill first notes that two vendors, not selected for an intended award of contract, should have been deemed non-responsive due to submitting deficient proposals and therefore not evaluated. Pursuant to RFP Section 4.4.1.5 *Public Works Contractor Registration*, all contractors must be registered at the time of proposal opening:

4.4.1.5 PUBLIC WORKS CONTRACTOR REGISTRATION

Pursuant to N.J.A.C. 12:62-2.1 and N.J.S.A. 34:11-56.51, the bidder and all named subcontractors shall be registered with the Department of Labor and Workforce Development (DLWD) at the time of proposal opening. Failure to possess a valid public works Contractor registration at the time of proposal opening shall deem the proposal non-responsive. Applications in progress or pending DLWD approval are not valid registrations.

The record reveals that TMC Services, Inc. (TMC) and WRS Environmental Services, Inc. (WRS) did not include proof of Public Works registration with their proposals. A search of the Department of Labor and Workforce Development's website shows that TMC possessed a valid registration from May 1, 2014 through April 30, 2015, and WRS possessed a valid registration from April 28, 2014 through April 27, 2015. The Wage and Hour Compliance Unit of the Department of Labor and

¹ The Committee was comprised of representatives from the Bureau and NJDEP.

² While there is initially a discrepancy in the Recommendation Report and Evaluation Committee Report about the company that reduced its pricing in response to the BAFO, the final pricing associated with each company was listed accurately in both documents and this error had no impact on the award decision.

³ All intended awardees were granted the opportunity to respond to the allegations against them in Qualified Spill's letter of protest.

Workforce confirmed that TMC was not registered prior to this certification and that WRS's prior registration expired in August 2010.

Therefore, Qualified Spill is correct that the proposals submitted by TMC and WRS should have been deemed non-responsive, as neither possessed a registration valid at the time of proposal submission, April 21, 2014. Notwithstanding this error, there is no effect on the scheduled award since both TMC and WRS received technical scores of "poor," neither was extended a BAFO, and neither was considered for award of contract.

II. Protest Against Ken's Marine and Clean Venture

Qualified Spill raises numerous arguments as to the proposals submitted by Ken's Marine and Clean Venture. However, I need not address each point of deficiency, as, for the reasons stated below, both of these proposals were non-responsive to a mandatory, material requirement of the RFP. RFP Section 4.4.4.4, *Personnel Requirements*, specified in relevant part:

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.

As noted in this section, each bidder was required 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. Furthermore, this section of the RFP required: "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 record reveals that Ken's Marine included Nova Development Group (Nova) as its designated subcontractor to perform the required asbestos remediation work. However, a review of the New Jersey Department of Labor and Workforce Development's 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, attempting to cure this deficiency, 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.

Similarly, Clean Venture failed to list a subcontractor that would perform asbestos-related work, nor provided proof that it possessed a valid Type A license. A review of the New Jersey Department of Labor and Workforce Development's OACL records confirms that Clean Venture did not possess a Type A license at the time of proposal opening. Therefore, the Evaluation Committee Report incorrectly stated that Clean Venture is a Type A licensed company. I also note that neither company included information relating to a proposed asbestos supervisor or asbestos worker as required by the RFP.

“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).]

The lack of a Type A license, as well as missing asbestos supervisor and asbestos worker permits, constitute a material deviation from the terms of the RFP. Under the two-prong River Vale test, first, a deviation from the mandatory terms of the RFP could not provide the State with an assurance that either Ken’s Marine or Clean Venture could perform the required scope of work. Second, to waive such a requirement would unlevel the playing field, as other bidders did meet these RFP requirements. These material deviations therefore render both Ken’s Marine’s and Clean Venture’s proposals non-responsive. To award these bidders a contract would not be in keeping with the Division’s governing statutes and I must therefore rescind these intended awards. I need not address the remaining arguments against Ken’s Marine and Clean Venture.

III. Protest Against Allstate

Qualified Spill contends that Allstate’s proposal possessed numerous deficiencies, yet the Committee did not take them in account when scoring Allstate. Specifically, Qualified Spill alleges: 1) Allstate’s Health and Safety Officer’s resume was not presented with enough detail to prove she met the mandatory requirements of Section 4.4.4.4(D); 2) the resume of Allstate’s proposed chemist was not presented with enough detail to prove he met the mandatory requirements of Section 4.4.4.4(C); and 3)

Allstate's project histories were presented with less detail than Qualified Spill's, yet Allstate received a higher technical score.

In response to Qualified Spill's first point of protest against Allstate, the RFP required the following in Section 4.4.4.4, *Personnel Requirements*:

D. Health and Safety Officer;

Duties/Responsibilities – The Health and Safety Officer shall have the authority and the knowledge to develop and implement the programmatic and site-specific health and safety plans and to verify compliance with the applicable health and safety requirements. The Health and Safety Officer shall audit site operations, enforce the health and safety plan and stop work when necessary, evacuate work areas if necessary, and evaluate monitoring data to make field decisions regarding health and safety.

Qualifications – The Health and Safety Officer should⁴ possess a sound working knowledge of State and Federal occupational safety and health regulations. The Health and Safety Office shall have formal professional development training in occupational safety and health beyond the initial HAZWOPER (Hazardous Waste Operations and Emergency Response) training (see 29 CFR 1910.120); and the Health and Safety Officer should have a minimum of five (5) years experience in the environmental or health and safety services field or one (1) year experience in the environmental or health and safety services field plus a Bachelor of Science degree in a related natural or physical science, engineering, or industrial health. Half of the experience should be in the area of industrial hygiene and/or environmental safety during site operations.

Allstate identified Donna Miller, CHMM, as its Health and Safety Officer. Ms. Miller's resume described her experience as Allstate's Corporate Compliance Manager. In this capacity she is responsible for the overall compliance of the company, including its 250 employees. Her resume also stated that she "provides regulatory compliance and solid and hazardous waste management for [Allstate's] clientele[.]" "oversees compliance of over [200] vehicles with DOT, EPA/RCRA, and other environmental regulations[.]" and "prepares permit applications and Federal and State reports, [and] performs site audits [and] permitting[.]" She has a Bachelor of Science in Environmental Science from Rutgers University and possesses the following certifications: Certified Hazardous Material Manager (CHMM), 40-hour OSHA HAZWOPER/ 8-hour Refresher Training, 10-hour OSHA General Industry & Construction, Federal Motor Carrier Safety Regulations Training, CPR & First Aid, Confined Space Training, OSHA 8-hour Supervisor Training, and DOT HN-126 Subpart H Training- Train the Trainer. Ms. Miller's resume also noted that prior to being employed by Allstate, she was employed as a Regulatory Specialist/Health & Safety Officer by a major waste management company from 1995 to 1999.

I concur with the Evaluation Committee's determination that Allstate "proposed personnel of appropriate expertise technically and administratively to perform the tasks of the contract" and note that the information provided in this resume sufficiently demonstrated Ms. Miller's experience and expertise. The resume satisfactorily fulfilled the requirements set forth in RFP Section 4.4.4.4(D).

In response to Qualified Spill's second point of protest, RFP Section 4.4.4.4(C) required the following of a proposed chemist:

C. Chemist;

Duties/Responsibilities - The chemist shall supervise and/or perform all sample collection, field characterization, and compatibility and disposal analysis, supervise distribution of samples to

⁴ As defined in RFP Section 2.1, should "denotes that which is recommended, not mandatory."

certified laboratories, and generate any necessary data reports.

Qualifications – The Chemist shall be a scientist specializing in chemistry with an undergraduate or graduate level degree in Chemistry or a related area of science with a minimum of 24 credits in chemistry. The scientist shall have worked as a chemist for a minimum of five (5) years and have expertise in the areas of identifying and categorizing unknown materials and reactive materials. The chemist should have two (2) years' experience in sample collection, analysis, identifying unknowns, and waste classification.

Allstate's proposal listed Bruce Thompson as its chemist. Mr. Thompson's resume listed his Bachelor of Science in Chemistry from Fairleigh Dickinson University and an Associate of Arts degree in Life Science from Union County College. His resume also stated he has "over 30 years of experience in the Chemical and Environmental Industry" and described his experience as a chemist with Allstate as being responsible for "implementing the company's technical support in waste classification for certification and manifesting of waste shipments." He also performed projects involving treatment methodologies (BDAT), based on chemical composition and EPA waste designations, and lab pack chemistry and protocols. I concur with the Evaluation Committee's determination that the information provided in Mr. Thompson's resume sufficiently fulfilled the requirements of RFP Section 4.4.4.4(C).

Thirdly, Qualified Spill's contention that Allstate's proposal presented project histories with less detail yet received a higher score than Qualified Spill, is without merit. RFP Section 4.4.4.5, *Experience with Contracts of Similar Size and Scope/Project Histories*, required a bidder to provide examples of the following types of experience on the supplied project history forms:

- A. Handling lab packed drums including handling, unpacking, repacking, sampling, classifying and arranging for disposal of lab packed drums, which include safely handling/classifying reactive or extremely hazardous chemicals;
- B. Handling drummed hazardous substance, bulk hazardous substance and contaminated soil Including removing, sampling, consolidating, staging, and arranging for the disposal of the material from a hazardous substance site;
- C. Example of work done using Level A Personal Protective Equipment;
- D. Underground Storage Tank Work including excavating, cleaning, pumping and experience removing tanks associated with subsurface investigation and closure;
- E. Managing a petroleum discharge into a waterway from a source other than an underground storage tank.

Bidders were advised in RFP Section 4.4.4.5 that the "proposal evaluation will consider the bidder's management approach, coordination of disciplines and subcontractors, quality control procedures, and prior experience through the evaluation of the project history forms[.]" and that "the relevance and quality of the Case Histories which the bidder submits are important factors weighed in the evaluation of the bidder's responsibility." The RFP therefore only required sufficient information to make a determination as to a bidder's experience and did not specify the quantity of detail required.

The Committee found that Allstate submitted "all required case histories and documents relating to the experience of the firm" and noted "the experience of the firm with contracts of similar size and scope." I concur that the Committee properly determined Allstate to be in compliance with RFP Section 4.4.4.5 and that the submitted documentation demonstrates the required experience with the contracts of similar size and scope. I therefore find the intended award of the subject contract to Allstate to be proper.

IV. Protest Against Atlantic Response

Qualified Spill notes in its letter of protest that Atlantic “appears to be the only awardee that is fully compliant” regarding Category A scoring criteria. Nonetheless, Qualified Spill contends that Atlantic’s project histories contained less detail than Qualified Spill’s project histories, yet Atlantic was scored higher.

The Evaluation Committee Report stated that Atlantic provided “all required case histories and documents relating to the experience of the firm” and that the information provided met the requirements of the RFP. As noted above, a project history was not scored on the amount of detail provided, but rather on the information provided and whether the listed experience met all RFP criteria.

A review of Atlantic’s proposal shows it properly provided all five case histories with sufficient detail to demonstrate its ability with the required experience of similar size and scope. I therefore concur with the findings of the Committee that Atlantic’s submitted histories met all RFP requirements, and I uphold the intended award to Atlantic.

V. Category C Evaluation

Qualified Spill further argues that, concerning Evaluation Category C, *Scope of Work*, no bidder addressed each item listed in RFP Section 3.5.1, *Project Coordination*. I address this argument as it relates to Allstate and Atlantic below.

RFP Section 3.5.1, *Project Coordination*, provided the “[~~c~~ontractor shall ensure its ability to perform services including, but not limited to, the following” 28 items. (Emphasis added.) By specifying the contractor, and not the bidder, was responsible for these items, the RFP limited these items as contract deliverables. Conversely, RFP Section 4.4, *Proposal Content*, contained the following instructions to bidders:

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 categories included in this section were: A. Project Manager; B. Supervisors; C. Chemist; D. Health and Safety Officer; E. Licensed Site Remediation Professional (LSRP); F. Professional Engineer (PE); G. Licensed Electrician/Licensed Electrical Contractor; H. Licensed Asbestos Personnel; I. Foreman; J. Heavy Equipment Operator; K. Laborer; L. Truck Driver; M. Licensed Blaster; N. Subsurface Evaluator; O. Traffic Control; and P. Tanker Tapping. Therefore, these

were the categories required of a bidder at the time of proposal submission. Allstate and Atlantic met these requirements.

The Evaluation Committee Report noted that Allstate did not provide sufficient information regarding how it would provide maritime marine services and that Atlantic did not describe how it would provide maritime marine services, guard services, and a street sweeper.⁵ However, these items were listed in RFP Section 3.5.1, not Section 4.4.4.4, and were contract deliverables rather than requirements for proposal submission. These services were described in the RFP's Scope of Work Section, specifically Section 3.5.10 *Maritime Marine Services*, 3.18 *Security*, and 3.28 *Contractor Identification of All Subcontractors or Their Personnel to Meet Contractor [Scope of Work]*. Notwithstanding this distinction, bidders were also advised in RFP Section 4.4.3, *Technical Proposal*, that a bidder "shall describe its approach and plans for accomplishing the work outlined in the [Scope of Work] section (Section 3.0)[]" and that its technical proposal "should minimally contain the information identified" in RFP Sections 4.4.3.1 through 4.4.3.6. Due to the absence of information regarding the aforementioned sections, both Allstate and Atlantic received scoring deductions in this Evaluation Category.

VI. Review of Qualified Spill's Proposal

Qualified Spill raises a number of points to support its argument that its proposal was erroneously scored when compared to the scores awarded to the intended awardees and contends it was misevaluated in Category C, *Scope of Work*. Qualified Spill received a technical score of 184 and was not recommended for an award of contract. The Committee made the following observations of Qualified Spill's proposal in its Evaluation Committee Report:

The Committee determined that the technical proposal earned the rating of "poor." The proposal was poorly presented, demonstrated an inadequate understanding of the objectives of the RFP, and indicated an insufficient comprehension of the Scope of Work to be performed and accomplished. The bidder proposed a mix of personnel of appropriate expertise technically and administratively to perform the tasks of the contract, but did not address many personnel and special expertise that were required by the RFP.

- A. Personnel: Most required [personnel] were identified and resumes were provided where required. Qualified Response did not identify the required low level radiation sub-contractor or workers; the proposal appeared to indicate that they would do this activity themselves, although the Committee found that the personnel are not licensed in the State of New Jersey to conduct this activity, as required in the RFP.
- B. Experience of Firm: Three (3) of the five (5) required case histories were unacceptable. The bidder did not provide case histories relating to their experience with: 1) Lab packs, 2) Level "A" work, and 3) petroleum discharges into a waterway. The firm is not a United State Coast Guard Oil Spill Removal Organization USCG OSRO, as required by the RFP.
- C. Scope of Work: All documentation needed to determine the bidders overall ability to undertake and successfully perform the technical requirements of the SOW was not

⁵ I also note that in order to be a Coast Guard-classified OSRO, a company is required to submit, among other things, "a plan that identifies and ensures by contract or other approved means (i.e. Letter of Intent), the availability of private personnel and equipment necessary to remove, to the maximum extent practicable, a worst case discharge (WCD), including a discharge resulting from fire or explosion, and to mitigate or prevent a substantial threat of such a discharge." See Guidelines for the U.S. Coast Guard Oil Spill Removal Organization Classification Program, Chapter 1, Section A(2) (April 2013). Because both Allstate and Atlantic are OSRO classified, the State may be assured of the same.

demonstrated by its proposal. The proposal lacked any mention on how the following required services would be provided; 1) Maritime marine services, 2) Guard services, 3) Street sweeper, 4) Subsurface Evaluator, 4) Solid waste transportation, and 5) Hazardous waste transportation. The proposal did not identify any disposal facilities or laboratories, as required.

As determined supra, of the seven proposals received, the proposals submitted by Ken's Marine, Clean Venture, TMC, and WRS are non-responsive; however, the intended awards to Allstate and Atlantic are upheld. Because the RFP allows for the award of "up to six contracts" to responsible bidders, I remand the evaluation of Qualified Spill's proposal to the Evaluation Committee to determine the merits of its scoring and an intended award of contract if warranted. Please note that this determination may hinge on Qualified Spill's ability to obtain the necessary OSRO classification prior to award of contract.

VII. Conclusion

Based on the findings and conclusions set forth above, I must rescind the slated awards to Ken's Marine and Clean Venture, and uphold the slated awards to Allstate and Atlantic. This is my final agency decision.

Thank you for your continued interest in doing business with the State of New Jersey. I invite you to take this opportunity to register your business with **NJ START** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: P. Michaels
L. Spildener
M. Pappas
Raymond Huckemeyer, Ken's Marine Service, Inc.
Michael Persico, Clean Venture, Inc.
Ted Piotrowski, Allstate Power Vac, Inc.