



State of New Jersey

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June 2, 2016

Via Electronic Mail [rgupta@sovcon.com] and USPS Regular Mail

Ravi Gupta, President
Sovereign Consulting Inc.
111-A North Gold Drive
Robbinsville, NJ 08691

Re: Protest of Notice of Intent to Award
RFP #15-X-23623 Field Sampling Assistance, NJDEP

Dear Mr. Gupta,

This correspondence is in response to your letter dated and received August 7, 2015, referencing the subject Request for Proposal (RFP) and regarding the Notice of Intent to Award the subject contract by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division). On behalf of Sovereign Consulting Inc. (Sovereign), you protest the classification of Sovereign's proposal as non-responsive and the slated award of the resulting contract to Handex Consulting & Remediation, LLC (Handex) and SADAT Associates, Inc. (Sadat). In support of your contention that Sovereign's proposal was erroneously deemed non-responsive, you submit that a subcontractor performing "field sampling support" under the Field Technician labor category should be considered a Professional Service and therefore exempt from the Public Works Contractor Registration Act, N.J.S.A. 34:11-56.51. You request an in-person meeting and that Sovereign's proposal be reinstated for evaluation.

I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law, and the proposal submitted by Sovereign. 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 Sovereign's protest without an in-person presentation. N.J.A.C. 17:12-3.2(d)(1). I set forth herein my final agency decision.

I. Background

On behalf of the New Jersey Department of Environmental Protection (NJDEP), the Bureau issued the subject RFP on October 7, 2014, to solicit proposals for Field Sampling Assistance. The resulting contract was to "provide labor, equipment, materials, and services to enable the appropriate and legally defensible collection of environmental field samples from a variety of matrices whose analysis will support the State's Site Remediation Program." RFP §1.1, *Purpose and Intent*. The Bureau intended to award up to two contracts, one primary and one alternate, to those responsible bidders, whose proposals, conforming to the RFP, "are most advantageous to the State, price and other factors considered." RFP §1.1, *Purpose and Intent*.

The Division received five proposals by the revised proposal deadline of January 6, 2015. The proposals were reviewed for initial compliance with administrative requirements and then forwarded to a five-person Evaluation Committee for review.¹ During the Evaluation Committee's review, Sovereign's proposal was found to be non-responsive for including a subcontractor that was not properly registered in accordance with the Public Works Contractor Registration Act. The Evaluation Committee Report noted:

. . . Sovereign identified two subcontractors to perform the duties of this RFP[:]

Foresight Enviroprobe, Inc. [SBE/WBE] and
Equity Environmental Engineering LLC [SBE]

The Department of Labor and Workforce Development (DLWD) database indicated that only Foresight Enviroprobe met DLWD's Public Works Registration requirements as per RFP Section 4.4.1.7 and . . . N.J.A.C. 12:62-2.1 that bidders must be registered with the DLWD at the time of the proposal opening. Equity Environmental Engineering LLC was not registered[,] therefore Sovereign Consulting is considered non-responsive to the RFP. As per a memo from DLWD, "any company that is engaged needs to be registered and we treat engaged as them bidding as a GC or once they have a sub agreement in place."

Following the completion of the evaluation process, the Bureau issued a Notice of Intent to Award Letter on July 28, 2015, advising all bidders of the intent to make a primary award to Handex and an alternate award to Sadat.² This protest followed.

II. Protest

In its letter of protest, Sovereign requests the Division reconsider its proposal for evaluation of contract award, stating that Equity Environmental LLC (Equity), its listed subcontractor to perform "Field Sampling," would perform services professional in nature, and therefore was not required to be Public Works registered. In support of its position, Sovereign included a letter from Equity in which it agreed that it was not required to be Public Works registered to provide "professional field sampling support" under "the Field Technician labor category."

The Hearing Unit's independent review of the record reveals that although Sovereign's proposal was rejected for listing a subcontractor who was not Public Works registered, the language of the RFP does not expressly require that all tasks associated with a field technician under the terms of the RFP be performed by a Public Works registered subcontractor. Therefore, the main issue of this protest is whether the duties to be performed by Sovereign as a subcontractor performing Field Sampling are covered in a labor category which required Public Works registration under the Public Works Contractor Registration Act (Act), N.J.S.A. 34:11-56.48 to -56.57, whether at the time of proposal submission or otherwise.

The Act specifies "[n]o contractor shall list a subcontractor in a bid proposal for the contract unless the subcontractor is registered pursuant to [the Act] at the time the bid is made." N.J.S.A. 34:11-56.51. The purpose of the Act is to ensure that contractors and subcontractors, engaged in public works

¹ The Evaluation Committee was comprised of representatives from the New Jersey Department of Environmental Protection and the Division.

² An initial Notice of Intent to Award Letter issued was rescinded on March 30, 2015, following the discovery that certain Best and Final Offer (BAFO) pricing had been erroneously excluded from the evaluation.

and “receiving the benefit of public tax dollars,” comply with Prevailing Wage requirements and do not “exploit their workers by denying them benefits and pay mandated by law[.]” N.J.S.A. 34:11-56.49 (b). The Act defines “public work” as “construction, reconstruction, demolition, alteration, custom fabrication, or repair work, or maintenance work, including painting and decorating, done under contract and paid for in whole or in part out of the funds of a public body, except work performed under a rehabilitation program.” N.J.S.A. 34:11-56.26(5).

The RFP provided in Section 2.2, *Contract-Specific Definitions/Acronyms*: “Public Works Contractor Registration Act – N.J.S.A. 34:11-56.48 et seq. All construction projects require public works registration and all applicable labor categories are subject to prevailing wage. Contractors and named subcontractors must be registered in accordance with the Public Works Contractor Registration Act on the date of proposal opening.” The RFP further provided in Section 4.4.1.7, *Public Works Contractor Registration*, in pertinent part:

If the bidder is utilizing subcontractors as part of their bid submission, any subcontractor being submitted for an applicable labor category covered by this Act must be registered with DLWD as a Public Works Contractor at the time of bid opening and a copy of their certificate must be included in the bid submission.

All applicable labor categories of subcontractors must be registered with the DLWD at the time of quote/bid submission to the Contractor.

....

[(Emphasis added.)]

RFP Section 5.21, *Public Works Contractor Registration Act N.J.S.A. 34:11-56.51*, further specified:

All Contractors and named subcontractors (i.e. those designated at the time of proposal submission) not performing Professional Services shall maintain a valid Public Works Contract registration issued by the Department of Labor and Workforce Development for the duration of the contract term.

....

All applicable labor categories of subcontractors must be registered with the DLWD at the time of quote/bid submission to the Contractor.

In RFP Section 4.4.4.4, *Labor/Personnel Requirements*, the Bureau specified the mandatory personnel required of all bidders and the specific requirements and experience criteria for each respective position. This section specified in pertinent part:

c. Field Technician

The personnel for this position should have minimum education qualifications that include a Bachelor of Science degree in Civil / Environmental Engineering, Chemistry, Biology, Geology, or Environmental Science, or related engineering or science field. Their services shall be calculated on an hourly unit of measure. Time will be broken down by specific sampling task and shall include the cost of equipment associated with the specific task. The NJDEP/State Representative and Contract shall reach an agreement on cost prior to purchase order creation.

....

The labor/personnel categories described previously are considered typical categories required to accomplish the work specified in this RFP and are to be used for establishing personnel rates on the Price Schedules for this RFP. Some labor/personnel categories are subject to the NJ Prevailing Wage Act.

Part 2 of Addendum #1, dated November 7, 2014, added the following language to the Field Technician category listed above in RFP Section 4.4.4.4:

Field Technicians are expected to be those staff whose primary responsibility is to collect the environmental samples being requested at the time of engagement. They should possess a minimum of three years' experience in the site remediation field with particular emphasis on field sampling projects involving ground water and soil sampling as well as potable, indoor air, sub-slab, near slab, sediment, surface water, waste and landfill vent sampling. Sample collection assumes working knowledge of all related tasks from field decontamination of sampling equipment, instrument measurement and container management including sample preservation and labeling and appropriate shipping and handling. In addition to sample collection, they are expected to record and document all field sampling activity in a scientific and legally defensible manner. Field Technicians must be trained in all aspects of the Health and Safety requirements associated with working on hazardous waste sites as specified in 29 CFR 1910.120.

In determining whether or not a specific labor category was covered under Public Works³, the Bureau received the following guidance from a Field Representative from the DLWD's Division of Wage and Compliance:

[Public Works] covered, if subcontractor has to drill holes or use[] the following types of apparatus (i.e. hand auger to extend a boring into the subsurface, shovel, post hole digger, etc.) for the collection of soil/groundwater/rock samples to take place (considered "construction" or "alteration" work, as referenced in the public works definition). This would also include the collection of vapor samples from subsurface soils or from inside a building, if done through the use of a drill, or similar type of apparatus, to drill a hole through the building foundation or into the ground for the collection of the samples. However, if this collection process did not require the use of a drill or similar type of apparatus, the work would not be covered. This would also include the collection of water samples from water wells, which is generally not covered, if the collection process only involves the use of a container for the water samples to be collected.

³ The RFP also included Appendix G: Sub-Slab Gas Sampling Guide (Parts 1 and 2) in its *List of Appendices (For Informational Purposes or Submission Post Contract Award)*. Further guidance on the duties and expectations associated with field sampling were provided in Appendix G, Part 1 and 2, *Installation and Collection of Sub-Slab Samples From Temporary Sub-Slab Probes (TSSP) For Vapor Intrusion (VI) Investigations*, and were made available to all bidders in Appendices #7 and 8. Appendix G detailed "the design, installation and sampling procedures for the collection of sub-slab soil gas samples using temporary sub-slab probes (TSSP) in the support of vapor intrusion (VI) investigations." This document outlined the method of temporary sub-slab probe preparation, installation, and sampling procedures, including the required preparation, equipment, and procedures for TSSP. Among other things, this document outlined that "drilling equipment is easily transported in a 5-gallon plastic bucket" and described the manner in which a technician will drill through a floor covering for the placement of the probe using a rotary hammer drill. The RFP similarly did not mandate that each subcontractor perform these services for the contractor.

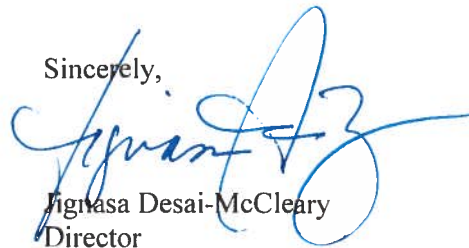
[(Emphasis added.)]

The record shows that Sovereign submitted a Subcontractor Utilization Plan that listed Equity as a Category II Small Business to perform “Field Sampling,” lists Equity as its “sampling team partner” and included Mr. Nicholas VanZile, an Equity employee, as one of six Field Technicians in its Contract-Specific Chart included as Figure 2. However, “field sampling” is not a specific labor category listed in the RFP or defined by the Act, and based upon Sovereign’s proposal and accompanying documents Equity may not perform sampling services covered by a labor category defined by the Act. Because the RFP did not mandate that a Field Technician must participate in those tasks deemed to fall under the Act, i.e., drilling holes, using a hand auger, etc., the Bureau should have sought clarification to determine whether or not Sovereign’s use of Equity as a subcontractor implicates activities covered by the Act.

Based on the foregoing, I overturn the rejection of Sovereign’s proposal as non-responsive. The Bureau is directed to rescind the July 28, 2015 Notice of Intent to Award Letter, review Sovereign’s proposal, and seek clarification as necessary with the aforementioned principles in mind. This is my final agency decision.

The Division appreciates your continued interest in doing business with the State of New Jersey and thanks you for registering your business with NJSTART at www.njstart.gov, the State of New Jersey’s new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: G. Olivera
J. Signoretta
P. Slack
P. MacMeekin