



State of New Jersey

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May 6, 2022

Via Electronic Mail tjcarey@aetnj.com

Thomas J. Carey
Advanced Environmental Technologies, L.L.C.
270 West Main Street
Little Egg Harbor, NJ 08087

Re: I/M/O Bid Solicitation #21DPP00640 Advanced Environmental Technologies, L.L.C.
Protest of Notice of Intent to Award
T2942 Pump Station/Collection System & Water Treatment Plant Operator – Ancora Psychiatric Hospital

Dear Mr. Carey:

This final agency decision is in response to your protest of March 18, 2022, on behalf of Advanced Environmental Technologies, L.L.C. (Advanced) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that email, Advanced protests the Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation No. 21DPP00640 - T2942 Pump Station/Collection System & Water Treatment Plant Operator – Ancora Psychiatric Hospital (Bid Solicitation). Specifically, Advanced alleges that the State's response to an electronic question submitted pursuant to Bid Solicitation Section 1.3.1 permits the Contractor to perform the Contract in a manner contrary to the New Jersey Department of Environmental Protection's (NJDEP) rules and regulations. By way of remedy, Advanced requests that the Division and NJDEP revise the specifications and re-bid the Contract.

By way of background, on July 23, 2021, the Bureau issued the Bid Solicitation on behalf of the Ancora Psychiatric Hospital (Ancora). Bid Solicitation §1.1 *Purpose and Intent*. The purpose of the Bid Solicitation was to solicit Quotes from qualified NJDEP licensed operators for the operation, maintenance, repair, inspection, and monitoring of the wastewater pump station/collection system and the water treatment plant (PWPT) located at Ancora. *Ibid*. It is the State's intent to award a Master Blanket Purchase Order (Blanket P.O.) to the responsible Vendor {Bidder} whose Quote, conforming to the Bid Solicitation, is most advantageous to the State, price and other factors considered. *Ibid*.

In accordance with the Bid Solicitation instructions, potential Vendor(s) {Bidder(s)} were permitted to submit questions to the Bureau, through the Division's NJSTART eProcurement system, by 2:00 pm eastern time on August 31, 2021. Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*. Through the posting of Bid Amendment #4 on October 25, 2021, the Bureau answered all seventeen (17) questions received.

On November 19, 2021, the Division's Proposal Review Unit opened three Quotes that were received by the submission deadline of 2:00 pm eastern time. After conducting an administrative review of the Quotes received, the Division's Proposal Review Unit released the Quotes to the Bureau for further review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*.

After completing the evaluation of the Quotes received on November 19, 2021, the Bureau prepared a Recommendation Report which indicated that the Quote submitted by Advanced was deemed non-responsive for failing to meet the requirements of Bid Solicitation Section 4.4.1.8., *Public Works Registration*. The Recommendation Report notes that Advanced was not listed in the Registered Public Works Contractors, which was verified by the New Jersey Department of Labor on or about December 7, 2021.

On March 7, 2021, the Bureau issued the NOI advising that the Blanket P.O. would be awarded to JES.¹

In response to the NOI, on March 18, 2022, Advanced submitted a letter of protest to the Division challenging the Bid Solicitation specifications stating in part:

I am in receipt of the Notice of Intent to Award regarding the above referenced, and as per Protest Procedures regulations, my company is formally protesting the Award of the above referenced solicitation. This protest is on the grounds that the Q&A portion of this solicitation, specifically Question #7 states that "Trained staff may provide services only under the direction of the Licensed Operator". This statement allows staffing to break NJDEP's rules and regulations.

In consideration of Advanced's protest, I have reviewed the record of this procurement, including the Bid Solicitation and electronic Q&A, Advanced's Quote and protest, the relevant statutes, regulations and case law. The review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest.

Pursuant to the Division's governing regulations, a challenge to a specification contained within the Bid Solicitation must be brought prior to the Quote opening date. N.J.A.C. 17:12-3.2(a). The governing regulations provide that "the written protest shall² be submitted to the Director only after the Division has formally responded to questions posed during the RFP-established question and answer period and in sufficient time to permit a review of the merits of the protest and to take appropriate action as may be necessary, prior to the scheduled deadline for proposal submission." N.J.A.C. 17:12-3.2(b), emphasis added. Further, the regulations provide that "the Director may disregard any protest of specifications filed fewer than seven business days prior to the scheduled deadline for proposal submission." N.J.A.C. 17:12-3.2(b)(3).

¹ The Bureau determined that Advanced was non-responsive to Bid Solicitation Section 4.4.1.8, *Public Works Registration*, which required at Quote opening that "the Vendor {Bidder} and Subcontractors performing public work as defined in N.J.S.A. 34:11-56.26 must be registered in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq." Advanced did not have an active public works registration at the time of Quote opening, and was not found on the List of Registered Public Works Contractors, as verified on December 7, 2021, by the Department of Labor.

² Shall – Denotes that which is a mandatory requirement. Should – Denotes that which is permissible or recommended, not mandatory. Bid Solicitation § 2.2 *General Definitions*.

A review of the record of this procurement indicates that Advanced did not avail itself of the opportunity to challenge the specifications as permitted by the governing regulations. Only now, after the issuance of the NOI, having not been selected as the intended awardee and finding that its submitted Quote was deemed non-responsive, does Advanced raise this challenge to the specifications in an effort to have the procurement canceled and rebid, potentially allowing Advanced to correct the deficiency contained within its Quote.³ Advanced's challenge to the specifications is therefore out of time. However, for the purpose of completeness, I will nonetheless address Advanced's challenge to the specifications here.

Advanced argues that the Bureau's response to Question #7 in Bid Amendment #4, regarding the requirements of Bid Solicitation Section 3.2 *Pumping Station/Collection System and Potable Water Treatment Plant (PWTP) Facility Operations*, allows the Contractor to not comply with NJDEP's rules and regulations regarding staffing. For reference, Bid Solicitation Section 3.2 stated:

The Vendor {Contractor} shall furnish all labor, materials, chemicals, equipment, supplemental, and incidental services for the operation, maintenance, monitoring, and repair of the pumping station, collection system and PWTP facility at APH. The Vendor {Contractor} shall also furnish appropriately trained staff, including a part-time Licensed Operator, in order to timely discharge the duties and responsibilities set forth in this Bid Solicitation and comply with all applicable laws, regulations, and policies governing the collection system/pumping station and PWTP operation.

The Vendor {Contractor} shall provide all daily operations, maintenance, adjustments, equipment operation, control testing, regulatory reporting and all other services needed to operate at the appropriate levels of treatment in accordance with applicable NJDEP requirements, regulations and permits.

Note: The Vendor {Contractor} will be compensated the awarded monthly fee for the completion of all tasks outlined herein unless otherwise specified.

During the Electronic Question and Answer Period, with respect to the requirements of Bid Solicitation Section 3.2, *Pumping Station/Collection System and Potable Water Treatment Plant (PWTP) Facility Operations* a potential Bidder inquired:

What is the difference between the duties of the trained staff and that of the part time operator?

In response to the question posed, after consulting with NJDEP, the Bureau stated:

The Vendor {Contractor} must ensure that the Licensed Operator maintain, in good standing and full force, the licenses that correspond to the most current NJDEP issued permits/requirements for each system pursuant to N.J.A.C. 7:10A-1 et seq.⁴ through the term of the Blanket P.O.,

³ Importantly, Advanced does not dispute the Bureau's finding that at the time of Quote submission, it was not on the list of Registered Public Works Contractors maintained by the Department of Labor.

⁴ N.J.A.C. 7:10A-1 et seq. set forth the examination and licensing requirements for water supply and wastewater treatment licensed operators.

inclusive of any extensions. At this time, the following licenses are required:

- Class C-2 Public Wastewater Collection System - collection system (piping);
- Class T-2 Public Water Treatment System – potable treatment plant; and
- Class W-2 Public Water Distribution System – pumping station.

Note: Information regarding qualifications and experience for these licenses can be found at <http://www.nj.gov/dep/exams/wsw.htm>
Trained staff may provide services only under the direction of the Licensed Operator.

Please refer to Section 2.3 of the Revised Bid Solicitation for a full definition of the Licensed Operator.

[Bid Amendment #4, Question #7.]

Further, Bid Solicitation Section 2.3, *Blanket P.O. Specific Definitions/Acronyms* was updated to define Licensed Operator as follows:

The individual approved by the DEP holding any local title, designation, or job description who is on-site at a system a significant amount of time, although not necessarily full time, and who has active involvement in and is responsible for the operation, maintenance, and effectiveness of the system, and who holds a license equal to or higher than that required for the system.

[Bid Solicitation Section 2.3, *Blanket P.O. Specific Definitions/Acronyms*.]

There was no definition of “trained staff” included in the Bid Solicitation.

In the protest, Advanced states:

NJDEP Rules and regulations governing the Operation of Water and Wastewater Facilities requires licensed operators to staff facilities. The above referenced solicitation has part time hours outlined for staffing. Due to the hours listed for staffing in the solicitation and the NJDEP ratings for this facility, a licensed operator must be staffed at the facility, not unlicensed trained staff under the direction of the licensed operator. This Bid Solicitation as written will allow the Vendor to break NJDEP staffing regulations as written. The facility is responsible for making sure all NJDEP rules and regulations are followed including staffing licensed operators at the facility.

In summary, Advanced argues that licensed operator must be at the facility at all times. However, Advanced fails to identify exactly which rules and/or regulations could be violated by the response to Question #7.

First, I note that the State of New Jersey Standard Terms and Conditions Section 2.10 *Compliance with Laws* requires that “[t]he contractor must comply with all local, State and Federal laws, rules and regulations applicable to this contract and to the goods delivered and/or services performed hereunder.” Therefore, to the extent that a Contractor must have a licensed operator on site during all working hours, the terms of the Contract already mandate that.⁵ Further, NJDEP’s guidance with respect to water and wastewater system operator licensing states:

A Licensed Operator is the individual approved by the DEP holding any local title, designation or job description who is on-site at a system a significant amount of time, although not necessarily full-time and who has active involvement in and is responsible for the operation, maintenance, and effectiveness of the system, and who hold a license equal to or higher than that required for the system.

[<https://www.state.nj.us/dep/watersupply/wsw.html>.]

Based upon this guidance, it does not appear that a Licensed Operator is required to staff the facility at all times. Rather, the facility can be staffed by a “trained staff” who works under the direction of a license operator.

Nothing in the Bid Solicitation permits the Contractor to violate the requirements of the applicable rules and regulations regarding staffing of the wastewater pump station/collection system and the water treatment plant (PWPT) located at Ancora Psychiatric Hospital. Accordingly, I sustain the Bureau’s Notice of Intent to Award to Jersey Environmental Solutions LLC.

Thank you for your company’s continuing interest in doing business with the State of New Jersey and for registering your business with *NJSTART* at www.njstart.gov. I encourage you to log into *NJSTART* to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities. This is my final agency decision on this matter.

Sincerely



Gregg Olivera
Deputy Director

GO: RUD: CKK

- c. M. Griffin
- L. Groninger
- K. Giles

⁵ A review of the Technical Quote submitted by Jersey Environmental Solutions, LLC (JES) shows that the proposed staffing meet the required qualifications. Additionally, all individuals described in JES’ Technical Quote were identified as licensed operators, all of which have been verified via the Licensed Water and Wastewater System Operators list located in the DEP DataMiner on NJDEP’s website. Based on the facts relevant to Advanced’s claim, the response to Question #7, and the Bid Solicitation, the intended awardee will operate in accordance with the relevant rules and regulations for this procurement.