



State of New Jersey

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June 4, 2015

Via Electronic [paul.hankins@donjon.com] and USPS Regular Mail

Paul Hankins, VP Salvage Operations
Donjon Marine Co., Inc.
100 Central Avenue
Hillside, NJ 07205-2033

Re: Specification Challenge
RFP 15-X-23761: Waterway Debris Assessment and Removal for Disasters

Dear Mr. Hankins:

This letter is in response to your letter dated May 18, 2015, on behalf of Donjon Marine Co., Inc. (Donjon), in which you have expressed concern regarding certain terms of the specifications for RFP 15-X-23761: Waterway Debris Assessment and Removal for Disasters. Specifically, Donjon has indicated that "as it is currently written we are finding it difficult if not impossible to put together a fair proposal. Almost all of the risk normally shared between contractor and the State is seemingly being placed squarely on the contractor." Despite the fact that the question and answer period has already expired, Donjon has requested that an update or addendum to the RFP be issued.

I have reviewed the record of this procurement, including the RFP, submitted bidder questions, relevant statutes, regulations and case law. This record has provided me with the information necessary to render an informed final agency decision on the merits of Donjon's specification challenge.

By way of background, RFP 15-X-23761: Waterway Debris Assessment and Removal for Disasters (RFP) was issued by the Procurement Bureau (Bureau) within the Division of Purchase and Property (Division) on behalf of the New Jersey Department of Environmental Protection (NJDEP). The purpose of this RFP is to solicit proposals from interested qualified firms to provide waterway debris assessment and waterway debris removal services for the State of New Jersey and local government entities as such need may arise in their jurisdiction. Pursuant to State law, the RFP was publically advertised on April 20, 2015. Bidders were provided with an opportunity to submit questions through May 1, 2015. Several questions were received and an addendum responding to those questions was issued on May 14, 2015. The RFP is scheduled to be opened on June 5, 2015.¹

With respect to the late questions raised in Donjon's May 18, 2015 letter, I address each below:

¹ The original scheduled Bid Opening date was May 27, 2015. Addendum #2 revised the Bid Opening Date to June 5, 2015.

Question 1: Supplemental Condition by the Contractor

Donjon states in its May 18, 2015 letter, that supplemental conditions proposed by a bidder that attempt to put the bidder in a more favorable condition and which by extension put the State in a less favorable condition, will be null and void. Donjon appears to be saying that there is no opportunity to negotiate changes to the RFP and State Standard Terms and Conditions. (Donjon May 18, 2015 letter).

The assertion that the State does not accept supplemental conditions proffered by interested bidders is untrue. The Division entertains all bidder requests for modifications to the Standard Terms and Conditions and exceptions to the requirements of the RFP during the Question and Answer period. The specifications provide for bidders to suggest alternate terms and conditions:

In the event that the bidder/offeror would like to present terms and conditions that are in conflict with either these terms and conditions or those set forth in the RFP, the bidder/offeror must present those conflicts during the Question and Answer period for the State to consider. Any conflicting terms and conditions that the State is willing to accept will be reflected in an addendum to the RFP. The State's terms and condition shall prevail over any conflicts set forth in a bidder/offeror's proposal that were not submitted through the question and answer process and approved by the State.

[SSTC, Section 1 0 - Standard Terms and Conditions Applicable to the Contract.]

Donjon did not avail itself of the opportunity to present alternate terms and conditions for consideration during the question and answer period.

It is the State's statutory mandate to award contracts to bidders submitting proposals that are most favorable to the State. In order for the Division to accomplish this mandate, the terms of those contracts that are advantageous to the State are accepted. Bidders agree to these terms and conditions in order to do business with the State.² Accordingly, no update or amendment to the RFP requirements will be made.

Question 2: Escalation Clause

Donjon's next challenges the fact that there is not a price escalation clause over the first year contract period. (Donjon May 18, 2015 letter).

Under the SSTC, applicable to this contract and which must be read in conjunction with the terms and conditions of the RFP, "[u]nless otherwise agreed to in writing by the State, all prices quoted shall be firm through issuance of the contract or purchase order and shall not be subject to increase during the period of the contract." (SSTC Section 6.1 - Price Fluctuation During Contract.) Moreover, the RFP defines "Firm Fixed Price" as

A price that is all-inclusive of direct cost and indirect costs, including, but not limited to, direct labor costs, overhead, fee or profit, clerical support, equipment, materials, supplies, managerial (administrative) support, all documents, reports, forms, travel, reproduction and any other

² It should be noted that the terms and conditions applicable to the emergency waterway debris contract awarded on February 21, 2013, of which Donjon was a vendor, contained similar terms to the subject RFP with respect to contractor liability.

costs. No additional fees or costs shall be paid by the State unless there is a change in the scope of work.

[RFP Section 2.1 – General Definitions]

In submitting a proposal, a bidder must account for all direct and indirect costs, inclusive of any fluctuation in market conditions when proposing its firm fixed price for the duration of the contract. Accordingly, no update or amendment to the RFP requirements will be made.

Question 3: No Commitment to Use Contract

In the May 18, 2015 letter, Donjon states that under the RFP, “[t]he State is under no requirement to use the contract should a disaster strike. If there is a cheaper alternative, it appears that the State is free to use that alternative.” (Donjon May 18, 2015 letter).

This interpretation misquotes and misunderstands standard and long standing State practice in which the State reserves the right to procure in unforeseen circumstances. Moreover, the RFP provides in pertinent part that:

[t]he State is issuing this RFP as part of **preparation** for a disaster that results in the generation of disaster-related debris in New Jersey’s tidal and non-tidal waterways beyond the capacity and capability of routine solid waste collection and transportation services, and disposal capacity.

[RFP Section 1.2 – Background, *emphasis added.*]

Moreover, the RFP has identified those situations under which contracts resulting from this RFP will be utilized.

The contracts are intended to be utilized in the event of 1) a Federally Declared Disaster, during which a Contractor shall comply with FEMA requirements, policies, recordkeeping standards, or 2) a State Declared Disaster, during which the Contractor need not comply with FEMA requirements, policies and protocols but must comply with applicable law and the requirements of any executed contract(s).

The NJDEP makes not guarantee of usage under any contract resulting from this RFP...In the event that this contract needs to be activate (sic), the process identified herein under Section 3.2³ Contract Activation will be followed.

[RFP Section 1.1 – Purpose and Intent.]

While there is no guarantee that a disaster event will occur that would require the awarded contracts will be utilized, if there is a declared Federal or State disaster, the State has every intention to follow the criteria set forth in Section 3.1 of the subject RFP. That section prescribes how those contractors who have existing contracts with the State may be used.⁴ Accordingly, no update or amendment to the RFP requirements will be made.

³ Section 3.1: Contract Activation, sets forth the criteria to be followed for both Federally Declared Disasters and State Declared Disasters.

⁴ As with all State contracts, the Director has the authority “to separately procure individual requirements that are the subject of the contract during the contract term, when deemed by the Director to be in the State’s best interest.” (RFP Section 1.1 – Purpose and Intent).

Question 4: Assessment Criteria

Donjon asserts that there is “no assessment criteria listed for those contractors desiring to bid on the Assessment phased of the envisioned work”. (Donjon May 18, 2015 letter).

This assertion is incorrect. The RFP price schedule sets forth price lines for the various types of assessment work. The RFP further stipulates that “[t]he Contractor is responsible for performing a waterway debris assessment, using the most cost-effective technology to document waterway debris prior to a separate contractor commencing debris removal.” (RFP Section 3.5 - Waterway Debris Assessment and Verification of Debris Removal.) Additionally, the RFP states that “[t]he Contractor may be required to utilize one or more assessment methods or technologies in order to effectively and thoroughly assess and identify the locations, types, and volume of eligible debris located in the waters of the State of the assigned region.” (RFP Section 3.5.1 - Assessment Methods and Technologies.)

Due to the contingent basis of the contract, the State cannot identify the specific scenarios for which a bidder should base its pricing. Disasters take many forms, such as earthquakes, hurricanes, tornados, or other natural and manmade events. The Division relies on the expertise of the bidder community to respond to this RFP with appropriate and cost-reasonable pricing. However, as a result of your letter, on May 22, 2015, the Bureau issued Addendum #2 to the RFP, which was posted pursuant to the Division requirements.

Question 5: Payment Terms

Donjon also challenges the fact that the RFP does not allow the contractor to stop work should payment be delayed for significant periods. (Donjon May 18, 2015 letter).

It is unclear from your May 18, 2015 letter, what length of time would qualify as a significant payment delay. However, the New Jersey Prompt Payment Act requires that payment by the State for services rendered by a contractor

shall be 60 calendar days from the date specified in the contract or if no required payment date is specified in the contract, then the required payment date shall be 60 calendar days from the receipt of a properly executed State invoice, or 60 calendar days from the receipt of goods or services, whichever is later. Interest shall not be paid unless goods and services are rendered.

[N.J.S.A. 52:32-34(b).]

This requirement is reiterated in the SSTC which states:

The New Jersey Prompt Payment Act, N.J.S.A. 52:32-32 et seq., requires state agencies to pay for goods and services within sixty (60) days of the agency’s receipt of a properly executed State Payment Voucher or within sixty (60) days of receipt and acceptance of goods and services, whichever is later. Properly executed performance security, when required, must be received by the State prior to processing any payments for goods and service accepted by state agencies. Interest will be paid on delinquent accounts at a rate established by the State Treasurer. Interest shall not be paid until it exceeds \$5.00 per properly executed invoice.

[SSTC Section 6.5 - New Jersey Prompt Payment Act.]

Further, Section 9.2 - Invoices and Payment of the RFP provides:

In the event of a dispute between the Contracting Entity and the Contractor as to whether an amount is owed for certain work, or as to whether an amount has been reasonably withheld by the Contracting Entity, the Contracting Entity shall pay all amounts that are not in dispute, but shall not be required to pay the amount that is in dispute until the parties settle or otherwise resolve such dispute. The Contractor shall continue to perform all of its obligations under the Contract notwithstanding such dispute.

Failure by the Contracting Entity to pay any amount in dispute shall not postpone, alleviate, diminish or modify in any respect the Contractor's obligation to perform work under the Contract, and the Contractor shall not cease or slow down its performance under the Contract on account of any such amount.

[RFP Section 9.2 - Invoices and Payment.]

Moreover, the RFP provides an avenue for resolving disputes between the Contracting Entity and the Contractor.

8.1.1 STATE CONTRACT MANAGER RESPONSIBILITIES

...The State Contract Manager is responsible for coordinating the use of the Contract and resolving minor disputes between the Contractor and the Contracting Entity.

...

8.1.2 COORDINATION WITH THE STATE CONTRACT MANAGER

Any Contracting Entity that is unable to resolve disputes with a Contractor shall refer those disputes to the State Contract Manager for resolution. Any questions related to performance of the work of the contract by Contracting Entities shall be directed to the State Contract Manager. The Contractor may contact the State Contract Manager if the Contractor cannot resolve a dispute with contract users.

[RFP Section 8.0 - State Contract Administration.]

As you acknowledge, in the event a dispute arises, Section 9.2 of the RFP requires that a contractor continue to perform work under the contract. However, Section 9.2 also provides that all amounts not in dispute shall be paid by the State, which when read in conjunction with the New Jersey Prompt Payment Act requires that these undisputed amounts be paid within sixty (60) days. Accordingly, no update or amendment to the RFP requirements will be made.

Question 6: Basis of Payment

Donjon challenges the use of payment based upon cubic yards verses weight. (Donjon May 18, 2015 letter).

RFP Section 3.0 - Scope of Work states “[p]ayment will be made at the unit rates bid. The unit of measure to be utilized in this contract, unless indicated otherwise, is by weight. See Price Schedule(s) and

RFP Section 3.6.3 for when weight is not utilized as the unit of measure.” Section 3.6.3 goes on to specify:

3.6.3 MEASUREMENT METHODS

The most typical unit measurement for vegetative and C&D debris is the cubic yard. Debris trucks and containers will be evaluated for capacity at the TDMA or final disposal facility by an appointed site monitor. The Contractor shall ensure that appropriate equipment is used to load debris efficiently so that the maximum level of compaction can be achieved to facilitate expeditious removal of debris. The Contractor shall ensure that trucks are not artificially loaded to maximize reimbursement (e.g. hand loading of trucks, debris is wetted, debris is fluffed and not compacted). If weight is identified by the Contracting Entity as the unit of measure for debris, the Contracting Entity shall utilize appropriate scales to determine weight unless otherwise identified herein and/or on the Bidder Price Schedule. The State, State Project Manager, or Contracting Entity may require that the Contractor install certified scales or have appropriate access to certified scales operated by licensed weigh masters as necessary to perform the requirements of the contract when weight is the unit of measure for determining quantities. Certified scales utilized shall be consistent with appropriate standards, be certified by the New Jersey Department of Law and Public Safety, Division of Consumer Affairs, Office of Weights and Measures and operated by appropriately certified operators to utilize such scales. Contractors may be required by the Contracting Entity to timely furnish and activate enough certified scales and operators to appropriately service the State or Contracting Entities’ needs. Invoices for work performed will be submitted using unit prices as explained below.

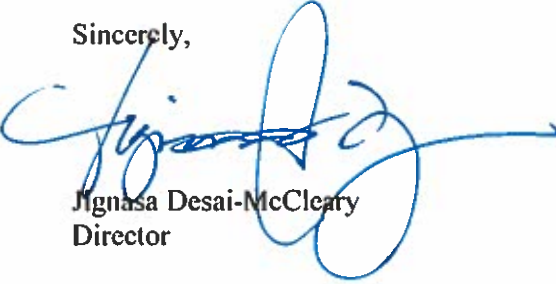
Several items or types of debris or circumstances for bid under this contract are not appropriate to measure by weight. These are identified in the Bidder Price Schedule, Attachment C Part A as having an alternate unit of measure utilized such as by gallons, per unit, per cubic yard, per pound, per linear foot, per tree or stump, etc. Bidders shall tender bids utilizing the unit of measure identified in the Bidder Price Schedule, Attachment C Part A. Should a price line in Attachment C identify more than one unit of measure, Bidders shall quote prices for all units of measure identified in the Bidder Price Schedule Attachment C Part A, B, or C as appropriate.

[RFP Section 3.6.3 - Measurement Method.]

The basis for payment for each category of debris is as set forth in Attachment C – Bidder Price Schedule as amended by Addendum #2. Because of the logistics involved with constructing appropriate scales at Temporary Debris Management Areas, the NJDEP has indicated that it is not economically feasible or practical for the NJDEP to construct scales at these sites. In instances where weight will not be used, NJDEP has established conversion standards between cubic yards and pounds. Further, NJDEP will employ debris monitors as needed to ensure that trucks are properly loaded and that load tickets are accurately completed. Accordingly, no update or amendment to the RFP requirements will be made.

Thank you for your 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. Having considered each of Donjon's challenges to the RFP specifications, I have determined that there is no need to amend that RFP.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M: RUD

c: M. Griffin
K. Woolford
J. Cross