



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. Box 039

TRENTON, NEW JERSEY 08625-0039
<https://www.njstart.gov>
Telephone (609) 292-4886 / Facsimile (609) 984-2575

FORD M. SCUDDER
Acting State Treasurer

JIGNASA DESAI-MCCLEARY
Director

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

May 24, 2016

Via Electronic Mail [ed.vernick@rve.com] and USPS Regular Mail

Edward Vernick, P.E., C.M.E., President
Remington & Vernick Engineers, Inc.
232 Kings Highway East
Haddonfield, NJ 08033

RE: Protest of Notice of Intent to Award
Solicitation #16-X-24153 Wastewater & Water Treatment Plant Operators for the NJDOC

Dear Mr. Vernick:

This correspondence is in response to your letter dated April 18, 2016 to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of Remington & Vernick Engineers, Inc. (Remington). In that letter, Remington protests the Amended Notice of Intent to Award (Amended NOI) a contract for Solicitation #16-X-24153 Wastewater & Water Treatment Plant Operators for the New Jersey Department of Corrections (NJDOC) issued by Division's Procurement Bureau (Bureau). The Amended NOI indicates that it is the Division's intent to award contracts to Advanced Environmental Technology (Advanced) and Jersey Environmental Solutions (JES) for the subject solicitation. Specifically, Remington alleges that it has performed a thorough analysis of the proposals submitted and the publically available information for the intended awardees and has concluded that there are significant deficiencies which will lead to operational and compliance issues if contracts are awarded to these bidders. With its protest, Remington requests a meeting to discuss its objections to the intended contract awards.

By way of background, this Request for Proposal (RFP) was issued on December 3, 2015, by the Bureau on behalf of the NJDOC to solicit proposals for the operation, maintenance, inspection and monitoring of the wastewater and water treatment plants located at the Albert C. Wagner Youth Correctional Facility (Wager), Bayside State Prison (Bayside); and, for the operation, maintenance, inspection and monitoring of the wastewater treatment plant located at the Mountainview Youth Correctional Facility (Mountainview). (RFP § 1.1 *Purpose and Intent*.) Specifically, the wastewater utility at Bayside consists of a collection system and treatment plant with an initial design capacity of .550 million gallons per day (MGD). (RFP § 1.2.3 *Wastewater Treatment Facility at BSP*.) The utility is an on-site, State-owned plant that services the Bayside and Southern State Correctional Facility (SSCF). In addition, Bayside has a State-owned potable water treatment plant that services Bayside and SSCF. (RFP § 1.2.3 *Water Treatment Facility at BSP*.) The wastewater utility at Wagner consists of a collection system and treatment plant with an initial design capacity of 1.3 MGD. (RFP § 1.2.1 *Wastewater Treatment Facility at ACWYCF*.) The utility is an on-site, State-owned plant that services Wagner, the Garden State Youth Correction Facility (Garden State) and the Township of Chesterfield, NJ. In addition, Wagner has a State-owned potable water treatment plant that services Wagner and Garden State. (RFP § 1.2.2 *Water Treatment Facility at BSP*.) Finally, the wastewater utility at Mountainview consists of a collection system and treatment plant with an initial design capacity of .365 MGD. (RFP § 1.2.5

Wastewater Treatment Facility at MYCF.) The facility is an on-site, State-owned plant that services Mountainview.

In accordance with the RFP, contracts will be awarded to those responsible bidders, whose proposals, conforming to the RFP, are most advantageous to the State, price and other factors considered. (*Ibid.*) Specifically, it was the intent of the Bureau to make one contract award per facility. (*Ibid.*) As such, bidders were permitted to submit a proposal for one, two or all three (3) facilities. (*Ibid.*)

On January 28, 2016, four proposals received by the submission deadline were opened by the Proposal Review Unit.¹ On March 11, 2016, the Bureau issued the original Notice of Intent to Award which indicated that a contract would be awarded to Advanced for all three facilities. After the issuance of the NOI, Advanced notified the Bureau that it did not have the capacity to handle the work required at all three facilities. Based upon this information, on April 5, 2016 the Bureau issued an Amended NOI stating that it was the intent of the Division to award a contract to Advanced for the Bayside and Mountainview facilities and to award a contract to JES for the Wagner facility. On April 28, 2016 Remington filed the instant protest.

First, with respect to Remington's request for a meeting to discuss the protest, I note that pursuant to N.J.A.C. 17:12-3.3(d)(1), "[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director." Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). In consideration of Remington's protest, I have reviewed the record of this procurement, including the RFP, the proposals submitted, the Bureau's Recommendation Report, and the relevant statutes, regulations, and case law. The issue(s) raised in Remington's protest were sufficiently clear such that a review of the record of this procurement 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 submitted by Remington on the written record.

Second, in addressing each of Remington's protest points, I note that RFP § 3.0 *Scope of Work* (SOW) sets forth the requirements for the Contractor – defined in the RFP as "[t]he bidder awarded a contract resulting from this RFP." (RFP 2.1 *General Definitions*.)² Therefore, the requirements set forth in RFP § 3 are not mandatory requirements of a bidder, but instead are requirements for the contractor after the contract has been awarded. In submitting a proposal, bidders were required to comply with the requirements of RFP Section 4, which included among other things the requirement to submit a Mobilization and Implementation Plan as identified in RFP § 4.4.3.1 and to submit an all-inclusive firm fixed monthly rate including all labor, tools, laboratory testing fees, onsite laboratory equipment, and all document preparation such as permit renewals, reports, etc. as identified in RFP § 4.4.7.

In connection with this protest, the Division's Hearing Unit conducted an independent review of Advanced and JES' proposals. With respect to Remington's protest that review found as follows:

Bayside State Prison

The Amended NOI indicates that it is the intent of the Bureau to award a contract for the operation, maintenance, inspection and monitoring of the wastewater and water treatment plants at Bayside to Advanced.

¹ One proposal submitted was automatically rejected by the Proposal Review Unit for the bidder's failure to submit all of the mandatory forms and pricing; the three remaining proposals were forwarded to the Bureau for evaluation.

² "Bidder" is defined as "an individual or business entity submitting a proposal in response to this RFP." RFP § 2.1 *General Definitions*.

In its protest, Remington alleges that based upon Advanced's proposal pricing it appears that Advanced "lack[s] a clear understanding of the scope of work required or [has] no intention of staffing this facility adequately." Remington alleges that this understaffing will result in long terms costs that will exceed any initial costs savings because preventative maintenance will not be performed which will result in improperly maintained equipment, compliance issues and fines which will inevitably result in overtime charges. Remington claims that Advanced's history of understaffing has resulted in State facilities not being properly maintained.

I note that this is a new procurement and therefore, staffing levels were not included in the RFP, discussed during the mandatory site visits, nor required of the bidder when submitting the proposal. Rather, after contract award, the contractor and the State will determine the necessary staffing to complete the SOW required by the RFP. The contractor's staffing levels will be monitored by the State Contract Manager. Specifically, as to the contractor's requirements after the contract award, RFP § 3.2.2.1 requires that

[t]he contractor shall be responsible for the daily wastewater treatment plant operation seven (7) days per week by a qualified State of New Jersey licensed operator, of the required grade, as required by NJDEP for the wastewater treatment plant classification. The Contractor shall provide one (1) full time licensed operator to satisfactorily operate the wastewater treatment plant as specified herein. The Contractor shall supervise the operation and control of the wastewater treatment plant including all control systems, treatment equipment and the conveyance systems.

In addition, RFP § 3.13.12 states:

[t]he contractor shall be responsible for the full operation of the water treatment plant by State of New Jersey licensed operators. The contractor shall provide daily operational and maintenance adjustments and equipment operation, control, testing, regulatory reporting and all other services needed to operate all unit processes at appropriate levels to meet the requirements of the NJPDES permit(s).

With respect to requirements of the bidder, RFP § 4.4.3.1 required that the bidders submit a Mobilization and Implementation Plan (Plan). Among other things, the RFP requested that in the Plan bidders identify a "plan for the deployment and use of management, supervisory or other key personnel during the mobilization and implementation period [; and,] the bidder's plan for recruitment of staff required to provide all services required by the RFP on the contract start date at the end of the mobilization and implementation period covering the (30) thirty days from notification of award." (RFP § 4.4.3.1 *Mobilization and Implementation Plan*.) Additionally, in submitting a proposal price RFP § 4.4.7.2 required that:

[t]he bidder shall submit an all-inclusive firm fixed monthly rate for the operation, maintenance, monitoring and inspection of Wastewater Treatment Plant and Water Treatment Plant at [Bayside] to include all labor, tools, laboratory testing fees, onsite laboratory equipment, and all document preparation such as permit renewals, reports, etc. No other fees or costs shall be paid by the State unless there is a change in the scope of work.

With its proposal, Advanced submitted the required Plan which identified Advanced's Managing Partner and Operations Manager as the persons who would be utilized to staff the facilities awarded pursuant to this RFP and further noted that both individuals possess the necessary water and wastewater

licenses to perform the work under the RFP's SOW. (Advanced's January 17, 2016 Proposal.) In addition, the Plan noted that recruitment will take place through existing company relationships, letters to prospective employees and Advanced's network of staffing resources. In its proposal, Advanced submitted an all-inclusive proposal price to perform the work required at Bayside; and it submitted a Plan which identified the key personnel to be utilized during the mobilization and implementation period and the bidder's plan for recruitment of staff.

Further, in reviewing the record, I note that upon receipt of the original NOI, Advanced reassessed its' resources against the scope of the intended award and advised the State that:

after careful consideration, my concern is spreading my company's resources too thin to manage all three treatment facilities. Due to this being a unique RFP, which contains three facilities geographically spread apart, I believe it would be in the best interest of both the State on behalf of DOC, as well as my company to set aside one facility to the next bidder.

[Advanced March 16, 2016, Email.]

In addition, Advanced confirmed that it had "assembled a team in place to effectively manage the Bayside State Prison Facility as well as the Mountainview Facility," and further noted that "the intent is for my company to provide outstanding management and operation services for the State on behalf of the DOC in regarding the RFP." *Id.* This communication from Advanced illustrates an understanding of the RFP requirements and staffing needs of the facilities.

Advanced's proposal conformed to the RFP requirements, and through its own due diligence, took steps to assess its resources, notify the State, and confirm its ability to manage the operation of the Bayside and Mountainview facilities as required by the SOW.

With respect to Remington's allegation that the prior complaints filed against Advanced demonstrate that Advanced has failed to properly maintain State facilities, the records of the Division's Contract Compliance and Audit Unit (CCAU) reveal that two complaints have been filed against Advanced; one in 2002 and one in 2012. Both complaints were administratively closed without a finding in favor of or against either the using agency or Advanced. With respect to the 2012 complaint, I note that after reviewing the allegations of the complaint, CCAU concluded that there was not adequate evidence that Advanced had violated its contract with the State; therefore, the case was being closed administratively. No other complaints have been filed against Advanced. Therefore, there was no reason to bypass Advanced's proposal pursuant to RFP § 6.9 *Complaints*.

Finally, regarding Remington's allegation that Advanced was unable to provide an Operator of Record in accordance with N.J.A.C. 7:10A, I note that the referenced administrative code sets forth the licensing requirements for water supply and wastewater treatment system operators. With its proposal, Advanced provided the required licenses. Therefore, Advanced complied with the RFP requirement.

Albert C. Wagner Youth Correctional Facility

The Amended NOI indicates that it is the intent of the Bureau to award a contract for the operation, maintenance, inspection and monitoring of the wastewater and water treatment plants at Wagner to JES.

In the protest letter, Remington alleges that the other intended awardee JES, also proposed staffing levels that are inadequate. Remington bases this allegation on the fact its proposed subcontractor currently employs several operators that have experience with the Wagner facility; therefore, Remington claims that it is in an unique position to understand the staffing requirements for this facility and has

based its staffing levels for Wagner based upon this knowledge. Remington alleges that JES' understaffing will result in "increased capital costs, regulatory non-compliance, heaving fines, and labor instability" which are all a concern for the operation of the utilities located at Wagner.

As noted above, mandatory staffing levels were not included in the RFP and staffing levels were not required to be submitted by the bidder with the proposal. Rather, after contract award, the contractor and the State will determine the necessary staffing to complete the SOW required by the RFP. Those staffing levels will be monitored by the State Contract Manager. As previously noted, with the proposal a bidder was required to submit the Plan as required by RFP § 4.4.3.1 *Mobilization and Implementation Plan*. (RFP § 4.4.3.1 *Mobilization and Implementation Plan*.) Further, with respect to the proposal pricing, RFP § 4.4.7.1 required firmed fixed monthly pricing.

In its proposal, JES submitted the required Plan which stated:

Upon notification that the [] contract has been awarded to JES, we will initiate several actions to accommodate a smooth transition for the state of the contract. JES will hold discussions with onsite personnel to investigate the possibility to transition over and join JES' team...Once it has been determined whether or not onsite personnel will be a good fit, JES will move forward with assigning the chosen operator to become familiar with plant equipment and processes.

...

JES' roster includes three S3, two S1 licenses, as well as three N4 license operators. Included is an organizational chart of potential personnel assigned.

[JES' January 28, 2016 Proposal.]

Here, JES submitted an all-inclusive proposal price to perform the work required at Wagner; and it submitted a Plan which identified how it intended to staff the facility.

Additionally, with respect to the contractor's requirements after the contract award and as noted above, RFP § 3.2.2.1 and RFP § 3.13.12 require that contract be responsible for the full operation of wastewater treatment plant and water treatment plant with a qualified State of New Jersey licensed operator. In its proposal, JES included the licenses for its operators.

JES' proposal submission therefore conformed to the RFP requirements.

Mountainview Youth Correctional Facility

The Amended NOI indicates that it is the intent of the Bureau to award a contract for the operation, maintenance, inspection and monitoring of the wastewater treatment plant at Mountainview to Advanced.

In its protest letter, Remington claims that the "State should insure that [Advanced] can adequately meet OSHA standards in all expected scenarios."³ (Remington April 18, 2016, Protest letter.)

RFP § 3.1 *General Requirements for the Wastewater Treatment Plant & Water Treatment Plant*, states in pertinent part:

³ "OSHA" - Williams-Steiger Occupational Safety and Health Act of 1970. See, 29 CFR 1910.1(a).

The Contractor shall be responsible for the full operation of both the primary wastewater treatment plants and the water treatment plants located at [Wagner] and [Bayside] and the wastewater treatment plant at [Mountainview] by a State of New Jersey licensed operator(s). The 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.

The section goes onto state “[a]ll operations shall meet or exceed OSHA and PEOSH [Public Employees Occupational Safety and Health]⁴ requirements; plants shall be operated in an orderly and safe manner.” (RFP § 3.1.7)

As noted above, Section 3 of the RFP sets forth the requirements for the contractor in performing the work required by the RFP. With respect to the requirements of OSHA, the United States Department of Labor, who administers the act, provides that “under [OSHA], employers are responsible for providing a safe and healthful workplace.” (See, <https://www.osha.gov/law-regs.html>.) With respect to PEOSH, the New Jersey Legislature states “that it is the policy of this State to ensure that all public employees be provided with safe and healthful work environments free from recognized hazards.” (N.J.S.A. 34:6A-26.) PEOSH is administered by the New Jersey Department of Health for health regulations in the workplace and the New Jersey Department of Labor and Workforce Development for safety regulations in the workplace. (See, http://nj.gov/health/peosh/index_readmore.shtml.)

Here, the RFP requirement to comply with OSHA and PEOSH is a requirement of the contractor. Accordingly, bidders were not required to submit documentation or to provide any response in its proposal regarding OSHA and PEOSH compliance, and accordingly, there was nothing to be evaluated, with respect to OSHA and PEOSH compliance, in each bidder’s proposal. During the performance of the contract, compliance with OSHA and PEOSH will be monitored by the State Contract Manager as well as the applicable government agency. Accordingly, no further evaluation of Advanced’s proposal, with respect to OSHA and PEOSH compliance is necessary.

Additional Factors

In its protest letter, Remington raises additional factors that it believes the Division should consider prior to awarding any contracts for this RFP. First, Remington questions whether Advanced has the financial capability to complete the SOW required for the multiple locations which the Bureau proposes to award to Advanced pursuant to the RFP. In connection with its evaluation of the proposal submitted, the Bureau requested that bidders provide financial statements demonstrating that the bidder has the financial capacity and capability to undertake and successfully complete the contract. (RFP § 4.4.4 *Financial Capability of the Bidder*.) After reviewing the documents provided by each of the bidders, the Division’s financial analyst concluded that each of the three responsive and responsible bidders had the financial capability and capacity to perform the contract requirements.

Second, Remington states that it can offer many additional services to the State. With respect to the additional services identified in the protest, these services were not requested in the RFP and therefore could not be considered in the evaluation of the proposal submitted.

Third, Remington implies that it would be in the best interest of the State to obtain the following information from each bidder for review:

⁴ While not specifically included in Remington’s protest, the RFP has similar requirements with respect to PEOSH.

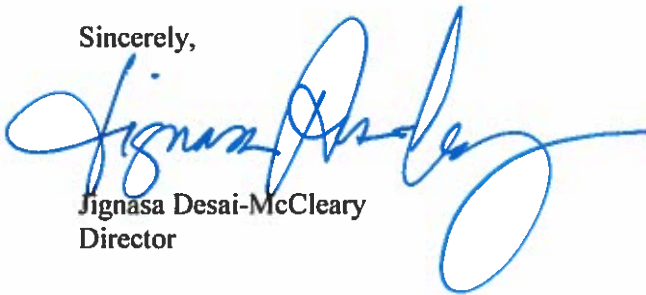
1. Minimum staffing level for each site
2. Proposed Operator of Record and Backup Operator for each site (this can be cross referenced with NJDEP to ensure compliance)
3. Financial data showing the company has sufficient capital to service new sales
4. Adequate liability insurance coverage
5. NJDEP approval on the DEP 065 form to properly operate these facilities with the appropriate staff

The agency's subject matter experts did not deem these items necessary for proposal review. Consequently, none of these items were requirements of the RFP; and therefore, the Bureau cannot now, after the solicitation has been advertised and proposals have been submitted, require that bidders provide this supplemental information for consideration in the contract award.

In light of the findings set forth above, the Bureau's NOI is sustained. This is my final agency decision with respect to the protest submitted by Remington.

Thank you for your company's interest in doing business with the State of New Jersey. I invite you to register your company with **NJSTART** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JDM: RUD

c: P. Michaels
L. Spildener