



## State of New Jersey

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July 22, 2016

Via Electronic Mail [tomdion@wildcopes.com] and USPS Regular Mail

Tom Dion, Executive Vice President  
Petroleum Equipment Service of New Hampshire  
30 Murray Hill Parkway-Suite 100  
East Rutherford, NJ 07073

RE: Protest of Notice of Award  
RFP #15-X-22978 Aboveground Storage Tanks: Installation, Removal, Repair and Related Equipment

Dear Mr. Dion:

This correspondence is in response to your letter of protest on behalf of Petroleum Equipment Service of New Hampshire (PES), received April 24, 2015, referencing the subject Request for Proposal (RFP) and regarding the Notice of Intent to Award issued by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division). In your letter, you 1) protest the slated award to John W. Kennedy Company, 2) note that the Bureau failed to incorporate PES's "BAFO" pricing into the award recommendation, 3) question the rejection of an alternate brand on price line 00004, and 4) contend the answers provided by the Bureau in response to the public Question and Answer period were overly vague. Based on the foregoing, you request the intended award be rescinded and the contract be resolicited.

I have reviewed the record of this procurement, including the RFP, PES's proposal, and relevant statutes, regulations, and case law. 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 PES's protest.

On December 2, 2014, the Bureau publicly released and advertised the subject RFP to solicit proposals for Aboveground Storage Tanks: Installation, Repair, Removal, and Accessory Equipment on behalf of the New Jersey Department of Transportation (DOT) and Statewide Using Agencies. The RFP included three categories of work, as set forth in RFP Section 3.0 *Commodity Description/Scope of Work*; bidders were not required to bid on all three categories. Category I is "for the supply of various brands and sizes of aboveground diesel and gasoline storage tanks complete with outer shell tanks and all inclusive related accessories[;]" Category II is "for Fuel Storage Tank related equipment (i.e. fuel dispensers, pumps, filtration and monitoring systems, etc.)[;]" and Category III is "for the installation, removal and repairs of aboveground storage tanks described in this RFP." The RFP intended to make an award to one responsible, responsive bidder for each approved brand or equal in Category I and II. Concerning Category III, the RFP specified an award be made to all responsible, responsive bidders conforming to the RFP, price and other factors considered. (See RFP Section 7.2 *Final Contract Award*.)

The Bureau received 18 proposals by the deadline of February 10, 2015. A number of proposals were automatically rejected for failure to provide mandatory documents, signatures, or pricing information. Upon completing a review of the remaining proposals, the Bureau made the following award recommendation:

**Category I – Lines 00001- 00004**

E.O. Habhegger Company

Note: NO Award – Line Item 00004. There were 3 proposals received and all 3 were for a Cylindrical Highland tank. This is not an Alternate “Brand” as Highland Tanks is covered under Line Item 00003.

**Category II – Lines 00005 – 00014 & 00034**

E.O. Habhegger Company (00005, 00009, 00010, 00011, 00014)

Fairfield Maintenance (00006)

John W. Kennedy Company (00008)

Petroleum Equipment of New Hampshire (00012, 00013)

NOTE: NO Award – Line 00007. There was 1 proposal received and it was for a Dresser Wayne Dispenser. This is not an Alternate “Brand” as Dresser Wayne Dispensers is covered under Line Item 00006.

**Category III – Lines 00015 – 00032 \*South Region Only**

RJ Walsh

A & J Construction

Whitemarsh Corporation

Independence Constructors

E.O. Habhegger

Fairfield Maintenance

TTI Environmental

Petro Mechanics

Aurora Environmental

C3 Technologies

John W. Kennedy Company

Spark Electric\*

The Bureau issued a formal Notice of Intent to Award Letter to all bidders on April 10, 2015. This protest followed.

PES first argues that the John W. Kennedy Company does not possess a valid Public Works Contractor Registration and therefore is not eligible for award of contract. RFP Section 4.4.1.7 *Public Works Contractor Registration* specified the following:

**4.4.1.7 PUBLIC WORKS CONTRACTOR REGISTRATION**

At the time of the proposal due date, the bidder and the subcontractors must be registered in accordance with the “The Public Works Contractor Registration Act (PWCRA) N.J.S.A. 34:11-56.48 et seq.) This registration is required for the various trade categories required to perform work as listed herein.

Questions regarding Public Works Contractor Registration, Department of Labor and Workforce Development registration should be addressed to:

Contractor Registration

New Jersey Department of Labor and Workforce Development

Division of Wage and Hour Compliance

PO Box 369 Trenton, NJ 08625-0389

Tel. 609-292-9464

Fax: 609-633-8591

For additional information the following web site should be checked:

[http://lwd.dol.state.nj.us/labor/wagehour/regperm/pw\\_cont\\_reg.html](http://lwd.dol.state.nj.us/labor/wagehour/regperm/pw_cont_reg.html)

**NOTE: All bidders, their named dealers and subcontractors must provide proof of registration with Public Works ON THE DATE OF PROPOSAL OPENING.**

RFP Section 6.6 *Evaluation Criteria* specified a Public Works Certification was necessary for Category III awards:

#### **6.6 EVALUATION CRITERIA**

The following criteria will be used to evaluate all proposals that meet the requirements of this RFP. The criteria are not necessarily listed in order of importance:

- a) Price: For **Categories I and II**, price will be evaluated by the lowest cost per brand line bid, based on the discounts provided for retail or distributor price list bid, in accordance with Section 4.4.7 of this RFP. A price list date and type must be on the list cover page. (example: January 1, 2013 / Type: retail, distributor price list)  
For **Category III**, bidders will be evaluated on submittals and qualification requirements in Section 4.4.3, Public Works Certification;
- b) Experience of the bidder; and
- c) The bidder's past performance under similar contracts, including if applicable, the Division's vendor performance database.

The Public Works Contractor Registration Act, N.J.S.A. 34:11-56.48 to -56.57, specifies that a contractor may not bid on a contract for "public work," as defined in N.J.S.A. 34:11-56.26, unless the contractor is properly registered in accordance with the act. N.J.S.A. 34:11-56.51. "Public work" is defined 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. Because Category I and Category II of the RFP pertained to supplying storage tanks and related equipment, a Public Works Registration was not required for these line items. However, such a registration was required for Category III, *Installation and Tank Removal Services*.

The record reveals that John W. Kennedy Company was not Public Works registered at the time of proposal opening. In a letter to the Bureau dated April 23, 2015, the branch manager confirmed John W. Kennedy Company was not Public Works registered and requested to rescind its Category III proposed pricing. As the actual entity that would perform the service set forth in the RFP, John W. Kennedy Company was required to be Public Works registered at the time of proposal opening. Since John W. Kennedy Company acknowledges it was not so registered, I find that the intended award of Category III to John W. Kennedy Company must be rescinded.<sup>1</sup>

In its second point of protest, PES argues it was error for the Bureau not to include PES's Best and Final Offer (BAFO) pricing in the *Recommendation Report* for various price lines in all three categories. The *Recommendation Report* notes that bidders were requested to provide a BAFO by March 18, 2015, yet only Ted Slack Environmental submitted a BAFO with lowered pricing.

The record reveals that PES did submit a timely BAFO through email on March 18, 2015, at 10:23 a.m. The *Recommendation Report* did not make note of this submission. While this omission was an error on the part of the Bureau, in an email correspondence from a representative of PES to the Bureau on April 15, 2105, PES concedes its BAFO "did not impact the final results[.]" Indeed, PES's BAFO pricing was not lower in cost than the pricing submitted by the intended awardees and therefore did not impact the scoring process.

Next, PES argues that regarding the Category I award, the State erred by not taking advantage of its pricing offered on Price Line 00004 for an "alternative brand." PES contends that "multiple authorized distributors offered pricing on cylindrical fireguards in the alternative line item section" and such tanks are "substantially less expensive their rectangular counterparts." PES requests the State review the tank

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<sup>1</sup> John W. Kennedy Company's intended award on Price Line 00008 is sustained, however, as Public Works Contractor registration was not a requirement for Category II.

specifications and consider a less restrictive version of the RFP, which would provide for acceptance of an alternate shape of the Highland brand tank on Price Line 00004.

RFP Section 3.1.1.1.2 *Approved Brands*, provided the specifications for the three approved brands of aboveground fuel storage tanks: Convault, Containment Solutions/Hoover Vault Tank, and Highland.

**3.1.1.1.2 APPROVED BRANDS**

The contractor shall be capable of providing, Convault, Containment Solutions/Hoover Vault Tank, and Highland, or Approved Equal brands. Approved equals must meet specifications set forth in this RFP for approved brands.

Capacity:	500 gal.	1000 gal.	2000 gal.	4000 gal.	6000 gal.	12000 gal.
<b>Rectangular tank</b>						
<b>Dimensions:</b>						
<b>Width</b>	4'-6" W	5'-8" W	8'-0" W	8'-0" W	8'-0" W	11'- 4" W
<b>Length</b>	11'-0" L	11'-0" L	12'-0" L	18'-8" L	21'-1" L	36'-8" L
<b>Height</b>	4'-7" H	4'-8" H	5'-7" H	7'-0" H	8'-10" H	8'-9 ¼" H
<b>Tolerance +/- ¼"</b>						

- **Rating:** UL 2085 2 hr. fire rated double wall for all sizes. Fire rating extended to include all legs and supports.
- **Warranty:** 30 year warranty for all size tanks. 30 year warranty for outer coating of tanks. (See Section 3.8 "Warranty")
- **Shape:** All sizes of tanks are listed as rectangular shapes. As an alternate to rectangular shaped tanks, cylindrical shaped tanks with similar length and capacity will be considered and reviewed for acceptance by the State.
- **Construction:** Double wall tank w/steel primary tank, monolithic concrete pour.

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As noted in the RFP and above: "As an alternate to rectangular shaped tanks, cylindrical shaped tanks with similar length and capacity will be considered and reviewed for acceptance by the State." Therefore, cylindrical tanks were considered as an alternative to rectangular tanks within the same brand (i.e., an alternate tank rather than an alternative brand), provided they offered the same storage capacity. On Price Line 00003, Commodity Code 830-69-033625, bidders were instructed to provide a percentage discount for the Highland brand tank. On Price Line 00004, Commodity Code 830-69-044396, a bidder could provide a percentage discount on an alternate brand to the Highland brand tank. In Part I of Addendum #2, *Answers to Questions*, dated January 16, 2015, the Bureau clarified: "An alternate brand is one that is in addition to the brands listed and that meets all of the requirements of the RFP. A 'no bid' should be entered on Line 00004 (page 1), 00007 (page 2), 00009 (page 3) and 00011 (page 3) if the bidder intends not to offer an 'alternate brand.'"

The record reveals that the intended awardee in Category I, E.O. Habhegger Company, offered a 29% discount on Price Line 00003 for Highland brand tanks and entered "no bid" on Price Line 00004. Price Line 00003 reflected the discount offered on all six sizes of Highland tanks. PES offered a BAFO pricing of a 25% discount on Price Line 00003 for rectangular Highland tanks and a 25% discount on Price Line 00004 for "Highland Tank- cylind[rical]". The Bureau and DOT determined that Highland cylindrical tanks did not constitute an "alternate brand" to Price Line 00003 for Highland brand tanks, but rather was an alternate tank. Therefore, E.O. Habhegger offered the greatest discount for the Highland tank brand and is the intended Price Line 00003 awardee. Based on the foregoing, I uphold this award.

Finally, PES contends that there should have been a second public Question and Answer period to seek clarification on the Bureau's answers that were "wide open for interpretation" to ensure that the State does not

receive products or services outside the awarded price lines. Specifically, PES points to the Bureau-supplied answers in response to question numbers 1, 4, and 21 in Addendum #2.

The RFP provided a specified Question and Answer period, during which time the Bureau accepted electronically submitted questions and inquiries from all potential bidders. This Question and Answer period closed on December 23, 2014, and the Bureau issued Addendum #2 containing the answers to the proposed question on January 16, 2015. Prior to issuing the answers, the Bureau extended the proposal submission deadline. I find the Bureau followed all assigned protocol for accepting questions and was not obligated to post an additional Question and Answer period.

PES contends the answers provided in response to the following questions were “not complete enough to make this a fair and equal bid”:

#	Page #	RFP Section Reference	Question	Answer
1	11	2.2	How does the contractor bill for a broken or damaged item – not covered under state contract? For example, a plumbing or electrical fitting, wire cable, etc.	For the replacement of broken or damaged items not specifically covered by a Line Item in this RFP, the Price List supplied in accordance with Section 4.4.7 shall also contain all auxiliary material and equipment that may be used. Discounts will not be applied to these items and payment will be made based on the actual price of the items as listed in the Price List supplied, payment will be made based on the amount paid as indicated on the supplier’s invoice that is provided.
4	12	3.1	Third paragraph states that the bidder shall include a “submersible pump” preinstalled. This equipment is a requirement of “Category II” specifications 3.2.2.1 (page 15).  Please clarify if the submersible pump is to be supplied by the Category I contractor or will the Category II contractor have to supply them with the submersible pump equipment as described within 3.2.2.1 (page 15)?	The submersible pump is to be supplied by the Category I contractor if a new fuel storage tank is being installed. The submersible pump described in Category II is to be supplied if ordered separately, i.e. being replaced on an existing fuel storage tank.
21	20	3.9.1	Of the same section, will there be line items for labor and equipment not specified in the State Contract Line Items? Specifically items necessary for the installation and removal of storage tanks, for example, schedule 40 black iron piping, fiberglass piping, underground and aboveground containment sumps, surface manholes and covers, pipe fittings, valves, anti-siphon valves, unions, emergency breakaways and shear valves, bollards. Construction materials such as asphalt and concrete for restoration and equipment needed for these tasks, stone, certified clean backfill?	Specialized rental equipment is described in Section 3.3.3.8 of the RFP. “Parts and Accessories” for the Price Lines being bid are defined in Section 4.4.3 of the RFP.

In response to Question #1, PES contends the answer did not “clarify the exact requirement to make all fair and equal to all bidders.” The answer provided for Question #1 advised bidders that “the Price List supplied

in accordance with Section 4.4.7 shall also contain all auxiliary material and equipment that may be used.” Because these price lists were categorized by brand, the Bureau answer specified that “[d]iscounts will not be applied to these items,” and the Bureau received 15 responsive proposals, I find that the answer was sufficiently clear.

In response to Question #4, PES contends that there were no specifications on the type of submersible pump other than those mentioned in RFP Section 3.1.1.2, and that because there are many different types of submersible pumps, it could have “influenced the final discount” offered at time of proposal submission. However, the answer to Question #4 clearly pointed all bidders to RFP Section 3.2.2.1, *Red Jacket Models or Approved Equal*, which provided the specifications necessary for a submersible pump. I note the Bureau received five responsive proposals for price lines in Category I, four responsive proposals for Category II Price Line 00008 Red Jacket Model submersible pump, and three responsive proposals for Category II Price Line 00009 alternate brand submersible pump. I find that the specification for submersible pump was sufficiently clear.

Finally, in response to Question #21, PES contends the answer provided is “extremely ambiguous” and is “wide open for interpretation.” However, RFP sections noted by the Bureau in its answer stated:

**3.3.3.8** Specialized rental equipment may be required for a project. The State contract Manager must approve the need for specialized rental equipment prior to rental. The contractor **MUST** document the personnel and hours of use and the type of equipment utilized on the invoice. The contractor will not be paid for just having the equipment available on his truck at the site.

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#### **4.4.3 SUBMITTALS**

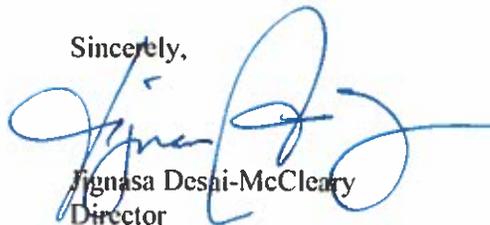
For all brands and alternate brands of Categories I and II, bidders are to provide price lists for those commodities being bid, including all parts and accessories.

I find that these RFP sections sufficiently address the topics in Question 21 to provide the necessary guidance to bidders. Also, the record indicates that the Division received 18 responsive proposals, of which 15 were evaluated for award of contract.

Based on the foregoing, John W. Kennedy Company’s award in Category III is rescinded. The Bureau is instructed to continue with award of contract as applicable. This is my final agency decision.

Thank you for your continued interest in doing business with the State of New Jersey. I invite to you to take this opportunity to register your business with NJSTART at [www.njstart.gov](http://www.njstart.gov), the State of New Jersey’s new eProcurement system.

Sincerely,



Jignasa Desai-McCleary  
Director

JD-M:DF

c: G. Olivera  
K. Woolford  
R. Regan

*Petroleum Equipment Service of New Hampshire*

*RE: Protest of Notice of Award*

*RFP #15-X-22978 Aboveground Storage Tanks: Installation, Removal, Repair and Related Equipment*

Additionally c:

Peter Hojnowski, E.O. Habegger Company, Inc.  
John Conaty, John W. Kennedy Company Inc.