



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR

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June 24, 2016

Via Email [chezell@buterwc.com] and USPS Regular Mail

Chad Hetzell, President
Butler Water Corrections
764 Ramsey Avenue
Hillside, NJ 07205

RE: Protest of RFP # 17-X-24262
Water Treatment & Maintenance Services (Heating & Cooling) - Statewide

Dear Mr. Hetzell:

This correspondence is in response to your email of May 19, 2016, and letter dated May 25, 2016, to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of Butler Water Corrections (Butler). In both correspondences, Butler protests the bidding process for the above referenced solicitation and requests an opportunity to participate in the bidding process.

I have reviewed the record of this procurement, including Butler's protest, the RFP 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 Butler's protest.

The subject Request for Proposal (RFP) was issued by the Division's Procurement Bureau (Bureau) on behalf of State agencies to solicit proposals for water treatment and maintenance services for the State's water treatment programs, including heating and cooling systems, at various locations throughout the State. The types of heating and cooling systems to be serviced under this contract include, but are not limited to, boiler systems, cooling towers, open and closed loop systems, recirculating hot and cold systems, and steam generating systems. RFP § 1.1 *Purpose and Intent*. The intent of the RFP is to award contracts to those responsible bidders whose proposals, conforming to the RFP are most advantageous to the State, price and other factors considered. Ibid.

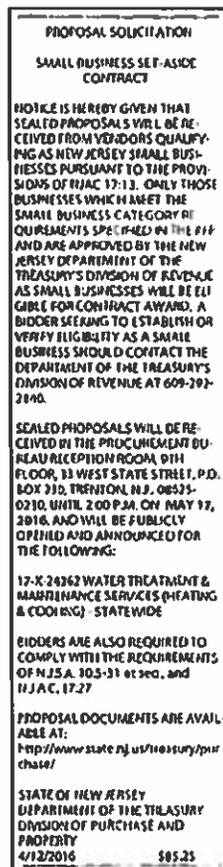
At the onset, I note that the Division's public procurement program reflects the New Jersey statutory and regulatory requirements that have been affirmed by New Jersey courts. A basic precept of the Division's governing statutes and regulations requires that sealed proposals be submitted by the deadline specified in the public advertisement and website notice. There is no statutory or regulatory requirement for email or other direct notice to potential bidders. The Division's regulations set forth procurement notification requirements at N.J.A.C. 17:12-2.1 Advertising as follows:

- (a) Advertising is required when the contract amount is expected to exceed the public bidding threshold or is not subject to the relevant exceptions of N.J.S.A. 52:34-6, 9, or 10. Public notice of the bidding opportunity shall be placed on the Division's website and with other

media, including newspapers, as required by law at N.J.S.A. 52:34-12 and determined by the State Treasurer to provide best notice thereof to bidders. Advertisements shall be made a minimum of seven business days in advance of the announced deadline for receipt of proposals to encourage free and open competition.

- (b) If, during the course of an advertised procurement pursuant to (a) above, it becomes necessary to alter any of the terms, conditions, or requirements of the request for proposal, such alterations shall be set forth in addenda to the RFP and shall be advertised a minimum of seven business days in advance of the announced deadline for receipt of proposals.
- (c) In addition to statutorily mandated public advertising, the Division shall also publish notices of bidding opportunities on the Division's website.

The record shows that the procurement was conducted in full accordance with the Division's governing statutes and regulations and by its standard announcement procedures and practices. Notice of the subject RFP was publicly advertised on the Division's website. Notice was also published in The Star-Ledger on April 12, 2016. N.J.A.C. 17:12-2.1(a) and (c); see figure below from the April 12, 2016 edition of The Star-Ledger.



Similarly, Addendum #1, responding to questions posed by potential bidders was advertised in The Star-Ledger and posted to the Division's website on May 5, 2016. N.J.A.C. 17:12-2.1(b).

On May 17, 2016, proposals received by the submission deadline were opened by the Proposal Review Unit. On May 19, 2016, Butler submitted its protest letter to the Division. Each of Butler's protest points is addressed below:

1. eRFP Notifications

Butler alleges that it is registered with eRFP to receive notifications of bidding opportunities for the commodity code associated with this procurement but that it never received any notification of the subject RFP.

As noted above, the Division's regulations set forth procurement notification requirements at N.J.A.C. 17:12-2.1 which state in pertinent part:

- (d) As a service to vendors interested in competing for State contracts to be awarded by the Division and to any other parties seeking information about bidding opportunities available via the Division's competitive contract procurement program, the Division provides an on-line self-registration service known as the e-RFP Notification Service. Vendors and other interested parties can register to receive direct e-mail notices pertaining to the Division's procurements for goods or services based upon specific commodity classes or codes. As this is a self-registration process, it does not create an entitlement for any party to receive notice of any particular solicitation of proposals, and the Division and the State shall not be liable for any losses, claims, or damages of any kind if a vendor or other party, for any reason, is not registered or does not receive an e-mail notice. It is the responsibility at all times for e-RFP Notification Service registrants to exercise due diligence in reviewing the notices on the Division's website to assure their awareness of State bidding opportunities announced by the Division

In keeping with N.J.A.C. 17:12-2.1(d), notice of the subject procurement was emailed by the Division's eRFP system to vendors who were registered with the eRFP Notification Service for NIGP Commodity Code-Class 968-96 (Public Works and Related Services – Water Treatment & Maintenance Services), the sole class code used for this procurement (T-0154). This commodity code was also the sole class code used for the prior procurement of T-0154 (RFP #11-X-21654) in 2011. In addition, RFP #15-X-23078 (Water Treatment Heating & AC Systems – DPMC), which sought similar services to the subject RFP for facilities managed by the Division of Property Management & Construction, also used commodity code 968-96.

The responsibility of registration and the selection of commodity codes necessarily rest solely with the potential bidder who will only receive an eRFP notification system email for those commodity codes for which it is registered. In connection with this protest, the Procurement Bureau contacted the Division of Enterprise and Revenue Service's (DORES) eSupport Unit to check whether or not Butler had registered for eRFP notification for NIGP Commodity Code 968-96. DORES confirmed that the eRFP notification system generated and delivered messages regarding the subject RFP and provided the Procurement Bureau with a list of 736 email addresses that were sent eRFP notification for the commodity code associated with RFP #17-X-24262. DORES confirmed that although Butler is registered for eight (8) commodity codes, it is not registered for commodity code 968-96.

Although Butler requests that it be permitted to participate in the procurement process, the administrative regulations that govern the Division's advertised procurement process establish certain requirements that must be met in order for a proposal to be accepted. The Division's governing regulations provide in relevant part: "[i]n order to be eligible for consideration for award of contract, the

bidder's proposal shall ... [b]e submitted on or before the due date and time and at the place specified in the RFP." N.J.A.C. 17:12-2.2(a). If the requirements of N.J.A.C. 17:12-2.2 are not met, a proposal must be rejected. These regulations are stringently enforced to maintain the equal footing of all bidders and to ensure the integrity of the State's bidding process.

In addition, the subject RFP provided:

1.3.2 SUBMISSION OF PROPOSAL

In order to be considered for award, the proposal must be received by the Procurement Bureau of the Division of Purchase and Property at the appropriate location by the required time. **ANY PROPOSAL NOT RECEIVED ON TIME AT THE LOCATION INDICATED BELOW WILL BE REJECTED. THE DATE AND TIME ARE INDICATED ON THE COVER SHEET. THE LOCATION IS AS FOLLOWS:**

PROPOSAL RECEIVING ROOM - 9TH FLOOR
PROCUREMENT BUREAU
DIVISION OF PURCHASE AND PROPERTY
DEPARTMENT OF THE TREASURY
33 WEST STATE STREET, P.O. BOX 230
TRENTON, NJ 08625-0230

[(Emphasis in original.)]

Moreover, the RFP provided:

4.2 PROPOSAL DELIVERY AND IDENTIFICATION

In order to be considered, a proposal shall arrive at the Division in accordance with the instructions on the RFP signatory page accompanying this RFP. Bidders are cautioned to allow adequate delivery time to ensure timely delivery of proposals. State regulation mandates that late proposals are ineligible for consideration. **THE EXTERIOR OF ALL PROPOSAL PACKAGES ARE TO BE LABELED WITH THE PROPOSAL IDENTIFICATION NUMBER AND THE FINAL PROPOSAL SUBMISSION DATE OR RISK NOT BEING RECEIVED IN TIME.**

[(Emphasis in original.)]

Further, within the segment of the subject RFP's signatory page that lists base requirements applicable to all advertised competitive procurements, the requirement for timely submission of proposals is set forth as follows:

PURSUANT TO N.J. STATUTES, REGULATIONS AND EXECUTIVE ORDERS, PROPOSALS WHICH FAIL TO CONFORM WITH THE FOLLOWING REQUIREMENTS WILL BE SUBJECT TO REJECTIONS:

1. PROPOSALS MUST BE RECEIVED AT OR BEFORE THE PUBLIC OPENING TIME OF 2:00 PM EASTERN TIME ON May 17, 2016

Thus, the requirements for timely submission of a signed and sealed proposal, as mandated by the administrative rules that govern the Division's procurements, were included in the provisions of the RFP. Here, although a Notice of Intent to Award has not yet been issued, the proposal submission deadline was 2:00 p.m. on May 17, 2016. As a result, Butler's request to submit a proposal for the subject contract request must be denied.

2. RFP Links

Butler states that it incurred issues with links within the RFP; specifically, that the links were not valid which required it to search elsewhere for information.

In connection with this protest, the Bureau and the Hearing Unit on June 6, 2016 and June 13, 2016 respectively checked all of the links within the subject solicitation. All of the links were fully functioning, except for <http://www.state.nj.us/treasury/purchase/bid/summary/17x24262.shtml>, found in Section 4.1 of the RFP. As is normal in all of the Division's solicitations, this link expired subsequent to the proposal opening date. Prior to the proposal opening date, the link was fully functioning. In addition, the Bureau notes that no issues regarding links contained in the RFP were raised by other potential bidders during the Q&A period or prior to or on the proposal opening date.

3. Proposal Checklist and Forms

Butler states that the Proposal Checklist contained different requirements for the submission of forms than required by the eBid system. Specifically, Butler notes the State Standard Terms and Conditions were not required by the Proposal Checklist, but were required to be uploaded for an eBid submission. Butler alleges that this discrepancy caused confusion and delayed its attempt to submit a timely proposal.

First, the Proposal Checklist contains two sections: (1) forms that must be submitted with your proposal; and (2) forms that are due before contract award. As stated on the form, the Proposal Checklist "was created as a guide to assist bidders in preparing a complete and responsive proposal. It is only advisory in nature. It is the bidder's responsibility to ensure that all requirements of the RFP have been met."

In order to successfully submit a proposal through eBid, a bidder must upload a document into the lockbox under the slot for the State Standard Terms and Conditions. If a bidder failed to upload a document into this slot, the "SUBMIT" button in eBid would not become active and the bidder would not be able to submit the proposal.

As noted above, the Division's governing regulations provide in relevant part that "in order to be eligible for consideration for award of contract, the bidder's proposal shall ... [b]e submitted on or before the due date and time and at the place specified in the RFP." N.J.A.C. 17:12-2.2(a). If the requirements of N.J.A.C. 17:12-2.2 are not met a proposal must be rejected. These regulations are stringently enforced to maintain the equal footing of all bidders and to ensure the integrity of the State's bidding process. With the above principals in mind, bidders are cautioned to allow adequate time to ensure that the proposal is properly submitted. RFP § 1.3.3 *Electronic Bidding (EBID)*, RFP § 4.2 *Proposal Delivery and Identification*.

4. Proposal Price Sheets

Butler alleges that the price sheet included with the solicitation was in error, as it included price lines for labor only. Butler states that the RFP is for chemicals and labor and that while various facilities were listed in the RFP, the price sheet did not include specific lines for those various locations to be serviced or price lines for chemicals.

Butler appears to misunderstand this most recent procurement. This solicitation was designed to allow the using agencies to conduct mini-bids due to the large number of participating facilities (68), and the specialized water treatment needs of each facility's heating and cooling system. Each facility requires a thorough site visit in order to determine the maintenance and treatment program required to maximize the efficiency and lifespan of the facility's system. In addition, the mini-bid process permits the addition and removal of participating facilities as needed by the State throughout the term of the contract. As stated in RFP § 1.1 *Purpose and Intent*:

For the purposes of this contract, the State has been divided into the following three (3) regions: North, Central, and South. The State intends to award at least one (1) responsive and responsible bidder per region. The facility heating and cooling system water treatment and maintenance programs will be selected based on a mini-bid process, including a site visit, conducted by each Using Agency for each participating facility.

[Emphasis added.]

Further, RFP § 3.1 *Monthly Water Treatment and Maintenance Program* provided details regarding the mini-bid process and how the individual using agencies will award contracts for the individual facility water treatment programs:

The Using Agency will contact the awarded Contractors of the geographic region in which the facility is located in order to schedule a site visit and to solicit an all-inclusive monthly cost quote for the complete water treatment and maintenance program of the facility's heating and cooling system.

The Contractor shall provide all services, labor and materials necessary to properly treat the heating and cooling systems in order to maximize the efficiency and life of the equipment. Materials include, but are not limited to, all treatment chemicals, test equipment, reagents, and chemical feed and control equipment necessary to implement and maintain the water treatment and maintenance program. The service and materials requirements will be established based on the specific needs of the facility and of the heating and cooling system equipment. The quote provided by the Contractor to the Using Agency shall be all-inclusive of all costs necessary to provide the heating and cooling system complete water treatment and maintenance program.

The Using Agency will select the awarded Contractor offering the most advantageous monthly quote, price and other factors considered, for the facility specific heating and cooling system complete water treatment and maintenance program.

To be eligible for a contract award, a bidder must have submitted a proposal for all price lines within a region; specifically for (1) All-Inclusive Hourly Labor Rate – Regular Hours; (2) All-Inclusive Hourly Labor Rate – Overtime; (3) All-Inclusive Hourly Labor Rate – Premium Time; and, (4) Supplier Invoice Markup % Reimbursable Services. RFP § 4.4.5 *Price Schedule/Sheet*. After the contract award, each using agency will conduct a mini-bid with the contract vendors in accordance with RFP § 3.1 *Monthly Water Treatment and Maintenance Program*.

With respect to the chemicals to be used in performing the work required, as noted above, the “all-inclusive monthly cost quote for the complete water treatment and maintenance program of the facility’s heating and cooling system” includes “all treatment chemicals, test equipment, reagents, and chemical feed and control equipment necessary to implement and maintain the water treatment and maintenance program.” RFP § 3.1 *Monthly Water Treatment and Maintenance Program*. (Emphasis added.)

Here, the proposal price sheet was correct. The price sheet requested that bidders supply all-inclusive hourly labor rates for performing water treatment and maintenance program services; and the percentage mark-up for reimbursable services (RFP § 3.3). With that information, using agencies will conduct mini-bids based upon their individual needs. Accordingly, the proposal price sheet was appropriate.

5. Proposal submission closing

Butler maintains that despite “flaws” in the procurement, it decided that it would still submit a proposal. In its protest, Butler states “that at exactly 2pm your time...the bid shut down as we were uploading.” Butler claims that according to its own clock, there were still 5 minutes left for it to submit its proposal.

The Division’s eBid system is synced to the Division’s network computerized timekeeping system. The eBid system closed for proposal submission at 2:01 P.M. As noted above, the Division’s administrative regulations require that “in order to be eligible for consideration for award of contract, the bidder’s proposal shall ... [b]e submitted on or before the due date and time and at the place specified in the RFP.” N.J.A.C. 17:12-2.2. It is the bidder’s responsibility to allow sufficient time to complete the bidding process.

As a result, despite Butler’s intent to submit a proposal for the subject contract in advance of the proposal deadline, under the provisions set forth above, the Division cannot accept a proposal from Butler after the proposal submission deadline has passed. It would not be in the State’s best interest to allow a bidder who did not appropriately submit its proposal, as required by the RFP, to be eligible to participate in the procurement process. Such acceptance would un-level the bidders playing field as the State received responsive proposals from other bidders in accordance with the proposal submission deadline.

6. Contract Extension

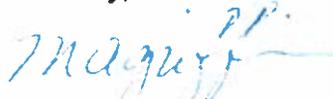
In the protest, Butler states that it is “disturbed” that the contract for Water Treatment & Maintenance Services - Heating & Cooling (T-0154) has not gone out to bid in many years. The current state contract for Water Treatment & Maintenance Services (T-0154) had an original term of three (3) years, commencing on August 1, 2011. As permitted by RFP § 5.2 *Contract Term and Extension Option*, the contract was extended for two (2) additional one-year periods, and is currently scheduled to expire on July 31, 2016.¹ A three (3) year term with two (2) one-year extensions, is consistent with the Division’s standards.

Based upon the foregoing, I must deny Butler’s request to participate in this procurement. While this is unfortunate for both Butler and the State, the Division appreciates your continued interest in doing business with the State of New Jersey. This is my final agency decision.

¹ RFP § 5.3 *Contract Transition*, also permits a transitional extension of 90 days.

Thank you for your continued interest in doing business with the State of New Jersey. I invite you to take this opportunity to register your business with [NJSTART](http://www.njstart.gov) at www.njstart.gov, the State of New Jersey's new eProcurement system, which went live on June 20, 2016. In registering your business, you should ensure that you review and select all commodity codes that you deem applicable to your business.

Sincerely,



Maurice A. Griffin
Chief Hearing Officer

MAG: RUD

c: G. Olivera
K. Woolford
R. Regan