



State of New Jersey

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

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Acting Director

February 2, 2024

Via Electronic Mail only SamTa@infassociates.com

Sam Ta
Vice President, Bids, Grants & Incentive Management
INF Associates LLC
747 3rd Avenue, 10th Floor, Suite #1001,
New York, NY 10017

Re: I/M/O Bid Solicitation #22DPP00769 – INF Associates LLC
Protest of Procurement Evaluation Process
T3138 Electric Vehicle Service Equipment - Statewide

Dear Mr. Ta:

This final agency to your protest of January 16, 2023, on behalf of INF Associates LLC (INF) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that email, INF protests the Division's Procurement Bureau (Bureau) Notice of Intent to Award letter (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #22DPP00769 – T3138 Electric Vehicle Service Equipment – Statewide (Bid Solicitation). Specifically, INF protests what it alleges are inconsistencies in the recommendation report alleging that the evaluation pertaining to another bidder, Livingston Energy Group LLC (Livingston) lacks verifiable evidence of a New Jersey Public Works Certificate at the time of RFI submission. INF further alleges that its request to engage MacFhionneghaile & Sons Electric as a subcontractor was denied, despite the fact that INF claims that this request was in line with New Jersey Public Works Certification requirements. By way of remedy, INF requests a detailed and transparent explanation of these decisions.

By way of background, on January 29, 2023, the Bureau issued the Bid Solicitation on behalf of the New Jersey Department of Environmental Protection. Bid Solicitation Sec. 1.1, *Purpose and Intent*. The purpose of the Bid Solicitation was to solicit Quotes to provide equipment, installation, maintenance, and software for Electric Vehicle Service Equipment (EVSE) for various State, local and county government agencies at various locations throughout the State. *Ibid*. It was the intent of the State to award Contracts to those responsible Bidder(s) whose Quotes, conforming to this Bid Solicitation are most advantageous to the State of New Jersey (State), price and other factors considered. *Ibid*.

In accordance with the Bid Solicitation instructions, potential Bidders were permitted to submit questions to the Bureau, through the Division's NJSTART eProcurement system, by 2:00 pm eastern time

on March 23, 2023. Bid Solicitation Section 2.1, *Electronic Question and Answer Period*. Through the posting of Bid Amendment #3 on May 23, 2023, the Bureau answered all questions received.

On June 23, 2023, the Division's Proposal Review Unit opened fifteen (15) Quotes that were received by the submission deadline of 2:00 P.M. Eastern Standard Time. After conducting an administrative review, 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 8.9, *Evaluation Criteria*.

After completing the evaluation of the Quotes received on June 23, 2023, the Bureau prepared a Recommendation Report which indicated that the Quote submitted by INF was deemed to be non-responsive for failing to meet the requirements of Bid Solicitation Section 3.11, *Public Works Contractor Registration*. The Recommendation Report notes that INF was not listed in the Registered Public Works Contractors, which was verified by the New Jersey Department of Labor. Furthermore, the Recommendation Report stated that INF's named subcontractor, MacFhionneghaile & Sons Electric, was listed in the Registered Public Works Contractors by the deadline.

On January 11, 2023, the Bureau issued the Notice of Intent (NOI) advising that Livingston Energy Group LLC and JF Acquisition LLC would be awarded part of each Price Line, alongside JF Acquisition LLC d/b/a JF Petroleum Group and Timothy P. Bryan Electric Co.

In response to the NOI, INF sent an email to the Division's Hearing Unit on January 16, 2024, protesting the alleged inconsistencies in the bidding process, such as alleging that the evaluation of Livingston lacked verifiable evidence of a New Jersey Public Works Certificate at the time of RFI submission, and that INF's request to engage MacFhionneghaile & Sons Electric as a subcontractor was denied in spite of this request being in line with New Jersey Public Works Certification requirements.

In consideration of INF's protest, I have reviewed the record of this procurement, including the Bid Solicitation and electronic Q&A, INF'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.

Section 3.11 of the Revised Bid Solicitation, *Public Works Registration*, states that "At the time of the Quote due date, the 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." Emphasis added. This language was developed to be consistent with the two mandatory requirements regarding bidders and subcontractors established in N.J.S.A. 34:11-56.51, which reads:

No contractor shall bid on any contract for public work as defined in section 2 of P.L.1963, c.150 (C.34:11-56.26), or for which payment of the prevailing wage is required by any other provision of law, unless the contractor is registered pursuant to this act. **No contractor shall list a subcontractor in a bid proposal for the contract unless the subcontractor is registered pursuant to P.L.1999, c.238 (C.34:11-56.48 et seq.) at the time the bid is made.** No contractor or subcontractor, including a subcontractor not listed in the bid proposal, shall engage in the performance of any public work subject to the contract, unless the contractor or subcontractor is registered pursuant to that act.

[N.J.S.A. 34:11-56.51 (emphasis added).]

As used in the Bid Solicitation, the term “must” denotes a mandatory requirement as further set forth in the Bid Solicitation’s glossary:

Must – Denotes that which is a mandatory requirement.

[Bid Solicitation Section 9, *GLOSSARY*]

The term “shall” also denotes that which is a mandatory requirement as further set forth in the Bid Solicitation’s glossary:

Shall – Denotes that which is a mandatory requirement.

[Bid Solicitation Section 9, *GLOSSARY*]

As noted on page 37 of the Recommendation Report, INF failed to submit proof of registration in accordance with the Public Works Contractor Registration Act. Bid Solicitation Section 3.11, *Public Works Registration*, requires that Bidders and subcontractors be registered in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq. Moreover, Bid Solicitation Section 3.2, *Bidder Responsibility*, clearly states that the “Bidder assumes sole responsibility for the complete effort required in submitting a Quote in response to this Bid Solicitation.” The submission of this information after the initial Quote has been submitted would not be sufficient to satisfy the requirement of Bid Solicitation Section 3.11.

In their January 16, 2024, protest submitted by electronic mail, INF submitted a copy of the Procurement Bureau’s Recommendation Report, December 21, 2023, Bid Tabulation, and the January 11, 2024, Notice of Intent to Award letter to INF, and requested a “a detailed and transparent explanation for these decisions.” Fortunately for INF, the detailed explanation INF seeks is contained in the Recommendation Report attached to INF’s protest email. Specifically, Pages 37-39 of the Recommendation Report outline in detail the following reasons why INF was found to be non-responsive:

- References to the requirements of Bid Solicitation Section 3.11 and Section 9;
- Citations to the PWCRA statutory sections;
- The May 23, 2023, Bid Amendment fully detailing the Public Works Registration requirements for both bidders and subcontractors;
- The October 30, 2023, correspondence from INF to the Procurement Bureau that INF is “currently awaiting approval” of its Public Works Certification;

After outlining how INF specifically failed to satisfy the Bid Solicitation and PWCRA requirements, the Procurement Bureau completed its analysis by noting that INF’s listed subcontractor, MacFhionngale & Sons Electric, was registered for Public Works, but INF was still non-responsive because it was not registered as of Quote opening.

INF challenges its non-responsive determination versus that of awarded vendor Livingston Energy Group (Livingston). A review of the Recommendation Report and Livingston’s Quote shows that both Livingston and its designated subcontractor Timothy P. Bryan Electric Company, Inc. (Bryan Electric) were registered for Public Works as of time of Quote opening based on their certifications provided with Livingston’s Quote. See the following documents from pages 34 and 36 of Livingston’s Quote:

Certificate Number 738204		Registration Date: 05/31/2023 Expiration Date: 05/30/2024
<p>State of New Jersey</p> <p>Department of Labor and Workforce Development Division of Wage and Hour Compliance</p> <p>Public Works Contractor Registration Act</p> <p>Pursuant to N.J.S.A. 34:11-56.48, et seq. of the Public Works Contractor Registration Act, this certificate of registration is issued for purposes of bidding on any contract for public work or for engaging in the performance of any public work to:</p>		
<p>Livingston Energy Group</p>		
Responsible Representative(s): Jason Zarillo, President	2023	Responsible Representative(s): Schuyler Poukish, CEO
<div style="display: flex; justify-content: space-between; align-items: flex-end;"> <div style="width: 30%;">  Robert Asaro-Angelo, Commissioner Department of Labor and Workforce Development </div> <div style="width: 30%; text-align: center;"> NON TRANSFERABLE </div> <div style="width: 30%; text-align: right;"> This certificate may not be transferred or assigned and may be revoked for cause by the Commissioner of Labor and Workforce Development. </div> </div>		

Certificate Number 50900		Registration Date: 05/01/2022 Expiration Date: 04/30/2024
<p>State of New Jersey</p> <p>Department of Labor and Workforce Development Division of Wage and Hour Compliance</p> <p>Public Works Contractor Registration Act</p> <p>Pursuant to N.J.S.A. 34:11-56.48, et seq. of the Public Works Contractor Registration Act, this certificate of registration is issued for purposes of bidding on any contract for public work or for engaging in the performance of any public work to:</p>		
<p>Timothy P. Bryan Electric Co., Inc.</p>		
Responsible Representative(s): Timothy Bryan, Jr., President	2022	Responsible Representative(s): Timothy Bryan, Sr., Vice-President
<div style="display: flex; justify-content: space-between; align-items: flex-end;"> <div style="width: 30%;">  Robert Asaro-Angelo, Commissioner Department of Labor and Workforce Development </div> <div style="width: 30%; text-align: center;"> NON TRANSFERABLE </div> <div style="width: 30%; text-align: right;"> This certificate may not be transferred or assigned and may be revoked for cause by the Commissioner of Labor and Workforce Development. </div> </div>		

Additionally, the above-provided information was, and is, available on the New Jersey Department of Labor's website. The following screenshot taken by the Commodities Unit on October 20, 2023, further evidences Livingston's registration was active and valid as of the date of Quote opening:

10/20/23, 10:39 AM

Microsoft Power BI

New Jersey Public Works Registered Contractors

WAGE AND HOUR DISCLAIMER: This list of registered Public Works contractors and subcontractors is provided for informational purposes only. The New Jersey Department of Labor and Workforce Development, Wage & Hour Division and Contract Compliance makes the official Public Works Contractor Registration status determinations. For specific and current registration information status, contact Wage & Hour Division and Contract Compliance at pwcr@dol.nj.gov or 609-292-9464.

Search Business Name

livingston

Registration Date

10/21/2021 12/26/2023

Address

Search

City

Search

State

Sea

Zip Code

Search

Certificate #

Search

1

of Contractors

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Map View

Contractors with Crafts

Business Name	Reg. Date	Exp. Date	Address	City	State	Zipcode	County	Certificate #
Livingston Energy Group	05/31/2023	05/30/2024	2345 Mavon Road Ext, Suite 1	Schenectady	NY	12308	Schenectady	736204

Microsoft Power BI

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While INF indicated it was awaiting approval of its Public Works Registration, the language in Bid Solicitation Section 3.11 and N.J.S.A. 34:11-56.51 unambiguously requires the rejection of a Quote if the bidder is not registered in accordance with the Public Works Contractor Registration Act as of the date of Quote opening. By failing to be registered by the date of Quote opening, INF did not comply with a mandatory condition of the Bid Solicitation because its Quote did not satisfy a mandatory requirement of the Bid Solicitation. The instructions in Bid Solicitation Section 3.11 were unambiguous that registration was required to be awarded a contract. Even though INF may be able to now rectify their prior non-compliance with the terms of Bid Solicitation Section 3.11, INF was still non-compliant with the terms in Bid Solicitation Section 3.36. As such, INF’s Quote contained a non-waivable deviation rendering the Quote non-responsive. Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 222 (Law Div. 1974).

In light of the findings set forth above, I sustain the conclusions in the Bureau’s December 20, 2023 Recommendation Report, that the INF Quote was non-responsive for failing to be registered in accordance with the Public Works Contractor Registration Act as required by the Bid Solicitation and uphold the January 11, 2024, Notice of Intent to Award.

Thank you for your company’s continuing interest in doing business with the State of New Jersey, 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 the Division's final agency decision. Pursuant to N.J.A.C. 17:12-3.1, this determination is appealable to the Appellate Division of the Superior Court in accordance with the New Jersey Court Rules (R. 2:4-1) which provide a party 45 days to appeal this final agency decision.

Sincerely,

A handwritten signature in black ink that reads "Cory K. Kestner". The signature is written in a cursive, flowing style.

Cory K. Kestner, Esq.
Acting Chief Hearing Officer

CKK: PCV

c. K. Thomas
C. Murphy
E. Flynn