



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
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October 8, 2019

Via Electronic Mail [lbluestone@genovaburns.com] and USPS Regular Mail

Lawrence Bluestone
Genova Burns, LLC.
30 Montgomery Street, 11th floor,
Jersey City, NJ 07302

Re: I/M/O Bid Solicitation #18DPP00249 AshBritt, Inc.
Protest of Notice of Intent to Award
T3044-Waterway Debris Removal Services for Disaster

Dear Mr. Bluestone:

This letter is in response to your correspondence, on behalf of AshBritt, Inc. (AshBritt), to the Acting Director of the Division of Purchase and Property (Division), dated August 22, 2019, protesting the Notice of Intent to Award letter (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #18DPP00249 T3044-Waterway Debris Removal Services for Disaster (Bid Solicitation) to CrowderGulf, LLC (CrowderGulf).

By way of background, on January 30, 2019, the Bureau issued Bid Solicitation #18DPP00249 on behalf of New Jersey Department Environmental Protection (DEP) to solicit Quotes to provide waterway debris removal services for the State and Cooperative Purchasing Program (CPP) participants as such needs may arise in their jurisdictions. Bid Solicitation § 1.1 *Purpose and Intent*. The goal of this Bid Solicitation was to award up to five (5) Master Blanket Purchase Orders (Blanket P.O.s) to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation, were most advantageous to the State, price and other factors considered. *Ibid*. The Bid Solicitation noted the State could award any and all price lines, but it reserved the right to separately procure individual requirements that are the subject of the Blanket P.O. during the Blanket P.O. term, when deemed by the Director of the Division of Purchase and Property (Director) to be in the State's best interest. *Ibid*.

In accordance with the Bid Solicitation's instructions, potential Vendor(s) {Bidder(s)} were permitted to submit questions to the Bureau, using the Division's **NJSTART** eProcurement system by February 27, 2019 2:00 pm. Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*. The Bureau received thirteen (13) questions.

On April 3 and 23, 2019, the Bureau issued Bid Amendment #1 and #2, revising the Quote submission due dates. On May 9, 2019, the Bureau issued Bid Amendment#3, revising the Quote submission due date to May 29, 2019. Through the posting of Bid Amendment #3, the Bureau answered

all thirteen (13) questions received, and posted the Revised Bid Solicitation entitled "T3044 Revised Bid Solicitation 050919".

On May 29, 2019, the Division's Proposal Review Unit opened three (3) Quotes received by the submission deadline of 2:00 pm eastern time from the following Vendors {Bidders}:

1. AshBritt Inc.
2. CrowderGulf LLC.
3. Ceres Environmental Services, Inc. (Ceres)

[Evaluation Committee Report, p. 6.]

After conducting a preliminary review of the Quotes for compliance with administrative requirements for Quote submission, the Proposal Review Unit forwarded the Quotes to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*. In conducting its preliminary review of the Quotes, the Bureau found the following:

1. AshBritt was non-responsive to the following mandatory material requirements of the Bid Solicitation:
 - a. Public Works Registration (Section 4.4.1.7)

AshBritt did not possess a valid Public Works Contractor Registration at the time of Quote opening on May 29, 2019. AshBritt submitted as part of its Quote documentation, related to its application for Public Works Contractor Registration, which was submitted on May 29, 2019. However, N.J.S.A. 34:11-56.26 and Bid Solicitation Section 4.4.1.7 require that the Vendor {Bidder} must be registered at the time of the Quote due date.
 - b. Certificate of Public Convenience and Necessity (Section 4.4.1.9)

AshBritt did not hold a valid Certificate of Public Convenience and Necessity at the time of Quote opening on May 29, 2019. The Bureau confirmed AshBritt's lack of this required certificate with DEP's Division of Solid & Hazardous Waste, Bureau of Planning & Licensing. The Bureau notes that AshBritt submitted its application for the Certificate of Public Convenience and Necessity on May 30, 2019, per DEP.
2. Ceres Environmental Services, Inc. was non-responsive to the following mandatory material requirement of the Bid Solicitation:
 - a. Certificate of Public Convenience and Necessity (Section 4.4.1.9)

Ceres did not hold a valid Certificate of Public Convenience and Necessity at the time of Quote opening on May 29, 2019. The Bureau confirmed Ceres' lack of this required certificate with DEP's Division of Solid & Hazardous Waste, Bureau of Planning & Licensing.
3. CrowderGulf was responsive to the mandatory requirements of the Bid Solicitation. The Bureau confirmed that CrowderGulf possessed the following licenses/certifications at the time of Quote opening, as required by the Bid Solicitation:

- a. Public Works Registration (Section 4.4.1.7);
- b. A-901 License (Section 4.4.1.8); and
- c. Certificate of Public Convenience and Necessity (Section 4.4.1.9)¹.

Furthermore, CrowderGulf provided as part of its Quote documentation/proof of bonding capacity up to \$25,000,000, as required by Bid Solicitation Section 4.4.3.4, Proof of Bonding Capacity.

[Evaluation Committee Report, pp. 6-7.]

In accordance with Bid Solicitation Section 6.8, *Negotiation and Best and Final Offer (BAFO)*, the Bureau requested a BAFO from CrowderGulf on June 25, 2019. *Id.* at p. 15. CrowderGulf submitted its BAFO on June 28, 2019, providing the State with minor reductions in pricing for numerous price lines. *Ibid.*

CrowderGulf received a total technical score of 4,680 out of a possible 6,000 points, with an average technical score of 780. *Id.* at p. 16. CrowderGulf met all mandatory requirements of the Bid Solicitation and was deemed by the Evaluation Committee to have provided a Quote that successfully met the expectations of the Bid Solicitation. *Evaluation Committee Report, p. 16.* The Committee was confident in the ability of CrowderGulf to successfully perform the services sought based upon its Quote. *Ibid.* Accordingly, the Evaluation Committee recommended a Contract award to CrowderGulf.

On August 15, 2019, the Bureau issued a NOI to CrowderGulf. On August 22, 2019, AshBritt wrote to the Division's Acting Director, protesting the August 15, 2019 NOI awarding the contract to CrowderGulf.

DISCUSSION

AshBritt's August 22, 2019 letter to the Division protests the August 15, 2019 NOI awarding the contract to CrowderGulf for the following reasons:

1. Award of a Master Blanket Purchase Order under this RFP to a single Bidder is not in the best interest of the State;
2. CrowderGulf's Quote should not have been considered as it materially deviates from the requirements of the RFP;
3. CrowderGulf's Disclosure of Investigations and other Actions Form omits material and relevant information and was intended to mislead the Committee;

Ashbritt requests an in-person hearing to address these issues and a stay of any award until its bid protest is resolved.

A. AshBritt's Request for an In-Person Hearing

With respect to AshBritt's request for an in-person hearing, I note that pursuant to N.J.A.C. 17:12-3.3(e), "The 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, "In 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. 12:12-3.3(d).

¹ The Bureau confirmed with DEP's Division of Solid & Hazardous Waste, Bureau of Planning & Licensing that the Vendor {Bidder} possessed the required valid CPCN at the time of the Quote opening date.

In consideration of AshBritt's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the protest, the relevant statutes, regulations, and case law. The issues raised by AshBritt are 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 based on the written record. I set forth herein my final agency decision.

B. AshBritt's Protest

In its protest, AshBritt argues that "award of a Master Blanket Purchase Order under this RFP to a single Bidder is not in the best interest of the State." AshBritt's August 22, 2019 Protest Letter, p. 6). AshBritt further states that "[b]y providing for the award of multiple MBPOs to responsible bidders, the Division confirmed at the time it issued the RFP that awarding multiple bidders was necessary, most advantageous to the State, and in the public interest, in order to promote one or more of the factors listed in N.J.S.A. 52:34-12.1(a). Id. at 7. AshBritt misunderstands the plain language of the Bid Solicitation in this regard. Bid Solicitation Section 1.1 *Purpose and Intent* states that the Bureau's intent was "to award up to five (5) Master Blanket Purchase Orders" (Emphasis added). Pursuant to Bid Solicitation Section 7.2 *Final Blanket P.O. Award*,

Blanket P.O. award[s] will be made with reasonable promptness by written notice to that responsible Vendor(s) {Bidder(s)}, whose Quote(s), conforming to this Bid Solicitation, is (are) most advantageous to the State, price, and other factors considered. Any or all Quotes may be rejected when the State Treasurer or the Director determines that it is in the public interest to do so.

The use of a single vendor or multi-vendor model is a determination within the Director's discretion. Bid Solicitation Section 1.1 *Purpose and Intent* states "The intent of this Bid Solicitation is to award up to five (5) Master Blanket Purchase Orders (Blanket P.O.s) to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation are most advantageous to the State, price and other factors considered." (Emphasis added). Thus, awarding contracts to multiple vendors was not required under this Bid Solicitation.

The Division's Director has broad discretion to select among qualified bidders in public contracting matters. See N.J.S.A. 52:34-12(d); In re Jasper Seating Co., Inc.'s Request for Reconsideration Regarding Request for Proposal No. 07-X-37695, 406 N.J. Super. 213, 222-24 (App. Div. 2009). N.J.S.A. 52:34-12(d) makes clear that the Division's Director has the exclusive discretion to determine "which bid will be most advantageous to the State, 'price and other factors considered.'" Commercial Cleaning v. Sullivan, 47 N.J. 539 (1966). The Evaluation Committee considered the evaluation criteria identified in Bid Solicitation Section 6.7.1 *Technical Evaluation Criteria* when it reviewed CrowderGulf's Quote for compliance with the Bid Solicitation's requirements. The Committee determined that CrowderGulf presented an impressive and well-organized Quote that successfully conveyed the qualifications of its personnel, the experience of its firm performing contracts of a similar size and scope, and its ability to complete the Scope of Work. (See, Evaluation Committee Report, p. 12). The Evaluation Committee concluded that:

"CrowderGulf met all mandatory requirements of the Bid Solicitation and was deemed by the Committee to have provided a Quote that successfully

met the expectations of the Bid Solicitation. The Committee is confident in the ability of CrowderGulf to successfully perform the services of the Blanket P.O. based upon its Quote. . . . As the sole responsive Quote, CrowderGulf's proposed pricing was deemed to be reasonable and acceptable. Therefore, based upon its successful Quote, which met all requirements of the Bid Solicitation, and its reasonable pricing, the Committee recommends award to CrowderGulf."

[Evaluation Committee Report, p. 16)]

The subject Bid Solicitation provides for statewide services and it is separated by two award regions (North and South), with two award groupings in each region (Tidal/Non-Tidal). CrowderGulf is the current, incumbent contractor for T014 Waterway Debris Assessment and Removal for Disasters, the southern region, while the northern region has no contractor. Here, the Evaluation Committee determined that making a single award to CrowderGulf, the only responsive Vendor {Bidder}, will be most advantageous to the State, price and other factors considered, and that making the new award would provide significantly more coverage for the disaster-related services than the current contract, which only provides coverage for half of the State.²

Next, AshBritt argues that CrowderGulf's Quote should have been rejected because it materially deviated from the requirements of the Bid Solicitation. AshBritt's August 22, 2019 Protest Letter, p. 9. In support of its argument, AshBritt asserts that CrowderGulf's Quote failed to include a copy of its Certificate of Public Convenience and Necessity (CPCN). Ibid.

AshBritt incorrectly argues that because the Bid Solicitation Checklist asks that a CPCN be provided by the Vendor with its Quote, "CrowderGulf's failure to include a copy of its CPCN with its quote is material." Id. at 10. The Bid Solicitation Checklist clearly indicates that it was created as a guide to Vendors in preparing their Quotes.

² AshBritt's reliance on Federal procurement standards are misplaced and inapplicable.



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BID SOLICITATION CHECKLIST

BID SOLICITATION #: 18DPP00249
BID SOLICITATION TITLE: T3044 - Waterway Debris Removal Services for Disasters

THIS CHECKLIST WAS CREATED AS A GUIDE TO ASSIST VENDORS (BIDDERS) IN PREPARING A COMPLETE AND RESPONSIVE QUOTE. IT IS THE VENDOR'S (BIDDER'S) RESPONSIBILITY TO ENSURE THAT ALL REQUIREMENTS OF THE BID SOLICITATION HAVE BEEN MET.

PART 1 FORMS, REGISTRATIONS AND CERTIFICATIONS THAT MUST BE SUBMITTED BY THE VENDOR (BIDDER) WITH THE QUOTE
OFFER AND ACCEPTANCE PAGE (See Bid Solicitation Section 4.4.1.1)
OWNERSHIP DISCLOSURE FORM (See Bid Solicitation Section 4.4.1.2.1)
DISCLOSURE OF INVESTMENT ACTIVITIES IN IRAN FORM (See Bid Solicitation Section 4.4.1.2.2)
SUBCONTRACTOR UTILIZATION PLAN (See Bid Solicitation Section 4.4.1.3)
PUBLIC WORKS CONTRACTOR REGISTRATION (See Bid Solicitation Section 4.4.1.7)
A-901 LICENSE (See Bid Solicitation Section 4.4.1.8)
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY (See Bid Solicitation Section 4.4.1.9)
PROOF OF BONDING CAPACITY (See Bid Solicitation Section 4.4.3.4)

Thus, the Bid Solicitation Checklist is an advisory document, unlike Bid Solicitation Section 4.4.1.9 *Certificate of Public Convenience and Necessity*, which states:

At the time of the Quote due date, the Vendor {Bidder}, and any applicable subcontractor, must³ hold a valid Certificate of Public Convenience and Necessity in accordance with N.J.S.A. 48:13A-6.2.

NOTE: All Vendors {Bidders} and subcontractors engaged in the commercial collection and/or disposal of solid waste must be registered at the time of Quote Opening. The Vendor {Bidder} should⁴ provide proof of certification with its Quote.

[Emphasis added.]

A review of the record reveals that at the time of the Quote due date, CrowderGulf held a valid CPCN, which was confirmed by the DEP's Division of Solid & Hazardous Waste, Bureau of Planning & Licensing. The Evaluation Committee reviewed and determined that CrowderGulf was in compliance with the CPCN requirement. (See Recommendation Report, p. 4). While CrowderGulf did not provide a copy of its CPCN with its Quote, its CPCN was current and on file with the DEP, a State agency, and could be

³ **Must** – Denotes that which is a mandatory requirement. Bid Solicitation Section 2.2. *General Definitions*.

⁴ **Should** – Denotes that which is permissible or recommended, not mandatory. Bid Solicitation Section 2.2. *General Definitions*.

independently verified. As such the Evaluation Committee had proof that CrowderGulf was in compliance with the requirement of Bid Solicitation Section 4.4.1.9.

Even if the omission of CrowderGulf's CPCN from its Quote is considered a deviation, it is not material. In Meadowbrook Carting Co. v. Borough of Island Heights, the court applied the two-part test espoused in Twp. of River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207 (Law Div.1974), for determining if a bid deviation is material:

[F]irst, whether the effect of a waiver [of the Bid Solicitation's terms] would be to deprive the [contracting party] of its assurance that the contract will be ... performed ... according to its specified requirements, and second, whether ... its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standards of competition.

[138 N.J. 307, 315 (1994).]

Here, neither the State nor the Division was deprived of assurance that the "contract will be performed according to its specified requirements" in this regard, because CrowderGulf's CPCN was current and on file with DEP and provided the State with the assurance necessary that CrowderGulf was in compliance with its CPCN and could fulfil the requirements of the Bid Specification. AshBritt does not provide any facts in support of its argument as to the first prong of the River Vale test. AshBritt argues that CrowderGulf was put in a position of advantage over the other bidders, because:

CrowderGulf's non-compliance with that requirement, placed at a disadvantage any potential bidder who chose not to submit a quote entirely or partly because they would not be able to submit a copy of their CPCN with the quote. Potential bidders may have applied for a CPCN in time for it to be approved and valid on May 29, 2019, but not in time to have received a copy in the mail from the DEP. Alternatively, potential bidders may have had a valid CPCN as of May 29, 2019, but could have misplaced the copy of the CPCN to be submitted with their quote.

[Ashbritt's August 22, 2019 Protest Letter, p.10]

The hypotheticals posed by AshBritt's are inapplicable to the situation at hand, because CrowderGulf did have a valid CPCN on file at the time of the Quote opening date and therefore, it was not placed on a position of advantage over other bidders. The fact that CrowderGulf did not provide its CPCN with its Quote does not render it materially deficient, because while having a valid CPCN at the time of the Quote opening date was a mandatory requirement of the Bid Solicitation, providing a copy of the CPCN was requested for the convenience of the State, but not mandatory.

Next, AshBritt argues that "CrowderGulf's Disclosure of Investigations and other Actions Form omits material and relevant information and was intended to mislead the Committee." (AshBritt's August 22, 2019 Protest Letter, g. 10). Pursuant to Bid Specification Section 4.4.2.2 *Disclosure of Investigations and Other Action Involving Bidder Form*:

"The Vendor {Bidder} **should** submit the Disclosure of Investigations and Other Actions Involving Bidder Form, with its Quote, to provide a detailed description of any investigation, litigation, including

administrative complaints or other administrative proceedings, involving any public sector clients during the past five (5) years, including the nature and status of the investigation, and, for any litigation, the caption of the action, a brief description of the action, the date of inception, current status, and, if applicable, disposition. **If a Vendor {Bidder} does not submit the form with the Quote, the Vendor {Bidder} must comply within seven (7) business days of the State's request or the State may deem the Quote non-responsive."**

[Emphasis added.]

On June 19, 2019, the Bureau sent CrowderGulf an email requesting it to provide its Disclosure of Investigations and Other Actions Form. On June 24, 2019, CrowderGulf provided a signed Disclosure of Investigations and Other Actions Form, and listed the following:

PART 3			
PROVIDING ADDITIONAL INFORMATION			
<p>If you answered "YES" to any of questions 1 - 5 above, you must provide a detailed description of any investigation or litigation, including, but not limited to, administrative complaints or other administrative proceedings involving public sector clients during the past five (5) years. The description must include the nature and status of the investigation, and for any litigation, the caption of the action, a brief description of the action, the date of inception, current status, and if applicable, the disposition.</p>			
PERSON OR ENTITY NAME	CrowderGulf, LLC		
CONTACT NAME	Raid Lopez	PHONE NUMBER	251-450-7430
CASE CAPTION	CROWDERGULF, LLC VS STATE OF NEW JERSEY		
INCEPTION OF THE INVESTIGATION	08/30/2018	CURRENT STATUS	Active
SUMMARY OF INVESTIGATION	Third parties sued CrowderGulf in a separate action claiming that the language of a prior contract between CrowderGulf and the State of New Jersey to perform disaster recovery work, which was successfully completed by CrowderGulf, was unenforceable and that CrowderGulf owed these third parties additional sums notwithstanding the terms of the contract between CrowderGulf and the State. CrowderGulf brought the above captioned action to enforce the terms of its contract with the State.		

The Bureau reviewed CrowderGulf's response, which contained disclosure of pending litigation, and it determined that the Form contained sufficient information and did not preclude CrowderGulf's Quote from consideration for an award⁵. Therefore, the Evaluation Committee determined that CrowderGulf satisfied the requirements of the Bid Specification Section 4.4.2.2 *Disclosure of Investigations and Other Action Involving Bidder Form*.

Lastly, AshBritt requests that "the award of any contract to CrowderGulf in connection with the RFP be stayed until this matter can be fully heard and resolved by the Director after an in-person hearing." (AshBritt's August 22, 2019 Protest Letter, p. 12).

There is no need for a stay, because pursuant to subsection (c) of the N.J.A.C. 17:12-3.3 Protest procedures, challenge to a contract award decision:

⁵ The Hearing Unit reviewed the subject matter of the lawsuit disclosed by CrowderGulf and agrees with the Bureau that the issue in the pending lawsuit, the Prevailing Wage Act, does not preclude the State from issuing NOI to CrowderGulf under this procurement. The current Bid Solicitation, unlike the prior procurement, contains Section 2.3 *Prevailing Wage Act*, which addresses the subject matter of the lawsuit disclosed by CrowderGulf.

“The Division shall . . . hold all contract awards for 10 business days, pending potential protests from bidders. For publicly advertised procurements, the Division shall notify all bidders of the outcome of the competition by issuance of a notice of intent to award. If the contract award is protested pursuant to (a)2⁶ above, the Division shall not award the contract in question until a final decision is rendered by the Director on the merits of the protest.”⁷

Based upon the foregoing, I sustain the Bureau’s Notice of Intent to Award to CrowderGulf.

Thank you for registering your company with **NJSTART** at www.njstart.gov, the State of New Jersey’s eProcurement system. I look forward to your company’s continuing interest in doing business with the State of New Jersey.

Sincerely,


Maurice A. Griffin
Acting Director

MAG: RD

c: R. Regan
L. Spildener

⁶ Notice of intent to award contract(s) pertaining to the subject procurement.

⁷ The Director may nonetheless award the contract notwithstanding the receipt of a protest “if the failure to award the contract will result in substantial cost to the State or if public exigency so requires. In such event, the Director shall notify all interested parties.” See N.J.A.C. 17:12-3.3 (c).