



## State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PURCHASE AND PROPERTY  
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July 31, 2017

Via Email [[mike@marinepowertechnologies.com](mailto:mike@marinepowertechnologies.com)] and USPS Regular Mail

Mike Telesco, President  
Marine Power Technologies, LLC  
39 Division Street #8107  
Somerville, NJ 08876

Re: Protest of Notice of Intent to Award  
Solicitation# 17DPP00068: Vibracore Sampling, Process & Grain Size Analysis of Offshore  
Sediment Samples

Dear Mr. Telesco:

This letter is in response to your emails of July 18, 2017, on behalf of Marine Power Technologies, LLC (hereinafter "Marine"), to the Division of Purchase and Property's (hereinafter "Division") Procurement Bureau (hereinafter "Bureau") and Hearing Unit. In those emails, Marine protests the Bureau's July 5, 2017, Notice of Intent to Award letter (hereinafter "NOI") which indicated that Master Blanket Purchase Orders (Blanket P.O.s) {Contracts} (hereinafter "Contracts") would be awarded to American Vibracore Services, Inc. (hereinafter "American") and Tetra Tech, Inc. (hereinafter "Tetra") for Solicitation# 17DPP00068: Vibracore Sampling, Process & Grain Size Analysis of Offshore Sediment Samples. In the email to the Hearing Unit, Marine requests an in-person hearing to present a case for reconsideration.

With respect to Marine's request for an in person hearing, 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 Marine's protest, I have reviewed the record of this procurement, including the Bid Solicitation# 17DPP00068: Vibracore Sampling, Process & Grain Size Analysis of Offshore Sediment Samples {Request for Proposal} (hereinafter "RFP"), the Quotes {Proposals} (hereinafter "Proposals") submitted, the Evaluation Committee Report, the Bureau's Recommendation Report, and the relevant statutes, regulations, and case law. This 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 submitted by Marine on the written record, as such an in-person hearing is not warranted. I set forth herein the Division's Final Agency Decision.

By way of background, on December 1, 2016, the Bureau issued the above referenced RFP on behalf of the New Jersey Department of Environmental Protection (NJDEP) to solicit Proposals for the following three (3) distinct services: (a) Vibracore sediment sample acquisition; (b) Vibracore processing; and (c) Offshore sediment sample grain size analysis. RFP § 1.1 *Purpose and Intent*. The intent of the RFP

is to award up to three Contracts to those responsible Vendors {Bidders} (hereinafter "Bidders") whose Proposals are most advantageous to the State, price and other factors considered. Ibid.

On January 26, 2017, the Division's Proposal Review Unit opened the six (6) proposals received by the submission deadline of 2:00 p.m. The proposals were then forwarded to the Bureau and the Evaluation Committee (hereinafter "Committee") for review and evaluation consistent with the requirements of RFP § 6.7.1 *Technical Evaluation Criteria* which states as follows:

#### **6.7.1 EVALUATION CRITERIA**

- a. Personnel: The qualifications and experience of the bidder's management, supervisory, and key personnel assigned to the contract, including candidates recommended for each of the positions/roles required;
- b. Experience of Firm: The bidders documented experience in successfully completing contracts of a similar size and scope in relation to the work required by this RFP; and
- c. Ability of Firm to complete the Scope of Work based on its Technical Proposal: The bidder's demonstration in the proposal that the Bidder understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the contract.

On July 5, 2017, the Bureau issued the NOI which indicated that Contracts would be awarded to American and Tetra.

On July 18, 2017, Marine submitted an email to the Bureau stating:

I don't want to sound like a sore loser. But I have some concerns. I see we were not the lowest bid as I came in at 2.38 million vs 1.69 for the selected team. But as a NJ based company our costs are higher then (sic) a Florida based one. I do worry about seeing the state saddled with cost overruns by a company unfamiliar with business in our area. Our sampling vessels hail from NY and NJ we deploy on 5 vessels ranging in size from 65 ft up to 120 ft in length... our sampling equipment is maintained at a constant state of readiness. I started Marine power in 2010 and put my heart and soul into it. What we do best is offshore core sampling. As you can imagine there is not always a huge demand for it so with all my chips on the table this match will feel like Apollo Creed versus Ivan Drago. But that's business...My father worked for the state for 37 years and our family prides ourselves on our commitment to the military and our community. I haven't taken a salary in a long time to keep as many people fed as I can. At the end of the day I got caught up in a state procurement system that I was not well versed in and time was working against me.

I would suggest before the state Awards a huge contract they should give all capable bidders a chance on a smaller one to see how they perform....

Shortly thereafter, Marine submitted a second email to the Bureau stating:

Lastly..... I'm definitely not an accountant but using 100% New Jersey sourced companies will return to the state coffers a great percentage of the

money awarded in the form of corporate tax and income taxes from employee payrolls...

So a company can be almost a third more expensive than the closest bidder and still probably come in at the same price at the end of the day.

In response to an email from the Division's Hearing Unit, Marine confirmed that it wished to the protest the intended contract award. See, Marine's July 18, 2017 email to the Hearing Unit.

In its protest, Marine pre-supposes that it was not awarded the contract because its proposed price was higher than the prices proposed by the intended awardees. See, Marine's first July 18, 2017 email to the Bureau. However, a review of the Evaluation Committee Report and the Bureau's Recommendation Report, reveals that Marine was not awarded a contract because its submitted Proposal was nonresponsive. Specifically, the Bureau concluded that the omission of a technical Proposal was a material deviation as Marine's submitted Proposal offered no insight as to Marine's ability to perform the Scope of Work identified in the RFP. See, June 20, 2017, Recommendation Report.

The Hearing Unit's independent review of Marine's Proposal reveals the Marine submitted the following documents in response to the RFP:

- Offer and Acceptance Page;
- Price Schedule; and,
- Cover Letter

No other documents or information was submitted by Marine with its Proposal.

In submitting a Proposal, the RFP required that a Bidder submit a technical Proposal describing its approach and plans for accomplishing the requirements outlined in the Scope of Work section of the RFP. RFP § 4.4.3 *Technical Quote {Proposal}*. The RFP offered further guidance to Bidders stating:

The Vendor {Bidder} must set forth its understanding of the requirements of this Bid Solicitation {RFP} and its approach to successfully complete the Blanket P.O. {Contract}. The Vendor {Bidder} should include the level of detail it determines necessary to assist the evaluation committee in its review of Vendor's {Bidder's} Quote {Proposal}.

[Ibid., *Emphasis added.*]

Moreover, the RFP advised Bidders that the technical Proposal at a minimum must include a response for RFP § 4.4.3 *Technical Quote {Proposal}* and RFP § 4.4.4 *Organizational Support and Experience* and that a failure to do so may result in Proposal being deemed non-responsive. RFP § 4.4.3 *Technical Quote {Proposal}*.

In submitting its response to the RFP, Marine did not submit a technical Proposal. Therefore, Marine's proposal contains a deviation. The question then is whether the deviation is material.

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Stermin, 25 N.J. 317, 324 (1957). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the court in Twp. of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). "In River Vale, Judge Pressler declared that after identifying the existence of a deviation, the issue is whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity." In re Protest of Award of On-Line Games Prod. And Operation Servs. Contract,

279 N.J. Super. 566, 594 (App. Div. 1995), citing River Vale, supra, 127 N.J. at 216. The River Vale court set forth a two-part test for determining whether a deviation is material:

First, whether the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that 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 standard of competition.

[River Vale, supra, 127 N.J. at 216.]

“If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” River Vale, supra, 127 N.J. at 222.

As noted above, Marine did not submit a technical proposal, and therefore a deviation exists. Nothing contained in Marine’s submitted documents offered any insight into Marine’s approach and/or plans for accomplishing the work outlined in the RFP. If the Bureau waived the RFP requirement that a Bidder submit a technical proposal describing its approach and plans for accomplishing the work outlined in the Scope of Work section of the RFP, the State would be deprived of any assurance that the contract would be entered into, performed and guaranteed according to its specified requirements. The deviation therefore is material, making Marine ineligible for a Contract award.

Based upon the foregoing, I sustain the July 5, 2017 NOI. This is my final agency decision with respect to the protest submitted Marine.

Thank you for your company’s continuing interest in doing business with the State of New Jersey and for registering your company with **NJSTART** at [www.njstart.gov](http://www.njstart.gov), the State of New Jersey’s new eProcurement system.

Sincerely,

  
Maurice A. Griffin  
Acting Director

MAG: RUD

c: P. Michaels  
L. Spildener  
A. MacMullen