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KEVIN D. WALSH
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April 5, 2022

Via Electronic Mail

Teri O'Connor, County Administrator
County of Monmouth
Monmouth County Hall of Records
One East Main Street
P.O. Box 1255
Freehold, NJ 07728

Re: OSC 21-50 - Contract P-46-2020; Modifications to the Leachate Pre-Treatment Plant at the Monmouth County Reclamation Center

Dear Ms. O'Connor,

On July 31, 2020, Monmouth County (County) submitted documents for post-award review pursuant to *N.J.S.A. 52:15C-10(a)* to the Office of the State Comptroller (OSC) pertaining to a \$2,884,000 contract entered into on July 28, 2020. The contract was for "Modifications to the Leachate Pre-Treatment Plant at the Monmouth County Reclamation Center" and purported to involve "technical and construction services." As submitted, the County indicated that the contract was awarded pursuant to the New Jersey Wastewater Treatment Public-Private Contracting Act (WTPPCA), *N.J.S.A. 58:27-19 et seq.*, and that the procurement was exempt from public bidding pursuant to *N.J.S.A. 40A:11-5(1)(bb)* (wastewater treatment services) and *40A:11-5(1)(gg)* (wastewater treatment system). According to those documents, the procurement was conducted by issuing a Request for Qualifications (RFQ) followed by a Request for Proposals (RFP). The County received and reviewed three qualification statements in response to the RFQ and three proposals in response to the RFP.

After its initial review of the submission, OSC requested additional documents and information from the County that would demonstrate compliance with the above-referenced statutes. In response, the County provided a copy of the RFQ and the successful contractor's response. The County provided further information in response to questions from OSC.

The RFQ that the County posted on its website stated that the procurement was being conducted under the Local Public Contracts Law (LPCL), *N.J.S.A.* 40A:11-1 *et seq.* The RFP, however, stated it was issued under the WTPPCA. The LPCL and WTPPCA are two different statutory procurement regimes with different notice and award requirements. This contradiction may have misled potential bidders and the public. As discussed below, the County stated it did not actually follow either of these laws. Rather, it claims to have followed the “Pay to Play” law that allows a county or municipality to award contracts to vendors who would otherwise be disqualified because of political contributions. See *N.J.S.A.* 19:44A-20.4 *et seq.*¹

Based on the information and documents provided by the County, OSC finds the County did not comply with the WTPPCA or the LPCL, resulting in a lack of transparency and limitation on competition. A version of this letter was shared with the County to provide it with an opportunity for comment. OSC considered the County’s response and modified this letter as appropriate in response to those comments.

1. The County improperly relied on the New Jersey Wastewater Treatment Public-Private Contracting Act

The WTPPCA establishes “a comprehensive procedure designed to authorize local government units to enter into contracts with private firms . . . for the provision of wastewater treatment services.” *N.J.S.A.* 58:27-20. It permits local units lacking adequate financial resources to rely on private entities to operate and maintain wastewater treatment facilities to the standards required by state and federal environmental protection laws. The statutory process:

enables local government units to enter with private firms or public authorities into long-term contracts that protect the rights and interests of residents of the local government unit, but allow the private firms or public authorities to utilize their expertise, experience and resources to enable the local government unit to comply with existing and more stringent future requirements of the “Federal Water Pollution Control Act,” 33 U.S.C. 1251 *et seq.*, the State “Water Pollution Control Act,” P.L.1977, c.74 (*N.J.S.A.*] 58:10A-1 *et seq.*) and the “Safe Drinking Water Act,” P.L.1977, c.224 (*N.J.S.A.*] 58:12A-1 *et seq.*).

[*N.J.S.A.* 58:27-20.]

The statute contemplates that private firms engaged by the local government will, among other things, use their own resources to construct, rehabilitate, operate, or maintain wastewater treatment facilities under long-term contracts. The WTPPCA is not a vehicle that may be used simply to avoid following the public bidding process whenever an entity seeks to enter into a contract involving a wastewater facility.

¹ Under *N.J.S.A.* 19:44A-20.7 and within the public purchasing community, this is referred to, somewhat incongruously, as the “fair and open process.” See also *Weaknesses in the Pay-to-Play’s “Fair and Open” Contracting System*, Office of the State Comptroller, September 15, 2011.

The WTPPCA establishes an alternative procurement process that is different from the traditional public bidding process required by the LPCL. As compared to the LPCL, the WTPPCA requirements are more rigorous.² *N.J.S.A. 58:27-23(a)* requires the public entity to publish a notice of its intent to enter into a contract in at least one newspaper of general circulation and one newspaper of broad regional circulation, at least 60 days prior to conducting a public hearing.

N.J.S.A. 58:27-23(b) specifies that the public notice must describe the type of services and “provide the name, address and phone number of the person who can provide additional information and a proposal document to an interested party.” The notice must also specify a deadline, not less than “30 days from the date of the publication of the notice for the submission of proposals by private firms or public authorities to the public entity.”

Further, *N.J.S.A. 58:27-24(a)* and (d) require the public entity to “conduct a public hearing on the proposed contract negotiated pursuant to [*N.J.S.A. 58:27-23*],” to “produce a verbatim record of the hearing,” and to issue “a written hearing report,” which is to be made available to the public upon request.

We evaluated whether the County appropriately used the process provided by WTPPCA under these circumstances and, if so, whether the County followed that law. We found both the County’s reliance on the WTPPCA inappropriate and, even if it were appropriate, the County did not comply with that law.

The County inappropriately relied on the WTPPCA because, among other things, the contract at issue here was not a long-term contract for the design, construction, or operation of the facility and because the company retained to modify the County’s existing treatment facility did not contribute its own resources. Rather, the County paid for the entire cost of the project. The County advised OSC that it used the WTPPCA previously to select a company to design, build, and operate the Leachate Treatment Plant (LTP) at the landfill and that the procurement was reviewed by OSC. OSC did review this procurement in 2011, and, unlike the contract discussed in this letter, it appears to have been an appropriate use of the statute. *That* procurement process was conducted in accordance with the WTPPCA. According to the County, the LTP, once finished, did not function properly and the company’s contract was eventually terminated. The County then engaged an engineering consultant to prepare plans and specifications to modify the LTP to perform within the required standards and procured the services of a contractor to implement the modifications according to those plans and specifications.

The documents provided by the County led OSC to conclude that this was not the kind of contract permitted by the WTPPCA and should have been publicly bid as required by the LPCL. The contractor was retained to modify the malfunctioning LTP according to the specifications prepared by the County’s engineering consultant, not to operate and maintain it, for a period not to exceed 317 days, including commissioning and project close-out.

² *N.J.S.A. 40A:11-4* requires public advertisement of the bid and award of the contract by resolution of the governing body, but does not require a public hearing or public notice of the contract award.

The County contends that the contract was not a simple construction contract, as OSC concluded, because it included “value engineering” and other “critical services” that brought the contract into the purview of the WTPPCA. At the same time, the County admits that it used the statute to avoid the low-bid requirement in the LPCL, expressing a concern that the selected contractor needed to have particular knowledge and understanding of the workings of a leachate treatment plant.

The RFP for the contract did include some services ancillary to the construction of the modifications such as testing, start-up, and assistance with commissioning the facility. However, the County’s responses to prospective bidders during the procurement process show this was simply a construction contract. For example, some bidders asked the County to clarify what technical services would be required, as opposed to construction services. In answer to one question, the County described the technical services as “functional and operational modification of the LTP, process and equipment integration and coordination with the Licensed Operator.” In answer to another question, the County advised that “the vendor will only be responsible for physical installation and executing sequence of operation for process control.” The County answered another similar question by stating, “[t]he vendor can decide to provide 'solely' construction services or to provide construction *and* design services through the Value Engineering mechanism.” These services alone are not sufficient to bring this procurement under the WTPPCA, which contemplates that the private firm will provide “wastewater treatment services.” The County’s belief that the project required “a working understanding of the proper design and purpose of the LTP as well as an engineering understanding of LTP operations” does not change the fact that the contractor did not design the modifications, but was only engaged to construct the modifications according to the plans and specifications prepared by the County’s engineering consultant. Further, the LTP was intended to be operated by another company. The RFP stated that completion of the modifications was anticipated to occur after transition to the new operator.

In response to questions from OSC regarding the public notice and hearing requirements and OSC’s letter, the County admits that it did not comply with the WTPPCA. In an attempt to explain why it failed to comply with the WTPPCA, the County claims it “inadvertently” followed the State’s “Pay to Play” law, proceeding “under what appears to be an inadvertent errant path of procurement.” The County explained that this is why it posted the RFQ on its website and then issued a RFP to three prequalified firms. The WTPPCA, however, does not provide for the two-step process the County used, which had the effect of limiting the number of bidders through prequalification requirements.

Further, the County advised OSC that it did not intend to advertise the RFP in a newspaper as required by the WTPPCA. This contravened *N.J.S.A. 58:27-23* because the statute requires that a public notice of the contracting unit’s “intent to enter into a contract” under the WTPPCA be published “in at least one newspaper of general circulation . . . and one newspaper of broad regional circulation, at least 60 days prior to conducting the public hearing required under [*N.J.S.A. 58:27-24*].”

The County further acknowledged that it did not give notice of its intent to enter into the contract under the WTPPCA to the Department of Environmental Protection or the Local Finance Board within the Department of Community Affairs (DCA), did not conduct a public hearing, and, thus, did not produce a written hearing report or verbatim record of the hearing, all as required by *N.J.S.A. 58:27-24*.

In sum, although the RFP was issued under the WTPPCA, the County did not comply with the terms of that statute. As described further below, these actions resulted in less competition for a multi-million dollar project and less transparency than if the County had followed the LPCL.

The County admits these failures, but asserts they were inadvertent and not intended to limit competition or transparency. The County contends that posting the RFQ on its website satisfies the transparency and competition requirements of the WTPPCA because 37 firms or services downloaded the RFQ, but it does not explain why only three firms actually responded to the RFQ. Simply posting the RFQ on the County's website did not satisfy the requirements for public advertising or the level of transparency contemplated by the public hearing and other requirements of the WTPPCA.

2. The County did not comply with the Local Public Contracts Law

In addition to improperly using the alternative WTPPCA procurement process to avoid having to award the contract to the lowest responsible bidder as required by the LPCL, the County employed an unauthorized pre-qualification process to pre-select a limited pool of bidders to compete for the contract. Resolution No. 2020-0540, which approved the award of the contract, indicated that the County first issued the RFQ and selected three responding firms to receive the RFP. Resolution No. 2020-0540 cites a 2013 resolution as authority for the process. That resolution, No. 2013-0537, established a two-step, qualifications-based process for engaging architectural and engineering consultants. There is no authority under either the WTPPCA or the LPCL for the RFQ/RFP process that the County used for this project. Even if such a prequalification process were authorized for architectural or engineering services, this contract did not involve architectural or engineering services.

OSC further notes that, if the County believed that specific expertise with LTPs was necessary for the successful completion of the project, it could have prequalified bidders for this contract by following the process set forth in *N.J.S.A. 40A:11-25*. This provision of the LPCL authorizes local governments to prequalify bidders according to the class or category of services and to fix qualifications based on financial ability, experience, capital, and available equipment. Prequalification regulations are subject to a public hearing and their adoption must be published in at least two newspapers circulating in the county. The proposal regulation must then be forwarded to the Director of Local Government Services within the DCA for approval.

As noted above, reviewing all of the bid documents together, it is evident that this was a construction contract and not a contract for wastewater services. No professional services were specifically articulated or requested. The contract involved work to an existing facility and modifications that were designed by others. In fact, the RFP informed bidders that the County was

concurrently in the process of procuring a different company to provide operations and maintenance services for the landfill (Operator), including operational responsibility for the LTP. The RFP also stated that completion of the modifications was anticipated to occur after transition to the new Operator. Here, the scope of work was for construction and related construction management and start-up services for a discreet, time-limited project at a lump-sum price. We disagree with the County that allowing the contractor to provide optional value engineering services and requiring the contractor to have a working knowledge of the operations of the LTP brings this contract within the ambit of the WTPPCA.

3. Findings and Conclusion

OSC finds that the County's actions with regard to this procurement violated the LPCL, by avoiding a formal bidding process, and the WTPPCA, by advising the public and bidding community that the RFP was issued under that law. As a result, the County inappropriately limited competition and failed to provide transparency to the public.

Compliance with all applicable statutory requirements is vital to protecting taxpayer funds, encouraging free and fair competition, and ensuring government efficiency and transparency. New Jersey's public bidding laws exist to "secure competition and to guard against favoritism, improvidence, extravagance and corruption." *Twp. of Hillside v. Sternin*, 25 N.J. 317, 322 (1957). The public bidding laws enable New Jersey residents to trust public officials are making well-reasoned and unbiased decisions that best serve the public's health and financial interests.

Through this letter, OSC advises the public, the County, and other local contracting units (1) that construction contracts must be awarded through a publicly advertised procurement process in accordance with the LPCL; and (2) that, if a public entity chooses to use the WTPPCA to procure wastewater treatment services, it must strictly comply with all requirements, including but not limited to those regarding public notice and a public hearing.

Respectfully,

KEVIN D. WALSH
ACTING STATE COMPTROLLER

By: Barbara D. Geary
Barbara D. Geary, Director
Procurement Division

c: Geoffrey S. Perselay, Deputy County Administrator (via electronic mail)
Helen Fiore, Director of Purchasing (via electronic mail)
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