



# State of New Jersey

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November 10, 2015

Via Electronic Mail [[info@atlanticresponse.com](mailto:info@atlanticresponse.com)] and USPS Regular Mail

Chris Dayke, President  
Atlantic Response, Inc.  
12D Connerty Court  
East Brunswick, NJ 08816

RE: Protest of Notice of Award of State Contract #T2435  
RFP #14-X-22848 Environmental Emergency Response Services: NJDEP & Statewide

Dear Mr. Dayke:

This is in response to your letter received July 22, 2014, referencing the subject Request for Proposal (RFP) and regarding the intended award of the subject contract by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division). On behalf of your company, Atlantic Response, Inc. (Atlantic), you protest the slated award of Contract #T2435 to Ken's Marine Services, Inc. (Ken's Marine) and Clean Venture, Inc. (Clean Venture), contending both companies failed to comply with mandatory, material RFP requirements. You do not protest the slated award to Allstate PowerVac, Inc. (Allstate).

I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law, and the proposals submitted by Ken's Marine and Clean Venture. 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 Atlantic's protest.

## I. Background

By way of background, the Bureau issued the subject RFP on behalf of the New Jersey Department of Environmental Protection (NJDEP) on March 18, 2014, to solicit proposals for statewide Environmental Emergency Response Services, encompassing response, cleanup, removal, transportation, storage, treatment, disposal, detection, inspection, and investigation of petroleum discharges, hazardous substance discharges, asbestos, low level radioactive materials, solid waste, explosives, and highly reactive substances as needed throughout the State of New Jersey. The Bureau intended to award contracts covering the north and south regions to up to six responsible bidders, whose proposals, conforming to the RFP, are most advantageous to the State, price and other factors considered.

The Bureau received seven proposals by the proposal submission deadline date of April 21, 2014.

The Evaluation Committee<sup>1</sup> (Committee) determined all seven proposals to be responsive and reviewed the submissions for compliance with the RFP. The proposals were then individually reviewed and given technical scores before pricing was revealed. Technical scores were based on the requirements set forth in RFP Section 6.7.1 *Technical Evaluation Criteria*, which evaluated A) *Personnel*, B) *Experience of Firm*, and C) *Ability of Firm to Implement and Perform the Scope of Work*. Assigned scores in each of these categories were then multiplied by the criterion weight to produce a weighted score for each criterion and added together to produce the overall weighted technical score.

Following this review, the Committee determined Ken's Marine, Allstate, Atlantic, and Clean Venture to be the bidders submitting the highest ranked proposals. Thereafter, the Committee requested a Best and Final Offer (BAFO) from these bidders pursuant to RFP Section 6.8, *Negotiations and Best and Final Offer (BAFO)*.<sup>2</sup> The Committee unanimously recommended the following bidders to receive a statewide service contract in the following order:

Bidder	Technical Rank	Technical Score	Price Rank	Total BAFO Cost
Ken's Marine	1	813	2	\$1,499,527.50
Allstate	2	788	1	\$1,365,443.00
Atlantic	3	765	3	\$1,625,958.00
Clean Venture	4	565	5	\$2,400,945.18

This protest followed. Ken's Marine and Clean Venture were given the opportunity to respond to the allegations set forth in Atlantic's letter of protest. Both Ken's Marine's reply letter and Clean Venture's reply letter were dated and received September 19, 2014.

## II. Protest Against Ken's Marine

With respect to Ken's Marine's proposal, Atlantic raises five points of protest by noting the following deficiencies in Ken's Marine's proposal: 1) failure to supply the required medical clearances for Heavy Equipment Operators and Laborers; 2) failure to provide the mandatory professional engineer's license; 3) failure to provide the mandatory electrician license; 4) failure to provide the mandatory asbestos license; and 5) failure to provide a qualified chemist.

In response to Atlantic's fourth argument, RFP Section 4.4.4.4(H), *Personnel Requirements*, required a bidder's proposal to identify a New Jersey licensed company with a Type A license, one asbestos worker with a Supervisor's Permit, and one asbestos worker with an Asbestos Worker Permit to perform work under this contract. This Section of the RFP further specified: "The license/permits shall be in good standing and effective at the time of proposal submission and a copy of the license/permits shall be submitted with the proposal."

A review of Ken's Marine's proposal shows it named Nova Development Group (Nova) as its environmental consultant and general contractor, who was slated to perform the asbestos remediation work. A review of the New Jersey Department of Labor and Workforce, Office of Asbestos Control and Licensing (OACL) records show that Nova's Type A license lapsed on January 7, 2014, and was not renewed. Therefore, it was not valid at the time of proposal submission on April 21, 2014. In Ken's

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<sup>1</sup> The Evaluation Committee was comprised of representatives from the Bureau and NJDEP.

<sup>2</sup> While there is initially a discrepancy in the Recommendation Report and Evaluation Committee Report about the company that reduced its pricing in response to the BAFO, the final pricing associated with each company was listed accurately in both documents and this error had no impact on the award decision.

Marine's letter of reply to this protest, it noted that it had recently learned that Nova terminated its New Jersey license and requested to substitute a different subcontractor to perform asbestos work. Although Ken's Marine cites to RFP Section 5.7, *Substitution or Addition of Subcontractor(s)*, which permits a contractor to "submit a written request to substitute or add a subcontractor," this section only applies to contractors, not bidders. A bidder is not permitted to request such a substitution, as, in this case, a bidder was required to include a company with a valid Type A license at time of proposal submission.

"It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived." Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 314 (1994) (internal quotation omitted). New Jersey courts have developed a two-prong test to consider "whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity." Twp. of River Vale v. R. J. Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). The two-prong test requires a determination of

first, whether the effect of a waiver would be to deprive the municipality 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.

[Meadowbrook, supra, 138 N.J. at 315 (internal quotation omitted) (affirming the two-prong test established in River Vale, supra, 127 N.J. Super. at 216).]

In this case, I find Ken's Marine's lack of an asbestos Type A certification, as well as missing Supervisor and Worker Permits, to be a material deviation from the terms of the RFP. Under the two-prong River Vale test, first, Ken's Marine's deviation from the mandatory terms of the RFP could not provide the State of an assurance that it could perform the required tasks of the RFP. Second, to waive such a requirement would unlevel the playing field, as other bidders did meet this RFP specification.

This material deviation therefore renders Ken's Marine's proposal non-responsive and it is not eligible for an award of contract. To award it a contract would not be in keeping with the Division's governing statutes and I must therefore rescind this intended award. In light of the material deviation in Ken's Marine's proposal as noted above, I need not address the remainder of Atlantic's arguments against Ken's Marine.

### III. Protest Against Clean Venture

With regard to Clean Venture, Atlantic also raises five arguments. Atlantic alleges the following discrepancies in Clean Venture's proposal: 1) failure to identify the required asbestos workers in its proposal; 2) failure to provide a statement demonstrating that it has the ability to cold tap a tanker; 3) failure to provide the mandatory professional engineer's license; and 4) failure to provide the mandatory training and medical clearance documentation for Heavy Equipment Operators and Laborers; and 5) failure to provide the mandatory site remediation professional license.

Concerning the first argument, the Evaluation Committee Report stated, "Clean Venture did not identify the required asbestos workers, although the company is licensed in the State of New Jersey to conduct this activity." As noted above, RFP Section 4.4.4.4(H) required a bidder to identify in its proposal a New Jersey company with a Type A license, one employee with an Asbestos Supervisor Permit, and one employee with an Asbestos Worker Permit, and to include copies of the appropriate licenses or permits with the proposal. A review of the New Jersey Department of Labor and Workforce OACL records reveals that Clean Venture never possessed a Type A license. Therefore, the Evaluation

Committee Report incorrectly stated that Clean Venture was a Type A licensed company. A review of Clean Venture's proposal also confirms it failed to include any information regarding employees with an Asbestos Supervisor Permit and Asbestos Worker Permit.

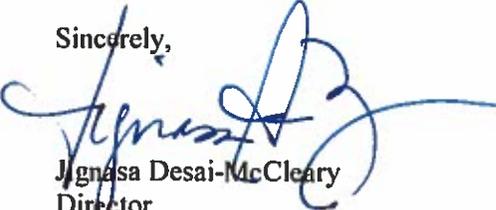
Under the River Vale analysis as outlined above, I find Clean Venture's deviation from the RFP in failing to possess a Type A license, Asbestos Supervisor Permit, and Asbestos Worker Permit, and by not offering a properly licensed subcontractor to perform the work in its place, to be material in nature. Because Clean Venture's proposal was materially deficient with respect to RFP Section 4.4.4.4(H), I must rescind its intended award and I need not address the remaining protest points against Clean Venture.

#### IV. Conclusion

Based on the findings and conclusions set forth above, I must rescind the intended awards to Ken's Marine and Clean Venture due to the material deficiencies contained in their proposals. The remaining intended awards to Allstate and Atlantic and remain in place. However, the evaluation of the remaining proposals is remanded to the Evaluation Committee for determination if any additional awards are merited.

Thank you for your continued interest in doing business with the State of New Jersey. Thank you for registering your business with **NJ START**, the State of New Jersey's new eProcurement system, which is scheduled to go live soon.

Sincerely,



Jignasa Desai-McCleary  
Director

JD-M:DF

c: P. Michaels  
L. Spildener  
M. Pappas  
Michael Persico, Clean Venture, Inc.  
Raymond Huckemeyer, Ken's Marine Service, Inc.