



State of New Jersey

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April 11, 2017

Via Email [cgerhard@cemco.us] and USPS Regular Mail

George J. Kayser, President
CEMCO – Custom Environmental Management Co., Inc.
P.O. Box 212
Hainesport, New Jersey 08036

Re: Protest of Notice of Intent to Award
Solicitation #17DPP00045: Solid Waste Disposal/Recycling NJDOT Maintenance Facilities

Dear Mr. Kayser:

This letter is in response to your correspondence of February 8, 2017, to the Division of Purchase and Property (“Division”) on behalf of CEMCO – Custom Environmental Management Co., Inc. (“CEMCO”) in which CEMCO protests the January 25, 2017 Notice of Intent to Award (hereinafter “NOI”) a Master Blanket Purchase Order {Contract} (hereinafter “Contract”) to Active Environmental Technologies, Inc. (“Active”) for Bid Solicitation {Request for Proposal} (hereinafter “RFP”) #17DPP00045: Solid Waste Disposal/Recycling NJDOT Maintenance Facilities. CEMCO alleges that the Quote {Proposal} (hereinafter “Proposal”) submitted by Active is non-responsive and therefore, Active should not be awarded a Contract for the Central Region. CEMCO Protest, p. 1. CEMCO requests an in-person hearing with respect to its protest.

With respect to CEMCO’s request for an in person hearing regarding the issues raised in its protest, 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 CEMCO’s protest, I have reviewed the record of this procurement, including the RFP, the Proposals submitted, the Bureau’s Recommendation Report, and the relevant statutes, regulations, and case law. The issues raised in CEMCO’s protest were 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 submitted by CEMCO on the written record.

BACKGROUND

By way of background, the subject RFP was issued on October 24, 2016, by the Procurement Bureau (“Bureau”) on behalf of the New Jersey Department of Transportation (hereinafter “DOT”). The purpose of the RFP was to solicit Proposals for solid waste removal and disposal/recycling/reuse services at participating DOT maintenance facilities located in each of three designated regions (North, Central and South) of the State. RFP § 1.1 *Purpose and Intent*. It is the intent of the Division to award a Contract to that responsible Vendor {Bidder} (hereinafter “Bidder”) whose Proposal, conforming to the RFP, is most

advantageous to the State, price and other factors considered for each region. Ibid. As such, the State may award one or up to three Contracts.

On November 30, 2016, three Proposals received by the submission deadline were opened by the Proposal Review Unit. One Proposal was automatically rejected by the Proposal Review Unit for failure to include a signed *Offer and Acceptance Page* with its Proposal. The remaining two (2) Proposals submitted by CEMCO and Active were forwarded to the Bureau for review and evaluation consistent with the criteria set forth in the RFP. Based upon that evaluation, on January 25, 2017, the Bureau issued the NOI advising all Bidders that it was the State's intent to award Contracts as follows:

- North Region – CEMCO – Custom Environmental Management Co., Inc.
- Central Region – Active Environmental Technologies, Inc.
- South Region – CEMCO – Custom Environmental Management Co., Inc.

On February 8, 2017, the Bureau received CEMCO's protest in which CEMCO alleges: (1) that Active failed to comply with the RFP requirement regarding the utilization of A-901 haulers; (2) that Active did not provide proof of its ability to timely supply roll-off containers with its Proposal; (3) that Active lacks experience to perform the Contract work; (4) that Active submitted an unbalanced bid; and (5) that the State's consumption model failed to include wood pallets in its calculations – had wood pallets been included, CEMCO would have been the most cost effective choice for the State.

On March 9, 2017, Active submitted its response to the protest.

DISCUSSION

1. Active complied with the RFP requirement for A-901 license.

CEMCO alleges that Active's Proposal does not comply with the RFP requirement regarding the utilization of A-901 haulers.

RFP § 3.4.8 *Licensing and Permit Requirements* states in part:

The [Contractor]¹ must be duly licensed to perform all work in accordance with New Jersey statutory requirements. The [Contractor] shall be responsible for determining and obtaining the necessary permits, licenses and/or approvals necessary to complete the work and shall make these available to the State Contract Manager prior to commencing work.

The necessary permits shall include, without limitation, an A-901 (solid waste) license pursuant to the requirements of N.J.S.A. 13:1E-128, 133, and 135; as well as a Certificate of Public Convenience and Necessity pursuant to N.J.S.A. 48:13A-6.2. The [Contractor's] use of only A-901 licensed Subcontractors is not sufficient to fulfill the [Contractor's] obligation to hold an A-901 license. The [Contractor] shall maintain in force for the duration of the [Contract] an A-901 license and a Certificate of Public Convenience and Necessity.

Further, RFP § 4.4.1.7 *A-901 License* states in part:

At the time of [Proposal] opening, the [Bidder] and any Subcontractors must each hold an A-901 License. The [Bidder] should provide proof of A-901 License with its Proposal.

¹ Vendor {Contractor} (herein referred to as "Contractor").

With its Proposal, Active submitted copies of its Solid Waste Transporter License, A-901 License, and Hazardous Waste Transporter License. Active did not propose the use of any Subcontractors; therefore, its Proposal conforms to this requirement of the RFP with respect to permit and licensing.

2. Active's Proposal complies with the RFP requirement for providing roll-off containers.

CEMCO alleges that Active's Proposal does not comply with the RFP requirement for providing roll-off containers. CEMCO states:

Active does not supply support of their capability to provide A-901 licensed roll off equipment yet they provided pricing for this line item. Their Vendor Questionnaire does not list roll off vehicles nor equipment and they did not disclose any Sub-Contractors. The intent established in the questionnaire does not meet the solicitation requirement of "Must supply within 5 days". It is unreasonable and non-responsive to propose the ability to purchase, register, and permit roll off equipment and supply the same within the solicitation mandate. Thus, they have clearly not demonstrated the ability to provide an A-901 hauler capable of delivering on this Unit Cost Item.

The RFP states that "the [Contract] resulting from this [RFP] will provide DOT with the ability to rent thirty (30) yard roll-off containers at a monthly rate." RFP § 3.1 *General Information*. Moreover, RFP § 3.4.2 *Roll-Off Containers*, requires that "within five (5) business days of written request by the State Contract Manager, the [Contractor] shall provide participating facilities in the awarded region with the ability to rent 30 cubic yard roll-off containers at a monthly rate." RFP § 3.4.2 *Roll-Off Containers*, *emphasis added*.

CEMCO misinterprets the RFP language. The requirement for providing roll-off containers is one for the Contractor not the Bidder. The RFP defines a Contractor as the Bidder who is awarded a Contract resulting from this RFP. RFP 2.2 *General Definitions*. In its Proposal, Active's states that upon being awarded the Contract it will purchase the roll-off trucks and containers. This statement demonstrates Active's understanding of, and intent to comply with the requirements of the RFP.

Further, CEMCO's comparison to the 2008 procurement (RFP #08-X-20280) for similar services is misplaced. There, in its Proposal, Gino's Trucking Company, Inc. (Gino's) stated that the Contract would be managed by its Subcontractor EnviroCraft Corporation (EnviroCraft). Based upon Gino's Proposal, it was clear that EnviroCraft would be acting as the prime Contractor, responsible for the transportation and disposal of solid waste and hazardous waste materials under the Contract. While Gino's was A-901 licensed, EnviroCraft was not. Because EnviroCraft would have been performing the Contract work, the Evaluation Committee determined that the Proposal submitted by Gino's was non-responsive.

Here, Active, which is A-901 licensed, proposes to perform all of the Contract work itself.² Further, in order to comply with the RFP requirement, Active stated that it will purchase the roll-off containers upon Contract award.³ Therefore, Active's Proposal conforms to this requirement of the RFP.

² Active has not proposed the use of any Subcontractors.

³ In its proposal, CEMCO stated that it would rent roll-off containers from one of four subcontractors listed in its proposal. None of the listed subcontractors is A-901 licensed. Through the clarification process, the Bureau confirmed that CEMCO, not the listed subcontractors, would be performing the transportation of the roll-off containers. The Bureau determined that since CEMCO, who is A-901 licensed, would be performing all of the transportation of the roll-off containers, that this conformed to the RFP requirements.

3. Active's Proposal demonstrates that it has the experience to perform the Contract work.

CEMCO alleges that Active does not have the experience necessary to perform the work required by this Contract. CEMCO however, offers no support for this statement.

In its Proposal response on the Vendor Questionnaire, Active stated:

Active has 23 years' experience in site remediation, hazardous and non-hazardous materials handling/disposal and related activities. We have moved hundreds of thousands of tons of asphalt, concrete, wood (and wood products), soils, (haz/non-haz), refuse, etc. Active's first choice is for beneficial reuse of these materials, however sometimes disposal is the more prudent option.

Further, on the Bidder Data Sheet Active identified three (3) other contracts it held under which it has provided some or all of the services sought by this RFP. With respect to Active's State Contract for Water Damage Restoration Services, the Bureau determined that the scope of work for that Contract was sufficiently similar as it included services for the removal and disposal of building and construction materials. The Bureau found those services were similar to services sought by the subject RFP and represented relevant experience, demonstrating Active's ability to perform the work sought by the subject RFP. Additionally, the Bureau spoke with one of the State Contract managers who indicated that "I have used Active for several remediation projects here at the State House and found them to be both capable and responsive to our needs." Active also listed PSE&G Nuclear as a reference for construction and wetlands remediation. The Bureau confirmed with PSE&G that the contracted work included the removal and disposal of waste and environmental materials. Additionally, the PSE&G representative spoke positively about Active's performance.

In reviewing Active's Proposal, specifically its listed experience against the requirements of the Contract, the Bureau determined that Active has the ability to perform the work sought by the RFP.

In response to the protest, Active states in part:

Active has over twenty-five (25) years of experience hauling soils, recyclables and materials for beneficial reuse, which is a large percentage of this Contract. Active currently operates five (5) fully permitted solid and hazardous waste vehicles across five (5) states (NJ, PA, DE, NY, CT) and has never been issued a Notice of Violation for any incident. Active has performed solid and hazardous waste hauling for many major waste industry companies including Waste Management, Heritage Environmental, and Whitman Environmental, to name a few.

[See Active's March 9, 2017, response to CEMCO Protest.]

While this information was not provided in its Proposal, and therefore was not considered in the Bureau's evaluation for Active's Proposal, it supports the information contained in Active's Proposal and confirms the Bureau's earlier conclusion that Active has the experience and ability to perform the work under sought by the RFP.

4. Active's Proposal was not an unbalanced bid, and was determined to be the lowest responsive Proposal consistent with the State's evaluation model.

CEMCO asserts that the Active's Proposal was an unbalanced bid and therefore CEMCO should be awarded the Contract because it is the most cost effective choice for the State. Specifically, CEMCO claims that Active's proposed price for providing roll-off containers is unbalanced because Active would be operating at a loss under this proposal.

The New Jersey Courts have defined an 'unbalanced bid' as one where a Bidder submits a nominal price for some work and enhanced prices for other work. Turner Construction Company v. New Jersey Transit Corporation, 296 N.J. Super. 530, 537 (App. Div. 1997). However, the Courts have also concluded that "reasonable unbalancing is perfectly proper." Id. at 538, citing, Riverland Construction Co. v. Lombardo Contracting Co., 154 N.J. Super. 42 (App. Div. 1977). "[T]he submission of an unbalanced bid standing alone does not invalidate the bid." Turner, supra, 296 N.J. Super. at 538; citing, Frank Stomato v. City of New Brunswick, 20 N.J. Super. 340, 344 (App. Div. 1952). In Turner, the court held

The submission of a zero bid is similar to that of a nominal penny bid. A nominal bid is not inherently evil or destructive of fair and competitive bidding. Every contractor may apply his own business judgment in the preparation of a public bid, and his willingness to perform one of the items for a nominal amount is but his judgmental decision in an effort to underbid his competitors.

As we stated in Riverland

[i]n the absence of a factual showing that such a decision subverts the principles of fair and competitive bidding there is no reason to invalidate the resulting bid. The pejorative connotation of the phrase "unbalanced bid" comes into play only when the nominal bid on one item is unbalanced because of an excessive bid on other items, or because of other elements pointing to fraud, collusion, unfair restriction of competition or other substantial irregularity. Reasonable unbalancing is perfectly proper.

[Turner, supra, 296 N.J. Super. at 538, *internal quotes and citations omitted.*]

As previously noted, Active states that it will purchase roll-off containers upon Contract award. In evaluating Bidder Proposals, the Division is not evaluating pricing in terms of Bidder profitability. Rather, the Division evaluates Proposals to ensure that Contracts are awarded to that responsible Bidder whose Proposal, conforming to the RFP, is most advantageous to the State, price and other factors considered. RFP § 1.1 *Purpose and Intent*.

Contrary to CEMCO's claim, the Proposal submitted by Active is not akin to that submitted by Gino's in response to the 2008 solicitation for similar services. There, Gino's Proposal contained zero pricing for all loading, transportation and roll-off container rentals, and significantly higher pricing for disposal services; in fact, the Committee report notes:

The Committee also found significant problems with the unit pricing submitted by Gino's on the price schedules for all three regions. For each County within a given region, Gino bid more zero unit prices than actual figure unit prices. All loading and transportation unit prices for each facility were bid zero. All roll-off rentals, including pickup and

transportation were bid zero, as were the refuse disposal line items. This held true for each County within a region and for all three regions.

As stated in the prelude to this evaluation, The State fully expects any Proposal to be “reasonably” balanced for the required services. The reasonable clause allows for some manipulation of costs from one item to another. The significant number of zero bids, accompanied by significantly higher disposal prices, surpassed any test of reasonableness. An example of this would be if the DOT stockpiled and amassed a significant quantity of refuse material at any facility. The schedules would require Gino to load, transport and dispose of this quantity at no cost to the State. As loading, transportation and disposal obviously requires labor, equipment and fuel and transportation trucks and fuel, and actual disposal tipping fees, the usage of these items by the DOT on any basis, would be infeasible and detrimental to the Contractor to the point where overall Contract administration would be impacted.

[June 2008 Evaluation Committee Report for RFP #08-X-20280, p. 9.]

Based upon Gino’s submitted pricing, the Bureau determined that Gino’s Proposal was non-responsive because it was an unbalanced bid.

Here, the Bureau’s evaluation of Active’s Proposal did not reveal nominal or zero pricing with respect to any line item.⁴ Active is free to exercise its business judgment regarding the price it will charge to the State for roll-off containers.

As “reasonable unbalancing is perfectly proper,” and there is no evidence that Active has engaged in fraud, collusion, unfair restriction of competition, or other substantial irregularity – necessary for a finding that a Bidder submitted an unbalanced bid, I conclude that the Proposal submitted by Active is not an unbalanced bid.

5. The Consumption Model Fairly Evaluated the Proposals Received.

CEMCO argues that the Bureau’s consumption model failed to include an evaluation for the cost to remove 28.86 tons of wood pallets from the West Trenton site. CEMCO claims that had the Bureau included this item in its evaluation, there would have been less than a \$200 price differential between its Proposal and that submitted by Active; and, when considering the time, effort, costs, work to administer two Contracts rather than one, CEMCO would have been found to be the best choice for the State for the award of the Central Region.

RFP § 6.7.1 *Vendor’s {Bidder’s} Price Schedule* states “[t]he Division will utilize a weighted consumption model to evaluate pricing for each of the three (3) regions (North, Central, and South). The pricing model will be date-stamped and entered into the record before [Proposal] opening.”

Prior to the Proposal opening date, the Bureau develop the consumption model that would be used in the evaluation. That consumption model utilized an estimated one year average usage which was based upon the total usage from 2013 – 2015. In an effort to place all Bidders on a level playing field with respect to the data used to develop the consumption model, RFP Attachment #2: *2013 – 2015 DOT Waste Usage Statistics*, which listed the generated waste usage for various material groupings for the years 2013, 2014, and 2015, was provided to all Bidders. RFP § 3.2.1 *Blanket P.O. {Contract} Specific Waste Types*.

⁴ CEMCO has not alleged that Active submitted nominal or zero pricing with respect to any line item, only that Active’s pricing for roll-off containers was so low such that it will not make a profit.


In connection with this protest, the State Contract Manger was contacted and indicated that the removal of wood pallets from the West Trenton site was performed on June 30, 2016 and December 8, 2016. Any data regarding 2016 usage was incomplete during the procurement of this contract, and because removal of wood pallets did not occur in other years, any data regarding the removal of wood pallets would have only been available to the incumbent vendor - CEMCO. As such, the Bureau did not include wood pallets in the consumption model, as if it had done so, it would have unlevelled the playing field as only CEMCO would have had the available usage data.⁵ Thus, the Bureau properly utilized the consumption model.

Finally, the Bureau acknowledges that pricing for the Central Region was very close between the Bidders.⁶ However, the RFP was designed to award one Contract in each region to the Bidder whose Proposal is most advantageous to the State, price and other factors considered. Based upon its review and analysis of the Proposals received the Bureau determined that an award to Active would be most advantageous to the State, price and other factors considered. I find no reason to disturb this conclusion.

Based upon the foregoing, I sustain the Bureau's NOI. This is my final agency decision with respect to the protest submitted by CEMCO.

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

Sincerely,


Maurice A. Griffin
Acting Director

MAG: RUD

c: G. Olivera
K. Woolford
R. Regan

⁵ If wood pallets had been included in the consumption model, the amount included would have been 9.62 tons as the consumption model utilized an estimated one year average usage based upon the total usage from 2013 – 2015.

⁶ Even if the wood pallets had been included in the consumption model, Active's proposal pricing would have still been less than that submitted by CEMCO.