



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. BOX 039
TRENTON, NEW JERSEY 08625-0039

Telephone (609) 292-4886 / Facsimile (609) 984-2575

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

JIGNASA DESAI-MCCLEARY
Director

June 12, 2015

Via Electronic Mail [hayes@aquasurvey.com] and USPS Regular Mail

Mr. Kenneth Hayes, President
Aqua Survey, Inc.
469 Point Breeze Road
Flemington, NJ 08822

RE: Protest of Notice of Proposal Rejection
RFP #15-X-23761 Waterway Debris Assessment and Removal for Disasters

Dear Mr. Hayes,

This correspondence is in response to your letter of protest, dated and received June 8, 2015, on behalf of Aqua Survey, Inc. ("Aqua Survey") to the Division of Purchase and Property ("the Division") referencing the subject RFP. The record of this procurement notes that Aqua Survey's proposal was rejected for not including the appropriate bid security. In your letter, you acknowledge this omission and contend that, as a small business, it is unreasonable for Aqua Survey to pay "greater than \$5,000 for a bid guarantee certificate" for a service that has been utilized "once in the last 15 years." As such, you request the Division waive the RFP requirement that all proposals include the specified bid security and reinstate Aqua Survey's proposal.

I have reviewed the record of this procurement, including the RFP, Aqua Survey's proposal, and relevant statutes, regulations, and case law. 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 Aqua Survey's protest.

The requirement to include a bid security with a proposal submission was a RFP specification:

4.4.1.5 BID SECURITY

All Bidders must submit a bid guarantee equivalent to \$1,000,000. This bid guarantee shall consist of a properly executed individual bid bond issued by an insurance or security company authorized to do business in the State of New Jersey, a certified or cashier's check drawn to the order of the Treasurer, State of New Jersey, or an irrevocable letter of credit drawn naming the Treasurer, State of New Jersey as beneficiary issued by a federally insured financial institution as assurance that the Bidder will, upon acceptance of its bid, execute such contractual documents as may be required within the time specified.

The State will hold all bid guarantees during the evaluation process. As soon as is practicable after the completion of the evaluation process, the State will:

- a. Issue an award notice for those offers accepted by the State; and
- b. Return all bid guarantees to those who have not been issued an award notice.

....

[(Emphasis added.)]

Item number 14 on the *Signatory Page* of the required RFP documents specified “the bidder must submit with the proposal bid security in the amount of \$1,000,000.00.” As defined in RFP Section 2.1 *General Definitions*, shall or must “denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive.” Furthermore, in Addendum #1, Part 1, *Answers to Questions*, the Division provided the following guidance to bidders concerning the required bid securities:

#	Page #	RFP Section Reference	Question	Answer
10	55 & 75	4.4.1.5 & 7.0	Please clarify whether the Bid Security, Payment Security and the Performance Security requirements apply if a bidder chooses to submit a proposal only for the Debris Assessment portion of the Scope or Work?	Yes, the Bid Security, Payment Security and the Performance Security requirements apply to each bidder whether they choose to submit a proposal only for the Debris Assessment portion or the Debris Removal portion, or both.

The record reveals that Aqua Survey’s proposal did not contain the required bid security. Rather, its *Signatory Page* indicated “NONE” in response to the type of bid security it would supply.

Despite the aforementioned language, Aqua Survey requests the Division waive the requirement that all bidders submit a bid security. “It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived.” Terminal Constr. Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 411 (1975). “Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding.” Id. at 412. However, “advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived.” Ibid.

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 Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 315 (1994) (internal quotations omitted) (affirming the two-prong test established in River Vale, supra, 127 N.J. Super. at 216).]

Under the first prong, when required, a bid security serves to provide the State a guarantee that if selected, the bidder will accept the contract as bid. Under the second prong, waiving the bid security requirement could serve to adversely affect the competitive bidding scheme, as courts have found the presence of a bid security requirement “may have deterred others from bidding who would have bid had they known that these conditions would be waived.” L. Pucillo & Sons, Inc. v. New Milford, 73 N.J. 349, 358 (1977) (internal quotation omitted). Therefore, I find this to be a material omission which may not be waived. The Division’s Administrative Code¹ reflects this policy, stating that a “bidder’s failure to submit the required bid security with its proposal shall be cause for rejection of the proposal.” N.J.A.C. 17:12-2.4(c) (emphasis added).

Notwithstanding Aqua Survey’s interest in competing for this procurement, it would not be in the State’s best interests to allow a bidder who did not provide the required bid security to be eligible to participate in the procurement process. Such acceptance would unlevel the bidders’ playing field and be contrary to the provisions of the public procurement process. Nonetheless, the Division does take note of your statement that the amount of the bid security may have been difficult for a small business to comply with and request that State experts weigh this concern against the State’s needs for the provision of critical services in future solicitations. However, in light of the findings set forth above, I must deny your request for eligibility to participate in the competition for the subject contract. This is my final agency decision on this matter.

This is an unfortunate situation for the State, as the Division encourages competition and appreciates the time and effort put forth in preparing and submitting Aqua Survey’s proposal. I invite you to take this opportunity to register your business with **NJ START** at www.njstart.gov, the State of New Jersey’s new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: M. Griffin
K. Woolford
J. Cross

¹ The Division’s administrative rules governing its procurement programs are set forth in N.J.A.C. 17:12. These rules can be accessed at <http://www.state.nj.us/treasury/purchase/AdminCode.shtml>.