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May 29, 2019

**VIA EMAIL [GLEEJS@JEA.COM](mailto:GLEEJS@JEA.COM)**

Jenny McCollum, Chief Procurement Officer  
Jacksonville Electric Authority  
JEA Customer Center  
21 W. Church St., 1st Floor, Room 002  
Jacksonville, FL 32202

**Re: Solicitation No. 061-19, Bid Protest of EnviroWaste Services Group, Inc.**

Dear Ms. McCollum:

EnviroWaste Services Group, Inc. ("EnviroWaste") hereby protests the terms of the Jacksonville Electric Authority's ("JEA")'s solicitation No. 061-19 for pipe bursting unit price construction (the "Solicitation") as unduly restrictive and ambiguous. **Furthermore, because this protest is being filed more than five calendar days prior to bid opening, it is timely and EnviroWaste is entitled to and demands a stay of this procurement.**

The Solicitation unduly restricts competition because the JEA will not accept a Florida General Contractor's license even though this would exceed the requirement for an Underground Utility and Excavation License. Additionally, the Solicitation unduly restricts competition because it prohibits offerors from meeting the minimum experience requirements with subcontractor references. As grounds EnviroWaste states:

## BACKGROUND

EnviroWaste is one of the industry leaders in the maintenance, inspection and repair of storm and sanitary systems throughout Florida. EnviroWaste holds a Florida General Contractor's license through its qualifier Eduardo ("Eddy") Barba. *See Exhibit 1*, Eduardo Barba DBPR Profile; *Exhibit 2*, EnviroWaste Sunbiz Profile.

As a general contractor, EnviroWaste "may contract for any activity requiring licensure under" §§ 489.101 – 489.146, Fla. Stat., and "may perform any work requiring licensure under [§§ 489.101 – 489.146], except as otherwise expressly provided in s. 489.113." § 489.105(3)(a), Fla. Stat. In turn, § 489.113, provides that "[a] **general contractor** shall not be required to subcontract the construction of a main sanitary sewer collection system, storm collection system, or water distribution system, not including the continuation of utility lines from the mains to the buildings, **and may perform any of the services, on public or private property, for which a license as an underground utility and excavation contractor is required under this part.**" § 489.113(3)(d), Fla. Stat. (emphases added). Pursuant to this plain language a general contractor does not need an underground utility and excavation license to perform that type of work.<sup>1</sup>

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<sup>1</sup> "Underground utility and excavation contractor" means a contractor whose services are limited to the construction, installation, and repair, on public or private property, whether accomplished through open excavations or through other means, including, but not limited to, directional drilling, auger boring, jacking and boring, trenchless technologies, wet and dry taps, grouting, and slip lining, of main sanitary sewer collection systems, main water distribution systems, storm sewer collection systems, and the continuation of utility lines from the main systems to a point of termination up to and including the meter location for the individual occupancy, sewer collection systems at property line on residential or single-occupancy commercial properties, or on multioccupancy properties at manhole or wye lateral extended to an invert elevation as engineered to accommodate future building sewers, water distribution systems, or storm sewer collection systems at storm sewer structures. However, an underground utility and excavation contractor may install empty underground conduits in rights-of-way, easements, platted rights-

On or about April 23, 2019, the JEA posted the Solicitation, which seeks offers for trenchless rehabilitation of the JEA's gravity sewer system using the pipe bursting method. The work to be performed is the installation of sewer mains by the pipe bursting method, including connecting to existing sewer mains, connecting existing services or installing house connections. The selected contractor is to furnish all labor, equipment, materials tools, and appurtenances necessary for the performance and completion of the work. **Exhibit 1**, Solicitation No. 061-19 (as initially issued), at p. 7 of 64 (pagination as per lower right corner).

The Solicitation provides for an award on a lowest price technically acceptable ("LPTA") basis, and states "JEA will Award this Contract to Respondent(s) whose Response meets or exceeds the Minimum Qualifications set forth in this Solicitation, and the Respondent's cost to JEA is the lowest." **Exhibit 1**, at p. 12 of 64. The Minimum Qualifications provided for by the Solicitation are:

- The Proposer shall have successfully completed during the previous three (3) years immediately preceding the Response Due Date, a minimum of 100,000 ft. of trenchless pipe bursting of gravity sewer using high-density polyethylene (HDPE) pipe.
- Respondent shall possess and provide proof of current Florida Underground Utility and Excavation Contractor License in conformity with Florida Statute 489.

**Exhibit 1**, at p. 8 of 64.

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of-way in new site development, and sleeves for parking lot crossings no smaller than 2 inches in diameter if each conduit system installed is designed by a licensed professional engineer or an authorized employee of a municipality, county, or public utility and the installation of such conduit does not include installation of any conductor wiring or connection to an energized electrical system. An underground utility and excavation contractor may not install piping that is an integral part of a fire protection system as defined in s. 633.102 beginning at the point where the piping is used exclusively for such system." § 489.105(3)(n), Fla. Stat.

On April 29, 2019, the JEA issued Addendum No. 2 to the Solicitation, which extended the deadline for submitting offers to June 4, 2019. **Exhibit 5**, Solicitation No. 061-19, Addendum 2. On May 24, 2019, the JEA issued Addendum No. 4, which included the following Questions and Answers regarding the minimum requirements:

Q: The specs state the proposer shall have completed 100,000'. Can the subcontractor have the experience to meet this qualification or must it be the prime contractor?

A: It must be the prime.

Q: Will JEA accept a general contractor's license in lieu underground utility?

A: Underground Utility license is required.

**Exhibit 7**, Solicitation No. 061-19, Addendum 4, at p. 2 of 2 (pagination as per bottom center).

EnviroWaste would submit an offer in response to the Solicitation, but it was planning on relying on its anticipated subcontractor's references to meet the experience requirements. Additionally, EnviroWaste intended to rely on its General Contractor's license to meet the licensing requirement. However, because the Solicitation unduly restricts competition EnviroWaste has been unlawfully excluded from the competition.

### **JURISDICTION, STANDING & TIMELINESS**

The JEA's Chief Procurement Officer has jurisdiction to review this bid protest pursuant to Section 5-101(a)(4) of the JEA Procurement Code. Namely, EnviroWaste is an experienced contractor for the services sought in the solicitation who would compete for the contract. However, the unduly restrictive Solicitation provisions unlawfully exclude EnviroWaste from the competition and deprive it of an opportunity to compete. Therefore, the terms of the

Solicitation have caused EnviroWaste to sustain a non-trivial competitive injury and it has standing to protest. *Matheson v. Miami-Dade Cnty.*, 258 So. 3d 516, 519-20 (Fla. 3d DCA 2018) (plaintiff had standing where it alleged it would have bid on county land if county had engaged in competitive bidding); *Accela, Inc. v. Sarasota Cnty.*, 901 So. 2d 237, 237-38 (Fla. 2d DCA 2005) (protesters challenging piggyback awards as unlawful had standing because they would have submitted offers if agency had conducted a competition). Finally, this protest is being filed more than five calendar days prior to the time set for bid opening. Therefore, this protest is timely and EnviroWaste is entitled to and demands a stay of the procurement pending the outcome of its protest. Section 5-101(a)(3) & (7).

#### DISCUSSION

**I. The Solicitation Unduly Restricts Competition Because A General Contractor's License Exceeds the Requirement for an Underground Utility and Excavation Contractor's License**

The government must specify its needs in a manner designed to permit full and open competition, and may include restrictive requirements only to the extent they are necessary to satisfy its legitimate needs or as otherwise authorized by law. *See, e.g., Advocacy Ctr. for Persons with Disabilities, Inc. v. State, Dep't of Child. & Family Servs.*, 721 So. 2d 753, 755-56 (Fla. 1st DCA 1998); *City of Opa-Locka v. Trs. of the Plumbing Indus. Promotion Fund*, 193 So. 2d 29, 30-32 (Fla. 3d DCA 1966). Thus, a solicitation cannot prohibit an offeror from **exceeding** the solicitation's minimum requirements at no additional cost to the government. *See, e.g., Tropabest Foods, Inc. v. State, Dept. of Gen. Servs.*, 493 So. 2d 50, 51-52 (Fla. 1st DCA 1986).

Here, the Solicitation requires offerors to hold an Underground Utility and Excavation Contractor's license. A General Contractor's license necessarily exceeds this requirement

because a General Contractor “may perform any of the services, on public or private property, for which a license as an underground utility and excavation contractor is required[,]” and more. §§ 489.105(3)(a), 489.113(3)(d) Fla. Stat. Nonetheless, when EnviroWaste asked the JEA to confirm that a General Contractor’s license would be acceptable the JEA stated it would not.

The JEA’s response to EnviroWaste’s question unduly and unlawfully restricts competition because it excludes general contractors that are authorized and qualified to perform “underground utility and excavation work” simply because they hold a license that authorizes and qualifies them to perform additional types of work. Furthermore, the award is to be made on an LPTA basis. There is no rational basis for prohibiting offerors from exceeding a requirement at no cost to the government; hence such a restriction is unlawful. *Adolphus v. Baskin*, 116 So. 225, 225-26 (Fla. 1928) (reversing with orders to enjoin award: “[T]he **reasonable** exercise of power by municipal govenmental [sic] authorities is always required as a matter of public policy and fidelity to the public trust. [. . .] Unreasonable action taken under color of authority that materially affects substantial rights of persons and of taxpayers is contrary to the principles upon which our system of government is founded.”) (emphasis in original). Therefore, the Solicitation should be amended so that it allows offerors to hold either a General Contractor’s license or an Underground Utility and Excavation Contractor’s license.

## **II. The Solicitation Unduly Restricts Competition Because it Prohibits Offerors From Providing Subcontractor References**

The Solicitation requires offerors to meet the experience requirement with the proposed prime contractor’s own references. This unduly restricts competition because Ch. 489 clearly authorizes General Contractors like EnviroWaste to oversee subcontractors who may be able to

meet the requirement. There is no rational basis for prohibiting prospective prime contractors like EnviroWaste from relying on their subcontractors' experience. Therefore, the Solicitation unduly restricts competition and is unlawful. The Solicitation should there be amended to provider for the evaluation of subcontractor experience.

**REQUEST FOR RELIEF**

EnviroWaste asks the JEA to amend the Solicitation to allow offerors to hold either a General Contractor's license or an Underground Utility and Excavation Contractor's license, and to allow offerors to rely on their subcontractor's experience when demonstrating their experience, and for all such further relief the JEA deems fit.

Sincerely,

Shutts & Bowen LLP

/s/ Andrew E. Schwartz  
Andrew E. Schwartz

cc: David King ([kinggd@jea.com](mailto:kinggd@jea.com))

## **EXHIBIT LIST**

Eduardo Barba DBPR Profile. ....	1
EnviroWaste Sunbiz Profile.....	2
Solicitation No. 061-19 (as initially issued) .....	3
Solicitation No. 061-19, Addendum 1 .....	4
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