



State of New Jersey

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September 25, 2015

Via Fax 973.349.1307 and USPS Regular Mail

James T. Prusinowski, Esq.
Trimboli & Prusinowski, LLC
268 South Street
Morristown, New Jersey 07960

Re: Protest of Notice of Intent to Award
RFP# 15-X-23644: Certified Court Reporting - Division of Workers' Compensation

Dear Mr. Prusinowski:

This letter is in response to your correspondence dated July 14, 2015, to the Division of Purchase and Property (Division), on behalf of JerseyShore Reporting, LLC (JerseyShore). In that letter, JerseyShore protests the Procurement Bureau's (Bureau) June 29, 2015, Notice of Intent to Award (NOI) a contract for Solicitation# 15-X-23644: Certified Court Reporting - Division of Workers' Compensation. JerseyShore contends that its proposal was improperly assessed and therefore its rating was artificially low. JerseyShore further claims that the errors made in calculating the technical score were so significant that the NOI should be withdrawn. With the protest, JerseyShore requested an opportunity to make an in-person presentation.

By way of background, the subject Request for Proposal (RFP) was issued on November 30, 2014, by the Bureau on behalf of the New Jersey Department of Labor and Workforce Development (DLWD) to solicit proposals for certified court reporters for the Division of Workers Compensation (DWC). The DWC uses the certified court reporters to record the testimony presented at hearings for injured workers in the State of New Jersey (State). The hearings are held at the Workers' Compensation Courts in various locations across the State as follows:

ZONE 1	ZONE 2	ZONE 3	ZONE 4
Freehold	Elizabeth	Atlantic City	Hackensack
Mount Holly	Lebanon	Bridgeton	Jersey City
New Brunswick	Mt. Arlington	Camden	Paterson
Trenton	Newark	Toms River	

It is the intent of the Bureau to award one contract in each of the four zones listed above, for a total of four contracts. Contracts will be awarded to those responsible bidders whose proposals, conforming to this RFP, are most advantageous to the State, price and other factors considered. (RFP § 1.1 *Purpose and Intent*.) Bidders were permitted to submit a proposal on a single zone or for multiple zones. (RFP § 4.4.7 *Method of Bidding*.) This RFP was a re-procurement for services provided under T1061 for the Certified Court Reporting Contract for the DWC, which is scheduled to expire on September 30, 2015. (RFP § 1.2 *Background*.)

On January 6, 2015, five proposals received by the submission deadline were opened by the Division's Proposal Review Unit. JerseyShore submitted a proposal for each of the four zones. On February 12, 2015, the Evaluation Committee (Committee) conducted its review of the proposals and on June 17, 2015, the Committee issued its report. On June 29, 2015, the Bureau issued its NOI indicating that the following contracts would be awarded:

- Zone 1: State Shorthand Reporting, LLC
- Zone 2: William C. O'Brien Associates, Inc.
- Zone 3: JerseyShore Reporting, LLC
- Zone 4: State Shorthand Reporting, LLC

On July 14, 2015, the protest end date, the Division received JerseyShore's protest letter in which it raises several contentions. First, JerseyShore alleges that "the evaluation does not establish a protocol for how the technical score was established...JerseyShore has the same criteria set out in its bid as other bidders but received a lower overall score. Also, in other instances, JerseyShore provided increased criteria than other bidders and received a lower score." Second, JerseyShore contends that State Shorthand Reporting, LLC (State Shorthand) failed to reveal that its proposal was a "joint venture" and that it either misrepresented and/or exaggerated its qualifications which should have resulted in State Shorthand receiving a lower evaluation score or being disqualified. Third, similar to the allegations raised against State Shorthand, JerseyShore claims that the proposal submitted by William C. O'Brien Associates, Inc. (O'Brien) contained numerous deficiencies and exaggerations which should have resulted in it receiving a lower score and/or being disqualified.

With respect to JerseyShore's request to make an in-person presentation, 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." The regulation further provides that "[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 JerseyShore's protest, I have reviewed the record of this procurement, including the RFP, the proposals submitted, the Evaluation Committee, the Bureau's Recommendation Report, and the relevant statutes, regulations, and case law. The issue(s) raised in JerseyShore's protest were sufficiently clear and JerseyShore presented information/documents in support of its position. This review of the record 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 JerseyShore. Thus, I set forth herein my final agency decision.

First, contrary to JerseyShore's allegation that there was no protocol established for how the technical scores would be established, the RFP specifically identifies the criteria to be employed by the Committee in reviewing the proposals.

6.7.1 EVALUATION CRITERIA

- a. Personnel: The qualifications and experience of the bidder's management, supervisory, and key personnel assigned to the contract, including candidates recommended for each of the positions/roles required.
- b. Experience of firm: The bidders documented experience in successfully completing contracts of a similar size and scope in relation to the work required by this RFP.
- c. Ability of firm to complete the Scope of Work based on its Technical Proposal: The Bidder's demonstration in the proposal

that the Bidder understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the contract.

In addition, the Committee report specifically describes how the technical scores were derived:

- a) Assigning a score from zero (0) to ten (10) to each criterion; according to the “Scoring Legend” below:

SCORING LEGEND:

9-10	Excellent
7-8	Very Good
5-6	Good
3-4	Fair
1-2	Poor
0	Not Responsive

- b) Multiplying the assigned score by the criterion weight, which produced a weighted score for each criterion; and
- c) Totaling all weighted scores, to derive the overall weighted score for the proposal.

Using the pre-established criteria, the Committee evaluated the strengths and weaknesses of each technical proposal based upon the documentation submitted. Based upon the foregoing, JerseyShore’s contention that there was no protocol for how the technical scores would be established and that the proposals were improperly evaluated is without merit.

JerseyShore further asserted that its proposal was improperly evaluated resulting in the company receiving a lower score than deserved. In preparing proposals, bidders were required to submit information supporting the company’s understanding and approach to perform the work required by the RFP. Specifically, the RFP required that “[t]he proposal should be submitted in two volumes with the content of each volume as indicated below.” (RFP § 4.4 *Proposal Content*.)

Volume 1

Section 1 - forms (Sections 4.4.1 and 4.4.2)

Section 2 – Technical Proposal (Section 4.4.3) – **NOTE: This section of the bidder’s submission is limited to 25 pages or fewer, with no smaller than a 12 point font.**

Section 3 – Organizational Support and Experience (Section 4.4.4)

Volume 2

Section 4 – Price Schedule (Section 4.4.5)

[RFP § 4.4 *Proposal Content*, emphasis in the original]

With respect to Volume 1 - Section 2, “the bidder shall describe its approach and plans for accomplishing the work outlined in the Scope of Work section, i.e., Section 3.0. The bidder must set forth its understanding of the requirements of this RFP and its ability to successfully complete the contract.” (RFP § 4.4.3 *Technical Proposal*.) Specifically, the bidder is required to submit, in a narrative format, details regarding the following:

- That it understands the objectives of the RFP, and set forth its technical approach and plans to meet the requirements of the RFP. (RFP § 4.4.3.1 *Management Overview*).

- “[D]escribe its specific plans to manage, control and supervise the contract to ensure satisfactory contract completion according to the required schedule.” (RFP § 4.4.3.2 *Contract Management*).
- Provide its mobilization and implementation plan, including a detailed timetable in order to demonstrate that the bidder is able to comply with the contract requirement that it be operational within 30-days of the NOI. (RFP § 4.4.3.4 *Mobilization and Implementation Plan*).
- Provide a summary of any anticipated problems during the term of the contract and provide a proposed solution. (RFP § 4.4.3.5 *Potential Problems*).

In addition, for Volume 1 - Section 3, the bidder is requested to provide detailed information regarding its organization, personnel and experience which supports the bidder’s qualifications and capabilities to perform the services required by the RFP. Specifically, the RFP requests that:

[t]he bidder should include information relating to its organization, personnel, and experience, including, but not limited to, references, together with contact names and telephone numbers, evidencing the bidder’s qualifications, and capabilities to perform the services required by this RFP. This section of the proposal must minimally contain the information identified below.

[RFP § 4.4.4 *Organizational Support and Experience*.]

A summary of the information that a bidder should provide in response to this section is as follows:

- Office address, including the name and telephone number for contact person. (RFP § 4.4.4.1 *Location*).
- Organization chart for those persons assigned to this contract and organization chart for the entire company. (RFP § 4.4.4.2 *Organization Charts*).
- Resumes for all management, supervisory and key personnel which emphasize the qualifications experience of the individuals in successfully completing contracts for a similar size and scope to the services required by this RFP. (RFP § 4.4.4.3 *Resumes*).
- List of back-up staff that may be used to assist or replace primary persons assigned to perform work under this contract. (RFP § 4.4.4.4 *Backup Staff*).
- List of contracts of a similar size and scope to the services required by this RFP, that the bidder has successfully completed. (RFP § 4.4.4.5 *Experience with Contracts of Similar Size and Scope*).
- Certified financial statements, including a balance sheet, income statement and statement of cash flow and all applicable notes for the most recent calendar year/fiscal year. (RFP § 4.4.4.6 *Financial Capability of the Bidder*).

A review of JerseyShore’s proposal submitted through eBid reveals that Jersey Shore’s technical proposal in response to Section 4.4.3 was two (2) pages. These pages detailed JerseyShore’s software programs, storage and access to records via JerseyShore’s website, printing and video services.

There was no information provided in response to the individual requirements of Section 2 - specifically no information related to *Management Overview, Contract Management, Mobilization and Implementation, or Potential Problems*. A response to this section of the RFP is mandatory “[i]n this section, the bidder shall describe its approach and plans for accomplishing the work outlined in the Scope of Work section...”¹ (RFP § 4.4.3 *Technical Proposal*, emphasis added). JerseyShore concedes that it

¹ 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.

did not provide a response for the mobilization and implementation plan. (July 13, 2015, Protest letter, page 2.) It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Township of Hillside v. Sternin, 25 N.J. 317, 324 (1957). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the Court in Township of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). “In River Vale, Judge Pressler declared that after identifying the existence of a deviation, the issue is whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), citing, River Vale, *supra*, 127 N.J. at 216.

First, whether the effect of a waiver would be to deprive the [government entity] 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.

[River Vale, *supra*, 127 N.J. at 216.]

“If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *Id.* at 222. Here, JerseyShore’s failure to provide the mandatory information in its proposal is a material deviation from the RFP requirements. Permitting the deviation potentially places JerseyShore in a position of advantage over other bidders who have bid in conformance with the specifications. Without information regarding JerseyShore’s *Management Overview, Contract Management, Mobilization and Implementation, or Potential Problems* for the proposed contract, the State cannot evaluate whether JerseyShore has an approach and plan to accomplish the scope of work outlined in the RFP. Because JerseyShore failed to include a response to the requested mandatory information, and because this information is material, its proposal was non-responsive.

JerseyShore’s eBid submission in response to Volume 1 - Section 3, *the Organizational Support and Experience*, was comprised of the following: organizational charts, list of court reporters, and resumes. Despite the fact that JerseyShore has previously provided court reporting services for a portion of the State, in its proposal, JerseyShore did not provide any information regarding other contracts of a similar size or scope that it has held. In its letter of protest, JerseyShore claims that it was asked by the State to take over an additional zone on the current DWC court reporting contract.² While the State can take notice of its own contracts, a bidder who omits information requested by the RFP does so at its own peril.

Further, JerseyShore states that its proposal was submitted electronically which demonstrates its superior technical abilities; however, neither the Committee nor the evaluation criteria credit additional points to a bidder for submitting an electronic proposal, as both electronic and paper proposals were accepted in response to the RFP. I additionally note that O’Brien successfully submitted its proposal by eBid and by hardcopy.

² When another vendor contract was cancelled, all other vendors under the contract were provided the opportunity to submit proposal for the additional zone. JerseyShore offered the highest rebate for the zone and therefore was awarded the contract.

With its protest, JerseyShore included a copy of its proposal; however, this attachment does not match the proposal submission filed in eBid. Unlike O'Brien, JerseyShore did not submit a hard copy of its proposal prior to the submission deadline. JerseyShore has alleged that an error in the eBid system caused some of the documents submitted or parts of some of the documents submitted on eBid to not be filed. In connection with the Hearing Unit's review of this protest, the Department of the Treasury, Division of Revenue and Enterprise Services' (DORES), which maintains eBid was contacted. DORES verified that the eBid system was fully functional at the time of the JerseyShore's eBid submission. RFP Section 1.3.3 *Electronic Bidding (eBid)* clearly states that "[i]t will be the bidder's responsibility to ensure that the eBid has been properly submitted." All documents uploaded by JerseyShore to eBid were received and reviewed by the Bureau/Evaluation Committee.

While the proposal included with the protest letter incorporated information regarding JerseyShore's qualifications to perform the contract, specifically, experience with contracts of a similar size and scope, references, additional resumes, information regarding back-up staff and an informational brochure - that information was not uploaded by JerseyShore to eBid as part of its proposal submission. Therefore, that information was not and could not be evaluated by the Committee. Further, in its report, the Committee noted:

...JerseyShore did not provide sufficient information throughout its proposal that the firm can undertake and successfully perform the technical requirements of the Scope of Work for all four (4) zones. JerseyShore identified twenty-five (25) full-time and six (6) part-time certified court reporters **but did not submit a hiring or mobilization plan.**

JerseyShore currently provides these services to the State, but references or experience of the firm with other contracts were not provided.³

[June 17, 2015, Evaluation Committee Report, *emphasis added*]

In contrast, the proposals submitted by State Shorthand and O'Brien, contained detailed information responding to each of the proposal requirements/evaluation criteria. Based upon the submissions, the Committee concluded the following:

Technical Score by Evaluation Criteria

Bidder	Criterion A	Criterion B	Criterion C	Avg. Technical Score
State Shorthand	625	805	920	783
Trainor	550	700	720	657
O'Brien	550	490	760	600
Jersey Shore	550	455	480	495
Torro	250	105	160	172

Specifically, as to the award for Zone 1 and Zone 4 the Committee noted:

The Committee determined that State Shorthand fully considered the RFP's requirements in presenting an organized proposal that detailed its

³ I note that JerseyShore's failure to provide references is not fatal to its proposal. RFP Section 4.4.4 *Organizational Support and Experience* states "[t]he bidder should include information relating to its organization, personnel, and experience, including, but not limited to, references, together with contact names and telephone numbers, evidencing the bidder's qualifications, and capabilities to perform the services required by this RFP." Pursuant to RFP Section 2.1 *General Definitions*, "[s]hould - [d]enotes that which is recommended, not mandatory."

approach to providing certified court reporters to the Division of Workers' Compensation in a professional and informative format.

The Committee noted the experience of the proposed personnel for this contract, as well as the experience of the firm with contracts of similar size and scope. State Shorthand has provided and continues to provide these services to local municipalities as well as various State agencies throughout New Jersey.

The Committee determined that State Shorthand provided ample information throughout its proposal that the firm can undertake and successfully perform the technical requirements of the Scope of Work. State Shorthand identified twenty-one (21) full time and one (1) part time certified court reports and also identified a hiring plan if additional staffing is needed.

State Shorthand submitted a proposal to provide services for all four (4) zones. State Shorthand demonstrated the experience, knowledge and resources to successfully provide certified court reporters for the Division of Worker's Compensation for all zones.

ZONE 1:

State Shorthand is ranked number one (1) in terms of average technical score with 783 of a possible 1,000 points, and number two (2) in price rank for Zone 1. The percentage rebate price difference between price rank 1 and 2 is only 0.5%. Based on these figures and the other factors noted above, the Committee recommends the proposal submitted by State Shorthand for award of Zone 1 as it represents an advantageous offer to the State, price and other factors considered. The Committee is unanimous in recommending State Shorthand for contract award for Zone 1.

...

ZONE 4:

State Shorthand is ranked number one (1) in terms of average technical score with 783 of a possible 1,000 points, and number one (1) in price rank for Zone 4. Based on these figures and the other factors noted above, the Committee recommends the proposal submitted by State Shorthand for award as it represents an advantageous offer to the State, price and other factors considered. The Committee is unanimous in recommending State Shorthand for contract award for Zone 4.

[June 17, 2015, Evaluation Committee Report]

As to Zone 2:

The Committee determined that O'Brien fully considered the RFP's requirements in presenting an organized proposal that detailed its approach to providing certified court reporters for Zone 2 and Zone 4 to the Division of Workers' Compensation in a professional and informative format.

The Committee determined that O'Brien provided ample information throughout its proposal that the firm can undertake and successfully perform the technical requirements of the Scope of Work. O'Brien identified seventeen (17) full time and six (6) part time certified court reporters.

O'Brien currently provides these services to the State but did not provide additional contact information or references.⁴

O'Brien demonstrated the experience, knowledge and resources to successfully provide certified court reporters for the Division of Worker's Compensation for both zones.

ZONE 2:

O'Brien is ranked number (2) in terms of average technical score with 600 of a possible 1,000 points, and number two (2) in price rank for Zone 2. The Committee determined that the difference in technical score far outweighs the small percentage difference in the proposed rebates between O'Brien and JerseyShore. The Committee is unanimous in recommending O'Brien for contract award for Zone 2.

[June 17, 2015, Evaluation Committee Report]

Based upon the Committee report, the Bureau determined that contracts should be awarded to State Shorthand Reporting, LLC for Zones 1 and 4; William C. O'Brien Associates, Inc. for Zone 2 and JerseyShore Reporting, LLC for Zone 3.⁵

Next, JerseyShore contends that State Shorthand did not reveal that its proposal was a joint venture. The RFP defines a joint venture as "[a] business undertaking by two or more entities to share risk and responsibility for a specific project." (RFP § 2.1 *General Definitions*). The fact that State Shorthand may hire court reporters who own their own businesses does not make this contract a joint venture. There is nothing contained in State Shorthand's proposal that indicates that it intends to share the risk and responsibility for the performance of this contract with any other individual or entity. With respect to a proposal being submitted as a joint venture, the RFP requires:

⁴ As noted above, O'Brien's failure to provide references was not fatal to its proposal.

⁵ In connection with a separate protest, a review of JerseyShore's *Ownership Disclosure Form* was conducted. With its proposal, JerseyShore submitted an *Ownership Disclosure Form* which indicated that Michelle Ertle owns more than 10% of the company; in fact, Ms. Ertle owns 50% of the company. No other persons or entities were identified on the form. Prior to contract award, the RFP required that the intended awardee submit a statement "certifying that no contributions prohibited by either Chapter 51 or Executive Order No. 117 have been made by the Business Entity and reporting all contributions the Business Entity made during the preceding four years to any political organization..." (RFP § 7.1.1 *Requirements of Public Law 2005, Chapter 51*). On July 7, 2015, JerseyShore submitted the Chapter 51 Statement which reveals that Michelle Ertle and Eugene Ertle, Jr. are each 50% shareholders of the company. JerseyShore admits that the *Ownership Disclosure Form* submitted with its proposal contained an error. New Jersey Courts have consistently held that strict compliance with the ownership disclosure requirements of N.J.S.A. 52:25-24.2 is necessary. As such, a proposal is properly rejected where it contains inaccurate ownership information. See, Impac, Inc. v. City of Paterson, 178 N.J. Super. 195, 200-01 (App. Div. 1981); Muirfield Const. Co., Inc. v. Essex County Imp. Authority, 336 N.J. Super. 126 (App. Div. 2000). Based upon the information contained in the Chapter 51 Statement and more importantly, JerseyShore's admission that its *Ownership Disclosure Form* contained an error, the Division had no choice but to find that the proposal submitted by JerseyShore was non-responsive.

1.4.8 JOINT VENTURE

[i]f a joint venture is submitting a proposal, the agreement between the parties relating to such joint venture should be submitted with the joint venture's proposal. Authorized signatories from each party comprising the joint venture must sign the proposal. A separate Ownership Disclosure Form, Disclosure of Investigations and Actions Involving Bidder form, Disclosure of Investment Activities in Iran form, and Affirmative Action Employee Information Report must be supplied for each party to a joint venture.

Rather, based upon the proposal submitted, State Shorthand will be performing all of the management and operational activities set forth in the proposal on its own; and therefore, will have all of the risk and responsibility for the performance of the contract.

JerseyShore further argues that both State Shorthand and O'Brien either misrepresented and/or exaggerated their qualifications which should result in both companies receiving a lower evaluation score or being disqualified. With respect to State Shorthand's proposal, JerseyShore alleges that State Shorthand does not have the requisite number of court reporters available to it for staffing purposes; therefore State Shorthand's score for Criteria A – Personnel, is too high. A review of the evaluation criteria for personnel reveals that proposals will be evaluated based upon “[t]he qualifications and experience of the bidder's management, supervisory, and key personnel assigned to the contract, including candidates recommended for each of the positions/roles required.” (RFP § 6.7.1 *Evaluation Criteria*). Contrary to JerseyShore's argument, the number of court reporters available is not the only factor considered in arriving at the technical score for Criteria A; rather, the Committee need only be assured that the company could supply a sufficient number of court reporters to handle the work in the zone(s) awarded. Further, while the RFP requests that “the bidder shall indicate the number of [full time and part time] certified court reporters presently available to [the] firm to work on this contract”, the RFP also permits bidders to recruit/hire additional court reporters after the award of the contract. (RFP § 4.4.4.2(b) *Organization Charts – Chart for the Entire Firm*, RFP § 4.4.4.4 *Backup Staff*). Both State Shorthand and O'Brien provided a plan to recruit additional court reporters in their proposal if the need arises.

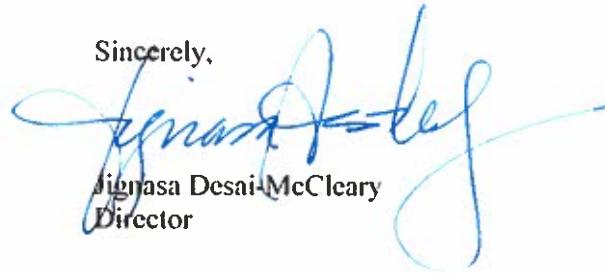
With respect to contracts of a similar size and scope listed by State Shorthand in its proposal, State Shorthand identified its other similarly sized and scoped contracts by contract number and title. As such, the Committee was aware of the other contracts held by State Shorthand and could place the appropriate weight on each in its evaluation. Finally, as to JerseyShore's assertion that its court reporting software is superior to that to be employed by State Shorthand to complete the contract work, the RFP does not contain any requirements regarding the software to be used by a contractor.

Similarly, JerseyShore's allegations against O'Brien are not relevant to this procurement. JerseyShore notes that O'Brien utilizes an outside company to handle its storage and retentions needs and that this should have strongly weighed against O'Brien in its technical score. However, nothing in the RFP precludes the use of an outside company to handle the storage and retention needs of the contractor.

In light of the findings set forth above, I sustain the Bureau's NOI with regard to Zones 1, 2 and 4. However, regarding the NOI to JerseyShore for Zone 3, that NOI is rescinded, because as noted earlier and in a separate final agency decision, JerseyShore's proposal was non-responsive as it failed to provide mandatory information and because it contained an erroneous *Ownership Disclosure Form*. This is my final agency decision on this matter with respect to the protest submitted by JerseyShore Reporting, LLC.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your company with **NI START** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Nignasa Desai-McCleary
Director

JD-M: RUD

c: L. Spildener
J. Signoretta
G. Olivera