



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR

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March 28, 2024

Via Electronic Mail tschenberg@waverlyindustries.com

Theodore Schenberg, CEO
Waverly Industries, LLC
145 W. Shore Drive
Culver, IN 46511

Re: I/M/O Bid Solicitation #24DPP00925 Waverly Industries, LLC
Protest of Notice of Intent to Award
T0120 Ice & Snow Removal Liquids and Chemicals for the
New Jersey Department of Transportation and South Jersey Transportation Authority

Dear Mr. Schenberg:

This final agency decision is in response to your letter dated February 10, 2024, regarding Bid Solicitation #24DPP00925 – T0120 Ice & Snow Removal Liquids and Chemicals for the New Jersey Department of Transportation and South Jersey Transportation Authority (Bid Solicitation), to the Division of Purchase and Property (Division) on behalf of Waverly Industries, LLC (Waverly). In that letter Waverly argues that the proposed award to Innovative Municipal Products US Inc. dba Innovative Surface Solutions (“Innovative”) for their product Magic Minus Zero for State-Supplied Price Sheet Price Lines 73 to 107 is in error because the product bid does not conform to the Bid Solicitation’s requirements, and presents an unfair advantage for Innovative. Specifically, Waverly argues that product offered contained chlorides, which were prohibited for the subject Price Lines, and Waverly would have bid its product containing chlorides if it knew such products would be accepted.

By way of background, the subject Bid Solicitation was issued on September 7, 2023, by the Division’s Procurement Bureau (Bureau) on behalf of the New Jersey Department of Transportation (DOT) and South Jersey Transportation Authority (SJTA) to solicit quotes for Ice & Snow Removal Liquids and Chemicals. Bid Solicitation Section 1.1, *Purpose and Intent*. Bidders’ electronic questions were due to the Bureau by September 25, 2023. The Bureau posted Bid Amendment #1, with answers to the questions received from potential Bidders, on October 10, 2023, including the following regarding chlorides:

#	Bid Solicitation Section Reference	Question (Bolded) and Answer
11	Bid Solicitation Section 4.3.2	<p>Question: Our company sells both a concentrated Agricultural product as well as one that is diluted with chlorides, both of which are on the Clear Roads® list. Either one of those products will meet the specification for the Agricultural product per 4.3.2. The State per its current contract has been receiving a concentrated Agricultural product that has not been diluted with chlorides (it contains naturally occurring trace chlorides). And since the State makes its own brine, it would seem not to be in the States interest to purchase an Agricultural product that includes a large percentage of chlorides. Will the state accept an Agricultural product that has been diluted with a liquid chloride?</p> <p>Answer: Only concentrated agricultural products must be offered. Products offered must not be diluted with chlorides.</p> <p>Bid Solicitation Section 4.3.2 has been revised. Please refer to the revised T0120 Bid Solicitation titled: "T0120 24DPP00925 Revised Bid Solicitation 10.10.2023".</p>

The Quote Opening Date was revised to October 31, 2023, and announced through the posting of Bid Amendment #10.

On October 31, 2023, the Division's Proposal Review Unit opened four (4) Quotes which were received by the submission deadline of 2:00 pm Eastern Time. After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirements, all four Quotes were forwarded to the Bureau for evaluation. Thereafter, the remaining responsive Quotes were reviewed and evaluated in accordance with Bid Solicitation Section 8.9, *Evaluation Criteria*.

After completing its review and evaluation of the Quotes, the Bureau submitted its Recommendation Report recommending that a Contract for Price Lines 73-85, Agricultural Based Deicing Liquid Chemicals (Northern Region), Price Lines 86-95, Agricultural Based Deicing Liquid Chemicals (Central Region), and Price Lines 96-107, Agricultural Based Deicing Liquid Chemicals (South Region) be awarded to Innovative. The Bureau's Recommendation Report additionally recommended that Contracts be awarded for other groups and price lines to Innovative, and Peckham Materials Corp., as delineated on Pages 2 through 17 of the Recommendation Report. Accordingly, on February 5, 2024, the Bureau issued the Notice of Intent to Award letter (NOI) advising the Bidders that it was the State's intent to award Blanket P.O.s consistent with the Recommendation Report.

On February 10, 2024, Waverly wrote to the Division's Hearing Unit protesting the Bureau's determination to award to Innovative arguing that Innovative's bid for Price Lines 73-107 should have been rejected for failing to satisfy the Bid Solicitation's requirements for those lines. In support of its protest point, Waverly states in pertinent part:

Our protest is based on two key points:

1. Misrepresentation of product by Innovative:

According to the Magic Minus Zero product specification sheet and SDS, it is an agricultural product diluted with chlorides. Specification 4.3.2 of the bid solicitation states:

LIQUID NATURAL DEICING SOLUTION (PRICE LINES 73 THROUGH 107)

The product offered shall be an Organic-Based Performance Enhancer (OBPE). The OBPE may be derived or prepared from a variety of sources including, but not limited to, agricultural processing residues, partially or wholly engineered synthetic materials or combinations of the two. **Only concentrated**

agricultural products must be offered. Products offered must not be diluted with chlorides. .(emphasis added)

Despite this, Innovative has submitted a bid for a product that does not meet the specified requirements.

2. Unfair advantage to Innovative:

By submitting a bid for a product that does not comply with the specifications, Innovative gains an unfair advantage. Waverly did not submit a bid for its chloride-added product in reliance on the State's clear guidance in Specification 4.3.2 . Now, Waverly is placed at a disadvantage compared to a bidder who is proposing a non-compliant product.

[Waverly Protest Letter, Pages 1-2, emphasis in original.]

In consideration of Waverly's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, Waverly's protest, the relevant statutes, regulations, and case law. 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.

After Bidders' electronic questions were submitted to the Bureau by September 25, 2023, the Bureau posted Bid Amendment #1, with answers to the questions received from potential Bidders, on October 10, 2023, including the response to Question #11 posted above regarding chlorides. As noted in the response, Bid Solicitation Section 4.3.2, *Liquid Natural Deicing Solutions (Price Lines 73 through 107)*, was revised, and that Section then read as follows:

The product offered shall be an Organic-Based Performance Enhancer (OBPE). The OBPE may be derived or prepared from a variety of sources including, but not limited to, agricultural processing residues, partially or wholly engineered synthetic materials or combinations of the two.

Only concentrated agricultural products must be offered. Products offered must not be diluted with chlorides.

The addition of OBPE is intended to provide desirable enhancements to the performance of the finished product (treated salt or salt brine) by providing increased corrosion inhibition, lowered eutectic point, and increased melting capabilities. The product must demonstrate passing limits of the Clear Roads Qualified Product List (QPL) requirements and should be listed on the QPL list: https://clearroads.org/wp-content/uploads/dlm_uploads/QPL_Updated-9.16.22.pdf

The liquid deicing solution must meet at a minimum the following specifications:

- a) Contain a freeze point of at least twenty-six (26) degrees Fahrenheit below zero;
- b) Be biodegradable and non-toxic to humans, animals and aquatic life;

- c) Be acceptable for use as a corrosion inhibitor for salt brines and able to be blended with all salt solutions, without stratification at any time;
- d) Be able to be used as an admix for salt stockpile mixing to prevent freezing of the pile, without leaching;
- e) Have a minimum concentration of thirty-seven (37) percent deicing solids;
- f) Shall contain a minimum of 20% of an organic based performance enhancer (OBPE)

Typical Properties shall be as follows:

Appearance	Clear/Amber/Brown
Specific Gravity	Min. 1.21 Max. 1.32
Pounds per Gallon	10.8 + or – 0.2
pH	3.0 – 7.0
Water Miscibility	Complete

Note that the Pounds per Gallon requirement takes precedence over the Specific Gravity requirement if a conflict occurs between these two specifications.

[Revised Bid Solicitation Section 4.3.2, *Liquid Natural Deicing Solutions (Price Lines 73 through 107)*, emphasis added to highlight revised language.]

A review of Innovative’s submitted Quote, including Innovative’s product specification sheet for the Magic Minus Zero product, revealed that the product submitted for the subject Price Lines on the State-Supplied Price Sheet included chlorides contrary to the express prohibition in Bid Amendment #1, Question #11, and the revised Bid Solicitation. Because Innovative did not provide a responsive product on the State-Supplied Price Sheet for Price Lines 73 through 107, the State would not be certain that the contract could be performed in accordance with the Bid Solicitation’s requirements for the subject Price Lines. Despite the fact that Innovative may have intended to submit a responsive product on the State-Supplied Price Sheet for these disputed Price Lines, the submitted State-Supplied Price Sheet and product specification sheet reveals that Innovative did not do so.

The **NJSTART** system does not prevent a Bidder from submitting a Quote and State-Supplied Price Sheet with a non-responsive product or without all of the required forms, documents, and information completed and attached as mandated by the specifications. The responsibility for ensuring that all products meet the Bid Solicitation’s requirements, and that all necessary forms and other submittals are properly completed and uploaded into **NJSTART** necessarily and appropriately rests solely with the Bidder; as such the Bid Solicitation advised:

The Bidder assumes sole responsibility for the complete effort required in submitting a Quote in response to this Bid Solicitation. No special consideration will be given after Quotes are opened because of a Bidder’s failure to be knowledgeable as to all of the requirements of this Bid Solicitation. The State assumes no responsibility and bears no liability for costs incurred by a Bidder in the preparation and submittal of a Quote in response to this Bid Solicitation or any pre-contract award costs incurred.

[Bid Solicitation Section 3.2, *Bidder Responsibility*.]

The State cannot ignore the fact that Innovative failed to provide a Quote with a product that satisfied the Bid Solicitation's requirements. Any argument to ignore the requirement would run contrary to the clear Bid Solicitation instructions required for the relevant Price Lines on the State Supplied Price Sheet as noted above, as well as New Jersey case law.

The New Jersey Courts have long recognized that the purpose of the public bidding process is to "secure for the public the benefits of unfettered competition." Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the "public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good." Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997). The objective of New Jersey's statutory procurement scheme is "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Barrick v. State of New Jersey, 218 N.J. 247, 258 (2014) (citing Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)). Consistent with this purpose, the New Jersey procurement law provides that "any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do." N.J.S.A. 52:34-12(a).

The Division's administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted as responsive. Those regulations provide in relevant part that:

(b) When using the lowest price process, the following apply:

1. **The factors and significant subfactors that establish the requirements of responsiveness shall be set forth in the RFP.**
The RFP shall specify that award will be made on the basis of the lowest calculated price of proposals meeting the factors and significant subfactors in the RFP.

[N.J.A.C. 17:12-2.9(a), emphasis added.]

The Bid Solicitation makes clear that certain requirements are mandatory and not subject to discretion. Specifically the Bid Solicitation Section 9.0 *Glossary* states:

Must – Denotes that which is a mandatory requirement.

Shall – Denotes that which is a mandatory requirement.

This mandatory language is found in Revised Bid Solicitation Section 4.3.2, *Liquid Natural Deicing Solutions (Price Lines 73 through 107)*, and makes clear that:

The product offered **shall** be an Organic-Based Performance Enhancer (OBPE). The OBPE may be derived or prepared from a variety of sources including, but not limited to, agricultural processing residues, partially or wholly engineered synthetic materials or combinations of the two.

Only concentrated agricultural products must be offered. Products offered **must not** be diluted with chlorides.

[Emphasis added.]

The clear language in these steps in Bid Solicitation Section 4.3.2 requiring that the product offered shall be an Organic-Based Performance Enhancer (OBPE), and that products offered must not be diluted with chlorides for the subject Price Lines, along with the Glossary definition explaining the mandatory nature of “shall” and “must” requirements, makes clear that the prohibition against products diluted with chlorides was a required component of the Bid Solicitation for responsiveness.

In reviewing the Quote submitted by Innovative, the Bureau failed to recognize that Innovative had failed to submit a product with no chlorides as required by the Bid Solicitation instructions. The Hearing Unit’s independent review of the Bid Solicitation requirements that products must not be diluted with chlorides were clear. The Bidder was clearly informed in the instructions that it must provide a product that is not diluted with chlorides on the State-Supplied Price Sheet for the subject Price Lines, and that failure to submit a qualifying product would result in the Bidder’s Quote being deemed non-responsive and ineligible for award. Thus, the Bureau incorrectly determined that the Quote submitted by Innovative was responsive because Innovative did in deed submit a Quote with a product diluted with chlorides despite the clear prohibition, and therefore Innovative was not eligible for an award. This decision is in line with the Division’s primary goal of ensuring that the public bidding process allows for unfettered competition. Meadowbrook, supra, 138 N.J. at 313.

In order for Innovative’s Quote to be considered responsive, Innovative needed to submit a product that is not diluted with chlorides with its Quote. While minor irregularities can be waived pursuant to the authority vested by N.J.A.C. 17:12-2.7(d) and Bid Solicitation Section 8.1 *Right to Waive*, it is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Stemin, 25 N.J. 317,324 (1957). In Meadowbrook Carting Co. v. Bor. of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the court in River Vale, supra, 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. The River Vale court set forth a two-part test for determining whether a deviation is material:

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, unfortunately, Innovative submitted a product on its Price Sheet in support of its Quote that did not meet the specifications outlined in Bid Solicitation Section 4.3.2 for the Price Lines at issue. Because Innovative failed to provide the Bureau with a product meeting the Bid Solicitation’s requirements, the State cannot be assured that the Blanket P.O. could be performed in accordance with the specified requirements of the Bid Solicitation based on the information provided with Innovative’s Quote and State-

Supplied Price Sheet, and providing Innovative with the opportunity to modify its bid documents with additional information such as a qualifying product post-Quote opening would adversely affect competitive bidding by placing Innovative in a position of advantage over the other bidders, and would undermine the necessary common standard of competition. River Vale, supra, 127 NJ. at 216. Innovative's failure to include a qualifying product on its State-Supplied Price Sheet for subject Price Lines with its Quote submission and as requested by the Bureau is a material deviation from the requirements of the Bid Solicitation. See N.J.A.C. 17:12-2.2(a)(6).

Accordingly, I remand this matter back the Bureau to evaluate whether there were any responsive bidders for the subject Price Lines, and to issues an award for the subject Price Lines in accordance with the terms of the Bid Solicitation, as well as the Division's procurement rules. I note that this procurement was structured to make one (1) contract award for each Price Line item; therefore, the remainder of the February 5, 2024, Notice of Intent to Award is not affected by this remand.

This is the Division's final agency decision. Pursuant to N.J.A.C. 17:12-3.1, this determination is appealable to the Appellate Division of the Superior Court in accordance with the New Jersey Court Rules (R. 2:4-1) which provide a party 45 days to appeal this final agency decision.

Sincerely,



Cory K. Kestner
Chief Hearing Officer

c: K. Thomas
C. Murphy
B. Birchmeier
S. Cummins