



State of New Jersey

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

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January 19, 2024

Via Electronic Mail at rcoyle@eaiupfit.com

Richard Coyle, VP & GM Government Sales
Emergency Accessories and Installations 250
Berlin Rd
Cherry Hill, NJ 08034

Re: I/M/O Bid Solicitation #23DPP00851 Emergency Accessories and Installations
Protest of Notice of Intent to Award
T1786 Equipment Acquisition & Installation for Marked/Unmarked Police Vehicles and
Prisoner Transport Vehicles

Dear Mr. Coyle:

This final agency decision is in response to your electronic mail dated December 5, 2024, regarding Bid Solicitation #23DPP00851 - T1786 Equipment Acquisition & Installation for Marked/Unmarked Police Vehicles and Prisoner Transport Vehicles for the Department of Law and Public Safety, Division of State Police, the New Jersey Department of Corrections (NJDOC), other State Agencies, Quasi-State Agencies and other Cooperative Purchasing Program Participants (Bid Solicitation), to the Division of Purchase and Property (Division) on behalf of Emergency Accessories and Installations (EAI). In that email EAI argues that the Notice of Intent to Award to Gold Type Business Machines Inc. (GTBM) should be vacated because GTBM failed to meet the requirements of Bid Solicitation Section 3.22, *Manufacturers certification*, since it is not an authorized distributor for certain products that are included in the Bid Solicitation. Specifically, EAI alleges that GTBM is not an authorized distributor for the products that it bid in its Quote.

By way of background, the subject Bid Solicitation was issued by the Division's Procurement Bureau (Bureau) on behalf of the Department of Law and Public Safety, Division of State Police, the New Jersey Department of Corrections (NJDOC), other State Agencies, Quasi-State Agencies and other Cooperative Purchasing Program Participants to solicit Quotes for equipment acquisition and installation for marked/unmarked police vehicles and prisoner transport vehicles. Bid Solicitation Section 1.1, *Purpose and Intent*. The Bid Solicitation, in accordance with Bid Solicitation Sections 3.8, 3.9, 8.9.2, and 8.16, contained a preference for Small Business Enterprise (SBE) and Disabled Veteran-Owned Business (DVOB) companies registered with the Division of Revenue and Enterprise Services (DORES) by the time of Quote opening. The proposed award will consolidate the separate awards for the prisoner transport vans under T2878 and S2878 into the new T1786 Contract award. See Page 5, Recommendation Report dated October 11, 2023 (Recommendation Report). Bidders' electronic questions were due to the Bureau by January 11, 2023, with a second period due by January 20, 2023. On July 5, 2023, the Bureau posted Bid Amendment #8 on [NJSTART](https://www.njstart.gov) with answers to the questions received from potential Bidders, and revised the Quote Opening Date to July 28, 2023.

On July 28, 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.

In conducting the review of the Quotes, the Bureau determined that GTBM and EAI were registered with DORES in the NJSAVI database as a Category 3 Small Business, and thus satisfied the SBE set-aside requirement in the Bid Solicitation. East Coast Emergency Lighting Inc. (East Coast) was not registered in the NJSAVI database as an active small business at the time of Quote opening because SBE certificate, A0121-82, was revoked by DORES on November 30, 2022, due to the Vendor's failure to submit the annual verification to DORES. At the time of Quote opening, Nielsen Fleet Inc. was not registered as an SBE in the NJSAVI database. With respect to DVOB certification, none of the bidders were registered in the SAVI Database at the time of Quote opening. See Page 7, Recommendation Report dated November 20, 2023 (Recommendation Report).

Thereafter, the remaining responsive Quotes were reviewed and evaluated in accordance with Bid Solicitation Section 8.9, *Evaluation Criteria*. The Recommendation Report recommended that an award be made to EAI for Group 1 (Price Lines 1 through 13), and to GTBM for Group 2 (Price Lines 14-26), and to GTBM for Individual Price Lines 27-29a in accordance with the Bid Solicitation. See Pages 3-4, Recommendation Report. With the exception of Price Line 29, EAI and GTBM were ranked number 1 or 2 for pricing when the 15% small business preference was taken into account. For Price Line 29, GTBM was ranked 1, while EAI was ranked number 3 behind East Coast because its submitted pricing was 19.4499% higher than East Coast's pricing, which is more than the 15% difference permitted in Bid Solicitation Sections 8.9.2 and 8.16. Accordingly, on October 18, 2023, the Bureau issued the NOI advising the Bidders that it was the State's intent to award Blanket P.O.s consistent with the Recommendation Report.

On December 5, 2023, EAI wrote to the Division's Hearing Unit protesting the Bureau's decision to award Group 2 (Price Lines 14-26) and Individual Price Lines 27-29a to GTBM because GTBM is not an authorized distributor for the brands it bid in response to the Bid Solicitation. In support of its protest point, EAI states in pertinent part:

According to Page 11, section 3.22 Manufacturers certification, it is stated that the bidder was authorized by the brand manufacturer to supply goods specified as of the quote opening date.

it appears that an intended awardee, Gold Type Business Machines is not an authorized distributor for the following products that are included in this RFP!

Whelen Engineering
Pro-Gard Products

I have attached a copy of Whelen Engineering distributor list for the State of New Jersey and Gold Type Business Machines is not an authorized distributor for the majority of the items listed.
The bid from Gold Type Business Machines does not meet the requirements of this RFP and should not be valid.

[EAI Protest Electronic Mail dated December 5, 2023.]

In consideration of EAI's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received and EAI'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.

The Bid Solicitation sets forth in two places that being an authorized manufacturer is required to perform the contract, and that proof of that status must be provided when requested by the State. Specifically, Bid Solicitation Section 3.22, *Manufacturer's Certification*, states:

Upon request, the Bidder should submit a letter of certification from the brand manufacturer, certifying that the Bidder is authorized by the manufacturer to supply the brand of goods specified. The certification must indicate that the Bidder was authorized by the brand manufacturer to supply the goods specified as of the Quote Opening Date. The State reserves the right to request such certification and to require that such certification be provided within five (5) business days from the time it is requested.

Additionally, Bid Solicitation Section 4.2, Contract Specific Requirements, states in pertinent part that:

The Contractor *must be a franchised and/or authorized factory representative*, able to furnish and install the Bundled Equipment. See Bid Solicitation Section 3.22, *Manufacturer's Certification*. The Contractor must notify the State of New Jersey of any changes in the status of its franchise or authorization with the manufacturer.

[Emphasis added.]

The review of GTBM's submitted Quote revealed that no manufacturer's certification was provided by EAI at time of Quote opening. As indicated above, Bid Solicitation Section 3.22, *Manufacturer's Certification*, required "that such certification be provided within five (5) business days from the time it is requested."

Pursuant to N.J.A.C. 17:12-3.3, the Director may request a response following the filing of the protest. These "are at the Director's discretion; the Director may disregard any unsolicited response or reply." N.J.A.C. 17:12-3.3(b)(4). Utilizing this authority, the following request was sent to GTBM on December 15, 2023, for the following information:

Dear Gold Type Business Machines:

A timely protest was filed in response to the Notice of Intent to Award letter to Gold Type Business Machines dated November 27, 2023. With respect to your company's proposed award, the protestor argues that Gold Type Business Machines should have been rejected for not being a franchised and/or authorized factory representative for Whelen or Pro-Gard, and therefore unable to furnish and install the Bundled Equipment as required by Bid Solicitation Section 4.2, Contract Specific Requirements. See also Bid Solicitation Section 3.22, *Manufacturer's Certification*.

Pursuant to N.J.A.C. 17:12-3.3(b)(4), the “Director may request that a bidder file a response to a protest. Responses and replies are at the Director’s discretion; the Director may disregard any unsolicited response or reply.” In accordance with this authority, and as permitted by Bid Solicitation Section 3.22, *Manufacturer’s Certification*, a request is hereby made for one or all of the following to provide the Director with information to address this protest issue in a Final Agency Decision (FAD):

1. A letter of certification from each brand manufacturer, certifying that Gold Type Business Machines is authorized by the manufacturer to supply the brand of goods specified and required for each awarded Price Line/Group. The certification must indicate that Gold Type Business Machines was authorized by the brand manufacturer to supply the goods specified as of the Quote Opening Date July 28, 2023. The requested certifications be provided by 4:00pm, Friday December 22, 2023, which is within five (5) business days from the time it is requested.

No additional information is needed at this time. We will contact you if any additional information is required.

As a reminder, should an in-person presentation be needed permitted by N.J.A.C. 17:12-3.2(e) “[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 issues raised to-date are sufficiently clear such that a review of the written record of this procurement, including the Protest, the Bid Solicitation, relevant statutes, regulations, and case law, has provided the information necessary with the exception of the above requested information. As such, an in-person hearing is not warranted at this time.

Finally, please be advised that this is not an opportunity to revise or modify your company’s bid. Kindly limit your response to the specific information requested above. Please provide your company’s response by 4:00pm December 22, 2023.

[Hearing Unit email to GTBM, dated December 15, 2023.]

As of the date of this Final Agency Decision, no response has been provided by GTBM providing a letter of certification from each brand manufacturer, certifying that GTBM is authorized by the manufacturer to supply the brand of goods specified and required for each awarded Price Line/Group.

The **NJSTART** system does not prevent a Bidder from submitting a Quote without all of the required forms, documents, and information completed and attached as mandated by the specifications. The responsibility for ensuring 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 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. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal shall¹ conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

- 6. Include all RFP-required pricing information.

[N.J.A.C. 17:12-2.2(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 Bid Solicitation Section 3.22, *Manufacturer's Certification*, and makes clear that:

Upon request, the Bidder should submit a letter of certification from the brand manufacturer, certifying that the Bidder is authorized by the manufacturer to supply the brand of goods specified. The certification *must* indicate that the Bidder was authorized by the brand manufacturer to

¹ "Shall – Denotes that which is a mandatory requirement." Bid Solicitation Section 9, *Glossary*.

supply the goods specified as of the Quote Opening Date. The State reserves the right to request such certification and to require that such certification be provided within five (5) business days from the time it is requested.

[Emphasis added.]

The clear language in Bid Solicitation Section 3.22 requiring a letter of certification from the brand manufacturer, along with Bid Solicitation Section 4.2 requiring that the Contractor must be a franchised and/or authorized factory representative, and the Glossary definition explaining the mandatory nature of “shall” and “must” requirements, makes clear that the letter of certification was a required component of the Bid Solicitation when requested.

In order for GTBM’s Quote to be considered responsive, GTBM needed to submit all of the information required by the Bid Solicitation with its Quote, or to respond within the timeframe established in the Bid Solicitation for post-Quote opening submissions. 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.]

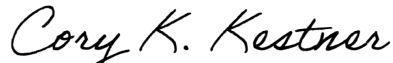
“If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *Id.* at 222.

Here, unfortunately, GTBM failed to submit a letter of certification as required in support of its Quote, or within five (5) days when requested by the Hearing Unit. Because GTBM failed to provide all of the required information when requested, 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 GTBM’s Quote, and permitting GTBM with the opportunity to perform the contract without a letter of certification from the brand manufacturers would adversely affect competitive bidding by placing GTBM in a position of advantage over the other bidders, and would undermine the necessary common standard of competition. River Vale, *supra*, 127 N.J. at 216. GTBM’s failure to include the proper information with its Quote submission or when later requested is a material deviation from the requirements of the Bid Solicitation. See N.J.A.C. 17:12-2.2(a)(6).

Accordingly, GTBM is non-responsive to the requirements of this Bid Solicitation and ineligible for award for any of the groups and individual lines awarded in the November 20, 2023 Recommendation Report, as additionally announced in the November 27, 2023, Notice of Intent to Award letter. I remand this matter back to the Bureau for the Bureau to determine whether it has the required information to make an award to the next potential awardee based on its prior rankings for the groups and lines awarded to GTBM. If a letter of certification is required from the next potential awardee, then that request will be made in accordance with the requirements of Bid Solicitation Section 3.22, *Manufacturer's Certification*, so the Bureau can evaluate whether the next potential awardee is responsive to that mandatory requirement before making a recommendation for award pursuant to Bid Solicitation Section 8.15, *Recommendation for Award*. The remainder of the November 27, 2023, 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

Acting Chief Hearing Officer

- c: V. Cronen, Gold Type Business Machines [via email to: vcronen@gtbm.com]
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