



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 5, 2018

Via Electronic Mail [jprofita@decotiislaw.com] and USPS Regular Mail

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Re: I/M/O Bid Solicitation #18DPP00205 Persistent Construction
T0777 Snow Plowing and Spreading Services
Protest of Notice of Intent to Award

Dear Mr. Profita:

This letter is in response to your correspondence of August 29, 2018, on behalf of Persistent Construction (Persistent) to the Division of Purchase and Property's Hearing (Division) Unit. In that correspondence Persistent protests the August 24, 2018, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) indicating an intent to award a Master Blanket Purchase Orders (Blanket P.O.s)¹ to several Vendors {Bidders} for Bid Solicitation #18DPP00205 - T0777 Snow Plowing and Spreading Services (Bid Solicitation).

¹ For consistency, this final agency decision uses terminology employed by the State of New Jersey's **NJSTART** eProcurement system. For ease of reference, the following is a table which references the **NJSTART** term and the statutory, regulatory and/or legacy term.

NJSTART Term	Statutory, Regulatory and/or Legacy Term
Bid Solicitation	Request For Proposal
Bid Amendment	Addendum
Change Order	Contract Amendment
Master Blanket Purchase Order	Contract
Offer and Acceptance Page	Signatory Page
Quote	Proposal
Vendor {Bidder}	Bidder
Vendor {Contractor}	Contractor

BACKGROUND

By way of background, on January 30, 2018, the Bureau issued the Bid Solicitation on behalf of the New Jersey Department of Transportation (NJDOT), to solicit Quotes from qualified Vendors {Bidders} to provide snow plowing and spreading services on all State interstates and highways under the jurisdiction of NJDOT. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award Statewide Blanket P.O.s to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation are most advantageous to the State, price and other factors considered. Ibid.

On February 28, 2018, the Bureau issued Bid Amendment #1 responding to the questions posed by potential Vendors {Bidders}. On March 16, 2018, the Division's Proposal Review Unit opened 164 Quotes received through the State's *NJSTART* eProcurement system and/or hardcopy format by the submission deadline of 2:00 pm eastern time. Thirty-two Quotes were automatically rejected by the Proposal Review Unit for failure to conform to the mandatory administrative requirements for Quote submission.

The remaining Quotes were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria* which states:

The following evaluation criteria categories, not necessarily listed in order of significance, may be used to evaluate Quotes {Proposals} received in response to this Bid Solicitation {RFP}. The evaluation criteria categories may be used to develop more detailed evaluation criteria to be used in the evaluation process.

- A. Experience of firm (Attachment #2): The Vendor's {Bidder's} documented experience in successfully completing Blanket P.O. {Contracts} of a similar size and scope in relation to the work required by this Bid Solicitation {RFP};
- B. Vendor Equipment (Attachment #1): The quantity and type of Vendor {Bidder} trucks and ability to provide equipment; and
- C. Price: The Vendor's {Bidder's} hourly rate. See Section 6.7.1 below.

With respect to the evaluation of the Vendors' {Bidders'} Quote pricing, Bid Solicitation Section 6.7.1 *Vendor's {Bidder's} Price Schedule* states:

The Bureau will utilize a weighted price model. The price model will be date-stamped and entered into the record before Quote {Proposal} opening.

One (1) or multiple awards will be made to the Vendor {Bidder} submitting the lowest hourly rate for each Snow Section and meeting, at a minimum, the criteria for experience and equipment set forth in this Bid Solicitation {RFP}, in the following order:

Snow Plowing and Hauling Services:

1st – Vendors {Bidders} supplying all required Class A trucks with equipment;

- 2nd – Vendors {Bidders} supplying all required Class A trucks without equipment;
- 3rd – Vendors {Bidders} supplying all required Class B trucks with equipment;
- 4th – Vendors {Bidders} supplying all required Class B trucks without equipment;
- 5th – Vendors {Bidders} supplying fewer than the required number of Class A trucks with equipment; and
- 6th – Vendors {Bidders} supplying fewer than the required number of Class B trucks without equipment.

For example, Vendors {Bidders} submitting responsive Quotes {Proposals} and able to supply all required Class A trucks with Vendor {Bidder} owned equipment, will be awarded a Blanket P.O. {Contract} before the Vendors {Bidders} supplying Class A trucks without equipment.

Spreading Services:

- 1st – Vendors {Bidders} supplying all required Class R trucks with an on board wetting system;
- 2nd – Vendors {Bidders} supplying all required Class R trucks;
- 3rd – Vendors {Bidders} supplying all required Class Q trucks with an on board wetting system;
- 4th – Vendors {Bidders} supplying all required Class Q trucks;
- 5th – Vendors {Bidders} supplying all required Class P trucks with an on board wetting system;
- 6th – Vendors {Bidders} supplying all required Class P trucks;
- 7th – Vendors {Bidders} supplying V Box trucks with an on board wetting system;
- 8th – Vendors {Bidders} supplying V Box trucks;
- 9th – Vendors {Bidders} supplying mid-body style trucks with an on board wetting system; and
- 10th – Vendors {Bidders} supplying mid-body style trucks.

For example, Vendors {Bidders} submitting responsive Quotes {Proposals} and able to supply all required Class R trucks, with an on board wetting system, will be awarded a Blanket P.O. {Contract} before the Vendors {Bidders} supplying Class R trucks without an on board wetting system.

The evaluation of Quotes received and submission of Quote pricing was conducted in three phases as set forth in Bid Solicitation Section 1.1 *Purpose and Intent* which states:

Award of this Bid Solicitation {RFP} will be conducted in three (3) consecutive phases, as described further below. All phases will continue until all Snow Sections have been awarded. Pricing shall not be released until completion of all phases and the final Notice of Intent to Award has been issued.

This procurement will be bid in three consecutive phases, numbered One, Two and Three. The first Phase will be Phase One (1). In Phase One (1), the State will attempt to award all Snow Sections. To the extent that any Snow Sections remain un-awarded following Phase One (1), the State will request that all Vendors {Bidders} who submitted a Quote {Proposal} to this Bid Solicitation {RFP} for Phase One (1) submit a Phase Two (s) price sheet addressing any Snow Sections that remain un-awarded that the Vendor {Bidder} is interested in. The State will attempt to award all remaining Snow Sections in Phase Two (2) based on the Phase Two price sheets received. In the event that any Snow Sections remain un-awarded after Phase Two (2) is completed, the State will request that all Vendors {Bidders} submit a Phase Three (3) price sheet, addressing any Snow Sections that remain un-awarded, that the Vendor {Bidder} is interested in.

Under no circumstances shall any Vendor {Bidder}, when submitting a Phase Two (2) or Phase Three (3) price sheet after being requested to do so by the State, submit any supplemental or additional information regarding any other aspects of its previously-submitted bid. During Phase Two and Phase Three, the State will only consider the price sheets, and will not consider any additional or supplemental information or documents.

1. **Phase One (1)** – will apply to all Vendors {Bidders} that have submitted a responsive Quote {Proposal};
2. **Phase Two (2)** – will apply to all Snow Sections not awarded and will occur after the Notice of Intent to Award has been issued for Phase One (1) and prior to the issuance of the final Notice of Intent to Award. All Vendors {Bidders} that have submitted a responsive Quote {Proposal}, in response to this Bid Solicitation {RFP}, will be eligible to participate during Phase Two (2); and
3. **Phase Three (3)** – will apply to Snow Sections not awarded and will occur after the Notice of Intent to Award has been issued for Phase Two (2) and prior to the issuance of the final Notice of Intent to Award. All Vendors {Bidders} that have submitted a responsive Quote {Proposal}, in response to this Bid Solicitation {RFP}, will be eligible to participate during Phase Three (3).

In other words, only those Vendors {Bidders} whose original submitted Quotes were responsive to the requirements of the Bid Solicitation would be able to participate in, and submit pricing for Phase 2 and Phase 3.

In accordance with the procedure set forth in Bid Solicitation Section 1.1 *Purpose and Intent*, after the review and evaluation of all Quotes received in response to Bid Solicitation Phase One was completed, the Bureau issued a preliminary notice. That preliminary notice advised the Vendors {Bidders} which snow plowing and spreading sections would be awarded based upon the Phase One submitted Quotes. The preliminary notice also provided Vendors {Bidders} the opportunity to withdraw a submitted Quote or a preliminarily awarded price line. Four Vendors {Bidders} withdraw a submitted Quotes for some or all of the snow plowing and/or and spreading sections originally submitted during Phase One. Thereafter, the

Bureau commenced Phase Two to solicit Quotes pricing for those snow plowing and spreading sections for which no responsive Quotes had been received. On June 11, 2018, requests for Phase Two pricing were sent to all Vendors {Bidders} who submitted Quotes which were deemed initially responsive. Phase Two Quote submission pricing was due to the Bureau on June 18, 2018 at 2:00 p.m.

After the review and evaluation of all Quotes received in response to the Bid Solicitation Phase Two was completed, the Bureau issued a second preliminary notice. That second preliminary notice advised the Vendors {Bidders} which snow plowing and spreading sections would be awarded based upon the Phase One and Phase Two submitted Quotes. The second preliminary notice also provided Vendors {Bidders} the opportunity to withdraw a submitted Quote or a preliminarily awarded price line. Thereafter, the Bureau commenced Phase Three to solicit Quote pricing for those snow plowing and spreading sections for which no responsive Quotes had been received in either Phase One or Phase Two. Requests for Phase Three pricing were sent to all responsive Vendors {Bidders} on June 26, 2018 with a Phase Three Quote submission due date of June 28, 2018 at 2:00 p.m.

After the review and evaluation of all Quotes received in response to the Bid Solicitation Phase Three was completed, the Bureau issued a third preliminary notice. That third preliminary notice advised the Vendors {Bidders} which snow plowing and spreading sections would be awarded based upon the Phase One, Phase Two and Phase Three submitted Quotes. The third preliminary notice also provided Vendors {Bidders} the opportunity to withdraw a submitted a Quote or a preliminarily awarded price line.

Thereafter, on August 22, 2018, the Bureau issued a Recommendation Report which recommended Blanket P.O. awards to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation are most advantageous to the State, price and other factors considered.² On August 24, 2018, the NOI was issued advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s consistent with the Bureau's Recommendation Report.

On August 29, 2018, the Division received Persistent's protest requesting that the Division "reverse its recommendation that the preliminary award to Persistent be rescinded." Persistent Protest, pp. 2.

In consideration of Persistent's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the submitted Quotes, 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. I set forth herein the Division's Final Agency Decision.

DISCUSSION

A review of the record of this procurement reveals that on March 16, 2018 Persistent uploaded the documents comprising its Quote. As shown in the screenshot below, with the Quote submission, Persistent included an *Ownership Disclosure Form* which indicated that there were no individuals, corporations or partnerships owning a 10% or greater interest in the Vendor {Bidder}.

² The list of Vendors {Contractors} who are recommended to receive Blanket P.O. awards are listed in the attachment to the Bureau's August 22, 2018 Recommendation Report.

STATE OF NEW JERSEY -- DIVISION OF PURCHASE AND PROPERTY OWNERSHIP DISCLOSURE FORM	
Solicitation Number: <u>18DPP00205</u>	Bidder/Offeror: <u>Persistent Construction, Inc.</u>
PART 1: PLEASE COMPLETE THE QUESTIONS BELOW BY CHECKING EITHER THE "YES" OR "NO" BOX. <small>ALL PARTIES ENTERING INTO A CONTRACT WITH THE STATE ARE REQUIRED TO COMPLETE THIS FORM PURSUANT TO N.J.S.A. 52:25-24.2</small> <small>PLEASE NOTE: IF THE BIDDER/OFFEROR IS A NON-PROFIT, THIS FORM IS NOT REQUIRED. PLEASE COMPLETE THE SEPARATE DISCLOSURE OF INVESTIGATIONS FORM.</small>	
	YES NO
1. Are there any individuals, corporations or partnerships owning a 10% or greater interest in the bidder/offeror?	<input type="checkbox"/> <input checked="" type="checkbox"/>
<small>IF THE ANSWER TO QUESTION 1 IS NO, PLEASE SIGN AND DATE THE FORM. YOU DO NOT HAVE TO COMPLETE ANY MORE QUESTIONS ON THIS FORM. IF THE ANSWER TO QUESTION 1 IS YES, PLEASE ANSWER QUESTIONS 2-4 BELOW.</small>	

In addition, with the Quote, Persistent submitted the *Two-Year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions Form (Chapter 51 Form)*. Again, the *Chapter 51 Form* did not reveal any individuals, corporations or partnerships owning a 10% or greater interest in the Vendor {Bidder}.

Having no information to the contrary, Persistent’s Quote was initially deemed responsive and compliant with the statutory requirements regarding ownership disclosure. As such, on June 25, 2018, the Bureau issued a second preliminary notice which indicated that price lines 10, 11, 12, 13 and 14 would be awarded to Persistent.

Because Persistent has submitted the *Chapter 51 Form* with its Quote, the Chapter 51 Unit undertook a review of its *Chapter 51 Form*. That review revealed Persistent had made a potentially disqualifying contrition.

Contributor Name	Relationship of Contributor to the Vendor	Date of Contribution	Amount of Contribution	Type of Contribution (i.e. currency, check, loan, in-kind)	Recipient (Full legal name)	Address of Recipient
Anthony Grano	None <small>Note: Anthony Grano is listed as the President of the Persistent Construction, Inc. Mr. Grano’s ownership interest (if any) is not known based on the submitted Chapter 51 form.</small>	November 1, 2017	\$500.00	Check	Fairview Democratic Committee	4 8 th Street Fairview, NJ 07022

Accordingly, the Chapter 51 Unit requested that Persistent provide a copy of the cancelled check for the listed contribution. In addition, the Chapter 51 Unit noted that Persistent

did not properly complete “Part 1: Business Entity Information.” More specifically, the applicant did not complete the section titled “10% and greater shareholders of a corporation or all shareholders of a PC.” (See p.

1 of attachment). If there are 10% and greater shareholders of the corporation, the applicant should list the names of the individuals and/or entities in this section. If there are none, the applicant should indicate "None" in this section. Please note that the response "N/A" is non-responsive and will not be accepted. Please instruct the applicant to complete this section accordingly.

In response to the request, Persistent amended its Chapter 51 Form listing Anthony Grano and Frank Ralph Grano each as a 50% shareholder of the corporation.³ In addition, Persistent stated that 50% of the above listed contribution was attributable to Anthony Grano and 50% to his wife Amy Grano. With the response, Persistent included a copy of the cancelled check demonstrating that the contribution had been made from the personal account of Anthony and Amy Grano.

Based upon the information submitted, Persistent's application for Chapter 51 approval was granted. However, the information provided revealed that Persistent's submitted *Ownership Disclosure Form* contained a contained a material deviation.

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Sternin, 25 N.J. 317, 324 (1957). "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." Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 222 (Law Div. 1974). The question to be answered is whether or not a bidder's failure to comply completely with the statutory ownership disclosure requirement is a material deviation which would render a bid nonresponsive. C&H Industrial Services, Inc. v. City of Vineland, 2014 N.J. Super Unpub. Lexis 1187, at *13 (App. Div. May 23, 2014). 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 Twp. 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 Award of On-Line Games Prod. And Operation Servs. Contract, 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.]

The subject solicitation required that Vendors {Bidders} provide the complete ownership structure with the proposal as mandated by N.J.S.A. 52:25-24.2. With respect to the submission of the *Ownership Disclosure Form* the RFP stated:

³ Persistent's updated Chapter 51 Form was dated March 15, 2018, prior to the Quote opening date.

Pursuant to N.J.S.A. 52:25-24.2, in the event the Vendor {Bidder} is a corporation, partnership or limited liability company, the Vendor {Bidder} must complete an Ownership Disclosure Form.

A current completed Ownership Disclosure Form must be received prior to or accompany the submitted Quote {Proposal}. A Vendor's {Bidder's} failure to submit the completed and signed form with its Quote {Proposal} will result in the rejection of the Quote {Proposal} as non-responsive and preclude the award of a Blanket P.O. {Contract} to said Vendor {Bidder} unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six (6) months prior to the Quote {Proposal} submission deadline for this procurement. If any ownership change has occurred within the last six (6) months, a new Ownership Disclosure Form must be completed, signed and submitted with the Quote {Proposal}.

[RFP § 4.4.1.2.1, *emphasis added*.]

The 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).

The Appellate Division has applied this well-settled law to a protest of another Division procurement. In the Matter of Protest of Scheduled Award of Term Contract T2813 RFP 12-X-22361 Laboratory Testing Service, Equine Drug Testing, Lexis 1698, at *25 (App. Div. July 10, 2013) (Equine). In Equine, HFL Sport Science (HFL) submitted an *Ownership Disclosure Form* to the Division with its proposal which indicated that there were no individuals, corporations or partnerships having a 10% or greater interest in the company. Id. at *2. However, its narrative proposal included a more involved ownership structure than set forth on the *Ownership Disclosure Form*. The Division sought clarification from HFL, which HFL provided, but the clarification would have acted as a supplement the bid documents, which is not permissible. Therefore, the Division ultimately found, and the Appellate Division affirmed, that the initial *Ownership Disclosure Form* provide by HFL did not conform to the requirements of the law and the additional information provided by HFL was an impermissible supplementation. Id. at 6, 18-19.

I further note that the matter before me can be distinguished from that matter before the court in, Schlumberger Industries, Inc. v. Borough of Avalon, 252 N.J. Super. 202 (App. Div. 1991). There, the Appellate Division recognized that a post-bid clarification could be permitted in limited circumstances. In Schlumberger, the bidder failed to list its full ownership structure with its proposal. The court concluded that the bidder was wholly-owned by a public company with the same name in its title; this fact was evidently known by the municipality that solicited the bids. Id. at 212-13. In Schlumberger, the municipality had engaged in negotiations with the bidder on a previous contract and the information regarding the bidder's ownership had been supplied to the municipality in connection with the earlier contract. Therefore, the municipality was aware of the bidder's ownership structure prior to the bid opening date. Id. at 207. However, the Court noted that "if there had been undisclosed shareholders holding 10% or more of the stock...the bid might be properly rejected." Id. at 212.

Here, while the State had a prior contract with Persistent, Persistent's last *Ownership Disclosure Form* on file is dated November 2012. Though the Division's governing laws permit a look back period, that look back is limited to six (6) months. See, Bid Solicitation § 4.4.1.2.1 *Ownership Disclosure Form*;

In the Matter of Protest of Scheduled Award of Term Contract T2813 RFP 12-X-22361 Laboratory Testing Service, Equine Drug Testing, Lexis 1698, at *25 (App. Div. July 10, 2013). Despite the fact that Persistent's previously submitted *Ownership Disclosure Form* may have listed Persistent's correct ownership structure, the information was almost five years old, well beyond the permitted look back period. In reviewing a Quote submitted in response to a Bid Solicitation, the Division does not have the power to waive the legislative requirement that a Vendor {Bidder} provide its ownership information prior to or accompanying the Quote submission. Only the New Jersey Legislature can change a requirement it has mandated.

Based upon the relevant case law, I find that Persistent's Quote contains a material deviation from the requirements of the Bid Solicitation making Persistent's Quote nonresponsive. With respect to the River Vale factors, I note that "noncompliance with N.J.S.A. 52:25-24.2 deprives the [contracting entity] of its assurance that the contract will be entered in to performed and guaranteed according to its specified requirements" because the failure to fully disclose 10% owners deprive the contracting entity and the public of the information with which it can be made aware of the real parties in interest, identify conflicts of interest, and the information necessary to assess the capability, financial stability and moral integrity of the bidder. C&H, supra, Lexis 1187 at *14-15; citing, George Harms, supra, 161 N.J. Super. at 372. Second, noncompliance with the statutory requirement "places the non-compliant bidder in a position of advantage over other bidders who might have bid on the project had they known they could avoid timely filing of the disclosure statement or that it would be waived." C&H, supra, Lexis 1187 at *16; citing, Muirfield, supra, 336 N.J. Super. at 136-37.

Accordingly, I find that Persistent is ineligible for a contract award. 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 the Quote. However, in light of the findings set forth above, I have no choice but to deny your request for eligibility to participate in the competition for the subject contract.

CONCLUSION

Based upon the foregoing, I find no reason to disturb the Bureau's recommendation. Accordingly, I sustain the August 24, 2018 Notice of Intent to Award. This is my final agency decision with respect to the protest submitted by Persistent.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your company with NJSTART at www.njstart.gov, the State of New Jersey's eProcurement system. I encourage you to log into NJSTART to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities. Please monitor the New Jersey Department of Transportation's, the Division's and the NJSTART websites for future bidding opportunities for these services.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: P. Michaels
L. Spildener
M. Groninger