



## State of New Jersey

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

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October 16, 2018

Via Electronic Mail [rgpaving72@aol.com] and USPS Regular Mail

Richie George  
R&G Paving Inc.  
1787 Kathleen Court  
Toms River, NJ 08755

Re: I/M/O Bid Solicitation #18DPP00205 R&G Paving Inc.  
T0777 Snow Plowing and Spreading Services  
Protest of the 9/5/2018 Final Agency Decision – I/M/O Bid Solicitation #18DPP00205 Jer-Car

Dear Mr. George:

This letter is in response to your emails of October 1, 2018 and October 9, 2018, on behalf of R&G Paving Inc. (R&G) to the Division of Purchase and Property (Division). In those emails R&G protests and seeks reconsideration of the Division's September 5, 2018, Final Agency Decision entitled I/M/O Bid Solicitation #18DPP00205 Jer-Car (hereinafter, "IMO Jer-Car").<sup>1</sup>

By way of background, on January 30, 2018, the Division's Procurement Bureau (Bureau) issued Bid Solicitation #18DPP00205 - T0777 Snow Plowing and Spreading Services (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 Master Blanket Purchase Orders (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 March 16, 2018, the Division's Proposal Review Unit opened Quotes from 164 Vendors {Bidders} received through the State's *NJSTART* eProcurement system and/or hardcopy format by the submission deadline of 2:00 pm eastern time. After conducting a preliminary review of the Quotes received, those Quotes which conformed to the administrative requirements for Quote submission were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*. 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*.

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<sup>1</sup> The Division's September 5, 2018, decision was issued in response to a protest filed by Jer-Car, Inc. (Jer-Car) following the Notice of Intent to Award (NOI) issued by the Bureau indicating an intent to award a Blanket P.O.s to several Vendors {Bidders} for the subject Bid Solicitation.

On August 22, 2018, the Bureau completed 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. On August 24, 2018, the NOI was issued advising all Vendors {Bidders} that it was the State's intent to award a Blanket P.O.s consistent with the Bureau's Recommendation Report. Specifically, the NOI included a spreadsheet of "intended awardees and associated price lines" and advised that it was "the intent of the Director of the Division of Purchase and Property (Division) to make a Master Blanket Purchase Order (Blanket P.O.) award" in accordance thereof. The NOI further advised that "in accordance with the Division's administrative regulations, N.J.A.C. 17:12-3.3 Protest Procedures, the protest period ends at 5:00 p.m. on Friday, August 31, 2018."

On August 31, 2018, the Division received a protest from Jer-Car, which was resolved by final agency decision dated September 5, 2018. See, IMO Jer-Car. The Division's September 5, 2018, final agency decision amended the August 24, 2018 NOI. Specifically, IMO Jer-Car concluded that Terco Enterprises, LLC (Terco), Washington Collision Center, LLC (Washington), and, R&G had submitted Quote pricing during Phase 2 of the procurement for twenty price lines for which they had been deemed non-responsive during Phase 1 of the procurement. IMO Jer-Car, p. 12, Attachment A.<sup>2</sup> The Bureau should not have considered the Phase 2 price Quotes for those specific price lines as doing so allowed Terco, Washington and R&G to clarify previously submitted Quotes contrary to the Court's reasoning in In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566 (App. Div. 1995).

As explained in IMO Jer-Car, R&G was impermissibly permitted to supplement its original Quote during Phase 2 of the procurement. Because certain price lines were being rescinded from R&G, a copy of that September 5, 2018 final agency decision was sent by email and regular first class mail to R&G.<sup>3</sup>

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<sup>2</sup> Terco – Price Lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, 97; Washington – Price Lines 70, 71, 215; R&G - Price Lines 128, 130, 143, 155, 156.

<sup>3</sup> On September 5, 2018, Terco Enterprises, LLC (Terco) contacted the Division protesting and requesting reconsideration of the Division's final agency decision issued in I/M/O Bid Solicitation #18DPP00205 Jer-Car (IMO Jer-Car). On September 6, 2016, Terco's Attorney contacted the Division requesting an opportunity to protest and seek reconsideration of the I/M/O Jer-Car decision. Terco was permitted to file its protest and request for reconsideration on or before September 11, 2018. In its protest and request for reconsideration, Terco requested a stay of the award of the certain price lines protested. However, prior to the Division issuing its decision with respect to Terco's request for reconsideration and stay, Terco filed an Order to Show Cause with the Superior Court of New Jersey-Chancery Division seeking temporary restraints with respect to the award of price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, 97, 99, 316, 329, and 330. That matter was transferred to the Superior Court of New Jersey-Law Division and on September 26, 2018, the Law Division issued a temporary stay of the contract awards related to price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, 97, 99, 316, 329, and 330 only. On October 1, 2018, the action was transferred to the Appellate Division and the temporary stay of the contract awards related to price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93 and 97 only, was continued. On October 2, 2018, the Appellate Division granted Terco's application for permission to file an emergent motion and ordered that the temporary restraints issues by the Law Division continue pending further order of the Appellate Division.

No communication was received from R&G related to the September 5, 2018, final agency decision, until October 1, 2018.<sup>4</sup> On that date, R&G wrote to the Bureau stating:

...my problem is why did I receive three different intents to award up until about a week before the waiver went out with no-email telling me that the routes were taken away, so that's telling me that there was a mistake on their part as well for not catching it earlier where we wouldn't have had an issue! Also on top of that my paperwork was corrected back in February about a week after you realized the mistake. Please I need your help here following is a major part of our business and my business will be in serious trouble without my plow routes. I am a businessman and if there was something done wrong on my part I would accept it I would have a hard time but it is what it is. But that was not the case there was a problem originally because I forgot to fill out the superintendent rate, then about a week later you emailed me I corrected it sent it back and from that point on and this was back in February I received the intent to award emails on each phase. This is not my fault please help!!!

That email was forwarded to the Division's Hearing Unit for review and consideration. On October 9, 2018 R&G wrote to the Hearing Unit stating:

Hello this is Richie from R&G Paving. [The Procurement Specialist] forwarded you some emails last week regarding a protest for us R&G Paving. For some reason our plow routes after being awarded and receiving three award notifications were taken away from us just before the waiver bid came out. And it is blowing my mind on why they were taken away when all of our paperwork was in and completed back in February when the bid first came out. Plowing is a big part of our business income and I cannot afford to lose these routes. I'm hoping that you guys will reconsider and give us back our plow routes that were taken away! Keep in mind 2 of the five routes that were taken away from us we won back and were awarded in the waiver bid. So there are three routes that we are hoping to get back. Please help fill me in I don't understand why this happened, all of our paperwork was correct. Remember I've been a loyal contractor for you guys for 25 years and this just isn't fair, please help!

First, the Division's governing regulations state in pertinent part:

- (b) A bidder, having submitted a proposal in response to an advertised RFP and finding cause to protest the award decision pursuant to (a)1 or 2 above, shall make written request to the Director, setting forth, in detail, the specific grounds for challenging the rejection of its proposal or for challenging the scheduled contract award, as applicable. The protest shall be filed within 10 business days following the bidder's receipt of written notification that its proposal is non-responsive or of notice of the intent to award, as applicable, or, pursuant to (e) below, prior to the deadline specified in the Division's notice of intent to award communication to the bidder, whichever date is earlier.

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<sup>4</sup> The September 5, 2018 final agency decision was sent to the email and mailing address provided by R&G in its Quote submission.

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3. The Director may disregard any protest of award filed after the 10 day protest period and proceed with the award of contract(s).

[N.J.A.C. 17:12-3.3(b), emphasis added.]

As noted above, the September 5, 2018, final agency decision was sent to R&G on September 5, 2018. R&G submitted its protest on October 1, 2018, well past the 10 day protest period. N.J.A.C. 17:12-3.3(b)(3). Therefore, R&G's protest and request for reconsideration must be administratively dismissed for not complying with the governing regulations for challenging the intended contract award.

Second, for the sake of completeness, I note that in connection with R&G's protest and request for reconsideration, the Division's Hearing Unit has reviewed the record of this procurement, including the Bid Solicitation, the submitted Quotes, protests, the Division's final agency decision issued in IMO Jer-Car, the relevant statutes, regulations, and case law.<sup>5</sup> Based upon that review, I find as follows:

Bid Solicitation section 1.1 *Purpose and Intent* advised all Vendors {Bidders} that:

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.

[Emphasis added.]

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<sup>5</sup> The record reflects R&G's request for reconsideration does not present any new or additional information that was not considered in IMO Jer-Car. See Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), quoting D'Atria v. D'Atria, N.J. Super. 392, 401-02 (Ch. Div. 1990) (explaining reconsideration should only be utilized where new information not available on the first application must be considered in the interest of justice, or where "1) the [tribunal] has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [tribunal] either did not consider, or failed to appreciate the significance of probative, competent evidence").

In conducting Phases 2 and 3 of this procurement, the Bureau should not have considered pricing during Phases 2 or 3 from those Vendors {Bidders} for the same price lines for which they were deemed nonresponsive in Phase 1.<sup>6</sup> Doing so materially unlevelled the playing field in favor of the partially responsive Vendors {Bidders} because those Vendors {Bidders} were permitted to “cure” Quotes which had been deemed nonresponsive during Phase 1, an opportunity not provided to other Vendors {Bidders} and a practice generally prohibited under applicable law. See, e.g., On-Line Games, supra, 279 N.J. Super. at 597 (“In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP”); In re Motor Vehicle Comm’n Surcharge Sys. Accounting and Billing Servs., No. A-3136-16, at \*32 (App. Div. Feb. 8, 2018) (explaining the Vendor’s “original bid was non-conforming, but the Division impermissibly allowed the bid thereafter to be materially altered”).

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. Though the Division acknowledges R&G’s statements regarding hardship resulting from not being awarded certain price lines, 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 Bid Solicitation. Accordingly, I find no reason to disturb the Division’s September 5, 2018 final agency decision in IMO Jer-Car.

Finally, I note that in IMO Jer-Car, Vendors {Bidders} were advised to “monitor the New Jersey Department of Transportation’s, the Division’s and the **NJSTART** websites for future bidding opportunities for these services.” IMO Jer-Car, p. 12. On September 10, 2018 NJDOT posted a request for proposals to its website to solicit proposals for the 2018 snow season to obtain contractors for those price lines which had not been awarded in connection with the Division’s solicitation. R&G submitted Quotes for price lines 128, 130, 143, 153, 155, 156, and 164. After reviewing the proposals received NJDOT listed R&G as an awardee for price lines 155 and 156.

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](http://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.

Sincerely,



Maurice A. Griffin  
Acting Director

MAG: RUD

c: P. Michaels  
L. Spildener  
M. Groninger

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<sup>6</sup> In other words, a Vendor {Bidder} was not permitted to submit “supplemental” information in Phase 2 or 3 regarding the Quotes submitted in Phase 1. It is noted that Vendors {Bidders} would not have known that some or all of their Phase 1 price lines were deemed nonresponsive at the time the Bureau requested Phase 2 and Phase 3 pricing. This information would not have been announced until the Bureau issued its NOI and accompanying Recommendation Report.