



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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September 28, 2018

Via Electronic Mail [Chand@KaplanWilliams.com] and USPS Regular Mail

Kashif T. Chand, Esq.
Kaplan, Williams & Graffeo LLC
60 Washington Street, Suite 204
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Re: I/M/O Bid Solicitation #18DPP00205 Terco Enterprises LLC
T0777 Snow Plowing and Spreading Services
Request for Reconsideration

Dear Mr. Chand:

This letter is in response to your correspondences of September 11, 13 and 14, 2018, on behalf of Terco Enterprises LLC (Terco) to the Division of Purchase and Property's (Division) Hearing Unit. In those correspondences Terco protests and requests reconsideration of the September 5, 2018 Final Agency Decision entitled I/M/O Bid Solicitation #18DPP00205 Jer-Car (hereinafter, "IMO Jer-Car"). The Division's September 5, 2018 decision was issued in response to a protest filed by Jer-Car, Inc. (Jer-Car) following the issuance of the Notice of Intent to Award (NOI) 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). The Division's September 5, 2018, final agency decision amended the August 24, 2018 NOI. Specifically, certain price lines (each price line represents a discrete snow plowing or spreading section)

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

which the Bureau had indicated an intent to award to Terco were rescinded as Terco was impermissibly permitted to supplement its original Quote during Phase 2 of the procurement.

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} and providing a revised Bid Solicitation. Bid Amendment #1 also posted a Revised Price Schedule/Sheet titled T0777 Revised Price Schedule – Snow Plowing and Spreading Services – NJDOT. The Revised Price Schedule/Sheet included revisions addressing questions received during the question and answer period, and otherwise made formatting adjustments to the presentation of the document.²

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* 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.

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:

² Pursuant to the Bid Solicitation section 1.4.1, "Any Bid Amendment {Addendum} to this Bid Solicitation {RFP} will become part of this Bid Solicitation {RFP} and part of any Blanket P.O. {Contract} awarded as a result of this Bid Solicitation {RFP}. . . . It is the sole responsibility of the Vendor {Bidder} to be knowledgeable of all Bid Amendments {Addenda} related to this procurement."

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).

[Emphasis added.]

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

Phase 3, but in no event could a bidder supplement or “fix” a bid due which they had been determined in Phase 1 to be non-responsive to..

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 1 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 1 submitted Quotes. Thereafter, the Bureau commenced Phase 2 to solicit Quote pricing for those snow plowing and spreading sections for which no responsive Quotes had been received. On June 11, 2018, requests for Phase 2 pricing were sent to all Vendors {Bidders} who submitted Quotes which were deemed initially responsive. Phase 2 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 2 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 1 and Phase 2 submitted Quotes. Thereafter, the Bureau commenced Phase 3 to solicit Quote pricing for those snow plowing and spreading sections for which no responsive Quotes had been received in either Phase 1 or Phase 2. Requests for Phase 3 pricing were sent to all responsive Vendors {Bidders} on June 26, 2018 with a Phase 3 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 3 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 1, Phase 2 and Phase 3 submitted Quotes. However none of these preliminary notices was a final award, upon which bidder should have relied as only the notice of award make the contract awards final.

Thereafter, 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.³ 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.” Accordingly, the NOI merely reflected the intent to make Blanket P.O. awards; it was not the final notice that awards were being made.

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. As noted in that decision, during the evaluation of the Quotes received, the Bureau had deemed Jer-Car nonresponsive for failure to include an all-inclusive hourly rate for hauling services. Bid Solicitation Section 4.4.4.2 *Price Sheet/Schedule Attachment Instructions* expressly required that all Vendors {Bidders} include an all-inclusive hourly rate for hauling services with the Quote submission. IMO Jer-Car, p. 7, 8. A Vendor’s {Bidder’s} failure to include this mandatory pricing information in the submitted Quote results in a material deviation from the requirements of the Bid Solicitation. As noted in IMO Jer-Car:

³ 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.

Based upon a review of the record and applicable law, I find that Jer-Car's Quote contains a material deviation from the requirements of the solicitation making its Quote nonresponsive. With respect to the previously mentioned River Vale factors, I find that Jer-Car's failure to include the all-inclusive hourly rate for hauling services deprives the State of its assurance that the Blanket P.O. will be entered into, performed, and guaranteed according to the Bid Solicitation's specified requirements. The Bid Solicitation advised all Vendors {Bidders} that they may be called upon to provide hauling services at any time during the term of the Blanket P.O. Bid Solicitation § 3.10.3 *Hauling and Other Equipment*. But, because Jer-Car did not include an all-inclusive hourly rate for these services, it would not be able to perform the required work, which all other Vendors {Contractors} would be required to provide. Further, failure to include the all-inclusive hourly rate for hauling services as required by the Bid Solicitation places Jer-Car in a position of advantage over other Vendors {Bidders} who might have bid on the project had they known they could avoid performing hauling services work by not providing a rate for these services. Finally, courts have held "a bidder's deviation from a price term in the solicitation is almost invariable material under a River Vale analysis . . . [because] manipulation of a price term poses one of the clearest threats to the major objective of our bidding laws to promote the honesty and integrity of those bidding and of the system itself." In re Request for Proposals #17DPP00144, Employee Benefits: Pharmacy Benefit Management Contract, 454 N.J. Super. 527, 564 (App. Div. 2018) (internal quotes and citations omitted). For these reasons, the Bureau's determination the Jer-Car's Quote contained a material deviation from the Bid Solicitation's requirements rendering the Quote nonresponsive is upheld.

[IMO Jer-Car, p. 8.]

In Jer-Car's protest, Jer-Car argued that it was unfair that the Bureau deemed some vendors non-responsive during Phase 1, but still permitted them to bid on Phase 2 and 3, while Jer-Car was deemed non-responsive during Phase 1 and it was not permitted to participate in later Phases. IMO Jer-Car, pp. 5, 10. The Division explained that some Vendors {Bidders} were deemed nonresponsive for a number of price lines in Phase 1, but still had at least one responsive price line.⁴ In contrast, Jer-Car had no responsive price lines in Phase 1. Where a Vendor {Bidder} was "partially responsive," it was invited to participate in the later Phases. However, if the Vendor {Bidder} had no responsive price lines in Phase 1, it was not invited to participate in later the Phases. Because Jer-Car had no responsive price lines in Phase 1, it was appropriately not invited to participate in Phase 2 and 3. See, Bid Solicitation § 1.1 *Purpose and Intent* (stating that only responsive Vendors {Bidders} would be invited to participate in Phases 2 and 3; IMO Jer-Car, p. 8-10.

In connection with Jer-Car's protest, a review of those Vendors {Bidders} that had submitted "partially responsive" Quotes revealed a fundamental unfairness. Specifically, as noted in IMO Jer-Car:

From review of the partially responsive Vendors {Bidders}, it appears that the Bureau permitted some Vendors {Bidders} that were deemed partially

⁴ IMO Jer-Car colloquially referred to Vendors {Bidders} in this category, with some price lines being non-responsive and some responsive as "partially responsive."

nonresponsive during Phase 1 to resubmit pricing for the affected price lines during Phase 2 and Phase 3. For example, the Recommendation Report reflects that Terco Enterprises LLC (Terco) was deemed nonresponsive on a number of price lines for failure to submit an all-inclusive hourly hauling rate on the State-supplied price sheet/schedule. Recommendation Report p. 17. For the same reasons outlined above, this represents a material deviation from the requirements of the Bid Solicitation, and the Bureau correctly concluded that Terco was nonresponsive on all price lines lacking an all-inclusive hourly hauling rate. However, because Terco's Quote still had a responsive price line within its Quote, it was invited to participate in Phase 2 and Phase 3. Recommendation Report, p. 50. In Phase 2, Terco resubmitted pricing for the price lines for which it was already deemed nonresponsive, ultimately being recommended for award for price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, and 97, which were all price lines that Terco was deemed nonresponsive in Phase 1. Recommendation Report pp. 17, 51-53.

[IMO Jer-Car, p. 11.]

As noted above, the Bid Solicitation advised all Vendors {Bidders} that “[u]nder 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.” IMO Jer-Car, p. 11, quoting Bid Solicitation § 1.1 *Purpose and Intent*. Therefore, the Division concluded:

In conducting Phases 2 and 3, the Bureau should not have considered pricing from vendors on the same price lines on which they were deemed nonresponsive in Phase 1. Doing so materially unlevelled the playing field in favor of the partially responsive Vendors {Bidders} because the Vendors {Bidders} were permitted to “cure” the earlier nonresponsive price lines, 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”).

After reviewing the Recommendation Report, and as set forth in Attachment A to this Final Agency Decision, it appears that three Vendors {Bidders} were allowed to cure twenty nonresponsive price lines by resubmitting pricing in a later Phase. The intended award of these price lines is hereby rescinded. Seven rescinded price lines received additional pricing during Phase 2. Accordingly, in these instances, the NOI is hereby amended to reflect an award to the Vendor {Bidder} who would be next in line following the disqualification of the initial intended awardee. Where no responsive Quotes were received on a price line and rescission

of the intended awards results in no intended awardee, the price line will be included within a supplemental future bidding opportunity for these services.

[IMO Jer-Car, p. 11-12, emphasis added.]

In IMO Jer-Car the Division rescinded twenty intended price line awards. Twelve of those price lines were intended to be awarded to Terco. Ultimately, of the twelve price lines impacting Terco, IMO Jer-Car re-awarded seven affected price lines to other Vendors {Bidders} and left five price lines without an intended award.⁵

On September 5, 2018, Terco contacted the Division's Hearing Unit regarding the time frame within which it would be permitted to submit its request for reconsideration of the Division's September 5, 2018, final agency decision, IMO Jer-Car. Terco was advised to submit its request for reconsideration to the Division's Hearing Unit by Friday, September 7, 2018. Thereafter, Terco, through its attorney, insisted that it be provided 10 days within which it could response to the September 5, 2018 final agency decision. The Division's governing regulations permit the Director to modify or amend the time period within which a protest might be filed in instances where public exigency exists or where there is a potential for substantial cost benefit or other advantage to the State. N.J.A.C. 17:12-3.3(e). As such, the Division truncated to the protest period. Terco thereafter requested that it be permitted to submit its request by Tuesday, September 11, 2018. The Division's Hearing Unit granted Terco's request.

On September 11, 2018, the Division received Terco's protest and request for reconsideration of the Division's September 5, 2018, final agency decision, IMO Jer-Car. In that protest, Terco alleges that the "decision is patently unfair, improperly interprets and applies the Bid Solicitation, and has resulted in significant damages to Terco." Terco Sept. 11, 2018 Protest, p. 1. Terco further alleges that the basis for the Division's decision was "arbitrary, unsupported by the Bid Solicitation and applicable law, indicates favoritism, improvidence, and corruption." Terco Sept. 11, 2018 Protest, p. 4. Terco requests that the Division reconsider its September 5, 2018 decision, reinstate the award to Terco or in the alternative commence a re-bid. Terco Sept. 11, 2018 Protest, p. 1, 11. Finally, Terco requests that the "bidding process be stayed" pending an appeal. Terco Sept. 11, 2018 Protest, p.2.

On September 21, 2018, Terco filed an order to show cause in the New Jersey Superior Court, Chancery Division, seeking temporary restraints and a preliminary injunction. At the Chancery Division's direction, the matter was re-filed in the Law Division. Following a telephonic hearing, on September 26, 2018, Hon. Mary C. Jacobson, A.J.S.C., in Terco Enterprises LLC v. New Jersey Department of Transportation and New Jersey Department of the Treasury, Division of Purchase and Property (MER-L-2017-18), issued an order instructing the Division to take no further action to effectuate the contracts for the disputed price lines, pending the court's review. A hearing on the matter is scheduled for October 1, 2018.

⁵ On September 10, 2018, the NJDOT commenced the process for awarding those unawarded lines for the 2018 snow season in accordance with the Waiver of Advertising statute. The purpose of the NJDOT waiver was to obtain vendors for those remaining price lines for which the Division did not receive any responsive Quotes. Price line 30, 31, 32, 48 and 50 were included on NJDOT's waiver. Bids for the waiver were due to NJDOT on September 18, 2018. While Terco submitted a bid to NJDOT, it only submitted a bid for price lines 32 and 378 (a section not included in the Bid Solicitation T0777). On September 26, 2018, before the Law Division issued its stay, NJDOT issued a notice indicating that Terco is the intended awardee for price line 312.

DISCUSSION

In its protest and request for reconsideration Terco asserts the Division's decision in IMO Jer-Car is "patently unfair, improperly interprets and applies the Bid Solicitation, and has resulted in significant damages to Terco as a direct consequence of its reliance on the Final Notice of Intent to Award." Terco Sept. 11, 2018 Protest, p.1. In support of its protest and request for reconsideration, Terco states: (1) that the Division misinterprets the Bid Solicitation; (2) that the Division is estopped from rescinding the notice of intent to award; and, (3) that the Bid Solicitation process was patently unfair and therefore requires that the procurement be re-bid. Terco requests the Division reverse IMO Jer-Car, or alternatively, re-bid the Bid Solicitation. Ibid. In the event the Division denies this relief, Terco requests an in-person presentation to "more fully create a record for appeal to the Appellate Division" and a stay of the "bidding process." Terco Sept. 11, 2018 Protest, p. 1-2.

A. Terco's Request for an in-person hearing

First, with respect to Terco's request for an in-person hearing I note that 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." Further, "[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 Terco's protest and request for reconsideration, I have reviewed the record of this procurement, including the RFP, the submitted Quotes, Terco's protest and request for reconsideration, the relevant statutes, regulations, and case law. The issues raised by Terco are sufficiently clear such that a review of the record of this procurement 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 Terco on the written record.

B. Terco's Request for Reconsideration of IMO Jer-Car

As to Terco's request for reconsideration of the IMO Jer-Car decision, Terco's September 11, 2018 letter 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"). However, to the extent that it was necessary to revisit the decision in IMO Jer-Car, those matter were considered and discussed with respect to Terco's substantive Protest below.

C. Terco's Protest

In its protest, Terco's claims that the Division misinterprets its own Bid Solicitation, specifically as it relates to Bid Solicitation Section 1.1 *Purpose and Intent*. The Division's interpretation of its own Bid Solicitation was not erroneous and is consistent with guiding 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).

As noted above, the Bid Solicitation advised all Vendors {Bidders} that only those “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 Phase Three (3)].” Bid Solicitation § 1.1 Purpose and Intent. Accordingly, those Vendors {Bidders} who submitted Quotes that were deemed non-responsive were not invited to submit Quote pricing for Phases 2 or 3. See, IMO Jer-Car. Permitting those Vendors {Bidders} to submit Quotes in response to Phase 2 or 3 would have allowed those Vendors {Bidders} to supplement or cure their originally submitted Quotes contrary to the guiding law. See, Township of River Vale v. Longo Construction Co., 127 N.J. Super. 207, 222 (Law Div. 1974) stating “a non-conforming bid is no bid at all.”

However, as noted in IMO Jer-Car, some Vendors {Bidders}, including Terco, submitted “partially responsive” Quotes in response to the original Bid Solicitation. In its original Quote submission, Terco submitted Quote pricing for price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, and 97 among others. For these listed price lines, Terco’s Quote was deemed non-responsive for failure to state an all-inclusive hourly hauling rate on the State-supplied price sheet/schedule as required by Bid Solicitation Section 4.4.4.2 Price Sheet/Schedule Attachment Instructions. Recommendation Report p. 17.

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). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test for determining materiality as set forth by the court in River Vale, supra. “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-waiveable irregularity.’” In re Protest of Award of On-Line Games Prod. & 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-waiveable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” Id. at 222.

Based upon a review of the record and applicable law, Terco’s original Quote submission contained a material deviation from the requirements of the solicitation making its Quote for these listed price lines nonresponsive. With respect to the River Vale factors, I find that Terco’s failure to include the all-inclusive hourly rate for hauling services deprived the State of its assurance that the Blanket P.O. will be entered into, performed, and guaranteed according to the Bid Solicitation’s specified requirements. The Bid Solicitation advised all Vendors {Bidders} that they may be called upon to provide hauling services at any time during the term of the Blanket P.O. Bid Solicitation § 3.10.3 Hauling and Other Equipment. But, because Terco

did not include an all-inclusive hourly rate for these services, it would not be able to perform the required work, which all other Vendors {Contractors} would be required to provide. Further, failure to include the all-inclusive hourly rate for hauling services as required by the Bid Solicitation places Terco in a position of advantage over other Vendors {Bidders} who might have bid on the project had they known they could avoid performing hauling services work by not providing a rate for these services. Finally, courts have held “a bidder’s deviation from a price term in the solicitation is almost invariably material under a River Vale analysis . . . [because] manipulation of a price term poses one of the clearest threats to the major objective of our bidding laws to promote the honesty and integrity of those bidding and of the system itself.” In re Request for Proposals #17DPP00144, Employee Benefits: Pharmacy Benefit Management Contract, 454 N.J. Super. 527, 564 (App. Div. 2018) (internal quotes and citations omitted). For these reasons, the Bureau’s determination the Terco’s Quote contained a material deviation from the Bid Solicitation’s requirements rendering the Quote partially nonresponsive is appropriate.

Terco however did submit a responsive Quote with respect to price line 330; therefore, its Quote was deemed “partially non-responsive” and it was permitted to participate in Phase 2 and 3. In submitting pricing in response to Phases 2 and 3, the Bid Solicitation specifically advised those Vendors {Bidders} that “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.” IMO Jer-Car, p. 11, quoting Bid Solicitation § 1.1 Purpose and Intent, emphasis added. The purpose of this provision was to avoid Vendors {Bidders} being permitted to supplement, change or correct a previously submitted price lines contrary to the Court’s holding in 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”). Allowing a Vendor {Bidder} to supplement, change or correct previously submitted price lines would result in an unleveling of the playing field as only those partially responsive Vendors {Bidders} would have been afforded the opportunity to do so, and those Vendors {Bidders} who submitted Quotes that were deemed non-responsive were not invited to participate in Phases 2 or 3 and would not have been permitted to “cure” the earlier nonresponsive price lines. Permitting any Vendor {Bidder} to cure a proposal submission is a practice generally prohibited under applicable law.

A review of the Bureau’s Recommendation Report and the August 24, 2018 NOI, revealed that the Bureau permitted some Vendors {Bidders}, whose Quotes has been deemed partially nonresponsive during Phase 1 to resubmit pricing for those affected price lines during Phase 2 and Phase 3. For example, the Recommendation Report reflects that Terco’s Quote was deemed nonresponsive for price lines 18, 19, 20, 21, 30, 31, 32, 33, 34, 35, 36, 38, 39, 40, 48, 49, 50, 51, 53, 54, 55, 56, 57, 80, 81, 82, 83, 84, 85, 86, 87, 88, 90, 91, 92, 93, 94, 96, 97, 98, & 102 for failure to submit an all-inclusive hourly hauling rate.

However, because Terco’s Quote still had a responsive price line within its Quote, it was invited to participate in Phase 2 and Phase 3. Recommendation Report, p. 50. During Phase 2, Terco submitted pricing for price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 82, 91, 93, 97, and 99 – resubmitting pricing for those price lines for which it was already deemed nonresponsive. As a result of the Phase 2 pricing, Terco was recommended for award for price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, 97 and 99. Recommendation Report pp. 17, 51-53. Based upon the language of the Bid Solicitation, Terco’s Quote for all but price line 99 should have been rejected as improper supplementation. Terco claims that the language of the Bid Solicitation permitted it to supplement its original Quote during Phase 2 and 3. Specifically, Terco refers to Bid Solicitation 1.1 Purpose and Intent which states “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.” Terco however misreads the intent of the statement. The intent of this sentence is to advise the Vendors {Bidders} that while they will be permitted to submit price sheet during Phase 2 and 3 in order to submit Quote pricing during the subsequent phases, they will not be permitted to otherwise supplement their originally submitted proposals.

Further, Terco erroneously claims that other Vendors {Bidders} were permitted to cure their Quote submissions and that there is no prohibition from it being able to do the same. Terco specifically points to the Quote submitted by Tony Sanchez, LTD (Sanchez). During Phase 1 Sanchez submitted Quote pricing for Price Lines 37, 38, 40, 80, 81, 83, & 91. Sanchez’s Quote pricing for these price line was deemed non-responsive for failing to submit an all-inclusive hourly superintendent rate. Sanchez submitted Quote pricing for other price lines which was responsive to the requirements of the Bid Solicitation and therefore, it was invited to submit Quote pricing for Phases 2 and 3. Sanchez was not permitted to cure any aspect of its previously submitted Quote for which was deemed non-responsive and was only listed as an intended awardee in the August 24, 2018 NOI for those price lines for which it had not submitted a Quote in Phase 1. Further, contrary to Terco’s statement, Atlantic Recycling Group (Atlantic) was not permitted to cure its submitted Quote. Rather, Atlantic submitted a responsive Quote and was afforded an opportunity to reduce its Quote pricing pursuant to Bid Solicitation Section 6.8 Negotiation and Best and Final Offer.

The Division has interpreted the requirements of the Bid Solicitation consistent with the applicable law, and has applied that determination consistently to all Vendors {Bidders}. Despite the fact that there was earlier error, the Division took the necessary steps to correct the error and amended the Notice of Intent to Award consistent with the requirements of the Bid Solicitation preventing any potential for favoritism, improvidence, corruption or unfettered competition.

Additionally, Terco asserts that the Division is estopped from rescinding the notice of intent to award. “Estoppel is rarely invoked against a governmental entity, but it may be applied in appropriate circumstances unless the application would prejudice essential governmental functions.” Middletown Twp. Policemen's Benevolent Ass'n Local No. 124 v. Twp. of Middletown, 162 N.J. 361, 364 (1998). A party seeking estoppel against a governmental entity must demonstrate detrimental reliance on the action or inaction of the official or entity.” M.J. Ocean, Inc. v. Dir., Div. of Taxation, 23 N.J. Tax 646, 655 (2008). “[T]he party seeking the benefit of estoppel has the burden of establishing that an officer of the State, conscious of the State's true interest and aware of the private [party's] misapprehension, stood by while the private [party] acted in detrimental reliance.” Id. at 655, citing, Newark v. Natural Resource Council in the Dept. of Env'tl. Protection, 82 N.J. 530, 545, 414 A.2d 1304 (1980), cert. denied, 449 U.S. 983, 101 S.Ct. 400, 66 L.Ed.2d 245 (1980). Terco seemingly recognizes the heavy burden it bears in demonstrating that estoppel should be invoked against a governmental entity stating that the requestor must demonstrate “(1) a clear and definite promise by the promisor; (2) the promise must be made with the expectation that the promisee will rely thereon; (3) the promisee must in fact reasonably rely on the promise, and (4) detriment of a definite and substantial nature must be incurred in reliance on the promise. See id. Each of these elements are satisfied here.” Terco, Sept. 11 Protest p. 9, citing. Trump Plaza Assocs. v. Dir., New Jersey Div. of Taxation, 25 N.J. Tax 555, 563 (App. Div. 2010). Terco claims that it detrimentally relied upon the NOI and purchased a vehicle at a cost of approximately \$200,000. I note that in its original Quote submission, Terco submitted Quote pricing for 48 discrete price lines. With that original Quote submission, Terco indicated that it had approximately 300 trucks at its disposal to perform the work sought by the contract. If Terco were properly awarded the twelve price lines in dispute, it would have needed less than 90 trucks to perform the work required. The fact that Terco expended funds to supplement its fleet of trucks was its own choice and not done in reliance upon the Bureau’s notice of intent. Moreover, the NOI clearly advised all Vendors {Bidders} of the protest period – the opportunity to challenge the intended awards, Terco’s purchase of a vehicle prior to the final awards being made was its own choice.

Finally, Terco’s allegation that price sheet used during Phase 1 “hid the all-inclusive hourly hauling rate” is meritless. In creating and submitted a Quote in response to the Bid Solicitation, Vendors {Bidders} were required to utilize the State-Supplied price sheet included with the Bid Solicitation.

Name	Description	Show Vendor	Confidential	Open	Attached By	Attached Date
Offer and Acceptance Page T0777.pdf (view details)	Offer and Acceptance Page T0777	✓	0	0	Micheline Granger	01/25/2018
Attachment 2 T0777 - Snow Plowing and Spreading Services-NJDOT.doc (view details)	Attachment 2 T0777 Vendor (Bidder) Experience	✓	0	0	Micheline Granger	01/25/2018
Vendor Checklist T0777-1.pdf (view details)	Vendor (Bidder) Checklist T0777	✓	0	0	Micheline Granger	01/25/2018
Price Schedule T0777 Snow Plowing and Spreading Services-NJDOT-1.xlsx (view details)	Price Schedule T0777 Snow Plowing and Spreading Services-NJDOT	✓	0	0	Micheline Granger	01/25/2018
Attachment 1 T0777 Snow Plowing and Spreading Services-NJDOT-1.docx (view details)	Attachment 1 T0777 Vendor (Bidder) Equipment	✓	0	0	Micheline Granger	01/25/2018
T0777 Snow Plowing and Spreading Services-NJDOT-2.docx (view details)	RFP T0777 Snow Plowing and Spreading Services NJDOT 013018	✓	0	0	Micheline Granger	01/25/2018
T0777 Bid Amendment 1 030118.docx (view details)	T0777 Bid Amendment 1 030118	✓	0	0	Micheline Granger	02/28/2018
Attachment 1 T0777 Revised Snow Plowing and Spreading Services-NJDOT.docx (view details)	Attachment 1 T0777 Revised Snow Plowing and Spreading Services-NJDOT	✓	0	0	Micheline Granger	02/28/2018
T0777 Revised RFP Snow Plowing and Spreading Services-NJDOT 030118.docx (view details)	T0777 Revised RFP Snow Plowing and Spreading Services-NJDOT 030118	✓	0	0	Micheline Granger	02/28/2018
T0777 Revised Price Schedule - Snow Plowing and Spreading Services-NJDOT.xlsx (view details)	T0777 Revised Price Schedule - Snow Plowing and Spreading Services-NJDOT	✓	0	0	Micheline Granger	02/28/2018

Upon opening the file, the State-supplied price sheet appears as follows:

SNOW PLOWING SERVICES (PAGES 1 TO 100)							
LINE NO	DESCRIPTION	QTY	UNIT	ALL-INCLUSIVE HOURLY RATE SNOW PLOWING-TRUCK ONLY	ALL-INCLUSIVE HOURLY RATE SNOW PLOWING TRUCK & EQUIPMENT	ALL-INCLUSIVE HOURLY RATE SNOW PLOWING SUPERINTENDENT	ALL-INCLUSIVE HOURLY RATE HAULING ONLY
1	SNOW PLOWING SERVICES – D.O.T. REGION: NORTH CREW 210 PATERSON SUBREGION: N3 SNOW SECTION: 5210261 RT 206, FROM GOFFLE ROAD, HAWTHORNE BORO, PASSAIC CO, TO RT 202 OAKLAND BORO, BERGEN CO (MP 4.4 TO 10.7) NUMBER OF TRUCKS REQUIRED: 7	1	HOUR				
2	SNOW PLOWING SERVICES – D.O.T. REGION: NORTH CREW 210 PATERSON SUBREGION: N3 SNOW SECTION: 5210262 RT 206 FROM RT 4, FAIRLAWI BORO TO GOFFLE RD, HAWTHORNE BORO (MP 0.0 TO MP 4.4) NUMBER OF TRUCKS REQUIRED: 7	1	HOUR				
3	SNOW PLOWING SERVICES – D.O.T. REGION: NORTH CREW 210 PATERSON SUBREGION: N3 SNOW SECTION: 5210263 RT 20, FROM RT 46, PATERSON TO FIRST AVENUE IN PATERSON (MP 0.0 TO 4.0) NUMBER OF TRUCKS REQUIRED: 5	1	HOUR				

The column requiring the All-inclusive hourly rate for hauling is clearly visible when opening the price sheet. Further, the Bid Solicitation made it clear that when submitting a Quote for Snow Plowing Services Vendors {Bidders} were required to submit pricing for hauling services.

A. Snow Plowing Services - Price Lines one (1) to 298:

1. The Vendor {Bidder} must submit an all-inclusive hourly rate to provide snow plowing services with one of the following options:
 - i. Snow plowing truck only; or
 - ii. Snow plowing truck and equipment, as defined in Sections 3.12.2 and 3.12.3 of this Bid Solicitation {RFP}.

2. The Vendor {Bidder} must submit an all-inclusive hourly rate for the following:
 - i. Snow Plowing Superintendent; and
 - ii. Hauling Services.

B. Snow Plowing Services/Other Equipment – Price Lines 299 to 309:

1. The Vendor {Bidder} must submit an all-inclusive hourly rate for any other additional equipment offered.

C. Spreading Services – Price Lines 310 – to 375:

1. The Vendor {Bidder} must submit an all-inclusive hourly rate to provide spreading services.

[Bid Solicitation § 4.4.4.2 *Price Sheet/Schedule Attachment Instructions.*]

In further support of its position that the design of the price sheet is cause for the Bid Solicitation to be cancelled, Terco claims that 35 Quotes submitted were rejected as non-responsive for failure to submit the All-inclusive hourly rate for hauling. Terco's statement is erroneous. The Quotes submitted by 15 Vendors {Bidders} were deemed non-responsive for the sole reason of failing to include an All-inclusive hourly rate for hauling. An additional six Quotes were deemed non-responsive each for multiple reasons, including failing to include the All-inclusive hourly rate for hauling. Recommendation Report, pgs. 7-8, 17. The fact that printing the price sheet may have required legal size rather than letter size paper does not result in the failure or cancellation of a Bid Solicitation.

D. Terco's Request for a Stay

Turning now to Terco's request for a stay, a stay is an extraordinary remedy and a party who seeks a stay must satisfy a particularly heavy burden [to] demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Zoning Bd. v. Service Elec. Cable Television, 198 N.J. Super. 370, 279 (App. Div. 1985). In exercising discretion to grant a request for stay, an agency must be guided by certain fundamental principles:

- (1) A preliminary injunction should not issue except when necessary to prevent irreparable harm...
- (2) Temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled...
- (3) Preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits...
- (4) The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying the relief...

[Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).]

Prior to the Division having the opportunity to issue its decision regarding Terco's request for a stay, Terco filed an Order to Show Cause with the Superior Court of New Jersey – Chancery Division; that matter was then transferred to the Law Division. On September 26, 2018, the Law Division entered an order granting Terco's request for stay of the award for price lines price lines 18, 20, 30, 31, 32, 48, 50, 53,

54, 55, 93, 97, 99, 316, 329, and 330.⁶ Accordingly, Terco's request for a stay before the Division is now moot. However, for the sake of completeness, I will address how the Division would have dealt with Terco's request for a stay if the issue were still before the Division.

1. Terco will not suffer irreparable harm if the stay of the Contract award is denied.

Terco will not suffer irreparable harm if the stay of the Blanket P.O. awards is denied. When considering a stay, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, supra, 90 N.J. at 132-33. While monetary damages are never available for the failure to award a public contract, not every request for stay that concerns a public contract award is granted. See, e.g., In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Mgmt. Servs., 436 N.J. Super. 350, 358 (App. Div. 2014) (denying stay of award of contract). This is one of the pillars underlying the public bidding law. The public interest, however, is greatly affected if the Division is unable to complete the Blanket P.O. awards. In order to be ready for the 2018-2019 snow plowing season, ensure that all necessary equipment is ordered and available, NJDOT required that the Blanket P.O.s be awarded by October 1, 2018. This ensures that NJDOT has sufficient time to perform all necessary vehicle and plow inspections prior to the commencement of the winter snow plowing season.

However, even if Terco would suffer irreparable harm, a finding of irreparable harm alone is not sufficient to permit the court to grant injunctive relief as the movant has the burden to establish all of the Crowe factors.

2. Terco has the legal right to request a stay of the Contract award.

The Division acknowledges that it is well settled that a bidder claiming to be entitled to an award of a contract has standing to challenge the award of a contract to another. M.A. Stephen Construc. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

3. Terco has not demonstrated a reasonable probability of ultimate success on the merits.

The New Jersey courts have consistently held that a movant bears the burden to satisfy a particularly heavy burden [to] demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Zoning Bd. v. Service Elec. Cable Television, 198 N.J. Super. 370, 279 (App. Div. 1985); Gauman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (internal citations omitted); see also, McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007) (stating that plaintiff must prove each of the Crowe factors and establish each by clear and convincing evidence); Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). In its request for stay, Terco did not address any of the Crowe factors. Rather, Terco simply requested that the "bidding process be stayed" until its appeal has been decided. Terco Sept. 11, 2018 Protest, p. 2. Terco has not established by clear and convincing evidence that it will suffer an irreparable harm; that it has a reasonable probability of success on the merits, or that the balance of hardship weighs in its favor. Therefore, Terco's request for a stay could have been administratively denied.

Even if Terco's protest and request for reconsideration could be read to set forth facts in support of a stay, as set forth in response to Terco's substantive protest points, as discussed above, Terco has not demonstrated a reasonable probability of success on the merits.

⁶ The September 5, 2018 decision, IMO Jer-Car did not affect the award of price lines 99, 316, 329 and 330 to Terco and it is still the intended awardee for these price lines.

4. The balance of the relative hardship weighs in favor of denying the request for a stay.

Lastly, Terco has not established that the balance of the hardship weighs in its favor, that it will suffer irreparable harm or that the subject matter of the suit will be destroyed if the stay is not granted.

Bid Solicitation Section 3.5 *Snow Season* advises that “the Vendor {Contractor} shall be prepared to provide services during the Winter Season period, beginning October 1st through April 30th.” As such, all Vendors {Contractors} will be required to have “All trucks . . . fully operational and ready to report for a Call-Out by October 1st of each year of the Blanket P.O. {Contract}.” Therefore, it is imperative that the State have the Blanket P.O.s in place by October 1, 2018. If the State does not move forward with the Blanket P.O. awards, the public will suffer hardship if NJDOT is unable to perform necessary equipment inspections and provide the Vendors {Contractors} with equipment if necessary prior to the start of the 2018 snow plowing season. “The important role the public interest plays when implicated, as here, and have held that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority, 433 N.J. Super. 445, 453-54 (App. Div. 2013) citing, Union County, supra, 399 N.J. Super. at 520-21. I note that the Division’s governing regulations permit the Division to award contracts, notwithstanding the receipt of a protest under certain circumstances. “The Director may award the contract, notwithstanding the receipt of a protest pursuant to the above provisions, if the failure to award the contract will result in substantial cost to the State or if public exigency so requires. In such event, the Director shall notify all interested parties.” N.J.A.C. 17:12-3.3(c). Because of the important public interest, and because Terco did not establish a probability of success on the merits or that the balance of equity’s weighed in its favor, as permitted by the Division’s governing regulations, the Division moved forward with the contract awards prior to the resolution of Terco’s protest.

CONCLUSION

Based upon the foregoing, including my review of Terco’s protest points and my reconsideration of may still be taking actions to effectuate the award of the disputed price lines to vendors I find no reason to disturb the September 5, 2018 final agency decision in IMO Jer-Car, amending the August 24, 2018 NOI and rescinding the intent to award to Terco price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93 and 97. This is my final agency decision with respect to the protest and request for reconsideration submitted by Terco. Should Terco wish to appeal this final agency decision, in accordance with the Division’s governing regulations “final agency determinations by the Director on matters of protest are appealable to the Appellate Division of the Superior Court of New Jersey.” N.J.A.C. 17:12-3.1(b).

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.

Sincerely,


Maurice A. Griffin
Acting Director

MAG: RUD

c: P. Michaels
L. Spildener
M. Groninger