



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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January 28, 2019

Via Electronic Mail [nate@elitevehiclesolutions.com] and USPS Regular Mail

Nate Herskovits, President
Elite Vehicle Solutions/Elite Emergency Lights, LLC
1000 Bennett Blvd. Unit
Lakewood, New Jersey 08701

Re: I/M/O Bid Solicitation # 17DPP00046 Elite Vehicle Solutions/Elite Emergency Lights, LLC
Protest of Notice of Intent to Award
T0106 Law Enforcement Firearms, Equipment and Supplies

Dear Mr. Herskovits:

This letter is in response to your correspondence of October 26, 2018, on behalf of Elite Vehicle Solutions/Elite Emergency Lights, LLC (Elite) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that correspondence, Elite protests the October 19, 2018, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #17DPP00046: Law Enforcement Firearms, Equipment and Supplies (Bid Solicitation).¹

By way of background, on February 7, 2017, the Bureau issued the Bid Solicitation on behalf of State Using Agencies and Cooperative Purchasing Partners to solicit Quotes for sixteen categories for law enforcement equipment and supplies. Bid Solicitation § 1.1 *Purpose and Intent* and Bid Solicitation § 3.1 *Law Enforcement Equipment and Supplies Categories*.

¹ 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

On April 20, 2017, the Proposal Review Unit opened 102 Quotes received by the submission deadline of 2:00 p.m. 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 § 6.6 *Evaluation Criteria*.

On September 13, 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 October 19, 2018, the NOI was issued advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s. On October 26, 2018, Elite wrote to the Division's Hearing Unit protesting the Bureau's decision not to award it a Blanket P.O. for the Setina Manufacturing (Setina) brand or the SoundOff Signal (SoundOff) brand in Category 12 – Vehicle Siren Systems & Vehicle Light Systems and Associated Accessories.

In consideration of Elite's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the submitted Quotes, Elite's protest, the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed Final Agency Decision on the merits of the protest. I set forth herein the Division's Final Agency Decision.

The record of this procurement reveals that Elite submitted a Quote for six different brands within Category 12 – Vehicle Siren Systems & Vehicle Light Systems and Associated Accessories. Relevant to this protest, Elite submitted a Quote for the Setina Manufacturing (Setina) brand and SoundOff Signal (SoundOff), an Equivalent Brand.² See, price lines 140 and 143 respectively on the screenshot below.

CATEGORY 12 - VEHICLE SIREN SYSTEMS & VEHICLE LIGHT SYSTEMS AND ASSOCIATED ACCESSORIES									
	Brand/Equivalent	Markup/Discount from Manufacturers Price List	% Percentage	Price List Type	Price List File Name	Price List Publication Date	Price List Page # Relating to the Brand Bid	Delivery Days AND	Cash Discount for Expedited Payment, See Section 6.4.5.6
153	Able 2		NO BID						
154	Code 5		NO BID						
155	Federal Signal		NO BID						
156	Gamber Johnson	Discount	46.00%	Retail	LIST PRICING 2-10-21	2/10/2017	All pages	14 Days	1% within 10 days
157	Havis		NO BID						
158	Jotto Public Safety		NO BID						
159	Pro-Gard Products LLC		NO BID						
140	Setina Manufacturing	Discount	13.00%	Retail	Member Price List - A4	3/1/2017	All Pages	20 Days	1% within 10 days
141	Troy Products		NO BID						
142	Whelen Police		NO BID						
143	Soundoff Signal	Discount	45.00%	Retail	Soundoff Signal 2017	2/1/2017	All Pages	14 Days	1% within 10 days
	Fenix	Discount	46.00%	Retail	Fenix_ListPrice_V7.6	3/17/2017	All Pages	20 Days	1% within 10 days
	Star Headlight	Discount	46.00%	Retail	FP COMPLETE LIST 20	12/1/2016	All Pages	14 Days	1% within 10 days
	Elite Emergency Lights	Discount	46.00%	Retail	77 Console-Cabinet L12	1/1/2017	All Pages	20 Days	1% within 10 days
CATEGORY 12A - VEHICLE SIREN SYSTEMS & VEHICLE LIGHT SYSTEMS INSTALLATION AND REPAIR RATE									
	Brand/Equivalent	Vehicle Installation & Repair Hourly Rate							
144	Able 2	NO BID							
145	Code 5	NO BID							
146	Federal Signal	NO BID							
147	Gamber Johnson	\$	85.00						
148	Havis	NO BID							
149	Jotto Public Safety	NO BID							
150	Pro-Gard Products LLC	NO BID							
151	Setina Manufacturing	\$	85.00						
152	Troy Products	NO BID							
153	Whelen Police	NO BID							
154	Soundoff Signal	\$	85.00						
	Fenix	\$	85.00						
	Elite Emergency Lights	\$	85.00						
	Star Headlight	\$	85.00						

² "Equivalent Brand – A manufacturer's brand that meets the requirements of the category listed in Bid Solicitation {RFP} Section 3." Bid Solicitation § 2.1.2 *Blanket P.O. {Contract}-Specific Definitions/Acronyms*.

In order to verify that Vendors {Bidders} have the authority to sell the brands proposed, the Bid Solicitation required that the Vendors {Bidders} submit a Manufacturer's Certification stating that the Vendor {Bidder} is authorized to supply the brand bid. Bid Solicitation § 4.4.3.3 *Manufacturer's/Distributor's Certification*. In addition, with respect to Equivalent Brands, the Bid Solicitation further required that:

Equivalent Brand Price Line - Vendors {Bidders} may submit Quotes {Proposals} for equivalent products that equally fulfill the requirements of the specific category for which the brand is being offered and not already listed on the Price Sheet. Equivalents to the listed brands may be offered but must be entered onto the corresponding equivalent brand price line. **If a Vendor {Bidder} is bidding an equivalent brand price line and is not the manufacturer of the equivalent brand, three (3) responsive Quotes {Proposals} must be received for the equivalent brand bid in order for the equivalent brand to be considered for an award.** If three (3) responsive Quotes {Proposals} are received for the equivalent brand, the State will make two (2) Statewide awards, one primary and one secondary for Category(ies) one (1) through eleven (11) and up to five (5) Statewide awards for each price line listed in Category(ies) twelve (12) through sixteen (16). **The State will waive the three (3) responsive Quote {Proposal} criteria only if the Vendor {Bidder} can supply a letter from the manufacturer which states that the Vendor {Bidder} is the sole source distributor of the brand.**

[Bid Solicitation § 4.4.5.2.3, emphasis added.]

On August 25, 2017, the Bureau wrote to Elite requesting that it submit the required Manufacturer's Certification for the brands proposed as required by Bid Solicitation § 4.4.3.3.

Additionally, the State is requesting that your firm submit Manufacturer's Certifications in accordance with Bid Solicitation {RFP} Section 4.4.3.3 for the following brands:

- Gamber Johnson;
- Setina Manufacturing; Soundoff Signal;
- Feniex; and,
- Star Headlight.

Elite did not provide the Manufacturer's Certification for the Setina brand and admits the same in its protest. Because Elite did not provide the required Manufacturer's Certification, the Bureau deemed Elite's Quote non-responsive for failing to conform to the requirements of the Bid Solicitation.³

In order for Elite's Quote to be considered responsive, Elite's failure to submit the required certification, would have to be deemed as a minor irregularity. Minor irregularities can be waived pursuant to the authority vested in N.J.A.C. 17:12-2.7(d) and Bid Solicitation RFP § 1.4.10, *Quote {Proposal}*

³ Elite notes that two other Vendors {Bidders} are listed on the NOI as receiving Blanket P.O. awards for the Setina brand. Those Vendors {Bidders}, Municipal Equipment Enterprises (Municipal) and Emergency Accessories and Installations (Emergency) both submitted the Manufacturer's Certification as required; and therefore, were eligible for Blanket P.O. awards. Municipal and Emergency submitted Quote and were awarded Blanket P.O.s for Categories 1 and 2 respectively.

Acceptances and Rejections. 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 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 the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), citing, River Vale, supra, 127 N.J. at 216. The River Vale court set forth a two-part test for determining whether a deviation is material:

First, whether the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[River Vale, supra, 127 N.J. at 216.]

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

In response to this Bid Solicitation, Setina directly submitted a Quote for Category 12.⁴ With its submitted Quote, Setina included a letter listing its authorized distributors. Elite was listed as an authorized distributor. Additionally, on August 30, 2017, presumably after receiving Elite’s request for a Manufacturer’s Certification, Setina contacted the Bureau stating in part:

One of our distributors Elite Vehicle Solutions is requesting a letter of distributorship, but I have a few questions about it. Setina Manufacturing has bid the contract directly with the State of New Jersey, with the intention of several of our distributors having the ability to sell of our contract.

Because Setina’s correspondence arose during the evaluation of the Quotes, the Bureau did not respond to Setina’s email believing that doing so could be seen as providing favoritism or engaging in corruption with one Vendor {Bidder} contrary to the State’s public policy with respect to public bidding. Barrick, infra, 218 N.J. at 258. However, Setina’s email to the Bureau was not related to its own Quote, but rather was related to Elite’s Quote. The Bureau could have communicated with Setina to ascertain the question that Setina suggested it had. Whether the Bureau could have provided an answer would have depended upon the nature of the question, and whether a response would have been appropriate under the governing statutory, regulatory and case law tenants governing contracts in New Jersey.

Here, Elite’s failure to submit the Manufacturer’s Certification is not a material deviation. The purpose of the Manufacturer’s Certification is to ensure that the Vendor {Bidder} has the authority at the time of the Quote submission to sell to the State of New Jersey the brand proposed in the Quote. It is not the submission of the certification that is dispositive, but rather the materiality determination rests on

⁴ Setina’s Quote was found to be non-responsive to requirements of the Bid Solicitation for failing to providing pricing in response Category 12A as required by the Bid Solicitation.

whether Elite was authorized to sell the brand bid as of the Quote submission deadline. Based upon Setina's own submitted Quote, Elite was an authorized distributor at the time of the Quote opening. Therefore, the State is assured that if Blanket P. O. is awarded, it will be performed as required as Elite is authorized to distribute the Setina brand. Either Elite was or was not authorized at the of the Quote submission. This fact does not change no matter when the certification is obtained. Additionally, Elite is not placed in a position of advantage over other Vendors {Bidders} as other Vendors {Bidders} were permitted to submit the Manufacturer's/Distributor's certification after the Quote opening date. See, Bid Solicitation Section 4.4.3.3 *Manufacturer's/Distributor's Certifications*.

In light of the findings set forth above, I overturn the Bureau's determination that Elite's Quote was non-responsive to the requirements of the Bid Solicitation. I direct to the Bureau to review Elite's Quote with respect to the Setina brand and make an award if appropriate.

I now turn to Elite's proposal for the SoundOff brand, while Elite did provide the Manufacturer's Certification as requested, the certification did not state that Elite was the sole source distributor of the SoundOff brand. As such, the Bureau found that Elite was not eligible for a Blanket P.O. award because its submitted certification did not comply with the requirements of the Bid Solicitation, specifically that Elite was the sole source distributor of the brand, since as noted above, there were not three responsive Quotes received for the equivalent brand.

As noted above, on August 25, 2017, the Bureau wrote to Elite requesting that it submit the required Manufacturer's Certification for the brands proposed as required by Bid Solicitation § 4.4.3.3. The referenced Bid Solicitation Section however only refers to the requirement that the Vendor {Bidder} provide the Manufacturer's Certification stating:

The Vendor {Bidder} should provide the following certification from the manufacturer or distributor of the brand bid:

1. Certification that the Vendor {Bidder} is authorized to supply the brand bid.
2. Certification, if applicable, that a retail price list is not available and that the only price list available is invoice price list (cost sheet).
3. Certification, if applicable, that the price list(s) and/or catalog is not confidential, and acknowledging that the Division will make the price list(s) and/or catalog(s) available to Using Agencies on the Division's website to allow all eligible purchasing entities access to the pricing information.

The manufacturer's certification must include the contact name, phone number, e-mail address, Bid Solicitation {RFP} number and price line number, for verification purposes.

If a Vendor {Bidder} does not provide the required certification, the State reserves the right to request such information from the Vendor {Bidder}. The Vendor {Bidder} must respond to such request by providing all requested information within forty-eight (48) hours. Failure to provide the requested information shall result in the Vendor's {Bidder's} Quote {Proposal} being deemed non-responsive for the brand bid.

The State may request confirmation from a distributor that it is, in fact, an authorized distributor of the brand manufacturer. The State may request that a distributor provide such confirmation directly from the manufacturer. If so requested, the information must be submitted to the State within forty-eight (48) hours of the request. Failure to provide the requested information may result in the Vendor's {Bidder's} Quote {Proposal} being deemed non-responsive for the brand bid.

If the intention of a manufacturer's certification is unclear/ambiguous, the State reserves the right to request further information from the Vendor {Bidder} or brand manufacturer in order to ascertain the true intention of the submission. Such information must be provided within forty-eight (48) hours of notification of such request. Failure to provide the requested information may result in the Vendor's {Bidder's} Quote {Proposal} being deemed non-responsive for the brand bid.

[Bid Solicitation Section 4.4.3.3 *Manufacturer's/Distributor's Certifications.*]

Neither the August 25, 2017, clarification letter nor the referenced Bid Solicitation Section advised the Vendor {Bidder} of the requirement that it provide a letter indicating that it was the sole source distributor. See, excerpt of the clarification letter on p. 3 above. Rather, the requirement that a Vendor {Bidder} provide a letter that it is a sole source distributor lies within Bid Solicitation Section 4.4.5.2 *Price Sheet Attachment Instructions* which states in relevant part:

4.4.5.2.3 Equivalent Brand Price Line - Vendors {Bidders} may submit Quotes {Proposals} for equivalent products that equally fulfill the requirements of the specific category for which the brand is being offered and not already listed on the Price Sheet. Equivalents to the listed brands may be offered but must be entered onto the corresponding equivalent brand price line. If a Vendor {Bidder} is bidding an equivalent brand price line and is not the manufacturer of the equivalent brand, three (3) responsive Quotes {Proposals} must be received for the equivalent brand bid in order for the equivalent brand to be considered for an award. If three (3) responsive Quotes {Proposals} are received for the equivalent brand, the State will make two (2) Statewide awards, one primary and one secondary for Category(ies) one (1) through eleven (11) and up to five (5) Statewide awards for each price line listed in Category(ies) twelve (12) through sixteen (16). The State will waive the three (3) responsive Quote {Proposal} criteria only if the Vendor {Bidder} can supply a letter from the manufacturer which states that the Vendor {Bidder} is the sole source distributor of the brand.

[Emphasis added.]

The Bureau, in requesting the Manufacturer's Certification from Elite, should have advised Elite of the requirement that the Manufacturer's Certification state that it is sole source distributor of the brand as required by Bid Solicitation Section 4.4.5.2.3 *Equivalent Brand Price Line*. Because the basis for the Bureau's decision to not award a Blanket P.O. to Elite for the SoundOff brand was the fact that the Manufacturer's Certification did not state that Elite was the sole source distributor of the brand, the Bureau should provide Elite with the opportunity to provide the Manufacturer's Certification as required by Bid

Solicitation Sections 4.4.3.3 and 4.4.5.2.3. I note that the Manufacturer's Certification from SoundOff must indicate that Elite was the sole source distributor of the brand at the time of Quote opening.

In light of the findings set forth above, I remand this matter to the Bureau for review consistent with this final agency decision.

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.

Sincerely,

A handwritten signature in blue ink, appearing to read "maguff", is written over the typed name.

Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas