



State of New Jersey

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

April 30, 2019

Via Electronic Mail [messengercolaj11@gmail.com] and USPS Regular Mail

Justin Messercola
Messercola Excavating Inc.
549 East Third Street
Plainfield, NJ 07069

Re: I/M/O Bid Solicitation #18DPP00205 Messercola Excavating Inc.
T0777 Snow Plowing and Spreading Services
Protest of Notice of Intent to Award

Dear Mr. Messercola:

This letter is in response to your correspondence of January 10, 2019, on behalf of Messercola Excavating Inc. (Messercola) to the Division of Purchase and Property's (Division) Hearing Unit. In that correspondence Messercola protests the January 9, 2019, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) indicating an intent to re-award certain price lines for Bid Solicitation #18DPP00205 - T0777 Snow Plowing and Spreading Services (Bid Solicitation).¹ In its protest letter, Messercola specifically protests the Bureau's intent to award price line 144 to Atlantic Recycling Group LLC (Atlantic).

In consideration of Messercola's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the submitted Quotes, the documents related to the Vendor's {Bidder's} performance,

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

the 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.

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 was 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 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 by hardcopy 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*.

On July 30, 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 were most advantageous to the State, price and other factors considered. In relevant part, the Recommendation Report detailed the Quote received for price lines 104 and 144 as follows, recommending a Blanket P.O. awards to Messercola:

Price Line #104 – the following Vendors {Bidders} submitted responsive Quotes, and although the Quote submitted by T. Reagan is the overall lowest cost, the Quote submitted by Messercola is considered to be most advantageous to the State price and other factors considered, as it offered the required quantity of trucks and equipment for this Section. In accordance to in Section 6.7.1, the Vendor {Bidder} supplying all required Class A trucks with equipment, will be awarded a Blanket P.O. before the Vendor {Bidder} supply Class A trucks without equipment. Therefore for the reason stated, Messercola is recommended for award of this price line.

Price Line #144 – the following Vendors {Bidders} submitted responsive Quotes, and although both ARG and Messercola both offered the required quantity of trucks and equipment for this Section, the Quote submitted by ARG is not considered to be the overall lowest cost responsive, responsible Quote. The Quote submitted by Messercola is considered to be the overall lowest cost responsive, responsible Quote, most advantageous to the State price and other factors considered, and therefore recommended for award of this price line.

[July 30, 2018, Recommendation Report, pgs. 60-61.]

In total, 89 Blanket P.O.s were awarded to various Vendors {Contractors} with a Blanket P.O. start date of October 1, 2018.

On November 15, 2018 and November 18, 2018, NJDOT made a “call-out” to Messercola in accordance with Bid Solicitation Section 3.8 *Vendor {Contractor} Readiness and Call-Out*. Messercola failed to report as required and to provide snow plowing services for the snow sections associated with price lines 104 and 144.

Price Line 104	Region: Central Crew 310 Sand Hill Subregion: C2 Snow Section 5310262 Route 1, from New Road, South Brunswick to Milltown Road, North Brunswick (MP 17.54 to MP 25.1)
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Price Line 144	Region: Central Crew 320 Ocean Subregion: C3 Snow Section 5320262 Route 35, from Route 36, Eatontown to Navesink River Bridge, Middletown Township (MP 29.27 to MP 34.5)
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Messercola’s failure to report for two call-outs was a violation of Bid Solicitation § 3.17.5 *Performance*, which states:

The services required by this Bid Solicitation {RFP} are essential to the safety and welfare of all roadway users, as such, all services must be provided promptly, efficiently and without delay.

The performance of the Vendor {Contractor} shall be evaluated by the SCM or the NJDOT Site Supervisor for each snow event, based on the following criteria:

- A. Response time;
- B. Reporting with less than the minimum required amount of trucks and/or equipment;
- C. Unsafe plowing/spreading practice;
- D. No show;
- E. Vehicle safety markings;
- F. Compliance with NJDOT Site Supervisor instruction;
- G. Use of an unlicensed driver/operator; and
- H. Violation of any NJDOT plowing/spreading guidelines.

Two (2) or more documented violations of one or any of the above, may result with termination of the Vendor’s {Contractor’s} Blanket P.O. {Contract}.

[Emphasis added.]

On November 21, 2018 NJDOT wrote to the Division requesting that the Blanket P.O.s of three (3) vendors be canceled. Specifically, as it related to Messercola, NJDOT stated:

This letter to the Department of Treasury, Division of Purchase and Property (DPP), is to request the termination of contracts recently awarded under T-0777 to the snow plowing and spreading contractors listed herein. Additionally, NJDOT will file a CCAU Complaint (Form CC-36) for the

purposes set out in N.J.A.C. 17:12-4.2; specifically, establishing a record that documents their poor performance in cases where they failed to meet the requirements of the contract.

...

Messercola Excavating, Contract 18-PROSI-00482. Messercola Excavating has multiple awards with NJDOT, and we are seeking ONLY to terminate the price lines 104 and 144 for the reasons listed herein. On two separate occasions, 11.15.18 and 11.18.18, Messercola was called to respond to the sections associated with the aforementioned price lines. On both occasions, the contractor failed to arrive. Justin Messercola was contacted on 11.20.18 for the purposes of determining their state of readiness as they relate to the aforementioned price lines. In his response, Justin Messercola indicated that those two price lines were sub-contracted to other companies, and those companies failed to ensure their equipment was ready. Justin Messercola made no excuses for the poor performance, and also indicated that replacement sub-contractors could not be readily procured by Messercola Excavating, and as such, is requesting NJDOT and DPP permit Messercola Excavating to terminate their contract, as they relate to those two price lines only. Messercola Excavating will be preparing a formal request for termination of those two price lines, at which time NJDOT will forward such correspondence to DPP...

DPP is aware that NJDOT is currently compiling an extensive file of complaints for numerous contractors, through an internal complaint process. Contractors have been given ample opportunity to make ready their equipment, as evidenced by the large majority of contractors doing so. This letter of formal request for specific contract termination is being made under the auspices of section 5.7 B1, C of the RFP, as well as N.J.A.C. 17:14-4.2. NJDOT will continue to provide letters of this nature to DPP should contractors continue to be non-responsive and in violation of their contractual obligations to the NJDOT, and the State of NJ writ (sic) large. These contracts are for services of an emergent nature and the safety and welfare of the traveling public depends largely on the successful execution of these contractual terms by our contractors...

[November 21, 2018, NJDOT letter to the Division.]

The State of New Jersey's Standard Terms and Conditions (SSTC) associated with this procurement permit the Division's Director to terminate a Blanket P.O. upon notice to the contractor. Specifically, SSTC Section 5.7 *Termination of Contract* states in pertinent part:

5.7 TERMINATION OF CONTRACT

...

B. For Cause:

1. Where a contractor fails to perform or comply with a contract or a portion thereof, and/or fails to comply with the complaints procedure in N.J.A.C. 17:12-4.2 et seq., the Director may

terminate the contract, in whole or in part, upon ten (10) days' notice to the contractor with an opportunity to respond; and

2. Where in the reasonable opinion of the Director, a contractor continues to perform a contract poorly as demonstrated by e.g., formal complaints, late delivery, poor performance of service, short-shipping, so that the Director is required to use the complaints procedure in N.J.A.C. 17:12-4.2 et seq., and there has been a failure on the part of the contractor to make progress towards ameliorating the issue(s) or problem(s) set forth in the complaint, the Director may terminate the contract, in whole or in part, upon ten (10) days' notice to the contractor with an opportunity to respond.

...

[Emphasis added.]

Based upon NJDOT's letter, on November 28, 2018, the Bureau wrote to Messercola advising it of the Division's intent to cancel Messercola's Blanket P.O. for Price Lines 104 and 144.

It is the intent of the Director of the Division of Purchase and Property (Division) to terminate the referenced Blanket P.O. that was awarded to your firm. The reasons and corresponding dates for the termination are provided below.

The following Notice of Termination shall ONLY apply to Price Lines #104 and #144.

1. The Vendor {Contractor} did not report for services for the above referenced Price Lines, on November 15, 2018 and November 18, 2018. This infraction falls under the category of Termination for Cause, Failure to Perform. The Bureau shall allow Messercola Excavating to terminate its Blanket P.O.s for these Price Lines, since it was determined by representatives at Messercola Excavating, that it could no longer perform services for these referenced Price Lines.

If your firm wishes to respond to this Notice of Termination, please provide a written response no later than ten (10) days upon receipt of this letter, to the following email address...

In response to the letter, on November 30, 2018, Messercola wrote to the Bureau stating:

On behalf of Messercola Excavating it is intended to appeal the recent Notice of Termination addressed November 28, 2018 regarding the instated (sic) Blanket P.O. Price Line #144 and price line #104. The Messercola Excavating firms requests the Treasury to reconsider the implemented Notice of Termination as all necessary accommodations have been made to ensure no further infractions and/or failures to perform occur for price line #144. After speaking directly with [NJDOT] in

response to the service that occurred November 18, 2018, Messercola Excavating has opted to employ a full fleet of new subcontractors effective November 20, 2018 for price line #144. It is in our knowledge that there was not a second contender for the for the (sic) bid route. As stated above it is at our request that the Notice of Termination is reconsidered as we strive to remain the holders of the section (144).

The Bureau did not respond to Messercola's letter.

On January 7, 2019, the Bureau completed a Recommendation Report which recommended that the Blanket P.O. for price line 144 be awarded Atlantic Recycling Group, LLC (ARG), as the responsible Vendor {Bidder} whose Quote, conforming to the Bid Solicitation was most advantageous to the State, price and other factors considered.

On January 8, 2019, the Bureau issued the NOI advising the affected Vendors {Bidders} that it was the State's intent to award price line 144 to ARG. On January 10, 2019, the Division's Hearing Unit received Messercola's letter protesting the cancelation of the Blanket P.O. and re-award of price line 144 to ARG.²

It is the desire of Messercola Excavating to retain the referenced section, providing the NJDOT with six (6) Class A trucks, for plowing in Crew 320 Ocean.

The issue that caused NJDOT to request our removal from that section has been rectified, and the Director of Central Region, for NJDOT, has spoken to us directly regarding this matter. We explained to the Director that our poor performance early on was a result of miscommunication with our sub-contractor, and the late promulgation of the contracts, coupled with an early winter event, was also a factor that should have been taken into consideration. Upon the conclusion of our conversation, the Director of Central Region felt that Messercola Excavating was more than capable of fulfilling our contractual obligation for this section. To that end, we have had our trucks inspected by NJDOT, and all are ready to respond should the need arise. It is also our understanding that NJDOT has requested a reversal of our removal, thereby permitting Messercola Excavating to continue providing services for the aforementioned, and other sections, for which we are under contract.

Messercola Excavating respectfully requests the NJ Department of Treasury to consider these facts, as well as the desire of the NJDOT, in its determination to permit Messercola Excavating to continue servicing this route.

As noted above, Messercola failed to report to two call-outs, a violation of the Bid Solicitation's scope of work which mandates that "[t]he Vendor {Contractor} shall be prepared to provide services during the Winter Season period, beginning October 1st through April 30th..." and that "[a]ll trucks must be fully operational and ready to report for a Call-Out by October 1st of each year of the Blanket P.O. {Contract}. Upon receipt of a Call-Out, the Vendor {Contractor} shall assemble the required number of trucks and/or

² Messercola has not protested the cancelation of the Blanket P.O. for price line 104.

equipment at the Assembly Location designated by NJDOT...” See, Bid Solicitation § 3.5 *Snow Season* and Bid Solicitation § 3.8 *Vendor {Contractor} Readiness and Call-Out*, emphasis added.³

In the protest, Messercola states that the failure to report was not a result of its own inaction, but rather that of its subcontractor. With respect to a Vendor’s {Contractor’s} use of a subcontractor, Bid Solicitation § 4.4.1.3 *Subcontractor Utilization Plan* requires that “Vendors {Bidders} intending to use a Subcontractor shall submit a Subcontractor Utilization Plan form.” With its Quote Messercola did submit the Subcontractor Utilization Plan form; however, the form indicated that Messercola was not using any subcontractors. See, Exhibit A – Messercola’s Subcontractor Utilization Plan Form submitted with the Quote. If after award Messercola desired to use a subcontractor to perform any portion of the services sought, it was required to inform and seek approval from the Division. See, Bid Solicitation Section 4.4.1.1.2 *No Subcontractor Certification* stating:

In the event the award is granted to the Vendor’s {Bidder’s} firm and the Vendor {Bidder} later determines at any time during the term of the Blanket P.O. {Contract} to engage Subcontractors to provide certain goods and/or services, pursuant to Section 5.8 of the SSTC, the Vendor {Bidder} shall submit a Subcontractor Utilization Plan form for approval to the Division in advance of any such engagement of Subcontractors.

The SSTC § 5.8 *Subcontracting or Assignment* further discusses a Vendor’s {Contractor’s} use of subcontractors stating in part:

Subcontracting: The contractor may not subcontract other than as identified in the contractor’s proposal without the prior written consent of the Director. Such consent, if granted in part, shall not relieve the contractor of any of his/her responsibilities under the contract, nor shall it create privity of contract between the State and any subcontractor. If the contractor uses a subcontractor to fulfill any of its obligations, the contractor shall be responsible for the subcontractor’s: (a) performance; (b) compliance with all of the terms and conditions of the contract; and (c) compliance with the requirements of all applicable laws;

At no time after the Blanket P.O. award did Messercola request permission to or advise the State that it intended to use a subcontractor to perform a portion of the awarded work. Messercola’s failure to advise the State of its intent to use a subcontractor is a violation of the State’s Standard Terms and Condition which state that the “contractor may not subcontract other than as identified in the contractor’s proposal without the prior written consent of the Director.” SSTC § 5.8 *Subcontracting or Assignment*. Further, even if Messercola had received approval to use a subcontractor to perform a portion of the awarded work, Messercola was nonetheless responsible for ensuring that the work was performed in accordance with the Bid Solicitation’s requirements.

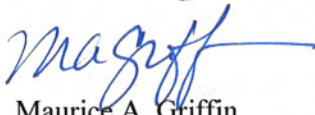
Despite the fact that Messercola wishes to continue with its Blanket P.O. for price line 144, Messercola violated the requirements of the Blanket P.O. by failing to appear for two consecutive call-outs as required by the Bid Solicitation. Messercola’s violation of the terms of the Bid Solicitation potentially jeopardized the safety and welfare of the traveling public. Accordingly, based upon the foregoing, I find no reason to disturb the Bureau’s recommendation that Messercola’s Blanket P.O. for price line 144 be

³ “Shall or Must – Denotes that which is a mandatory requirement.” Bid Solicitation § 2.2 *General Definitions*.

terminated and re-awarded to ARG. Accordingly, I sustain the January 8, 2019, Notice of Intent to Award. This is my final agency decision with respect to the protest submitted by Messercola.

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,



Maurice A. Griffin
Acting Director

MAG: RUD

c: K. Centofanti
K. Popso
R. Regan
A. Davis

EXHIBIT A



STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY

33 WEST STATE STREET, P.O. BOX 230
TRENTON, NEW JERSEY 08625-0230

SUBCONTRACTOR UTILIZATION PLAN FORM

BID SOLICITATION #: 18DPP00205
 BID SOLICITATION TITLE: T0777 SNOW PLOWING & SPREADING SERVICES

VENDOR/BIDDER NAME: MESSEACOLA EXCAVATING INC
 VENDOR/BIDDER ADDRESS: 549 EAST THIRD ST
PLAINFIELD NJ 07069
 VENDOR/BIDDER PHONE NUMBER: 908-561-4243
 VENDOR/BIDDER EMAIL: Fmesseacola@aol.com

INSTRUCTIONS: List all businesses to be used as subcontractors.

SUBCONTRACTOR'S NAME: _____
 SUBCONTRACTOR IS A SMALL BUSINESS: YES NO
 IF YES, SMALL BUSINESS CATEGORY*: I II III
 SUBCONTRACTOR'S ADDRESS: _____
 SUBCONTRACTOR PHONE NUMBER: _____
 SUBCONTRACTOR EMAIL: _____
 SUBCONTRACTOR FEIN: _____
 TYPE(S) OF SERVICE(S) TO BE PROVIDED: NONE
 ESTIMATED VALUE OF SUBCONTRACT: _____

SUBCONTRACTOR'S NAME: _____
 SUBCONTRACTOR IS A SMALL BUSINESS: YES NO
 IF YES, SMALL BUSINESS CATEGORY*: I II III
 SUBCONTRACTOR'S ADDRESS: _____
 SUBCONTRACTOR PHONE NUMBER: _____
 SUBCONTRACTOR EMAIL: _____
 SUBCONTRACTOR FEIN: _____
 TYPE(S) OF SERVICE(S) TO BE PROVIDED: _____
 ESTIMATED VALUE OF SUBCONTRACT: _____

Attach Additional Sheets If Necessary

* For those Vendors/Bidders listing Small Business Subcontractors: Attach copies of Division of Revenue - Small Business Enterprise Unit registration for each subcontractor listed. If Vendor/Bidder has not achieved established subcontracting set-aside goals, also attach documentation of good faith effort to do so in the relevant category in accordance with N.J.A.C. 17:13-4 and the Notice to All Vendors/Bidders.

CERTIFICATION

I, the undersigned, certify that I am authorized to execute this certification on behalf of the Vendor/Bidder, that the foregoing information and any attachments hereto, to the best of my knowledge are true and complete. I hereby certify that this Subcontractor Utilization Plan (Plan) is being submitted in good faith. I certify that each subcontractor has been notified that it has been listed on this Plan and that each subcontractor has consented, in writing, to its name being submitted for this contract. Additionally, I certify that I shall notify each subcontractor listed on the Plan, in writing, if the award is granted to my firm, and I shall make all documentation available to the Division of Purchase and Property upon request. I acknowledge that the State of New Jersey is relying on the information contained herein, and that the Vendor/Bidder is under a continuing obligation from the date of this certification through the completion of any contract(s) with the State to notify the State in writing of any changes to the information contained herein; that I am aware that it is a criminal offense to make a false statement or misrepresentation in this certification, and if I do so, I am subject to criminal prosecution under the law and that it will constitute a material breach of my agreement(s) with the State, permitting the State to declare any contract(s) resulting from this certification void and unenforceable.

Signature: [Handwritten Signature]
 Print Name and Title: Franco Messercola president

Date: 3/12/2018