



State of New Jersey

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

Via Electronic Mail [JVoytko@americanasphaltcompany.com] and USPS Regular Mail

Jim Voytko
American Asphalt Company
100 Main Street
West Collingswood Heights, NJ 08059

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

Dear Mr. Voytko:

This letter is in response to your correspondence of August 28, 2018, on behalf of American Asphalt Company (American Asphalt) to the Division of Purchase and Property’s (Division) Hearing Unit. In that correspondence American Asphalt protests the August 24, 2018 Notice of Intent to Award (NOI) issued by the Division’s Procurement Bureau (Bureau) indicating an intent to award 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 record of this procurement reveals that American Asphalt’s Quote was deemed non-response for failing to submit an all-inclusive hourly hauling rate as required by Bid Solicitation section 4.4.4.2 *Price Sheet/Schedule Attachment Instructions*.

By way of background, on January 30, 2018, the Division’s Procurement Bureau (“Bureau”) issued the Bid Solicitation on behalf of the New Jersey Department of Transportation (NJDOT), to solicit Quotes

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

from qualified Vendors {Bidders} to provide snow plowing and spreading services on all State interstates and highways under the jurisdiction of NJDOT. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State’s intent to award Statewide Master Blanket Purchase Orders (“Blanket P.O.s”)² to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation are most advantageous to the State, price and other factors considered. Ibid.

The Bid Solicitation advised all Vendors {Bidders} how the Bureau would review and evaluate Quotes in Bid Solicitation Section 6.7 *Evaluation Criteria*:

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.

Further, Bid Solicitation section 1.1 *Purpose and Intent* detailed that the procurement would occur in three phases, as follows:

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 Sections³ have been awarded. Pricing shall not be released

² 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.

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³ The Bid Solicitation defined the term “Snow Section” as “[a] predetermined section of the highway requiring snow plowing and/or spreading services.” Bid Solicitation § 2.3 *Blanket P.O. {Contract}-Specific Definitions/Acronyms*.

until completion of all phases and the final Notice of Intent to Award has been issued.

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

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

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

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

On February 28, 2018, the Bureau issued Bid Amendment #1 responding to the questions posed by potential Vendors {Bidders}. On March 16, 2018, the Division's Proposal Review Unit opened 164 Quotes received through the State's **NJSTART** eProcurement system and/or hardcopy format by the submission

deadline of 2:00 pm eastern time. Thirty-two Quotes were automatically rejected by the Proposal Review Unit for failure to conform to the mandatory administrative requirements for Quote submission.

A review of the Quotes submitted by the submission deadline reveals American Asphalt uploaded a Quote via **NJSTART** at 8:57:55 a.m. on March 16, 2018. American Asphalt uploaded ten files as Quote 00001893, comprised of the following documents:

- A State of New Jersey, Department of Labor and Workforce Development, Division of Wage and Hour Compliance certificate of registration; Proof of State of New Jersey, Business Registration Certificate; and Certificate of Employee Information Report;
- An *Offer and Acceptance Page*;
- A Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form;
- A copy of the **NJSTART** Procurement Program Checklist;
- Completed Bid Solicitation Attachment #1 – Vendor {Bidder} Equipment Forms for the following Snow Sections:
 - Snow Section 5410264 (price line 226);
 - Snow Section 5430263 (price line 284);
 - Snow Section 5414263 (price line 240);
- A copy of Bid Amendment #1;
- A copy of the Bid Solicitation;
- A State-supplied price sheet/schedule.

On April 11, 2018, American Asphalt was sent a Notice of Proposal Rejection advising that its Quote was rejected for failure to submit all “RFP certifications, forms, and attachments.” Specifically, American Asphalt’s Quote did not include an *Ownership Disclosure Form*.⁴ American Asphalt protested the rejection by email dated April 12, 2018. Although American Asphalt's Quote submission did not include an *Ownership Disclosure Form*, further review revealed that a valid *Ownership Disclosure Form* was on file with the Division and there had been no change in the ownership information disclosed on that form, as permitted by Bid Solicitation section 4.4.1.2.1 *Ownership Disclosure Form*. Accordingly, as American Asphalt complied with the ownership disclosure requirements of N.J.S.A. 52:25-24.2, the Proposal Rejection issued to American Asphalt was rescinded and its Quote was forwarded to the Bureau for further review and evaluation.

After initial review by the Bureau, American Asphalt’s Quote was again deemed non-responsive because of its failure to include all-inclusive hourly rate for hauling services within its State-supplied price sheet/schedule as required by Bid Solicitation section 4.4.4.2 *Price Sheet/Schedule Attachment Instructions*. See Recommendation Report, p. 7. American Asphalt submitted a Quote for snow plowing services on three price lines, 226, 240, and 280, as shown in the below excerpts from American Asphalt’s State-supplied price sheet/schedule:

⁴ American Asphalt completed its *Disclosure of Investment Activities in Iran Form* within its **NJSTART** Vendor Profile. See Bid Solicitation § 4.4.1.2.2 *Disclosure of Investment Activities in Iran Form*.

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
226	SNOW PLOWING SERVICES – D.O.T. REGION: SOUTH CREW 410 PENNSAUKEN SUBREGION: S1 SNOW SECTION: 5410264 RT 130 FROM RT 73, PENNSAUKEN TO MOTT AVENUE, BURLINGTON CITY (MP 35.5 TO MP 45.7) NUMBER OF TRUCKS REQUIRED: 12	1	HOUR	\$249.60	N/A	\$75.00	N/A
240	SNOW PLOWING SERVICES – D.O.T. REGION: SOUTH CREW 414 DEPTFORD SUBREGION: S1 SNOW SECTION: 5414263 RT 42 – ATLANTIC CITY EXPRESSWAY (MP 6.2 TO MP 14.3) NUMBER OF TRUCKS REQUIRED: 8	1	HOUR	\$249.60	N/A	\$75.00	N/A
280	SNOW PLOWING SERVICES – D.O.T. REGION: SOUTH CREW 428 MIDDLE TWP SUBREGION: S3 SNOW SECTION: 5428262 RT 47 FROM WILDWOOD TO RT 347 DENNIS TWP (MP 0.7 TO MP 20.91) RT 83 FROM RT 47, SOUTH DENNIS TO RT 9, CLERMONT (MP 0.0 TO MP 3.8) NUMBER OF TRUCKS REQUIRED: 7	1	HOUR	\$249.60	N/A	\$75.00	N/A
284	SNOW PLOWING SERVICES – D.O.T. REGION: SOUTH CREW 430 BORDENTOWN SUBREGION: S1 SNOW SECTION: 5430263 RT 206 FROM SOUTH PEMBERTON ROAD, SOUTHAMPTON TWP TO RT 68, MANSFIELD TWP (MP 26.8 TO MP 33.5) NUMBER OF TRUCKS REQUIRED: 6	1	HOUR	No Bid			

While American Asphalt submitted a Bid Solicitation Attachment #1 – Vendor {Bidder} Equipment Form related to price line 284 as shown above, American Asphalt’s State-supplied price sheet reflects a bid on price line 280 and a “no bid” on price line 284.

On August 24, 2018, the Bureau issued its NOI announcing intended awardees following all three phases of the procurement. On August 28, 2018, American Asphalt submitted a formal protest to the Hearing Unit stating:

This letter is being sent in protest to the awarding or non-awarding of bids on Bid Solicitation #18DPP00205.

American Asphalt Company, 100 Main St., West Collingswood Hts., NJ 08059 did present a bid for Snow Sections: Line # 226 Sec. 5410264, Line #240 Sec. 5414263 and Line #284 Sec. 5430263. We had previously plowed these sections in prior years and had nothing but praise and accolades from those Section Leaders.

According to your Awarded Price Lines, both sections #226 Sec. 5410264 & #284 Sec. 5430263 were not awarded and remain OPEN both of which we had bid on and the third # 240 Sec. 5414263 was awarded to Aqua-Tex Transport Inc.

We are requesting a determination as to why our bids were rejected and or not awarded.

It must be noted that American Asphalt Company’s bid was originally rejected because it was deemed incomplete. Upon questioning that decision it was determined that American Asphalt Company’s bid was complete due to an “administrative error and is hereby rescinded” and we received a letter dated April 16th, 2018 stating, “Your proposal will be evaluated along with the other proposals prior to the time of proposal opening”. A copy of this letter is attached in case this was the reason our bids were rejected or not awarded.

If, it is determined that an in-person presentation is warranted, we are prepared to do so.

The Hearing Unit accepted American Asphalt's email as a protest of the Bureau's determination that American Asphalt's Quote was nonresponsive to the Bid Solicitation's requirements.

With respect to American Asphalt's offer to provide an in-person presentation, 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 information hearing." N.J.A.C. 17:12-3.3(d). In consideration of American Asphalt's protest, I have reviewed the record of this procurement, including the Bid Solicitation, American Asphalt's Quote and protest, the relevant statutes, regulations, and case law. The issues raised in American Asphalt's protest 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 American Asphalt on the written record. I set forth herein the Division's Final Agency Decision.

The Division's administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal shall⁵ conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), *emphasis added*.]

The subject solicitation was comprised of the Bid Solicitation, other documents and mandatory forms which were specifically addressed within Bid Solicitation Section 4.0 *Quote {Proposal} Preparation and Submission* which states in pertinent part:

The Vendor {Bidder} must submit its pricing using the format set forth in the State-supplied price sheet/schedule(s) accompanying this Bid Solicitation {RFP}.

The State's Price Sheet/Schedule solicits pricing for the following:

- A. Snow Plowing and Hauling Services;
- B. Snow Plowing Services/Other Equipment; and
- C. Spreading Services.

⁵ The terms "shall" and "must" are defined to mean "that which is a mandatory requirement." Bid Solicitation § 2.2 *General Definitions*. The terms "should" and "may" are defined to mean "that which is permissible or recommended, not mandatory." Bid Solicitation § 2.2 *General Definitions*.

The Vendor {Bidder} is not required to submit pricing for all line items in order to be considered for award. The Vendor {Bidder} may submit pricing for one (1) or multiple line items.

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.

In the event that a Vendor {Bidder} using **NJSTART** to submit a Quote {Proposal} uploads a price sheet/schedule attachment and completes the “Items” Tab in **NJSTART** (instead of entering a Unit Cost of \$1.00 as instructed), the price sheet/schedule attachment will govern.

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

While American Asphalt submitted a State-supplied price sheet/schedule as required by Bid Solicitation sections 4.4.4 *Price Schedule/Sheet* and 4.4.4.2 *Price Sheet/Schedule Attachment Instructions*, it did not include all of the information that was required. Bid Solicitation section 4.4.4.2 *Price Sheet/Schedule Attachment Instructions* required Vendors {Bidders} submitting Quotes for snow plowing services to include (1) an all-inclusive hourly rate to provide the plowing services (either providing the truck alone or with plowing equipment) plus all-inclusive hourly rates for (2) snow plowing superintendent and (3) hauling services. Bid Solicitation § 4.4.4.2 *Price Sheet/Schedule Attachment Instructions*. Because American Asphalt did not include an all-inclusive hourly rate for hauling services on any of the price lines it quoted, American Asphalt’s Quote contained a deviation from the Bid Solicitation’s requirements. Accordingly, the issue is whether American Asphalt’s failure to include an all-inclusive hourly rate for hauling services on the State-supplied price sheet is a material deviation from the Bid Solicitation’s requirements.

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 Township of River Vale v. Longo Construction Co., 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-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, I find that American Asphalt’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 American Asphalt’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 American Asphalt 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 American Asphalt 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 American Asphalt’s Quote contained a material deviation from the Bid Solicitation’s requirements rendering the Quote nonresponsive is upheld.

CONCLUSION

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

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

Sincerely,



Maurice A. Griffin
Acting Director

MAG:REG

c: P. Michaels
L. Spildener
M. Groninger