



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. BOX 039
TRENTON, NEW JERSEY 08625-0039
<https://www.njstart.gov>
Telephone (609) 292-4886 / Facsimile (609) 984-2575

PHILIP D. MURPHY
Governor

ELIZABETH MAHER MUOIO
State Treasurer

SHEILA Y. OLIVER
Lt. Governor

MAURICE A. GRIFFIN
Acting Director

September 5, 2018

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

William R. Burnett
WR Burnett, Inc.
195 New Road
Monmouth Junction, NJ 08852

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

Dear Mr. Burnett:

This letter is in response to your correspondence of August 28, 2018, on behalf of WR Burnett, Inc. (Burnett) to the Division of Purchase and Property’s (Division) Hearing Unit. In that correspondence, Burnett 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 Burnett’s Quote was deemed non-response for failing to submit Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form.

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 from qualified Vendors {Bidders} to provide snow plowing and spreading services on all State interstates

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

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.

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 Sections² 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.

² 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*.

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 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.³ Thirty-two Vendors {Bidders} had their Quotes 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 Burnett uploaded a Quote via **NJSTART** at 02:15:20 p.m. on March 14, 2018. Burnett uploaded eighteen files as Quote 00001868, comprised of the following documents:

- *An Offer and Acceptance Page;*
- *A Two-year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions Form;*
- *A Disclosure of Investigations and Other Actions Involving Bidder Form;*
- *A Disclosure of Investment Activities in Iran Form;*

³ The Quote breakdown was as follows: 164 distinct Vendors {Bidders} submitted a total of 177 Quotes. Thirty-six (36) Vendors {Bidders} submitted hard copy Quotes and four (4) of those also submitted a Quote through **NJSTART**. One hundred and thirty one (131) Vendors {Bidders} submitted Quotes via **NJSTART**, six (6) of those submitted multiple duplicate Quotes through **NJSTART**.

- A Form AA302 *Employee Information Report*;
- Completed Bid Solicitation Attachment #1 – Vendor {Bidder} Equipment Forms for the following Crews:
 - Snow Section 104
 - Snow Section 105
 - Snow Section 106
 - Crew 332, Spreading
 - Snow Section 158
- Excerpts of the State Supplied Price Sheet/Schedule; and
- An *Ownership Disclosure Form*.

Burnett's Quote was forwarded to the Bureau for evaluation, but after initial review, the Bureau deemed Burnett's Quote non-responsive because of its failure to submit the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form. See Recommendation Report, p. 6.

The Bureau issued its NOI announcing intended awardees following all three phases of the procurement on August 24, 2018. On August 28, 2018, Burnett sent the following correspondence:

W R Burnett is hereby protesting the awarding of the above bids. Our prices are competitive, and we have over twenty years of experience on the bids referred to above. Line items 104 and 106 were awarded on Phase 3 of the process and line item 105 is still open. Because of our location we can provide and have provided the services necessary for the community and the state in timely manner. Due to fact that our bid is lower, we hereby request an opportunity to present our case in person and be provided with an explanation as to why are bids were and are not being considered.

With respect to Burnett's request for 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 Burnett's protest, I have reviewed the record of this procurement, including the Bid Solicitation, Burnett's Quote and protests, the relevant statutes, regulations, and case law. The issues raised in Burnett'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 Burnett on the written record. I set forth herein the Division's Final Agency Decision.

DISCUSSION

A. Burnett's Quote Contained a Material Deviation from the Bid Solicitation

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 shall⁴ 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 furnish all information required by completing the forms accompanying this Bid Solicitation {RFP} for one (1) or more Snow Sections and offering optional graders and loaders. These forms must be submitted by the Vendor {Bidder} with its Quote {Proposal}. Failure to submit the forms with the Quote {Proposal} will result in rejection of the Quote {Proposal}.

- A. Attachment #1 – Vendor Equipment Form; and
- B. Attachment #2 – Experience of Bidder.

All forms listed above must be downloaded from the State website along with the Bid Solicitation {RFP} and other special forms.

[Bid Solicitation § 4.4.3 *Submittals*.]

As outlined above, Burnett did not include a Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form within its Quote. Therefore, the question is whether Burnett's failure to submit Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form as required by Bid Solicitation section 4.4.3 *Submittals* represents a material deviation from the requirements of the Bid Solicitation.

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,

⁴ 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*.

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 Burnett’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 Burnett’s failure to include experience information within its Quote 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 because the Bid Solicitation advised all Vendors {Bidders} that their experience represented a material factor upon which the Quotes would be evaluated and awarded. For example, Bid Solicitation section 3.2 *Vendor {Contractor} Requirements* establishes that all Vendors {Contractors} shall possess “at a minimum, two (2) years’ experience performing snow plowing or spreading services on public roadways.” Similarly, Bid Solicitation section 6.7 *Evaluation Criteria* advised all Vendors {Bidders} that its experience as documented in the submitted Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form would represent a factor in the evaluation of submitted Quotes. Accordingly, Burnett’s failure to submit the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form or otherwise documenting its experience within its Quote deprived the State of assurance that Burnett met the minimum qualifications for the award of a Blanket P.O. and undermined the ability of the Division to conduct the evaluation of the Quote as required by the Bid Solicitation. Further, if the Division were to consider Burnett’s Quote even though it had not included a completed Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form, Burnett would be in a position of advantage over other Vendors {Bidders} who might not have bid on the project had they known they could avoid demonstrating the required two years’ experience plowing or spreading on public roadways.

While Burnett notes that it provided lower pricing on price lines 104 and 106 than that ultimately awarded by the Bureau, the courts have held that a non-responsive bid is “no bid at all.” *Id.* at 222. Accordingly, even though Burnett may have Quoted a more favorable price, the Division is not able to consider the Quote because it did not materially comply with the requirements of the Bid Solicitation.

B. The Division Cannot Consider Burnett’s Positive Incumbent Experience Not Detailed Within the Quote

Burnett notes in its protest letter that it has “over twenty years of experience,” but the Bureau appropriately did not consider this information because is outside of the four corners of the Quote submitted by Burnett and considering this information would give Burnett an unfair advantage over non-incumbent vendors.

The Division's overriding mission in conducting sealed, advertised bidding is to "encourage free and open competition." N.J.A.C. 17:12-2.1. It is only through maintaining a level playing field for all potential Vendors {Bidders} that the public policy of "thwarting favoritism, improvidence, extravagance, and corruption" underlying the public bidding process can be realized. Barrick v. State, 218 N.J. 247, 258-59 (2014). As Burnett's Quote did not include any reference to its prior positive experience with the State of New Jersey, the Bureau cannot now reach outside of the Quote to pull that information in without compromising the Bid Solicitation's level playing field.⁵ Doing so would provide Burnett preferential treatment simply because of its status as an incumbent contractor.

This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put forth in preparing and submitting the Proposal. However, in light of the findings set forth above, I have no choice but to deny your request for eligibility to participate in the competition for the subject contract. This is my final agency decision on this matter.

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

⁵ N.J.A.C. 17:12-2.8 outlines the Division's authority to consider a Vendor's {Contractor's} record of poor performance, which is also discussed in Bid Solicitation section 6.10 *Poor Performance*.