



# 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>

ELIZABETH MAHER MUOIO  
*State Treasurer*

MAURICE A. GRIFFIN  
*Acting Director*

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

Telephone (609) 292-4886 / Facsimile (609) 984-2575

May 25, 2021

Via Electronic Mail Only [jtobin@hendersonproducts.com](mailto:jtobin@hendersonproducts.com)

David Westergaard, Director Finance  
Henderson Products, Inc.  
1085 South 3<sup>rd</sup> Street  
Manchester, IA 52057

Re: I/M/O Bid Solicitation #21DPP00583 Henderson Products, Inc.  
Protest of Notice of Intent to Award  
T1495 Customized Snow Plows and Related Components, NJDOT and Authorities – Statewide

Dear Mr. Westergaard:

This final agency decision is in response to your letter of April 19, 2021 on behalf of Henderson Products, Inc. (Henderson) to the Division of Purchase and Property’s (Division) Hearing Unit. In that letter, Henderson protests the Procurement Bureau’s (Bureau) April 8, 2021, Amended Notice of Intent to Award letter (Amended NOI) issued for Bid Solicitation #21DPP00583 - T1495 Customized Snow Plows and Related Components, NJDOT and Authorities – Statewide (Bid Solicitation).

By way of background, on October 31, 2020, the Bureau issued the Bid Solicitation on behalf of the New Jersey Department of Transportation (NJDOT), the New Jersey Turnpike Authority and the South Jersey Transportation Authority (SJTA), other State Using Agencies and the Cooperative Purchasing participants. The purpose of the Bid Solicitation was to solicit Quotes for customized snowplows and related components. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State’s intent to Master Blanket Purchase Orders (Blanket P.O.s) to those responsible Vendors {Bidders} whose Quote, conforming to the Bid Solicitation, are most advantageous to the State, price and other factors considered. Bid Solicitation § 7.2 *Final Blanket P.O. Award*. The Bid Solicitation contained 23 price lines divided into three groups.

Group Number	Price Line Number	Description
<b>Group 1</b> (Price lines 1 – 7)	1	NJDOT Specific Heavy-Duty Manual Reversible (Straight) Snow Plow, 11 Foot Wide, 36 Inches High (M.R. 11-36-MOD-J)
	2	NJDOT Specific Heavy-Duty One-Way (Funnel), 12 Foot Wide (MODEL O.R.12.75 -53-1HD)
	3	NJDOT Specific Heavy-Duty Power Reversible Snow Plow, 11 Foot Wide, 36 Inches High (Worm Gear Type)
	4	N NJDOT Specific High Power Reversible Torsion Trip Edge Plow, 11 Foot Wide, 36 Inches High
	5	One Additional Set Of Parts Service And O&M Manuals
	6	Technical Support (Hourly Rate) – Operators And Mechanics Training
	7	Special Monotone Paint Color in Lieu of Manufacturer’s Standard Paint Color

Group Number	Price Line Number	Description
<b>Group 2 (Price Lines 8 – 21)</b>	8	NJTA Specific Manual Reversible One-Way Snow Plow, 11 Foot Long, 47 Inches High
	9	NJTA Specific Manual Reversible Snow Plow, 11 Foot Long, 42 Inches High (J-STYLE)
	10	NJTA Specific Power Reversible Expressway Snow Plow 11 Foot Long, 50 Inches High
	11	NJTA Specific Power Reversible Snow Plow, 11 Foot Long, 42 Inches High,
	12	NJTA Specific Snow Plow Blade: Option A
	13	NJTA Specific Snow Plow Blade: Option B
	14	NJTA Specific Snow Plow Blade: Option C
	15	NJTA Specific Ceramic Combination Plow Blades - Blades Only
	16	NJTA Specific Flexible Carbide Combination Plow Blades - Blades Only
	17	Hourly Rate For Installation, Maintenance And Repair of Snow Plow
	18	One Additional Set Of Parts Service And O&M Manuals
	19	Technical Support (Hourly Rate) – Operators And Mechanics Training
	20	Special Monotone Paint Color in Lieu of Manufacturer’s Standard Paint Color
21	Special Two Color Paint in Lieu of Manufacturer’s Standard Paint Color	
<b>Group 3 (Price Lines 22 and 23)</b>	22	SJTA Specific Reversible Snow Plow (J STYLE), 11 Foot Wide, 36 Inches High
	23	Special Monotone Paint Color in Lieu of Manufacturer’s Standard Paint Color

The State intends to make one (1) Blanket P.O. award per Group (Groups 1, Group 2, and Group 3), in accordance with Section 7.2 of this Bid Solicitation. Vendors {Bidders} were permitted to bid on one Group, two Groups or all Groups. To be eligible for an award, Vendors {Bidders} must have bid on all price lines within the Group.

On February 5, 2021, the Division’s Proposal Review Unit opened three (3) Quotes submitted by the submission deadline of 2:00 p.m. eastern time. After conducting a preliminary review of the Quotes received for compliance with the mandatory requirements for Quote submission, the Quotes were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*.

After completing its review and evaluation, on March 4, 2021, the Bureau prepared a Recommendation Report that recommended that Blanket P.O.s be awarded as follows:

- Group 1 – No Award
- Group 2 – Henderson
- Group 3 – Trius, Inc.

On March 18, 2021, the Bureau issued the Notice of Intent to Award (NOI) advising all Vendors {Bidders} that it was the State’s intent to award a Blanket P.O. consistent with the March 4, 2021, Recommendation Report. No protests were received in response to that NOI. Thereafter, while reviewing the Quotes in order to finalize the awards, the Bureau determined that Henderson’s submitted Quote was non-responsive because Henderson took an exception to the mandatory terms and condition of the Bid Solicitation. Specifically, Henderson included the following statement with its uploaded Quote documents in **NJSTART**:

Vendor accepts the terms & conditions with exceptions:Henderson Products Inc is taking exception to the Indemnification section of the Insurance Certificate requirements. The language is too broad in the terms of 'responsible for any indirect loss'. Henderson is responsible for losses that arise directly from our work and materials. Henderson is not responsible for 'any indirect loss' unless these conditions are clearly identified.

Accordingly, on April 7, 2021, the Bureau prepared a Revised Recommendation Report that recommended that Blanket P.O. award for Group 2 to Henderson be rescinded and re-awarded to Trius, Inc. In the Revised Recommendation Report the Bureau noted that Henderson's exception directly conflicted with the terms and conditions of the Bid Solicitation, and that Henderson did not propose its modification during the Question and Answer period as required by Bid Solicitation Section 1.3.1.1 *Exceptions to the State of New Jersey Standard Terms and Conditions (SSTC)*. On April 8, 2021, the Bureau issued the Amended NOI advising all Vendors {Bidders} that it was the State's intent to rescind the Blanket P.O. for Group 2 to Henderson and re-awarded to Trius, Inc.

On April 19, 2021, Henderson submitted a letter protesting the Bureau's determination that its Quote did not conform to the requirements of the Bid Solicitation; and therefore the original recommendation that Henderson should be awarded Group 2, was rescinded.

In consideration of Henderson's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, Henderson'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.

Recognizing that potential Vendors {Bidders} may want to propose modifications to the terms and conditions of a Bid Solicitation, in order to ensure that all potential Vendors {Bidders} have the same information available to them when creating and submitting a Quote, Bid Solicitation Section 1.3.1.1 *Exceptions to the State of New Jersey Standard Terms and Conditions (SSTC)* required that:

**Questions regarding the State of New Jersey Standard Terms and Conditions (SSTC) and exceptions to mandatory requirements must be posed during this Electronic Question and Answer period and shall contain the Vendor's {Bidder's} suggested changes and the reason(s) for the suggested changes.**

[Emphasis in the original.]

Further, potential Vendors {Bidders} were alerted to the fact that proposed modifications or exceptions to the terms and conditions of the Bid Solicitation that directly conflict with the language of the Bid Solicitation may render the Quote non-responsive. Bid Solicitation Section 4.1 *General* states in relevant part:

A Vendor {Bidder} may submit additional terms as part of its Quote. Quotes including Vendor {Bidder} proposed terms and conditions may be accepted, but Vendor {Bidder} proposed terms or conditions that conflict with those contained in the Bid Solicitation, as defined in Section 2.0 of this Bid Solicitation, or that diminish the State's rights under any Bid Solicitation resulting from the Bid Solicitation, may render a Quote non-responsive. It is incumbent upon the Vendor {Bidder} to identify and remove its conflicting proposed terms and conditions prior to Quote submission. Where additional terms are submitted they may be accepted, rejected, or negotiated, in whole or in part, at the State's sole discretion where the terms do not conflict with material terms of the Bid Solicitation

or do not diminish the State's rights under the Bid Solicitation resulting from the Bid Solicitation.

In the event that a Vendor {Bidder} intends to propose terms and conditions that conflict with the Bid Solicitation, those Vendor {Bidder} proposed terms and conditions shall only be considered if submitted and agreed to pursuant to the electronic question and answer procedure set forth in Section 1.3.1 of this Bid Solicitation. Vendors {Bidders} shall not submit exceptions in the Quote or on the "Terms and Conditions" Tab through [NJSTART](#).

[Emphasis added.]

Accordingly, if a Vendor {Bidder} desired to propose terms that conflicted with the terms and conditions of the Bid Solicitation, the Vendor {Bidder} was required to submit the proposed language during the Question and Answer period. Bid Solicitation 1.3.1 *Electronic Questions and Answer Period*.

In the protest, Henderson admits that it did not submit the proposed exception during the Question and Answer period. Additionally, with the protest Henderson states that it has submitted the required insurance certification and that insurance coverage would not include any inclusion to exclusion contrary to the terms and conditions of the State of New Jersey's Standard Terms and Conditions. Henderson states that it was therefore retracting the exception to the State's Standard Terms and Conditions contained in its Quote. Henderson requests that the Bureau reconsider it for an award of Group 2.

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). Although the Division has broad discretion to select among qualified and responsive Vendors {Bidders} in public contracting matters, the discretion afforded to the Director, "is not limitless." See, *In re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 559 (App Div. 2018); *Barrick v. State*, 218 N.J. 247, 258-259 (2014). 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." *Ibid*, citing *Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop.*, 99 N.J. 244, 256 (1985)). For that reason, the Division's governing regulations mandate stringent enforcement to maintain the equal footing of all Vendors {Bidders} and to ensure the integrity of the State's bidding process. Notably, "a proposal that is not...responsive to the material requirements of the [Bid] shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal." N.J.A.C. 17:12-2.7(c). Consistent with this purpose, the New Jersey procurement law provides that "any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do." N.J.S.A. 52:34-12(a).

The question before me is whether Henderson's exception to the State's Standard Terms and Conditions were material deviations rendering the Quote non-responsive. In determining whether a material deviation exists, 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). "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." *Twp. of River Vale v. Longo Constr. Co.*, 127 N.J. Super. 207, 222 (Law Div. 1974). 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 Award of On-Line Games Prod. And Operation Servs. Contract*, 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.]

Essentially, the materiality test “is nothing more than an enunciation of what has always been the only relevant matter in a bid conformity inquiry: whether waiver of the deviation would thwart the aims of the public bidding laws.” *In Re Motor Vehicle Comm’n Surcharge Sys. Accounting & Billing Servs.* 2018 N.J. Super. Unpub. LEXIS 285\*21, 2108 WL 766856, citing *On-Line Games*, 279 N.J. Super at 596. In *In Re Motor Vehicle*, the court observed that:

In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way. Public bidding laws were adopted to secure for the taxpayers the benefits of competition and to promote the honesty and integrity of the bidders and the system. These laws must be construed as nearly as possible with sole reference to the public good.

[*In Re Motor Vehicle*, supra 2018 N.J. Super. Unpub. LEXIS 285 \*21, citing *Township of Hillside v. Sternin*, 25 N.J. 317, 324 (1957), *On-Line Games*, 279 N.J. Super at 589, *Keyes Martin*, supra, 99 N.J. at 256.]

Reviewing Henderson’s exception to State’s Standard Terms and Conditions under the *River Vale* factors, I find that Henderson’s exception was a material deviations from the requirements of the Bid Solicitation. First, with respect to indemnification the State of New Jersey Standard Terms and Conditions Section 4.2 *Indemnification* states:

The contractor’s liability to the State and its employees in third party suits shall be as follows:

- A. Indemnification for Third Party Claims - The contractor shall assume all risk of and responsibility for, and agrees to indemnify, defend, and save harmless the State of New Jersey and its employees from and against any and all claims, demands, suits, actions, recoveries, judgments and costs and expenses in connection therewith which shall arise from or result directly or indirectly from the work and/or materials supplied under this contract, including liability of any nature or kind for or on account of the use of any copyrighted or uncopied composition, secret process, patented or unpatented

- invention, article or appliance furnished or used in the performance of this contract;
- B. The contractor's indemnification and liability under subsection (a) is not limited by, but is in addition to the insurance obligations contained in Section 4.2 of these Terms and Conditions; and
  - C. In the event of a patent and copyright claim or suit, the contractor, at its option, may: (1) procure for the State of New Jersey the legal right to continue the use of the product; (2) replace or modify the product to provide a non-infringing product that is the functional equivalent; or (3) refund the purchase price less a reasonable allowance for use that is agreed to by both parties.

As noted above, in its Quote Henderson stated "Vendor accepts the terms & conditions with exceptions: Henderson Products Inc. is taking exception to the Indemnification section of the Insurance Certificate requirements. The language is too broad in the terms of 'responsible for any indirect loss'. Henderson is responsible for losses that arise directly from our work and materials. Henderson is not responsible for 'any indirect loss' unless these conditions are clearly identified." Henderson's exception to the indemnification language of the State's Standard Terms and Conditions prevents the State from being assured that the Bid Solicitation will be entered in to performed and guaranteed according to its specified requirements. *River Vale*, supra, 127 N.J. at 216.

Second, if the State accepted Henderson's exception, Henderson would be in a position of advantage over other Vendors {Bidders} who did not bid because they could not agree with the mandatory requirements of the Bid Solicitation or correctly believed that they could not submit alternative language with Quote. *Ibid*. Henderson did avail itself of the Question and Answer period asking one question regarding the scope of work contained in the Bid Solicitation. Neither Henderson nor any other potential Vendor {Bidder} asked a question regarding the indemnification language of the State's Standard Terms and Conditions. However, contrary to the clear requirements of the Bid Solicitation, Henderson did not submit its proposed exception to the terms and conditions of the Bid Solicitation to the Bureau for review during the Question and Answer period. Henderson reserved for itself, contrary to the requirements of the Bid Solicitation, the right to mandate the terms and conditions of the Bid Solicitation for its own benefit, leaving it with "the option, after all bids are opened, to decline the contract." *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 566 (App. Div. 2018). Because the requirements of Bid Solicitation are equally applicable to all Vendors {Bidders} who submit Quotes in response to this Bid Specification, "[r]equiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract." *Barrick*, supra, 218 N.J. at 259. This ensures that all Vendors {Bidders} are on a level playing field, aware of the terms and conditions of the Bid Solicitation and the resulting Bid Solicitation awards when submitting Quotes and pricing. This process ensures that no one Vendor {Bidder} is put in a position of advantage, to the detriment of another, by being able to submit a term which is more favorable to itself which other Vendors {Bidders} are not permitted to do.

*In Re Motor Vehicle*, supra 2018 N.J. Super. Unpub. LEXIS 285 \*28, citing, *Hall Constr. Co. v. N.J. Sports & Exposition Auth.*, 295 N.J. Super. 629, 635 (App. Div. 1996).

As the Supreme Court explained over sixty years ago, "[e]very element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders... If this were not the rule, the mandate for equality among bidders would be illusory and the advantages of competition would be lost.

[*In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 568, 575 (App. Div. 2018), citing, *Hillside v. Sternin*, 25 N.J. 317, 322-23 (1957).]

Because Henderson's Quote contained a material deviation from the requirements of the Bid Solicitation, I concur with the Bureau's determination that Henderson's Quote was non-responsive.

Based upon the foregoing, I find no reason to disturb the Bureau's determination that the Quote submitted by Henderson was non-responsive. Accordingly, I sustain the April 8, 2021 Notice of Intent to Award.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your business with **NJSTART** at [www.njstart.gov](http://www.njstart.gov). 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. This is my final agency decision on this matter.

Sincerely,



Maurice A. Griffin  
Acting Director

MAG: RUD

c: J. Kerchner  
K. Thomas  
S. Ghorbani  
D. Warren