



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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August 23, 2017

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

Hiram Reinhart, President
Para Scientific Co.
297 Cedar Lane
Fairless Hills, PA 19030

Re: Specification Challenge – Request for Reconsideration
Bid Solicitation {Request for Proposal} #17DPP00064
Scientific Equipment Accessories Supplies and Maintenance Statewide

Dear Mr. Reinhart:

This correspondence is in response to your letter dated August 13, 2017, on behalf of Para Scientific Company (hereinafter “Para Scientific”), which was received by the Division of Purchase and Property’s (hereinafter “Division”) Hearing Unit on August 14, 2017. In that letter, Para Scientific seeks reconsideration of its protest of certain specifications of the subject Bid Solicitation {Request for Proposal} #16DPP00064: Scientific Equipment Accessories Supplies and Maintenance Statewide (hereinafter “RFP”).

By way of background, the subject RFP was advertised by the Division’s Procurement Bureau (hereinafter “Bureau”) on March 22, 2017, on behalf of State Using Agencies.¹ RFP § 1.1 *Purpose and Intent*. The purpose of the RFP is to solicit Quotes {Proposals} (hereinafter “Proposals”) for Scientific Equipment, Accessories, Supplies, Chemicals and Reagents, Instrument Rental and Maintenance, including both educational/instructional and professional/laboratory grade equipment, accessories, and supplies, as applicable. *Ibid.* The State intends to award Master Blanket Purchase Orders (Blanket P.O.s) {Contracts} (hereinafter “Contracts”) to those responsible Vendors {Bidders} (hereinafter “Bidders”) whose Proposals, conforming to this RFP, are most advantageous to the State, price and other factors considered. *Ibid.* One award will be made per brand for each price line, representing Categories 1 through 4. RFP § 7.2 *Final Blanket P.O. {Contract} Award*. The State intends to award Price Lines 5 (Maintenance Agreements) and Price Line 6 (Hourly Rate for Maintenance) to all Bidders awarded Categories 1 through 4.²

On July 27, 2017 the Division received Para Scientific’s original protest to the subject specifications. In that protest Para Scientific raised the following issues related to the specifications for the subject RFP: (1) that the State is favoring large distributors; (2) that there should be preference granted for

¹ The State intends to extend awarded Contracts to the Division’s Cooperative Purchasing Program participants. RFP § 1.1 *Purpose and Intent*.

² The original Proposal opening date was scheduled for April 25, 2017 and has been extended to August 25, 2017.

small business; and, (3) that the State should make Contract awards based upon regions. On August 8, 2017 the Division issued its final agency decision with respect to the Para Scientific's protest finding that no modification to the RFP was necessary. Now, Para Scientific requests that the Division review and reconsider its previous decision.

At the outset I note that the Division's governing regulations do not contemplate requests for reconsideration. I do however note that requests for reconsideration

should be utilized only for those cases which fall into that narrow corridor in which either 1) the [tribunal] has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [tribunal] either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .

Alternatively, if a litigant wishes to bring new or additional information to the [tribunal's] attention which it could not have provided on the first application, the [tribunal] should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the [tribunal] must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

[Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), citing, D'Atria v. D'Atria, N.J. Super. 392, 402-402 (Ch. Div. 1990) (stating "[r]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice.).]

In requesting reconsideration, Para Scientific has not brought to light any new or additional information which was not included in its original protest, nor has it set forth any facts demonstrating that the Division's final agency decision was arbitrary, unreasonable or capricious. Rather, Para Scientific simply disagrees with the Division's decision, and asks that the Division reconsider the decision based upon the same information and arguments presented in the original protest.

Further, I note that under the Division's governing regulations, challenges to advertised specifications should be submitted to the Division prior to the proposal opening date allowing sufficient time for the Division to review the issues presented and make and publish changes to the RFP if necessary. N.J.A.C. 17:12-3.2(b)(3). Moreover, the regulations permit the Division's Director to "disregard any protest of specifications filed fewer than seven business days prior to the scheduled deadline for proposal submission." Ibid. I note that Para Scientific's initial protest of the specifications as well as this request for reconsideration were both received and filed with the Division's Hearing Unit on the day before the scheduled Proposal opening date. In both instances the Procurement Bureau was forced to postpone the Proposal opening date to allow sufficient time for the review of the allegations raised in the protests.

While Para Scientific may not be entitled to reconsideration under the law nor entitled to the review of this protest due to late filing, for the sake of completeness I will address each of Para Scientific's arguments here.

In consideration of Para Scientific's request for reconsideration, I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations and case law. This review has provided me with the information necessary to determine the facts of this matter and to render a determination regarding Para Scientific's specification challenge. I set forth herein the Division's final agency decision.

In its request for reconsideration, Para Scientific states the following: (1) that it has the right to file a protest; (2) the specifications and the Division’s answers to the questions posed by potential bidders demonstrate that the State is favoring large distributors; (2) that there should be price preference granted for small business; and, (3) that the State should make Contract awards based upon regions to allow for installation charges to the invoiced to Using Agencies.

First, Para Scientific questions the difference between a “formal bid protest” and a “question” to be raised during the Question and Answer period (hereinafter “Q&A Period”), stating “I would like to clarify, however, that I am under the impression that a FORMAL BID PROTEST is not the same as a *Question* and, therefore would not be restricted to the Q&A time period? Added to that, the PROTESTER did not have the benefit of a reply and explanation of #88, page#33, section 4.4.3.2 *MANUFACTURER’S CATALOG AND PRICE LIST* until after the Q&A period.” See, Para Scientific’s letter dated August 13, 2017, p. 1 (emphasis in the original). Para Scientific takes specific issue with a footnote contained on the August 8, 2017, final agency decision which noted that potential bidders should be mindful of the RFP deadlines. The statement was not made in an attempt to limit Para Scientific’s ability to timely file a protest; rather it made note of the fact that questions regarding the RFP specifications could have been raised during the Q&A period which would have alleviated the need to postpone the Proposal opening date. The Division does not dispute Para Scientific’s ability to file a protest and agrees that bidders have the ability to ask questions regarding the specifications during the Q&A Period as set forth RFP § 1.3.1 *Electronic Question and Answer Period* and to file a protest regarding specifications as permitted by N.J.A.C. 17:12-3.2. In its August 8, 2017 decision, the Division fully addressed all issues raised by Para Scientific in its protest; and will again address those issue here.

Second, as it did in the original protest letter, Para Scientific questions a large distributor’s ability to submit a price list stating if “the LD can’t find the manufacturer's pricelist. How did they arrive at the prices with which they are basing their prices? Were they with Moses?” See, Para Scientific’s letter dated August 13, 2017, p. 2. Para Scientific alleges that allowing a Bidder to submit a non-published price list will allow large distributors to manipulate pricing and present false information to the State. In support of its position, Para Scientific included an exhibit which it asserts demonstrates that large distributors are manipulating prices and presenting false information to the State at the expense of small businesses and the taxpayers. Specifically, Para Scientific states “See Exhibit # GW7/2017 and explain how everything is level [when Para Scientific] is working with a discount off of the manufacturer’s price list while the [large distributor] is inflating the price of the same item and the State merrily awards a contract to the [large distributor] based on a percentage discount to which the State does not even apply math, evidently to determine what they are paying verses the real pricelist directly from the manufacturer.” See, Para Scientific’s letter dated August 13, 2017, p. 2.

Para Scientific’s self-made exhibit, shown below, does not support its allegation that large distributors are manipulating pricing and presenting false information to the State.

Exhibit
#GW7/2017

| Kimble price 2017/7/23/2017 | | | |
|-----------------------------|------------|-------------------|---------------|
| Manufacturer 2017 List | | | |
| Manufacturer | Item | Pack | Cost |
| Kimble-Chase | 14000-600 | 6/pk x 6 = 36 | \$214.42 / Cs |
| Kimble-Chase | 14000-1000 | 6/pk x 4 =24 / Cs | \$268.21 / Cs |
| Fisher 600ml | VWR | Fisher EDU | Carolina Biol |
| 02-539M | 89001-066 | S307308 | N/A |
| 36 pk | 36 pk | 36 pk | N/A |
| \$264.36 | \$259.00 | \$358.50 | N/A |
| Fisher 600ml | VWR | Fisher EDU | Carolina Biol |
| 02-539P | 02-539P | S3073010 | N/A |
| 24 pk | 24 pk | 24 pk | N/A |
| \$330.74 | \$295.00 | \$452.00 | N/A |

The exhibit, which purports to show pricing from several manufactures/distributors, none of which is a small business registered with the State, simply demonstrates that pricing for the same item, decreases with larger package sizes or that different vendors have presented different pricing for identical items. The fact that different vendors may have different price lists to which a discount may be applied is a fact known to the State, and acknowledged in RFP sections 4.4.3.2; 4.4.5.2; 4.4.5.2.3; and, 6.6 each of which ask the Bidder to identify the price list type to which the mark-up or discount will be applied. The exhibit, does not provide any evidence of how a large distributor is able to manipulate prices.³

Additionally, contrary to Para Scientific's protest, the State does in fact "apply math" when evaluating the proposals received in response to this solicitation. Specifically, RFP § 6.6 *Evaluation Criteria* states in part:

Evaluation Methodology

....

However, if Vendors {Bidders} have submitted Quotes {Proposals} for the same brand utilizing different types of manufacturer's price list (for example: retail, jobber, wholesale, invoice/cost), the State will evaluate each of the Vendors' {Bidders'} submissions by choosing a market basket of up to ten (10) items from each Vendor's {Bidder's} price list submission and applying the percentage discount or markup bid. The Quotes {Proposals} will be ranked based on the lowest combined pricing for the items selected. The method for selecting the market basket will be set prior to Quote {Proposal} opening and will not be revealed to Vendors {Bidders} until notice of intent to award is issued.

In anticipation that Bidders might submit different types of price lists, the RFP put all potential Bidders on notice of the evaluation methodology that would be employed – specifically the use of a market basket. Furthermore, use of the market basket is designed to minimize any potential for price manipulation by any Bidder. Therefore, no modification to the RFP is necessary.

Third, with respect to the Small Business set aside/preference, Para Scientific questions the Division's decision not to set this solicitation aside for small business as the Division noted the fact that there are ten (10) companies with active small business registrations who are also registered with the commodity codes associated with this procurement. In support of its position Para Scientific states:

Your review of the suggestion for a Small Business preference is not understood. The State does a review. They somehow come to a conclusion that ten small businesses do not matter. The State review gets twisted around to suggest that the entire contract would see all the other vendors banded from participating. I do not know how that concept developed in your mind but a *PREFERENCE* does not mean a wholesale *REPLACEMENT* in my mind. A preference - which if your review included the real world -would show is already in effect in cities and communities as close to NJ as NY. A preference in the *PROTESTER'S* concept would be a percentage (2% to 10%) arrived at to give the Small Business vendor a level playing field when compared to the [large distributor's] advantages in buying power, freight costs, advertising (and as we have seen earlier in this communication – misrepresentation of facts and pricing). You reference that Purchasing/Procurement has no statutory

³ I note that there is only one comparable item listed on the exhibit, this alone is insufficient to prove a price manipulation.

of regulatory authority to give a price advantage to Small Business. Does the State, then, have a legal ban against offering this type of consideration when the present President and two leaders before him have signed documents to help Small Business and we have a national as well as local representation called the Small Business Administration?

[Para Scientific's April 13, 2017 letter, p. 3, *emphasis in the original.*]

During the prior procurement of this contract, only one of the companies registered as a small business submitted a proposal in response to that prior procurement. Based upon this prior experience in procuring these services, the Bureau determined that it is unlikely that one small business would be able to meet the needs of State's Using Agencies which totaled approximately \$58 million dollars and the needs of the Division's Cooperative Purchasing Program partners choosing to utilize the Contract. As such, the Division determined that it would not be in the best interest of the State to solicit this Contract as a small business set aside as there is little likelihood that there will be a sufficient number of small businesses awarded contracts so as to satisfy the requirements of State Using Agencies and Cooperative Purchasing Partner utilizing this contract. While Para Scientific notes that the current and former presidents have made statements indicting support for small business, the Division's procurement authority is limited to the powers granted to it by State statute and regulation, neither of which give the Division the authority to give small business a price preference as requested by Para Scientific. As previously noted, small businesses are always permitted and encouraged to submit Proposals in response to this and any other Bid Solicitation they deem they are qualified to bid on, regardless of whether the contract is set aside for small businesses.

Fourth, Para Scientific states that Contracts should be awarded by the State based upon geographic regions/zones in order to account for installation costs. During the Q&A period several questions were posed by potential bidders regarding installation charges. Each was reviewed and considered by the Bureau, which in turn determined that installation costs were appropriately included in the purchase cost of a particular items. Accordingly, no modification to the RFP was made in response to the question posed. Potential Bidders were all on notice that their proposal pricing should account for and include installation costs as may be applicable. The Hearing Unit's independent review of this issue did not reveal any reason to disturb the Bureau's decision.

Based upon the foregoing, although I understand Para Scientific's concerns, I find no reason to amend the specifications of the RFP. This is my final agency decision. Thank you for your company's interest in doing business with the State of New Jersey and for registering your company with [NJSTART](http://www.njstart.gov) at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,

s/ Maurice Griffin

Maurice Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas
C. Murphy