



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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September 25, 2015

Via Email meca@stevenslee.com and USPS Regular Mail

Maeve E. Cannon, Esq.
Stevens & Lee
100 Lenox Drive, Suite 200
Lawrenceville, NJ 08648

Re: Protest of Notice of Intent to Award
RFP# 15-X-23644: Certified Court Reporting – Division of Workers’ Compensation

Dear Ms. Cannon:

This letter is in response to a letter dated July 7, 2015, submitted by Joseph Trotto on behalf of John F. Trainor, Inc. (Trainor) to the Division of Purchase and Property (Division), protesting the Procurement Bureau’s (Bureau) June 29, 2015, Notice of Intent to Award (NOI) a contract for Solicitation# 15-X-23644: Certified Court Reporting – Division of Workers’ Compensation. In that protest letter, Mr. Trotto contends that the Evaluation Committee scored Trainor too low with respect to criteria C – the ability of the company to perform the work requested in the RFP. With the protest, Trainor requested a meeting to discuss the proposal.

By way of background, the subject Request for Proposal (RFP) was issued on November 30, 2014, by the Bureau on behalf of the New Jersey Department of Labor and Workforce Development (DLWD) to solicit proposals for certified court reporters for the Division of Workers Compensation (DWC). The DWC uses certified court reporters to record the testimony presented at hearings for injured workers in the State of New Jersey (State). Those hearings are held at the Workers’ Compensation Courts in various locations across the State as follows:

ZONE 1	ZONE 2	ZONE 3	ZONE 4
Freehold	Elizabeth	Atlantic City	Hackensack
Mount Holly	Lebanon	Bridgeton	Jersey City
New Brunswick	Mt. Arlington	Camden	Paterson
Trenton	Newark	Toms River	

It is the intent of the Bureau to award one contract in each of the four zones listed above, for a total of four contracts. Contracts will be awarded to those responsible bidders whose proposals, conforming to this RFP, are most advantageous to the State, price and other factors considered. (RFP § 1.1 *Purpose and Intent*.) Bidders were permitted to submit a proposal on a single zone or for multiple zones. (RFP § 4.4.7 *Method of Bidding*.) This RFP was a re-procurement for services provided under T1061 for the Certified Court Reporting Contract for the DWC, which is scheduled to expire on September 30, 2015. (RFP § 1.2 *Background*.)

On January 6, 2015, five proposals received by the submission deadline were opened by the Division's Proposal Review Unit. Trainor submitted a proposal for Zone 1. On February 12, 2015, an Evaluation Committee (Committee) conducted its review of the proposals and on June 17, 2015, the Committee issued its report. On June 29, 2015, the Bureau issued its NOI indicating that the following contracts would be awarded:

Zone 1: State Shorthand Reporting, LLC
Zone 2: William C. O'Brien Associates, Inc.
Zone 3: JerseyShore Reporting, LLC
Zone 4: State Shorthand Reporting, LLC

On July 2, 2015, subsequent to the NOI being issued, Trainor reviewed the proposals submitted by other bidders and thereafter submitted a request to the Division to obtain copies of all of the proposals submitted. Prior to the July 14, 2015, protest period end date, on July 8, 2015, the Division received Trainor's protest letter. In the protest letter, Trainor stated that "the evaluators improperly scored my firm much too low and, for that reason, we did not score high technically. The most amazing score is for Criteria 'C' which is the ability of the bidder to complete the scope of work based in its technical proposal."

Thereafter, on July 17, 2015, you, on behalf of Trainor, submitted a supplemental protest letter to the Division.¹ In that letter, Trainor additionally alleged that: (1) State Shorthand Reporting, LLC (State Shorthand) and JerseyShore Reporting, LLC (JerseyShore) failed to complete the subcontractor utilization form; and therefore, their proposals were materially nonresponsive and should be rejected; (2) JerseyShore failed to properly complete the Stockholder Disclosure Form; and, (3) Trainor's proposal was improperly evaluated. The Division permitted State Shorthand and JerseyShore to each submit a response to the issues raised against them in Trainor's protest.²

In the initial protest letter, Trainor requested a meeting with the Director and the Committee to discuss its proposal. In reviewing the submitted proposals, the Committee did not entertain presentations from any of the bidders. All proposals were evaluated based upon the contents of the submitted proposals. A discussion of the proposal with Trainor would afford one bidder an opportunity that the other bidders did not have. Moreover, such a discussion appears to seek and could result in Trainor being permitted to supplement, change, correct and/or alter what was submitted in its January 6, 2015, proposal, potentially placing it in a position of advantage over other bidders who have bid in conformance with the specifications. Permitting Trainor to have a meeting with the Director and Committee during which it could potentially supplement its proposal, would be inconsistent with the Appellate Division's reasoning in In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, where the court held that "[i]n clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP." 279 N.J. Super. 566, 597 (App. Div. 1995).

Further, to the extent that Trainor desires to make a presentation regarding its protest, I note that 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.

¹ The Hearing Unit granted Trainor a short extension of time within which it was permitted to supplement its original protest letter with a letter from retained counsel.

² On August 7, 2015, Trainor submitted an unsolicited reply to the Division responding to the statement submitted by State Shorthand in response to Trainor's protest. I note that it is in the Director's discretion to request supplemental information from parties related to the issues raised in a protest. Here, no reply was requested from Trainor. That being said, the reply submitted by Trainor was reviewed in connection with this protest, and nothing contained in that reply impacts the outcome of this 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 informal hearing.” N.J.A.C. 17:12-3.3(d). In consideration of Trainor’s protest, I have reviewed the record of this procurement, including the RFP, the proposals submitted, the Evaluation Committee report, Bureau’s Recommendation Report, and the relevant statutes, regulations, and case law. The issue(s) raised in Trainor’s protest were sufficiently clear and Trainor presented information/documents in support of its position. 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 submitted by Trainor on the written record. Thus, I set forth herein my final agency decision.

First, Trainor alleges that both State Shorthand and JerseyShore failed to disclose that several of their proposed court reporters are not employees of the respective companies, but rather were subcontractors. Trainor continues by stating that both State Shorthand and JerseyShore failed to complete the *Subcontractor Utilization Plan* form making each of their proposals materially non-responsive to the RFP requirements.

With respect to the utilization of subcontractors, the State’s Standard Terms and Conditions (STC), issued with this RFP, indicate that “[t]he contractor may not subcontract other than as identified in the contractor’s proposal without the prior written consent of the Director.” (STC § 5.8(a) *Subcontracting or Assignment*; RFP § 5.7 *Substitution of Addition of Subcontractors*). The RFP defines subcontractor as:

[a]n entity having an arrangement with a State contractor, where by the State contractor uses the products and/or services of that entity to fulfill some of its obligations under its State contract, while retaining full responsibility for the performance of all of its [the contractor’s] obligations under the contract, including payment to the subcontractor. The subcontractor has no legal relationship with the State, only with the contractor.

[RFP § 2.1 *General Definitions*, emphasis added.]

The RFP goes on to state that:

[f]or a proposal that does NOT include the use of any subcontractors, by signing the RFP Signatory Page, or by entering a PIN if submitting an eBid proposal, the bidder is *automatically* certifying that:

1. In the event that the award is granted to the bidder’s firm and the bidder later determines at any time during the term of the Contract to engage subcontractors to provide certain goods and/or services, pursuant to Section 5.8 of the State of NJ Standard Terms and Conditions, the bidder will submit a Subcontractor Utilization Plan form for approval to the Division of Purchase and Property in advance of any such engagement of subcontractors.

[RFP § 4.4.1.1.2 *No Subcontractor Certification*]

In response to Trainor’s protest, JerseyShore states that it does not intend to use subcontractors which is evidenced by the fact that JerseyShore did not list any entities in its list of available reporters. Therefore, JerseyShore states that it was not required to complete the subcontractor utilization form. Rather, JerseyShore states that it is utilizing independent contractors which does not trigger the need for the subcontractor utilization form. Moreover, JerseyShore notes each individual listed in its proposal is available to work for the company full-time.

Similarly, in response to Trainor's protest, State Shorthand states that it is not utilizing subcontractors. "The clear and unambiguous definition of "subcontractor" contained in the Request for Proposal 15-X-23644 only includes an "entity" or the use of another court reporting agency by the successful bidder to provide the required court reporting services. The definition of "subcontractor" under the Request for Proposal does not include individual court reporters." (State Shorthand's August 4, 2015, Response to Trainor Protest). State Shorthand's response also noted that individual court reporters would be used to provide services, as opposed to subcontracted entities.

As to Trainor's first point of protest, I note that an entity is defined as "an organization (as a business or governmental unit) that has an identity separate from those of its members." (See, *Merriam-Webster Dictionary*, available at: <http://www.merriam-webster.com/dictionary/entity>). Individual court reporters, which may be retained as independent contractors to perform work on this contract, are not entities and therefore the completion of the *Subcontractor Utilization Plan* form is not required as this form is required only when other 'entities' are being utilized to complete contractual services. Based upon the information contained in the respective proposals, neither JerseyShore nor State Shorthand are utilizing subcontractors to perform work under the contract; each has confirmed the same in their response to Trainor's protest. Accordingly, I find that neither JerseyShore nor State Shorthand was required to complete and submit the *Subcontractor Utilization Plan* form as both companies have indicated that they will not be utilizing the services of other entities to perform work under this contract.

Next, Trainor contends that JerseyShore may have submitted an *Ownership Disclosure Form* which is inaccurate. Trainor bases this allegation on statements contained in JerseyShore's proposal wherein Eugene Ertle "describes himself as the co-owner of JerseyShore Reporting LLC and its Chief Executive Officer." (Trainor's July 17, 2015, protest letter). However, on the *Ownership Disclosure Form*, JerseyShore only disclosed Michelle Ertle, Vice President, as a person who owns more than 10% of the company.

N.J.S.A. 52:25-24.2 addresses when ownership must be disclosed and states in pertinent part that:

No corporation or partnership shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation or said partnership, there is submitted a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% or more of its stock, of any class or of all individual partners in the partnership who own a 10% or greater interest therein, as the case may be. If one or more such stockholder or partner is itself a corporation or partnership, the stockholders holding 10% or more of that corporation's stock, or the individual partners owning 10% or greater interest in that partnership, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, exceeding the 10% ownership criteria established in this act, has been listed.

With this backdrop, New Jersey Courts have consistently held that strict compliance with the ownership disclosure requirements of N.J.S.A. 52:25-24.2 is necessary. As such, a proposal is properly rejected where it contains inaccurate ownership information. See, Impac, Inc. v. City of Paterson, 178 N.J. Super. 195, 200-01 (App. Div. 1981); Muirfield Const. Co., Inc. v. Essex County Imp. Authority, 336 N.J. Super. 126 (App. Div. 2000).

By requiring the identity disclosure statement to be submitted with the bid (or prior thereto) the Legislature evinced an intention that any bid not containing such a statement would not be a valid bid. No bidder submitting such an invalid bid is eligible to be awarded the public contract. Any other interpretation of the statute would render nugatory the meaning of the clear language used. The character of the legislation and a reading thereof in context justifies a mandatory, imperative construction.

...

There is no provision in the statute permitting a [government entity] to waive the requirement of disclosure or to allow a bidder additional time following the acceptance of bids to cure an invalid bid. . .The policy of the State is to guard against favoritism and unfair competition by demanding integrity of the bidding process through strict construction of bidding standards...The policy of the State is to guard against favoritism and unfair competition by demanding integrity of the bidding process through strict construction of bidding standards...

Strict construction is essential if integrity of bidding is to be achieved... The action by the [government entity] in waiving noncompliance with the identity disclosure statute has created precisely the type of result which the Legislature sought to avoid in enacting a statute designed to preserve fair competition through conformance with an established framework for public contract bidding.

[George Harms Constr. Co. v. Lincoln Park, 161 N.J. Super. 367, 372-74 (Law Div. 1978); citing, Assembly Bill 22 (1976), "Statement of Assembly Municipal Government Committee"; Assembly Bill 22 (1976), "Statement of Senate State Government, Federal and Interstate Relations and Veterans Affairs Committee."]

The *Ownership Disclosure Form* is specifically addressed in RFP Section 4.0, *Proposal Preparation and Submission*, which states in pertinent part:

4.4.1.2.1 OWNERSHIP DISCLOSURE FORM

Pursuant to N.J.S.A. 52:25-24.2, in the event the bidder is a corporation, partnership or sole proprietorship, the bidder must complete and sign the attached Ownership Disclosure Form. A current completed Ownership Disclosure Form must be received prior to or accompany the submitted proposal. A bidder's failure to submit the completed and signed form with its proposal will result in the rejection of the proposal as non-responsive and preclude the award of a contract to said bidder unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six months prior to the proposal submission deadline for this procurement. If any ownership change has occurred within the last six months, a new Ownership Disclosure Form must be completed, signed and submitted with the proposal.

[Emphasis added.]

With its proposal, JerseyShore submitted an *Ownership Disclosure Form* which indicated that Michelle Ertle owns more than 10% of the company; in fact, Ms. Ertle owns 50% of the company. No other persons or entities were identified on the form.

Prior to contract award, the RFP requires that the intended awardee submit a statement “certifying that no contributions prohibited by either Chapter 51 or Executive Order No. 117 have been made by the Business Entity and reporting all contributions the Business Entity made during the preceding four years to any political organization...” (RFP § 7.1.1 *Requirements of Public Law 2005, Chapter 51*). With respect to Limited Liability Companies, the Chapter 51 form requires a listing of all members with any equity interest. Subsequent to the NOI being issued, on July 7, 2015, JerseyShore submitted the Chapter 51 Statement which reveals that Michelle Ertle and Eugene Ertle, Jr. are each 50% shareholders of the company.

In its response to Trainor’s protest, JerseyShore admits that the *Ownership Disclosure Form*, submitted with the proposal, contained an error. JerseyShore asserts that this error was not made in an attempt to deceive the Division; in fact, JerseyShore states that the Division was fully aware that Eugene Ertle owned 50% of the company based upon proposals submitted by JerseyShore during the last twelve years, all of which indicate that Eugene Ertle is a 50% owner of the company.

Pursuant to RFP Section 4.4.1.2.1 *Ownership Disclosure Form*, if the “Division has on file a signed and accurate *Ownership Disclosure Form* dated and received no more than six months prior to the proposal submission deadline for this procurement” then a bidder’s failure to submit a completed and signed form with its current proposal will not result in a rejection of the proposal as non-responsive. However, a review of the Division’s records reveals that there was no *Ownership Disclosure Form* on file which was dated and received no more than six months prior to the current proposal deadline. Based upon the information contained in the Chapter 51 Statement and more importantly, JerseyShore’s admission that its *Ownership Disclosure Form* contained an error, the Division has no choice but to find that the proposal submitted by JerseyShore was non-responsive.

With respect to Trainor’s allegation that its proposal was improperly evaluated, in preparing proposals, bidders were required to submit information about the company supporting its understanding and approach to perform the work required by this RFP. Specifically, “[t]he proposal should be submitted in two volumes with the content of each volume as indicated below.” (RFP § 4.4 *Proposal Content*.)

Volume 1

Section 1 - forms (Sections 4.4.1 and 4.4.2)

Section 2 – Technical Proposal (Section 4.4.3) - **NOTE: This section of the bidder’s submission is limited to 25 pages or fewer, with no smaller than a 12 point font.**

Section 3 – Organizational Support and Experience (Section 4.4.4)

Volume 2

Section 4 – Price Schedule (Section 4.4.5)

[RFP § 4.4 *Proposal Content*, emphasis in the original]

For Volume 1 - Section 2, “the bidder shall describe its approach and plans for accomplishing the work outlined in the Scope of Work section, i.e., Section 3.0. The bidder must set forth its understanding of the requirements of this RFP and its ability to successfully complete the contract.” (RFP § 4.4.3 *Technical Proposal*). Specifically, the bidder is required to submit, in a narrative format, details regarding the following:

- That it understands the objectives of the RFP and set forth its technical approach and plans to meet the requirements of the RFP. (RFP § 4.4.3.1 *Management Overview*).

- “[D]escribe its specific plans to manage, control and supervise the contract to ensure satisfactory contract completion according to the required schedule.” (RFP § 4.4.3.2 *Contract Management*).
- Provide its mobilization and implementation plan, including a detailed timetable in order to demonstrate that the bidder is able to comply with the contract requirement that it be operational within 30-days of the NOI. (RFP § 4.4.3.4 *Mobilization and Implementation Plan*).
- Provide a summary of any anticipated problems during the term of the contract and provide a proposed solution. (RFP § 4.4.3.5 *Potential Problems*).

For Volume 1 - Section 3, the bidder is requested to provide detailed information regarding its organization, personnel and experience which supports the bidder’s qualifications and capabilities to perform the services required by the RFP. Specifically, the RFP requests that:

[t]he bidder should include information relating to its organization, personnel, and experience, including, but not limited to, references, together with contact names and telephone numbers, evidencing the bidder’s qualifications, and capabilities to perform the services required by this RFP. This section of the proposal must minimally contain the information identified below.

[RFP § 4.4.4 *Organizational Support and Experience*.]

A summary of the information that a bidder should provide in response to this section is as follows:

- Office address, including the name and telephone number for contact person. (RFP § 4.4.4.1 *Location*).
- Organization chart for those persons assigned to this contract and organization chart for the entire company. (RFP § 4.4.4.2 *Organization Charts*).
- Resumes for all management, supervisory and key personnel which emphasize the qualifications experience of the individuals in successfully completing contracts for a similar size and scope to the services required by this RFP. (RFP § 4.4.4.3 *Resumes*).
- List of back-up staff that may be used to assist or replace primary persons assigned to perform work under this contract. (RFP § 4.4.4.4 *Backup Staff*).
- List of contracts of a similar size and scope to the services required by this RFP, that the bidder has successfully completed. (RFP § 4.4.4.5 *Experience with Contracts of Similar Size and Scope*).
- Certified financial statements, including a balance sheet, income statement and statement of cash flow and all applicable notes for the most recent calendar year/fiscal year. (RFP § 4.4.4.6 *Financial Capability of the Bidder*).

The Committee evaluated each proposal submitted using the following criteria set forth in the RFP:

6.7.1 EVALUATION CRITERIA

- a. Personnel: The qualifications and experience of the bidder’s management, supervisory, and key personnel assigned to the contract, including candidates recommended for each of the positions/roles required.

- b. Experience of firm: The bidders documented experience in successfully completing contracts of a similar size and scope in relation to the work required by this RFP.

- c. Ability of firm to complete the Scope of Work based on its Technical Proposal: The Bidder's demonstration in the proposal that the Bidder understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the contract.

With respect to Trainor's proposal, the Committee evaluation report notes:

The Committee determined that Trainor fully considered the RFP's requirements in presenting an organized proposal that detailed its approach to providing certified court reporters for Zone 1 to the Division of Workers' Compensation in a professional format.

Trainor provided ample information throughout its proposal that the firm can undertake and successfully perform the technical requirements of the Scope of Work. Trainor identified thirteen (13) full time and two (2) part time certified court reporters.

Trainor currently provides these services to the State and also identified past performance with various State agencies. Trainor did not provide references.

Trainor submitted a proposal to provide services for Zone 1 only. Trainor demonstrated the experience, knowledge and resources to successfully provide certified court reporters for the Division of Worker's Compensation.

As noted above, as part of the proposal, a bidder was required to submit, in a narrative format, details regarding its *Management Overview, Contract Management, Mobilization and Implementation Plan* and provide a summary of any *Potential Problems*. A review of Trainor's proposal reveals that for Volume 1 - Section 2, Trainor provided a response to RFP § 4.4.3.1 *Management Overview* and RFP § 4.4.3.5 *Potential Problems* only. RFP Section 4.4.3.1 *Management Overview* requires that:

[t]he bidder shall set forth its overall technical approach and plans to meet the requirements of the RFP in a narrative format. This narrative should demonstrate to the State that the bidder understands the objectives that the contract is intended to meet, the nature of the required work and the level of effort necessary to successfully complete the contract. This narrative should demonstrate to the State that the bidder's general approach and plans to undertake and complete the contract are appropriate to the tasks and subtasks involved.

Mere reiterations of RFP tasks and subtasks are strongly discouraged, as they do not provide insight into the bidder's ability to complete the contract. The bidder's response to this section should be designed to demonstrate to the State that the bidder's detailed plans and approach proposed to complete the Scope of Work are realistic, attainable and appropriate and that the bidder's proposal will lead to successful contract completion.

However, in response to *Management Overview*, Trainor recounted the history of the company and simply noted that it has the knowledge and expertise to provide all of the services needed. Specifically, Trainor stated:

John F. Trainor, Inc. is one of the oldest court reporting firms in the State of New Jersey, dating back to 1940's. Our Founder, John F. Trainor, was awarded Certificate Number 1, as the first Certified Court Reporter in the State of New Jersey. He served as Chairman of the State Board of Court Reporting from 1941 until his retirement in 1970.

John F. Trainor, Inc. has been providing Certified Court Reporter to the New Jersey Division of Workers Compensation since shortly after its inception. We have the knowledge and expertise to provide all the services needed by the Division. Our staff is fully qualified and have been covering Workers Compensation hearings for many years. The principal of the firm has 48 years of experience in Workers Compensation as well as general freelance court reporting.

[Trainor's January 6, 2015, Proposal]

Trainor did not address the RFP's requirement that the bidder describe that it understands the objectives of the new contract; the nature of the required work and the level of effort necessary to successfully complete the new contract; the bidder's general approach and plans to undertake and complete the tasks and subtasks involved in the new contract; and that the bidder's detailed plans and approach proposed to complete the Scope of Work are realistic, attainable and appropriate. (RFP § 4.4.3.1 *Management Overview*).

In response to RFP Section 4.4.3.5 *Potential Problems*, which states that "[t]he bidder should set forth a summary of any and all problems that the bidder anticipates during the term of the contract. For each problem identified, the bidder should provide its proposed solution", Trainor responded that "[w]e do not anticipate any problems, as we have been doing this work for many years, and have the resources and procedures in place, developed over time, to deal with any possible contingencies." (Trainor's January 6, 2015, Proposal).

Trainor did not provide a response anywhere in its proposal to RFP § 4.4.3.2 *Contract Management* or RFP § 4.4.3.4 *Mobilization and Implementation Plan*. I note that the subject RFP was revised in connection with the current procurement and contained new proposal requirements which include, but are not limited to the need to provide a response regarding the bidder's *Contract Management* and a *Mobilization and Implementation Plan*. Bidders are cautioned to review all proposal requirements to ensure that a complete proposal is submitted in response to an RFP as "[t]he bidder assumes sole responsibility for the complete effort required in submitting a proposal in response to this RFP." (RFP § 1.4.2 *Bidder Responsibility*). A response to RFP Section 4.4.3 *Technical Proposal* is mandatory - "[i]n this section, the bidder shall describe its approach and plans for accomplishing the work outlined in the Scope of Work section...."³

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Township 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 set forth by the Court in Township 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]

³ Shall or Must - Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive.

and hence non-waivable irregularity.” On-Line Games, supra, 279 N.J. Super. at 594, citing, River Vale, supra, 127 N.J. at 216.

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-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *Id.* at 222. Here, Trainor’s failure to provide the mandatory information in its proposal is a material deviation from the RFP requirements. Permitting the deviation potentially places Trainor in a position of advantage over other bidders who have bid in conformance with the specifications. Without information regarding Trainor’s *Contract Management and Mobilization and Implementation* for the proposed contract, the State cannot evaluate Trainor’s approach and plan to accomplish the scope of work outlined in the RFP.

Because Trainor failed to include a response to the requested mandatory information, its proposal was non-responsive. Trainor’s lack of information, compared to other proposals received, is evidenced in the Committee’s scoring for Criterion C.

Technical Score by Evaluation Criteria

Bidder	Criterion A	Criterion B	Criterion C	Avg. Technical Score
State Shorthand	625	805	920	783
Trainor	550	700	720	657
O’Brien	550	490	760	600
Jersey Shore	550	455	480	495
Torro	250	105	160	172

For Volume I - Section 3, Trainor did provide details regarding the company’s organization, personnel and experience; however, as noted in the Committee Report, Trainor did not provide references. I note that Trainor’s failure to provide references is not fatal to its proposal. RFP Section 4.4.4 *Organizational Support and Experience* states “[t]he bidder should include information relating to its organization, personnel, and experience, including, but not limited to, references, together with contact names and telephone numbers, evidencing the bidder’s qualifications, and capabilities to perform the services required by this RFP.” Pursuant to RFP Section 2.1 *General Definitions*, “[s]hould – [d]enotes that which is recommended, not mandatory.” Further, with respect to other State contracts held by Trainor, the State can take notice of those contracts and ascertain contact information for references.⁴

In its evaluation report the Committee noted that “Trainor demonstrated the experience, knowledge and resources to successfully provide certified court reporters for the Division of Worker’s Compensation.” However, “[t]he Committee did not recommend Trainor for award of Zone 1 due to technical score and having the lowest price rank.” (June 17, 2015, Evaluation Committee Report). In contrast, the proposal submitted by State Shorthand, the intended awardee for Zone 1, contained detailed

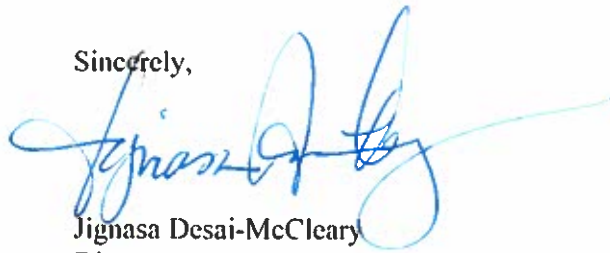
⁴ Trainor has a current contract with the State to provide Certified Court Reporting Contract for the DWC (T1061), which is scheduled to expire on September 30, 2015. In addition, Trainor has a contract with the State (T2767) to provide certified court reporters and certified real time court reporters for various using agencies in the State, which is scheduled to expire on June 30, 2016.

information responding to each of the proposal requirements/evaluation criteria; as such, State Shorthand was ranked number 1 in terms of technical score. State Shorthand was also ranked 2 in terms of price ranking for Zone 1. Therefore, the Committee unanimously recommended the award of the contract for Zone 1 to State Shorthand.

In light of the findings set forth above, I sustain the Bureau's NOI to State Shorthand for Zones 1 and 4. In addition, I rescind the NOI to JerseyShore Reporting, LLC for Zone 3 as JerseyShore's failure to provide an accurate *Ownership Disclosure Form* rendered the company's proposal non-responsive. The Bureau is directed to conduct further review of the responsive proposals submitted for Zone 3 for the purpose of selecting an awardee for this Zone. This is my final agency decision with respect to the protest submitted by John F. Trainor.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your company with **NJ START** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M: RUD

c: L. Spildener
J. Signoretta
G. Olivera
J. Prusinowski, Esq.