



## State of New Jersey

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October 16, 2018

Via Electronic Mail [[rhunt@parkermccay.com](mailto:rhunt@parkermccay.com)] and USPS Regular Mail

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Re: I/M/O Bid Solicitation #18DPP00205 Central Jersey Landscaping  
T0777 Snow Plowing and Spreading Services  
Request for a Stay

Dear Mr. Hunt:

This letter is in response to your correspondence of October 4, 2018, on behalf of Central Jersey Landscaping (Central Jersey) to the Division of Purchase and Property's (Division) Hearing Unit. In that correspondence, Central Jersey requests a stay of the award of price lines 336, 337, 349, 350, 359, 372, and 375 pending the outcome of Central Jersey's appeal of the Division's September 5, 2018 final agency decision.

By way of background, on January 30, 2018, the 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 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.

On February 28, 2018, the Bureau issued Bid Amendment #1 responding to the questions posed by potential Vendors {Bidders} and providing a revised Bid Solicitation. Bid Amendment #1 also posted a Revised Price Schedule/Sheet titled T0777 Revised Price Schedule – Snow Plowing and Spreading Services – NJDOT. The Revised Price Schedule/Sheet included revisions addressing questions received during the question and answer period, and otherwise made formatting adjustments to the presentation of the document.<sup>1</sup>

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<sup>1</sup> Pursuant to the Bid Solicitation section 1.4.1, "Any Bid Amendment {Addendum} to this Bid Solicitation {RFP} will become part of this Bid Solicitation {RFP} and part of any Blanket P.O. {Contract} awarded as a result of this Bid Solicitation. {RFP}. . . . It is the sole responsibility of the Vendor {Bidder} to be knowledgeable of all Bid Amendments {Addenda} related to this procurement."

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. After conducting a preliminary review of the Quotes received, those Quotes which conformed to the administrative requirements for Quote submission were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria* which states:

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.

Central Jersey uploaded a Quote via *NJSTART* at 11:22:07 a.m. on March 16, 2018. Central Jersey uploaded eighteen files as Quote 00002027, comprised of the following documents:

- *An Ownership Disclosure Form*;
- *An Offer and Acceptance Page*;
- *Proof of State of New Jersey, Business Registration Certificate*;
- *A Form AA302 Employee Information Report*;
- *State Supplied Price Sheet/Schedule*;
- *Completed Bid Solicitation Attachment #1 – Vendor {Bidder} Equipment Forms for the following Crews:*
  - *Crew 314, Spreading*
  - *Crew 316, Spreading*
  - *Crew 330, Spreading*
  - *Crew 331, Spreading*
  - *Crew 410, Spreading*
  - *Crew 430, Spreading*
  - *Crew 468, Spreading*
- *A Disclosure of Investigations and Other Actions Involving Bidder Form*;
- *A Disclosure of Investment Activities in Iran Form*; and
- *A Two-year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions Form.*

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

After completing the review of all Quotes received and completing all phases of the procurement, on August 22, 2018, the Bureau prepared a Recommendation Report which recommended Blanket P.O. awards to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation are most advantageous to the State, price and other factors considered. On August 24, 2018, a Notice of Intent to Award (NOI) was issued advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s consistent with the Bureau's Recommendation Report. Specifically, the NOI included a spreadsheet of "intended awardees and associated price lines" and stated that it was "the intent of the Director of the Division of Purchase and Property (Division) to make a Master Blanket Purchase Order (Blanket P.O.) award" in accordance thereof.

Later on August 24, 2018, Central Jersey sent an email to the Bureau stating:

I was under the impression that we had a complete package. We were deemed unresponsive due to the following:

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}.

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

We have been a vendor with the DOT for the past five years. I read this clause to be for "Snow Sections or Loaders" We were bidding on "spreading services" and it was not on the checklist so I did not include it with my package. Can you please revisit this prior to awarding? I believe the RFP was not written clearly regarding this requirement.

On August 29, 2018, the Hearing Unit received a supplemental protest from Central Jersey's counsel adding a number of additional arguments challenging the Bureau's determination that Central Jersey's Quote was nonresponsive. On September 5, 2018, the Division issued its final agency decision upholding the Bureau's determination that Central Jersey' Quote was non-responsive. In part, the final agency decision, as related to Central Jersey's failure to include Attachment A with its Bid Solicitation stated:

The *NJSTART* system does not prevent a Vendor {Bidder} from submitting a Quote without all of the required forms and documents attached as mandated by the Bid Solicitation. The responsibility for ensuring that all necessary forms and other submittals are uploaded into *NJSTART* necessarily and appropriately rests solely with the Vendor {Bidder}. Bid Solicitation § 1.4.2 *Vendor {Bidder} Responsibility*.

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](http://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.

[September 5, 2018, final agency decision, p. 12.]

On October 3, 2018, Central Jersey filed a Notice of Appeal with the Superior Court of New Jersey Appellate Division. On October 4, 2018 Central Jersey requested a stay from the Division of the contract awards.<sup>2</sup>

A request for a stay is an extraordinary remedy and a party who seeks a stay must satisfy a particularly heavy burden [to] demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Zoning Bd. v. Service Elec. Cable Television, 198 N.J. Super. 370, 279 (App. Div. 1985); Gauman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (internal citations omitted); see also, McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007) (stating that plaintiff must prove each of the Crowe factors and establish each by clear and convincing evidence). In exercising discretion to grant a request for stay, an agency must be guided by certain fundamental principles:

- (1) A preliminary injunction should not issue except when necessary to prevent irreparable harm...
- (2) Temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled...

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<sup>2</sup> I note that there is currently before the Appellate Division the matter of Terco Enterprises, LLC v. New Jersey Department of Transportation and New Jersey Department of the Treasury – Division of Purchase and Property, Docket No. A-000578-18T2, which challenges the award of price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93 and 97 under the subject Bid Solicitation. In that matter, on September 5, 2018, Terco Enterprises, LLC (Terco) contacted the Division protesting and requesting reconsideration of the Division's final agency decision issued in I/M/O Bid Solicitation #18DPP00205 Jer-Car (IMO Jer-Car). On September 6, 2016, Terco's Attorney contacted the Division requesting an opportunity to protest and seek reconsideration of the I/M/O Jer-Car decision. Terco was permitted to file its protest and request for reconsideration on or before September 11, 2018. In its protest and request for reconsideration, Terco requested a stay of the award of the certain price lines protested. However, prior to the Division issuing its decision with respect to Terco's request for reconsideration and stay, Terco filed an Order to Show Cause with the Superior Court of New Jersey-Chancery Division seeking temporary restraints with respect to the award of price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, 97, 99, 316, 329, and 330. That matter was transferred to the Superior Court of New Jersey-Law Division and on September 26, 2018, the Law Division issued a temporary stay of the contract awards related to price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93, 97, 99, 316, 329, and 330 only. On October 1, 2018, the action was transferred to the Appellate Division and the temporary stay of the contract awards related to price lines 18, 20, 30, 31, 32, 48, 50, 53, 54, 55, 93 and 97 only, was continued. On October 2, 2018, the Appellate Division granted Terco's application for permission to file an emergent motion and ordered that the temporary restraints issues by the Law Division continue pending further order of the Appellate Division.

- (3) Preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits...
- (4) The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying the relief...

[Crowe v. De Gioia, 90 N.J. 126, [32-34 (1982).]

The New Jersey courts have consistently held that a movant must clearly and convincingly demonstrate the right to a stay. Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). As discussed in detail below, in reviewing each of the Crowe factors, Central Jersey has not demonstrated that it is entitled to a stay.

### **1. Central Jersey will not suffer irreparable harm.**

Central Jersey will not suffer irreparable harm if the stay of the Blanket P.O. awards is denied. In support of its position, Central Jersey states that:

CJL, is in the business (sic) (for over the last five consecutive years) of providing the State (for this very contract) salt spreading services. This contract makes up a quarter of the entire work for CJL and covers the State roadways from Pennsauken up to East Amwell, New Jersey. Without the award of the contract, CJL will undoubtedly have to downsize its workforce, costing New Jersey tax payers their livelihood. Per the bid documents, the "snow season" commences October 1, 2018. While snow and ice may not be imminent, a significant amount of expense and energy is required in advance of actual weather conditions to order the requisite products and ready its equipment. Relatedly, as time elapses, CJL's options for other work for the season dwindle, and the uncertainty of its workload for the winter season leaves its hands tied. Because of the potential impact on CJL's employees and uncertainty of the ultimate outcome, time is of the essence for this decision.

[Central Jersey Request for a Stay, p. 4.]

When considering a stay, "harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, *supra*, 90 N.J. at 132-33. While monetary damages are never available for the failure to award a public contract, not every request for stay that concerns a public contract award is granted. *See, e.g., In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Mgmt. Servs.*, 436 N.J. Super. 350, 358 (App. Div. 2014) (denying stay of award of contract). This is one of the pillars underlying the public bidding law. Moreover, the fact that Central Jersey may have previously provided services to the State does not entitle it to a contract in perpetuity. In re Motor Vehicle Comm'n Surcharge Sys. Accounting and Billing Servs., No. A-3136-16, at \*13 (App. Div. Feb. 8, 2018). No bidder is entitled to award of a public contract. Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 546 (1966).

Alternatively, the public interest is greatly affected if the Division is unable to complete the Blanket P.O. awards. In order to be ready for the 2018-2019 snow season and to ensure that all necessary equipment is ordered and available, NJDOT required that the Blanket P.O.s be awarded prior to October 1, 2018. This ensures that NJDOT has sufficient time to perform all necessary vehicle and plow inspections and obtained

all necessary equipment prior to the commencement of the winter snow plowing season. Further, NJDOT has already commenced the process of distributing equipment and performing the inspections necessary for the 2018-2019 snow season.

Finally, while it is true that Central Jersey could suffer harm from not being awarded Blanket P.O.s pursuant to this Bid Solicitation, this is a risk that a company routinely bears when it participates in the public bidding process. Thus, Central Jersey has not demonstrated by clear and convincing evidence that it will suffer irreparable harm if the relevant contract awards are not stayed.

**2. Central Jersey has the legal right to request a stay of the Contract award.**

The Division acknowledges that it is well settled that a bidder claiming to be entitled to an award of a contract has standing to challenge the award of a contract to another. M.A. Stephen Construc. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

**3. Central Jersey has not demonstrated a reasonable probability of ultimate success on the merits.**

Central Jersey has not established by clear and convincing evidence that it has a reasonable probability of success on the merits. In support of its request for a stay, Central Jersey states the Division incorrectly determined that its Quote was non-responsive; and that the Division should have permitted Central Jersey to clarify its Quote with respect to its experience as the Division permitted other Vendors {Bidders} to clarify certain aspects of their Quotes.

As noted in the Division's September 5, 2018 final agency decision, Central Jersey's submitted Quote contained a material deviation rendering the Quote non-responsive. Specifically, Central Jersey did not include Attachment #2 – Vendor {Bidder} Experience Form with its Quote as required by Bid Solicitation Section 4.4.3 *Submittals* 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.

In reviewing Central Jersey's submitted Quote, the Bureau determined, and I agreed, that Central Jersey's failure to include the required information regarding its experience with its Quote was a material deviation from the requirements of the Bid Solicitation. The Bureau could not allow Central Jersey to provide information regarding its experience in the field after the Quote opening as doing so would result in an impermissible clarification, contrary to the Court's holding in In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995) ("In 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"); In re Motor Vehicle Comm'n Surcharge Sys.

Accounting and Billing Servs., No. A-3136-16, at \*31 (App. Div. Feb. 8, 2018) (explaining the Vendor's "original bid was non-conforming, but the Division impermissibly allowed the bid thereafter to be materially altered"). Further, the Division could not consider Central Jersey's prior contract experience with the State, as Central Jersey made no reference to any prior contract with the State within its submitted Quote. Considering information outside of Central Jersey's submitted Quote would put Central Jersey in a position of advantage over other Vendors {Bidders} who may have similarly failed to include Attachment #2 – *Experience of Bidder* form with its submitted Quote despite having the required experience.

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). 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." Barrick v. State of New Jersey, 218 N.J. 247, 258. (2014); citing, Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985). 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 Central Jersey's Quote did not include any reference to its prior experience with the State of New Jersey, the Bureau could not consider information not contained within Central Jersey's Quote without compromising the Bid Solicitation's level playing field as doing so would provide Central Jersey preferential treatment simply because of its status as an incumbent contractor. Central Jersey's failure to submit the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form or otherwise documenting its experience was a material deviation rendering its Quote non-responsive. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994); Township of River Vale v. Longo Construction Co., 127 N.J. Super. 207, 222 (Law Div. 1974) (stating "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"); In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995).

Further, to the extent that Central Jersey alleges that the Division permitted other Vendors {Bidders} to clarify or cure their Quotes which were similarly deemed non-responsive, Central Jersey's statement is erroneous. Quotes submitted by eight Vendors {Bidders} were deemed non-responsive for failing to include Attachment #2 – *Experience of Bidder* Form with the Quote; Quotes from two other Vendors {Bidders} were deemed non-responsive for failing to include all information required on Attachment #2 – *Experience of Bidder* Form; and the Quote submitted by another Vendor {Bidder} was deemed non-responsive for failing to include Attachment #1 – Vendor Equipment Form and Attachment #2 – *Experience of Bidder* Form. See, Recommendation Report, pp. 6-8. None of these eleven Vendors {Bidders} was permitted to clarify or cure the submitted Quote. See, Recommendation Report.<sup>3</sup>

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<sup>3</sup> As alluded to in this request for a stay, in its original protest, Central Jersey referenced that the Division permitted Vendors {Bidders} to cure deficiencies related to the submission of the required *Ownership Disclosure Form*. The ownership disclosure examples cited by Central Jersey in its original protest overturned automatic rejections of Quotes after the Division determined each Vendor {Bidder} either submitted statutorily-required ownership information within the Quote or that Vendor {Bidder} had a valid, signed Ownership Division form on file with the Division that was dated and received within the prior six months. N.J.S.A. 52:25-24.2 requires all Vendors {Bidders} to provide "a statement setting forth the names

Accordingly, Central Jersey has not established by clear and convincing evidence that it has a reasonable probability of success on the merits.

**4. The balance of the relative hardship weighs in favor of denying the request for a stay.**

Lastly, Central Jersey has not established that the balance of the hardship weighs in its favor, that it will suffer irreparable harm or that the subject matter of the suit will be destroyed if the stay is not granted. In support of its request, Central Jersey acknowledges that “it would not be out of the ordinary to have winter weather conditions in October.” Central Jersey Request for a Stay, p. 8. Rather, Central Jersey seeks to maintain the status quo. Ibid.

Bid Solicitation Section 3.5 *Snow Season* advises that “the Vendor {Contractor} shall be prepared to provide services during the Winter Season period, beginning October 1<sup>st</sup> through April 30<sup>th</sup>.” As such, all Vendors {Contractors} will be required to have “All trucks . . . fully operational and ready to report for a Call-Out by October 1<sup>st</sup> of each year of the Blanket P.O. {Contract}.” Therefore, it is imperative that the State have the Blanket P.O.s in place by October 1, 2018. If the State does not move forward with the Blanket P.O. awards, the public will suffer hardship if NJDOT is unable to perform necessary equipment inspections and provide the Vendors {Contractors} with equipment if necessary prior to the start of the 2018 snow plowing season. Further, should a winter event happen in the interim the State Court please placed in a position where it was not able to plow sections of highways and/or roads thereby placing the health and safety of the public at risk. “The important role the public interest plays when implicated, as here, and have held that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.” Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Authority, 433 N.J. Super. 445, 453-54 (App. Div. 2013) citing, Union County, supra, 399 N.J. Super. at 520-21.

I note that the Division’s governing regulations permit the Division to award contracts, notwithstanding the receipt of a protest under certain circumstances. “The Director may award the contract, notwithstanding the receipt of a protest pursuant to the above provisions, if the failure to award the contract will result in substantial cost to the State or if public exigency so requires. In such event, the Director shall notify all interested parties.” N.J.A.C. 17:12-3.3(c). Because of the important public interest, and because Central Jersey did not establish a probability of success on the merits or that the balance of equity’s weighed in its favor, as permitted by the Division’s governing regulations, the Division and NJDOT previously preceded with the contract awards prior to the receipt of Central Jersey’s request for a stay.

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and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be.” The statute expressly provides that this ownership information be provided to the Division “prior to the receipt of the bid or accompanying the bid.” Ibid. (emphasis added). While the Division publishes the *Ownership Disclosure Form* to make compliance with the requirements of N.J.S.A. 52:25-24.2 easier, submission of the specific form is not required as long as the statutorily required information is included “prior to” or within the Quote. If the statutorily required information is provided to the Division “prior to” or within the Quote there is technical compliance with the statute and the Bid Solicitation requirement, even if the *Ownership Disclosure Form* itself is not submitted. In those situations, there was no material deviation or impermissible clarification.



In light of the findings set forth above, I deny Central Jersey's request for a stay. 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 Quote. This is my final agency decision with respect to the request for stay submitted by Central Jersey.

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](http://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.

Sincerely,

A handwritten signature in blue ink that reads "magriff". The signature is stylized and cursive.

Maurice A. Griffin  
Acting Director

MAG: RUD

c: P. Michaels  
L. Spildener  
M. Groninger