



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
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October 3, 2019

Via Electronic Mail [washingtoncollision@yahoo.com] and USPS Regular Mail

Dennis Chamberlain
Washington Collision Center, LLP
65 Route 31 North
Washington, NJ 07882

Re: I/M/O Bid Solicitation #19DPP00334 Washington Collision Center, LLP
T2171 – Vehicle Towing and Roadside Services
Protest of Notice of Intent to Award

Dear Mr. Chamberlain:

This letter is in response to your correspondence of August 15, 2019, on behalf of Washington Collision Center, LLP (Washington) to the Division of Purchase and Property's (Division) Hearing Unit protesting the August 9, 2019, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau). In the protest letter, Washington requests that the Division cancel and re-bid Bid Solicitation #19DPP00334 T2171 – Vehicle Towing and Roadside Services (Bid Solicitation). The record of this procurement reveals that the Bureau deemed Washington's Quote non-responsive to the requirements of the Bid Solicitation because its certification as a Small Business Enterprise had been revoked as of the Quote opening date.

By way of background, on January 18, 2019, the Bureau issued the Bid Solicitation on behalf of the Bureau of Transportation Services, Division of Administration, Department of the Treasury (Transportation), to solicit Quotes from qualified Vendors {Bidders} to provide vehicle towing and roadside repair services. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award up to five Blanket P.O.s in each county to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation is most advantageous to the State, price and other factors considered. *Ibid*. On February 28, 2019, the Bureau issued Bid Amendment #1 extending the Quote submission deadline to April 3, 2019. On March 25, 2019, the Bureau issued Bid Amendment #2 responding to the questions received from potential Vendors {Bidders} and extending the Quote submission deadline to April 11, 2019.

On April 11, 2019, the Division's Proposal Review Unit opened 34 Quotes received by the submission deadline of 2:00 pm eastern time. On July 30, 2019, after completing its review and evaluation of the Quotes received, the Bureau completed a recommendation report which recommended Blanket P.O. awards be made to sixteen Vendors {Bidders} whose submitted Quotes were most advantageous to the State, price and other factors considered. On August 9, 2019, the Bureau issued the NOI advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s to the following Vendors {Bidders}:

A&B Auto Repair	Jack's Auto Service
A-1 Towing	John's Main Auto Body
Bergen Brookside Towing	Johnson Specialized Transportation
City Wide Towing	Nick's Towing Service
Donald Rzepka (a/l Al's Auto Body)	P.P.T.D. LLC
GJ Auto Repair & Service	Puleio's Service Center
Glendola Service Center	SHT Corporation
Hy-Way Towing & Collision	TruckMasters Inc.

On August 15, 2019, Washington submitted a protest to the Division's Hearing Unit. In the protest letter, Washington states that:

As I know in our case with the Small Business Registration Form states that it doesn't expire until 10/26/2019. I assume that the other Vendors (Bidders) have the same error as of expiration date. As many of the Vendors (Bidders) have doing this same Bid Solicitation since August 30, 2012 with seven extension for 7 years to continue to supply the State with towing and roadside services As in our case with no rate increase on any extension which only benefited the State of New Jersey.

As the State doesn't send out letter for any updates of this form as it does on other yearly form such as the Annual Report. As I had tried many times to update the Small Business Form on the state web site before bid due date through the MYNEWJERSEY web site NJPORTAL.COM the site has been down is still down as of today. When trying to call the Small Business Registration office to verify that the forms were up to date before the opening bid date you must leave a message which no one has returned my multiple calls from that office. When calling the technical web site number I was told they have to work out the kinks in the system. If 15 out 16 Vendors (Bidders) had the same error that the system might need to be updated.

As I feel that this Bid Solicitation should be rebid since there was no way to update the Small Business Certification due to the failing state web site or get verbal verification due to the lack of no return phone calls. Or give 15 Vendors (Bidders) the same opportunity that you extend to Truck Master to correct their error on a MUST submit form.

In the protest, Washington raises the following questions:

- (1) Why was Truck Master's Inc. permitted to clarify its ownership after the Quote opening date?
- (2) How will the State know if a Vendor {Contractor} employs subcontractors to perform part of the work? Why would the State permit subcontractors as they won't be held to the same standard?
- (3) How could the current contract have been extended for so many years? And how can the current contract be extended when the current Bid Solicitation has been awarded?

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

an informed final agency decision on the merits of the protest submitted by Washington. I set forth herein my final agency decision.

In 1983 the New Jersey Legislature enacted the “Set-Aside Act for Small-Businesses, Female Businesses and Minority Businesses.” See, N.J.S.A. 52:32-17 et seq. The law required that the Division, when setting contracts aside for award to Small Business Enterprises advise the bidding community of the same and reject all Quotes from those businesses that are not certified as of the Quote opening date. See, N.J.S.A. 52:32-25. The regulations promulgated by the Department of the Treasury regarding Small Business Set-Asides similarly states “[i]f a business is to be eligible to bid on a specific set-aside contract or participate in the subcontracting target programs for purposes of this chapter, it must be registered as a small or veteran-owned business by [Division of Revenue and Enterprise Services (DORES)] on or before the date the bid or proposal is due at the State contracting agency.” See, N.J.A.C. 17:13-3.2. A review of the subject Bid Solicitation reveals that all Vendors {Bidders} were put on notice that awards would be confined to those businesses certified as Small Business Enterprise as of the Quote opening date. Specifically, the Bid Solicitation stated that:

Pursuant to the provisions of N.J.S.A. 52:32-17 and N.J.A.C. 17:13 this is a full Set-Aside Blanket P.O. for Category I, II, & III for Small Businesses. The Vendor {Bidder} must¹ be registered as a qualifying small business with the Division of Revenue and Enterprise Services, Small Business Registration and M/WBE Certification Services Unit by the date the Quote is received and opened. Evidence that the Vendor {Bidder} has registered as a small business should be submitted with the Quote. Vendors {Bidders} should verify its Small, Minority, Veteran, and Women Owned Business Certification status on the “Maintain Terms and Categories” Tab within its profile in *NJSTART*. In the event of an issue with a Vendor’s {Bidder’s} Small, Minority, Veteran, and Women Owned Business Certification status, *NJSTART* provides a link to take corrective action.

Inasmuch as this is a full or partial set-aside Blanket P.O., the Vendor {Bidder} should provide, as part of its response to this Bid Solicitation, proof of its current registration as a qualifying small business with the New Jersey Division of Revenue and Enterprise Services, Small Business Registration and M/WBE Certification Services Unit. Application and registration requirements are presented on the web at <http://www.nj.gov/njbusiness/contracting/> or by contacting that agency as indicated below during business hours.

New Jersey Department of the Treasury
Division of Revenue and Enterprise Services
Small Business Registration and M/WBE Certification Services Unit
33 West State Street – Fifth Floor
PO Box 026
Trenton, NJ 08625-0026
Telephone: 609-292-2146
Fax #: 609-292-8764

¹ “Must – Denotes that which is a mandatory requirement.” See, Bid Solicitation Section 2.2 *General Definitions*.

**** IF THE VENDOR {BIDDER} IS AN INCUMBENT VENDOR {CONTRACTOR} AND/OR HAS PREVIOUSLY REGISTERED OR BEEN CERTIFIED UNDER THE FORMER SBE/MBE/WBE PROGRAM, THE VENDOR {BIDDER} SHOULD ENSURE IT IS REGISTERED ON THE DAY OF QUOTE RECEIPT WITH THE DIVISION OF REVENUE AND ENTERPRISE SERVICES, SMALL BUSINESS REGISTRATION AND M/WBE CERTIFICATION SERVICES UNIT TO BE ELIGIBLE FOR AWARD.**

IN ORDER TO EXPEDITE THE SMALL BUSINESS REGISTRATION PROCESS FOR THIS PROCUREMENT, THE VENDOR {BIDDER} MAY FAX A COPY OF BID SOLICITATION PAGE ONE (1) REFLECTING THE QUOTE SUBMISSION DATE ALONG WITH THE COMPLETED SMALL BUSINESS REGISTRATION FORM TO THE NEW JERSEY DIVISION OF REVENUE AND ENTERPRISE SERVICES, SMALL BUSINESS REGISTRATION AND M/WBE CERTIFICATION SERVICES UNIT TO THE FAX NUMBER ABOVE.

[Bid Solicitation Section § 4.4.1.4.1 *Small Business Set-Aside Blanket P.O.* Emphasis added.]

Further, the Bid Solicitation notified Vendors Bidders that they could verify their certification status in *NJSTART*. Specifically, Bid Solicitation Section 4.4.1.4 *Small Business Registration For Set-Aside Blanket P.O.*

Vendors {Bidders} should verify its Small, Minority, Veteran, and Women Owned Business Certification status on the “Maintain Terms and Categories” Tab within its profile in *NJSTART*. In the event of an issue with a Vendor’s {Bidder’s} Small, Minority, Veteran, and Women Owned Business Certification status, *NJSTART* provides a link to take corrective action.

Moreover, in response to a question posed by a potential Vendor {Bidder}, in Bid Amendment #2, the Bureau confirmed the requirement that a Vendor {Bidder} must be registered as Small Business Enterprise by the Quote opening date.

#	Bid Solicitation Section Reference	Question (Bolted) and Answer
7	Section 4.4.1.4.1 Small Business Set-Aside Blanket P.O.	<p>My firm has always been a small business. Is it really necessary for me to be registered in order to submit a bid?</p> <p>YES. The Vendor {Bidder} must be registered as a qualifying small business with the Division of Revenue and Enterprise Services, Small Business Registration and M/WBE Certification Services Unit by the date the Quote is received and opened. Evidence that the Vendor {Bidder} has registered as a small business should be submitted with the Quote.</p> <p>Please refer to Section 4.4.1.4.1 for more information related to this Bid Solicitation’s Small Business Set-Aside requirements.</p>

A review of the records maintained by DORES reveals that Washington was not certified as Small Business Enterprise on April 11, 2019, the Quote opening date. The records reveal that Washington received its initial certification as a Small Business Enterprise on or about November 9, 2007; however, that certification expired on November 8, 2008. Washington renewed its certification on October 25, 2010 (expired on October 24, 2013); October 16, 2013 (revoked on January 14, 2016); October 26, 2016 (revoked on January 24, 2019); and, then August 22, 2019.

With respect to the subject Bid Solicitation, Washington was certified as Small Business Enterprise on October 26, 2016. As required by the applicable regulations, Washington was required to submit its Small Business Enterprise Annual Verification Form on October 26, 2018. Specifically, the regulations provide in part:

(e) Annually the business shall submit, prior to the anniversary of the registration notice, a verification statement, in which it shall attest that there has been no change in the ownership, revenue eligibility, or control of the business at the State's website, <https://www.njportal.com/DOR/SBERegistry/>.

1. If the business fails to submit the annual verification statement by the anniversary date of the registration notice, the registration will lapse and the business will be deemed revoked from the State's small business database. If the business seeks to be registered after revocation, it will have to reapply and pay the \$ 167.00 application fee.

[N.J.A.C. 17:13-3.1]

In August 2018, DORES, the certifying entity, notified Washington that it was required to submit the Small Business Enterprise Annual Verification Form by October 26, 2018. Washington did not submit its Small Business Enterprise Annual Verification Form; and therefore, its Small Business Enterprise certification was revoked.

On April 10, 2019, Washington uploaded the documents comprising its Quote to **NJSTART** in response to the subject Bid Solicitation as shown below.

Quote 00002980 - WASHINGTON COLLISION CENTER LLP					
General	Items	Questions	Subcontractors	Terms & Conditions	Attachments (1)
					Evaluations
					Preference
					Reminders
					<u>Summary</u>
Header Information					
Quote #: 00002980	Bid #: 19DPP00334	Status:	Submitted		
Organization: Division of Purchase and Property	Delivery Days: 0	Discount Percent:	0.0		
Description: T2171 - Vehicle Towing and Roadside Services	Alternate Bid: No	Shipping Terms:	F.O.B. Destination		
Bid Flag: Yes	Ship Via Terms:	Payment Term:	Not Applicable		
Freight Terms:	Info Contact: DENNIS CHAMBERLAIN 908-689-1511	Quote Total:	\$1.00		
Promised Date: 07/01/2019					
Comment:					
Date Last Updated: 04/10/2019 03:42:27 PM	User Last Updated: DENNIS CHAMBERLAIN	User Created:	DENNIS CHAMBERLAIN		
Print format: Quote					
Vendor accepts the terms & conditions with no exceptions.					
Bid Acknowledgements:					

At the time that Washington uploaded its Quote documents, its Small Business Enterprise certification was revoked and its **NJSTART** Vendor Profile indicated that its Small Business Enterprise certification was revoked as shown in the figure below.

Category: Certification: Small Business Enterprise

Description: This Certification status is updated daily. If you have questions regarding Small Business eligibility, please see the following link:

Revoked or Expired

Notes:

EXPIRATION DATE 2019-10-26, REVOCATION DATE 2019-01-24

As advised in Bid Solicitation Section 4.4.1.4 *Small Business Registration For Set-Aside Blanket P.O.* and Bid Solicitation Section § 4.4.1.4.1 *Small Business Set-Aside Blanket P.O.*, had Washington reviewed the Terms and Categories Tab within its *NJSTART* Vendor Profile, it would have been aware that its Small Business Enterprise status was revoked. At that time, prior to the Quote opening of April 11, 2019, Washington could have taken steps to cure the revocation. Further, as noted above, Washington's Annual Verification Form was due on October 26, 2018. Had Washington become re-certified at any time between January 8, 2019, the Quote Advertising date, and April 11, 2019, the Quote opening date, (a period of more than three months), Washington may have been eligible for an award.

Subsequent to the issuance of the NOI on August 9, 2019, Washington filed an application for re-certification as a Small Business Enterprise. However, when attempting to file the on-line application it encountered an error message and was compelled to file a paper application. Regardless of the length of time it took for Washington's application for re-certification to be approved, Washington's certification would have been too late for it to be eligible for a Blanket P.O. award for the subject Bid Solicitation, as certification was required prior to Quote opening. See, N.J.S.A. 52:32-25 (stating, "when a contract or portion thereof has been designated as a set-aside, invitations for bids shall be confined to businesses designated by the department as appropriate for the set-aside and bids from other bidders shall be rejected.") Unfortunately, the Division does not have the power to waive the legislative requirement that a Vendor {Bidder} be certified as a Small Business Enterprise as of the Quote opening date. Only the New Jersey Legislature can change a requirement it has mandated.

With respect to Washington's statement that another Vendor {Bidder}, Truck Masters, Inc. (Truck Masters) was permitted to clarify certain information contained within the submitted Quote, I note that the New Jersey Legislature has mandated that a Vendor {Bidder} must supply its ownership information, prior to or with its Quote, to be eligible to enter into a Blanket P.O. with the State. N.J.S.A. 52:25-24.2. In order to make the process of complying with the legislative requirement easier, the Division provides to the bidding community an *Ownership Disclosure Form* to be completed, signed and submitted with the Quote. The record of this procurement reveals that with its submitted Quote, Truck Masters included both its *Ownership Disclosure Form* and the *Two-Year Chapter 51 Form*. On its *Ownership Disclosure Form* Truck Masters indicated that there were no "individuals, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor {Bidder}." However, on its *Two-Year Chapter 51 Form*, also submitted with the Quote, Truck Masters indicated there was one individual who owned 100% of Truck Masters. As such, an ambiguity existed within Truck Masters' submitted Quote. In In re Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, the court held that "[t]he RFP specifically approved of bidders' clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. 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." 279 N.J. Super. 566, 597 (App. Div. 1995), emphasis added. Accordingly,

the Bureau requested that Truck Masters clarify the ambiguity between the two documents included with the submitted Quote. While the Division's provides the bidding community with the *Ownership Disclosure Form*, the submission of the form itself is not necessary to comply with the statutory requirement of providing the ownership information with submitted Quote. The Bureau's request that Truck Masters clarify the ambiguity in its submitted Quote and its acceptance of Truck Masters' response was permitted by law. In Washington's situation however, the document (Small Business Enterprise Certification) was not submitted with the Quote; therefore, no clarification was available to Washington.

Second, with respect to Washington's allegation that any Vendor {Contractor} may use a subcontractor to complete a portion of the contracted services, I note that a Vendor's {Contractor's} use of a subcontractor is governed by Bid Solicitation § 4.4.1.3 *Subcontractor Utilization Plan* requires that "Vendors {Bidders} intending to use a Subcontractor shall submit a Subcontractor Utilization Plan form." With respect to the Quote submitted by Johnson Specialized, Johnson Specialized did submit the Subcontractor Utilization Plan form; however, the form indicated that Johnson Specialized was not using any subcontractors. If after award Johnson Specialized desires to use a subcontractor to perform any portion of the services sought, it is required to inform and seek approval from the Division. See, Bid Solicitation § 4.4.1.3 *Subcontractor Utilization Plan* stating:

in the event the award is granted to the Vendor's {Bidder's} firm and the Vendor {Bidder} later determines at any time during the term of the Blanket P.O. to engage Subcontractors to provide certain goods and/or services, pursuant to Section 5.8 of the SSTC, the Vendor {Bidder} shall submit a Subcontractor Utilization Plan form for approval to the Division in advance of any such engagement of Subcontractors.

The State of New Jersey Standard Terms and Conditions (SSTC) § 5.8 *Subcontracting or Assignment* further discusses a Vendor's {Contractor's} use of subcontractors stating in part:

Subcontracting: The contractor may not subcontract other than as identified in the contractor's proposal without the prior written consent of the Director. Such consent, if granted in part, shall not relieve the contractor of any of his/her responsibilities under the contract, nor shall it create privity of contract between the State and any subcontractor. If the contractor uses a subcontractor to fulfill any of its obligations, the contractor shall be responsible for the subcontractor's: (a) performance; (b) compliance with all of the terms and conditions of the contract; and (c) compliance with the requirements of all applicable laws;

Further, even if Johnson Specialized, or any other Vendor {Contractor}, receives approval to use a subcontractor to perform a portion of the awarded work, the Vendor {Contractor} is nonetheless responsible for ensuring that the work is performed in accordance with the Bid Solicitation's requirements as the State has no contractual relationship with the subcontractor. See, SSTC § 5.9 *No Contractual Relationship Between Subcontractors and State* stating "Nothing contained in any of the contract documents, including the RFP and vendor's bid or proposal shall be construed as creating any contractual relationship between any subcontractor and the State."

With respect to the extension of the current Blanket P.O.s and the award of new Blanket P.O.s in response to the subject Bid Solicitation, I note that the subject Bid Solicitation did not specify an award date. With respect to the extension of Blanket P.O.s under Bid Solicitation #12-X-22504, the Hearing Unit's review of all of the relevant documents reveals that the current Blanket P.O.s (Bid Solicitation #12-X-22504) had a base term of three years, with two one-year extensions. See, Bid Solicitation #12-X-22504

Section 5.2 *Contract Term and Extension Option*. The New Jersey Standard Terms and Conditions associated with Bid Solicitation #12-X-22504 included additional extension language as follows:

CONTRACT TERM AND EXTENSION OPTION - If, in the opinion of the Director, it is in the best interest of the State to extend a contract, the contractor shall be so notified of the Director's Intent at least thirty (30) days prior to the expiration date of the existing contract. The contractor shall have fifteen (15) calendar days to respond to the Director's request to extend the term and period of performance of the contract. If the contractor agrees to the extension, all terms and conditions including pricing of the original contract shall apply unless more favorable terms for the State have been negotiated.

The Director, during the term of Bid Solicitation #12-X-22504, determined that it was in the State's best interest to extend the existing Blanket P.O.s. As permitted, those Vendors {Contractors} agreeing to the extension had their Blanket P.O.s extended through the current expiration date of November 30, 2019.² Contrary to Washington's belief, the Bureau did not extend the current Blanket P.O.s pursuant to Bid Solicitation Section 5.3 *Contract Transition* which states "[i]n the event that a new contract has not been awarded prior to the contract expiration date, as may be extended herein, it shall be incumbent upon the contractor to continue the contract under the same terms and conditions until a new contract can be completely operational. At no time shall this transition period extend more than 120 days beyond the expiration date of the contract." While the 120-day transition period is available, the Bureau has not invoked it.

Based on the findings set forth above, I sustain the Bureau's August 9, 2019 NOI. 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 business with **NJSTART** at www.njstart.gov, the State of New Jersey's eProcurement system. I encourage you to log into **NJSTART** to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: A. Davis
R. Regan
E. Castaldo

² The last extension associated with Bid Solicitation #12-X-22504 from September 1, 2019 through November 30, 2019, was necessary to provide the Division's Hearing Unit with sufficient time to resolve those protests received in response to the NOI for the subject Bid Solicitation.