



## State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY  
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October 29, 2021

*Via Electronic Mail* [info@gelmanlawfirm.com](mailto:info@gelmanlawfirm.com)

David Gelman, Esq.  
Gelman Law, LLC  
850 Route 70 West  
Cherry Hill, NJ 08002

Re: I/M/O Bid Solicitation #20DPP00556 Johnson's Specialized Transportation, Inc.  
T3118 – Emergency Winter Season Towing Services – NJDOT  
Protest of Notice of Intent to Award – Request for Reconsideration

Dear Mr. Gelman:

This letter is in response to your October 20, 2021 correspondence on behalf of Johnson's Specialized Transportation, Inc. (JSTI), to the Division of Purchase and Property's Procurement Bureau (Bureau) which was forwarded to the Division's Hearing Unit for review. In that correspondence, JSTI requests a reconsideration hearing with respect to the August 20, 2021, Notice of Intent to Award (NOI) issued by the Bureau indicating an intent to award a Master Blanket Purchase Orders (Blanket P.O.s or Contract) to several Vendors {Bidders} for Bid Solicitation #20DPP00556 – T3118 Emergency Winter Season Towing Services (Bid Solicitation). Specifically, JSTI requests reconsideration of the award of Price Lines 29-34 to Hamilton Auto Clinic, LLC (HAC).

By way of background, on December 22, 2020, 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 emergency towing and roadside services at all locations identified on the State-Supplied Price Sheet during the Winter Season, from October 1<sup>st</sup> through April 30<sup>th</sup>. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award Contracts to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation are most advantageous to the State, price and other factors considered, for each Price Line listed on the State-Supplied Price Sheet. *Ibid*.

On February 5, 2021, the Division's Proposal Review Unit opened eighteen (18) Quotes received through the State's **NJSTART** eProcurement system by the submission deadline of 2:00 pm eastern time. The Quotes were reviewed and evaluated by the Bureau consistent with the requirements of Bid Solicitation § 6.7 *Evaluation Criteria*. On August 17, 2021, the Bureau prepared a Recommendation Report which recommended Contract awards to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation are most advantageous to the State, price and other factors considered. The Recommendation Report reveals that HAC was to be awarded price lines 29 – 34 as the Bureau determined that HAC has submitted as Quote which was most advantageous to the State, price and other factors

considered for those price lines. On August 20, 2021, the NOI was issued advising all Vendors {Bidders} of the State's intent to award Contracts consistent with the Bureau's Recommendation Report.

Thereafter, on September 3, 2021, the Division received JSTI's protest challenging the intended Contract award to HAC. JSTI alleged that "[i]t is well known that" HAC does not have the equipment necessary to perform under the terms of the Bid Solicitation for the Price Lines it is to be awarded. Furthermore, JSTI alleges that "a bidder must fully complete the application . . . [by giving] a complete and accurate list of any and all subcontractors along with all of their information", and, because "[HAC] did not provide such information", JSTI protests "to prevent and reverse [HAC]'s award . . ." JSTI further writes that it "suspects" that HAC "substantially underestimated completed contracts amounts." See JSTI Protest, pp. 1-2. HAC was afforded the opportunity to respond to the protest, and on September 23, 2021, submitted a letter in response to the protest along with the affidavit of its managing member, Erica Makuch. In that affidavit, Ms. Makuch stated that "[t]here are no subcontractors that provide towing services for HAC and in particular no subcontractors to be utilized with respect to the aforesaid contract."

On September 29, 2021, the Division issued the final agency decision sustaining the August 20, 2021 NOI. Thereafter, the Bureau completed the administrative process to award a Contract to HAC. On October 4, 2021, JSTI wrote to the Bureau to request reconsideration and a hearing. That email was forwarded to the Division's Hearing Unit for review. On October 5, 2021, the Hearing Unit advised that "Pursuant to the Division's governing regulations, appeals from the final agency decision are to the Superior Court Appellate Division. See, NJAC 17:12-3.1. If [JSTI] wishes to request a reconsideration of the Division's final agency decision [it] may do so by submitting the request to the Division's Hearing Unit by noon on Friday, October 8, 2021. Any request for reconsideration will be reviewed on the papers." JSTI stated that the documentation would be forthcoming, and requested a hearing date. The Division's Hearing Unit advised JSTI that "whether or not an in-person hearing is held is within the sole discretion of the Director. Upon receipt of the request for reconsideration the Director, or Division designee, will determine whether or not an in-person hearing is necessary."

JSTI did not submit its request for reconsideration, request for a hearing and supporting documentation to the Division's Hearing Unit until October 20, 2021.<sup>1</sup> That correspondence was forwarded to HAC who timely submitted a response by October 25, 2021.

First, with respect to JSTI's request for a hearing, I note that requests for an in-person presentation to challenge the intended Contract award, are governed by N.J.A.C. 17:12-3.3(e) which states that "[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. 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). I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the Bureau's Recommendation Report, the relevant statutes, regulations, case law, and the request for reconsideration and response of the intended awardee. The issues raised in request for reconsideration are sufficiently clear such that a review of the record of this procurement has provided me with the information necessary to determine the facts of this matter and to render an informed decision, as such an in-person hearing is not warranted.

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<sup>1</sup> JSTI's request for reconsideration was submitted to the Division well past the October 8, 2021; however, for the sake of completeness it will be addressed in this letter.

Second, with respect to the JSTI's request for reconsideration, I note that:

[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.).]

With the request for reconsideration, JSTI asserts that the issue is whether "Hamilton Auto Clinic, LLC engaged in any fraudulent actions associated with the vehicles." JSTI Request for reconsideration, p. 1. In support of the allegation, JSTI presented a memorandum from an investigator<sup>2</sup> which JSTI claims demonstrates that the HAC's vehicles are not its own, and therefore, HAC does not have the ability to perform the work required under its awarded Contracts. Specifically, the memorandum states:

- 11 vehicles were found to be registered to High Gear Towing LLC 22 US Highway 130 Trenton NJ 08620.
- 2 vehicles were found to registered (sic) to Hamilton Auto Clinic LLC 22 US Highway 130 STE A Trenton NJ 08620.

[JSTI Request for reconsideration, p. 8.]

JSTI continues stating:

The dispute is not whether Hamilton Auto Clinic, LLC has enough vehicles, the dispute is that Hamilton Auto Clinic only has 2 vehicles registered in their name. The remaining vehicles are listed in another company, which is a subcontractor. That was never listed in their application. If Hamilton Auto Clinic, LLC wanted to have the vehicles registered to High Gear Towing, they should have either listed them as a subcontractor, or submitted a separate bid. They did neither.

[JSTI Request for reconsideration, p. 2.]

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<sup>2</sup> JSTI's investigator is listed as Robert Clark Agency, Investigations/Consulting.

In response, HAC submitted a letter stating:

Once again, I am including another affidavit of Erica Makuch on behalf of HAC and High Gear Towing to provide specific clarity to the Division of the Treasury. First, the principals of HAC are Erica and Justin Makuch, both of whom are the managing members of HAC and High Gear and are the exclusive members of each of the LLC's. Both have extensive towing experience including having previously and competently provided emergency towing services for the NJDOT for this same contract from the years 2017 through 2020. During those previous contract years, HAC operated using its own towing equipment as well as that of High Gear without having utilized any subcontractors whatsoever. The business relationship between the two LLC's given their commonality of ownership having the exact same two (2) principals and members, allows HAC to have exclusive and immediate availability to all of High Gear's towing equipment, including all of High Gear's vehicles for use by HAC when and if needed. There are no specific conditions or limitations on HAC's use of the High Gear towing equipment at any time and this business arrangement has existed since High Gear was formed and began its operations. It was in place during the contract years 2017-2020 as stated aforesaid. HAC has financial responsibility for the High Gear towing equipment including the vehicles but that in no way shape or form has any subcontractor relationships as desperately and inaccurately advanced by Mr. Johnson.

Further, HAC included an affidavit from Ms. Makuch verifying the information contained in the October 25, 2021 letter.

As noted above, the Bid Solicitation sought Quotes from qualified Vendors {Bidders} to provide emergency towing and roadside services. Bid Solicitation § 1.1 *Purpose and Intent*. Awarded Vendors {Contractors} are required to complete the services set forth in Bid Solicitation Section 3.0 *Scope of Work*, including "Supply all manpower, vehicles, and as required, equipment necessary to perform services." Bid Solicitation Section 3.5.1 *General Requirements*. The Bid Solicitation further details requirements for the awarded Vendors {Contractors} and its employees, but notably does not require that a Vendors {Contractors} own the trucks necessary to complete the contracted work. Rather, the awarded Vendors {Contractors} must have access to the vehicles and equipment necessary to performs the services awarded. Whether a Vendor {Contractor} choose to utilize its existing fleet of vehicles and equipment, purchase new vehicles and equipment, rent vehicles and equipment, or if it has access to vehicles and equipment owned by another entity is within the discretion of the awarded entity.

With respect to the use of subcontractors, Bid Solicitation Section 4.4.1.3 *Subcontractor Utilization Plan* stated:

For a Quote that does NOT include the use of any Subcontractors, by signing the Bid Solicitation Offer and Acceptance Page, the Vendor {Bidder} is automatically certifying that 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.

Further, Bid Solicitation Section 5.5 *Vendor {Contractor} Responsibilities* stated "The Vendor {Contractor} shall have sole responsibility for the complete effort specified in this Blanket P.O."

HAC submitted a Quote for price lines 3, 4, and 29 – 34. With the Quote, HAC include the Offer and Acceptance Page agreeing to the following:

By signing and submitting this Offer, the Vendor {Bidder} certifies and confirms that:

1. The Vendor {Bidder} has read, understands, and agrees to all terms, conditions, and specifications set forth in the State of New Jersey Standard Terms and Conditions and the provisions set forth in the Bid Solicitation Section 4.4.1.1.1 (MacBride Principles Certification), Section 4.4.1.1.2 (Non-Collusion), and Section 4.4.1.1.3 (New Jersey Business Ethics Guide Certification);
2. The Vendor's {Bidder's} failure to meet any of the terms and conditions of the Blanket P.O. as defined in the Bid Solicitation shall constitute a breach and may result in suspension or debarment from further State bidding;
3. A defaulting Vendor {Contractor} may also be liable, at the option of the State, for the difference between the Blanket P.O. price and the price bid by an alternate Vendor {Bidder} of the goods or services in addition to other remedies available; and
4. By signing and submitting this Offer, the Vendor {Bidder} consents to receipt of any and all documents related to this Bid Solicitation and the resulting Blanket P.O. by electronic medium.

HAC did submit the Subcontractor Utilization Plan form with its Quote. The form indicated that HAC was not using any subcontractors. By signing the Bid Solicitation Offer and Acceptance Page, HAC certified that, in the event it determines to engage subcontractors, it would submit a Subcontractor Utilization Plan form for approval to the Division in advance of any such engagement, as is required by Bid Solicitation § 4.4.1.3. HAC was awarded price lines 29 – 34 to perform the towing services sought in the Bid Solicitation.

HAC has not sought approval for the use of subcontractors, and, in the affidavit submitted in response to the JSTI's original protest, HAC indicated that it does not anticipate using subcontractors for this Contract. Rather, HAC advised that it has access to all of the vehicles and equipment necessary to perform the services sought. As noted in the Bid Solicitation, this is a contract for providing towing services, not for providing tow trucks. Notably, the Bid Solicitation did not require that a Vendor {Bidder} own all of the vehicles and equipment necessary to perform the services sought. In fact, the Bid Solicitation did not require that HAC or any Vendor {Bidder} submit an equipment list with the Quote. Rather, the list of vehicles provided by HAC was submitted solely in response to JSTI's protest.

In order to perform the services sought by the Bid Solicitation, a Vendor {Contractor} must have access to use vehicles and equipment necessary to perform the services sought. Here HAC has certified that it has access to the vehicles and equipment necessary to perform the services sought from High Gear Towing LLC (High Gear), a company which has the common owners to HAC. Importantly, JSTI as not alleged, and HAC has not stated, that it will be using employees of High Gear to perform any of the contracted towing services. If, in the future, HAC needs to use a subcontractor, High Gear or any other

company, to perform a portion of the towing services awarded, it will be required to follow the procedures set forth in the Bid Solicitation.

Based upon the foregoing, I find no reason to disturb the Bureau's recommendation that price lines 29 – 34 be awarded to HAC. Accordingly, I sustain the August 20, 2021, Notice of Intent to Award and the September 29, 2021 final agency decision.

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,



Maurice A. Griffin  
Acting Director

MAG: RUD

c: R. Regan  
K. Popso  
Hamilton Auto Clinic, LLC