



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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September 5, 2018

Via Electronic Mail [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
Protest of Notice of Intent to Award

Dear Mr. Hunt:

This letter is in response to your correspondence of August 24 and 28, 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 protests the August 24, 2018 Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) indicating an intent to award Master Blanket Purchase Orders (Blanket P.O.s)¹ to several Vendors {Bidders} for Bid Solicitation #18DPP00205 - T0777 Snow Plowing and Spreading Services (Bid Solicitation). The record of this procurement reveals that Central Jersey's Quote was deemed non-response for failing to submit Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form.

¹ For consistency, this final agency decision uses terminology employed by the State of New Jersey's **NJSTART** eProcurement system. For ease of reference, the following is a table which references the **NJSTART** term and the statutory, regulatory and/or legacy term.

NJSTART Term	Statutory, Regulatory and/or Legacy Term
Bid Solicitation	Request For Proposal
Bid Amendment	Addendum
Change Order	Contract Amendment
Master Blanket Purchase Order	Contract
Offer and Acceptance Page	Signatory Page
Quote	Proposal
Vendor {Bidder}	Bidder
Vendor {Contractor}	Contractor

By way of background, on January 30, 2018, the Division's Procurement Bureau ("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 Master 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.

The Bid Solicitation advised all Vendors {Bidders} how the Bureau would review and evaluate Quotes in Bid Solicitation Section 6.7 *Evaluation Criteria*:

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.

Further, Bid Solicitation section 1.1 *Purpose and Intent* detailed that the procurement would occur in three phases, as follows:

Award of this Bid Solicitation {RFP} will be conducted in three (3) consecutive phases, as described further below. All phases will continue until all Snow Sections² have been awarded. Pricing shall not be released until completion of all phases and the final Notice of Intent to Award has been issued.

This procurement will be bid in three consecutive phases, numbered One, Two and Three. The first Phase will be Phase One (1). In Phase One (1), the State will attempt to award all Snow Sections. To the extent that any Snow Sections remain un-awarded following Phase One (1), the State will request that all Vendors {Bidders} who submitted a Quote {Proposal} to this Bid Solicitation {RFP} for Phase One (1) submit a Phase Two (s) price sheet addressing any Snow Sections that remain un-awarded that the Vendor {Bidder} is interested in. The State will attempt to award all remaining Snow Sections in Phase Two (2) based on the Phase Two price sheets received. In the event that any Snow Sections remain un-awarded after Phase Two (2) is completed, the State will request that all Vendors

² The Bid Solicitation defined the term "Snow Section" as "[a] predetermined section of the highway requiring snow plowing and/or spreading services." Bid Solicitation § 2.3 *Blanket P.O. {Contract}-Specific Definitions/Acronyms*.

{Bidders} submit a Phase Three (3) price sheet, addressing any Snow Sections that remain un-awarded, that the Vendor {Bidder} is interested in.

Under no circumstances shall any Vendor {Bidder}, when submitting a Phase Two (2) or Phase Three (3) price sheet after being requested to do so by the State, submit any supplemental or additional information regarding any other aspects of its previously-submitted bid. During Phase Two and Phase Three, the State will only consider the price sheets, and will not consider any additional or supplemental information or documents.

1. **Phase One (1)** – will apply to all Vendors {Bidders} that have submitted a responsive Quote {Proposal};
2. **Phase Two (2)** – will apply to all Snow Sections not awarded and will occur after the Notice of Intent to Award has been issued for Phase One (1) and prior to the issuance of the final Notice of Intent to Award. All Vendors {Bidders} that have submitted a responsive Quote {Proposal}, in response to this Bid Solicitation {RFP}, will be eligible to participate during Phase Two (2); and
3. **Phase Three (3)** – will apply to Snow Sections not awarded and will occur after the Notice of Intent to Award has been issued for Phase Two (2) and prior to the issuance of the final Notice of Intent to Award. All Vendors {Bidders} that have submitted a responsive Quote {Proposal}, in response to this Bid Solicitation {RFP}, will be eligible to participate during Phase Three (3).

In other words, only those Vendors {Bidders} whose original submitted Quotes were responsive to the requirements of the Bid Solicitation would be able to participate in and submit pricing for Phase 2 and Phase 3.

On February 28, 2018, the Bureau issued Bid Amendment #1 responding to the questions posed by potential Vendors {Bidders}. 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.³ Thirty-two Vendors {Bidders} had their Quotes automatically rejected by the Proposal Review Unit for failure to conform to the mandatory administrative requirements for Quote submission.

A review of the Quotes submitted by the submission deadline reveals 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*;

³ The Quote breakdown was as follows: 164 distinct Vendors {Bidders} submitted a total of 177 Quotes. Thirty-six (36) Vendors {Bidders} submitted hard copy Quotes and four (4) of those also submitted a Quote through **NJSTART**. One hundred and thirty one (131) Vendors {Bidders} submitted Quotes via **NJSTART**, six (6) of those submitted multiple duplicate Quotes through **NJSTART**.

- 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.

The Bureau issued its NOI announcing intended awardees following all three phases of the procurement on August 24, 2018. Later on August 24, 2018, Central Jersey sent the Bureau an email 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. First, Central Jersey noted the Division had reconsidered the automatic rejections of a number of Vendors {Bidders} who had failed to submit *Ownership Disclosure Forms* with their Quotes. In one instance, Central Jersey notes, the Division accepted an *Ownership Disclosure Form* that a Vendor {Bidder} had submitted to the Division in response to an earlier procurement even though

that Vendor {Bidder} failed to include the form within its Quote. In a second instance, the Division accepted ownership information included within a different form as substantial compliance with ownership disclosure requirements of N.J.S.A. 52:25-24.2. Central Jersey, therefore, requests that the Division apply a similar reasoning and conclude that Central Jersey's "experience information . . . is readily available to the State by virtue of [Central Jersey]'s five (5) years of performing spreading work under previous contracts with the State, and the verification of equipment was submitted with Attachment #1."

Second, Central Jersey asserts that the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form "is neither required by statute nor relevant to the scope of work" and concludes that the Bureau's determination that failure to include it is "manifestly unfair." In support of this argument, Central Jersey argues that the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience form required the Vendor {Bidder} to "answer six (6) questions about the Vendor/Bidder's experience plowing snow. Importantly, [Central Jersey] exclusively bid on spreading operations, in particular, price lines 336, 337, 350, 359, 372, and 375." While Central Jersey does not expressly request that the Division accept it as timely filed, Central Jersey's supplemental protest included a completed Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form.

Finally, Central Jersey states "the **NJSTART** eProcurement system was not functioning properly in uploading [Central Jersey]'s documents," as demonstrated by the fact that "the Disclosure of Investment Activities in Iran and Statement of Vendor/Bidder Ownership, were uploaded multiple times in submitting [Central Jersey]'s Quote." It notes "the **NJSTART** homepage has a public bulletin informing users of technical issues with the site." Central Jersey requests an opportunity for an in-person hearing, or, in the alternative, a reconsideration of the finding of non-responsiveness.

With respect to Central Jersey's request for an in-person presentation, 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. 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 information hearing." N.J.A.C. 17:12-3.3(d). In consideration of Central Jersey's protest, I have reviewed the record of this procurement, including the Bid Solicitation, Central Jersey's Quote and protests, the relevant statutes, regulations, and case law. The issues raised in Central Jersey's protest 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 Final Agency Decision on the merits of the protest submitted by Central Jersey on the written record. I set forth herein the Division's Final Agency Decision.

DISCUSSION

A. Central Jersey's Quote Contained a Material Deviation from the Bid Solicitation

The Division's administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal shall⁴ conform to the following requirements or be

⁴ The terms "shall" and "must" are defined to mean "that which is a mandatory requirement." Bid Solicitation § 2.2 *General Definitions*. The terms "should" and "may" are defined to mean "that which is permissible or recommended, not mandatory." Bid Solicitation § 2.2 *General Definitions*.

subject to designation as a non-responsive proposal for non-compliance:

...

4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), *emphasis added*.]

The subject solicitation was comprised of the Bid Solicitation, other documents and mandatory forms which were specifically addressed within Bid Solicitation Section 4.0 *Quote {Proposal} Preparation and Submission* 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.

[Bid Solicitation § 4.4.3 *Submittals*.]

As outlined above, Central Jersey did not include a Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form within its Quote. Therefore, the question is whether Central Jersey's failure to submit Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form as required by Bid Solicitation section 4.4.3 *Submittals* represents a material deviation from the requirements of the Bid Solicitation.

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. 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 for determining materiality as set forth by the court in Township of River Vale v. Longo Construction Co., 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] and hence non-waiveable irregularity.'" 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) (citing River Vale, *supra*, 127 N.J. at 216). The River Vale court set forth a two-part test for determining whether a deviation is material:

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-waiveable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *Id.* at 222.

Based upon a review of the record and applicable law, I find that Central Jersey’s Quote contains a material deviation from the requirements of the solicitation making its Quote nonresponsive. With respect to the previously mentioned River Vale factors, I find that Central Jersey’s failure to include experience information within its Quote deprives the State of its assurance that the Blanket P.O. will be entered into, performed, and guaranteed according to the Bid Solicitation’s specified requirements because the Bid Solicitation advised all Vendors {Bidders} that their experience represented a material factor upon which the Quotes would be evaluated and awarded. For example, Bid Solicitation section 3.2 *Vendor {Contractor} Requirements* establishes that all Vendors {Contractors} shall possess “at a minimum, two (2) years’ experience performing snow plowing or spreading services on public roadways.” Similarly, Bid Solicitation section 6.7 *Evaluation Criteria* advised all Vendors {Bidders} that its experience as documented in the submitted Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form would represent a factor in the evaluation of submitted Quotes. Accordingly, Central Jersey’s failure to submit the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form or otherwise documenting its experience within its Quote deprived the State of assurance that Central Jersey met the minimum qualifications for the award of a Blanket P.O. and undermined the ability of the Division to conduct the evaluation of the Quote as required by the Bid Solicitation.⁵ Further, if the Division were to consider Central Jersey’s Quote even though it had not included a completed Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form, Central Jersey would be in a position of advantage over other Vendors {Bidders} who might not have bid on the project had they known they could avoid demonstrating the required two years’ experience plowing or spreading on public roadways.

B. The Division Cannot Consider Central Jersey’s Positive Incumbent Experience Not Detailed Within the Quote

Central Jersey urges the Division to consider its “five (5) years of performing spreading work under the previous contracts with the State.” However, this information is outside of the four corners of the Quote submitted by Central Jersey and considering this information would give Central Jersey an unfair advantage over non-incumbent vendors.

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 positive experience with the

⁵ Central Jersey’s supplemental protest included a completed Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form. While not expressly requested by Central Jersey, it is noted that the above conclusion that Central Jersey’s failure to submit a completed Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form represents a material deviation from the Bid Solicitation also prevents the Division from allowing Central Jersey to cure the material deviation after award. On-Line Games, *supra*, 279 N.J. Super. at 590 (“Contracting authorities may not waive any material or substantial variance between the conditions under which the bids are invited and the proposal submitted.”).

State of New Jersey, the Bureau cannot now reach outside of the Quote to pull that information in without compromising the Bid Solicitation's level playing field.⁶ Doing so would provide Central Jersey preferential treatment simply because of its status as an incumbent contractor.

The ownership disclosure examples cited by Central Jersey overturned automatic rejections of Quotes after determining 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 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). The *Ownership Disclosure Form* is specifically addressed in Bid Solicitation section 4.4.1.2.1 *Ownership Disclosure Form* which adds more detail on the ability of the Division to consider information submitted prior the receipt of the Quote:

Pursuant to N.J.S.A. 52:25-24.2, in the event the Vendor {Bidder} is a corporation, partnership or limited liability company, the Vendor {Bidder} must complete an Ownership Disclosure Form.

A current completed Ownership Disclosure Form must be received prior to or accompany the submitted Quote {Proposal}. A Vendor's {Bidder's} failure to submit the completed and signed form with its Quote {Proposal} will result in the rejection of the Quote {Proposal} as non-responsive and preclude the award of a Blanket P.O. {Contract} to said Vendor {Bidder} unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six (6) months prior to the Quote {Proposal} submission deadline for this procurement. If any ownership change has occurred within the last six (6) months, a new Ownership Disclosure Form must be completed, signed and submitted with the Quote {Proposal}.

In the alternative, to comply with this section, a Vendor {Bidder} with any direct or indirect parent entity which is publicly traded may submit the name and address of each publicly traded entity and the name and address of each person that holds a 10 percent or greater beneficial interest in the publicly traded entity as of the last annual filing with the federal Securities and Exchange Commission or the foreign equivalent, and, if there is any person that holds a 10 percent or greater beneficial interest, also shall submit links to the websites containing the last annual filings with the federal Securities and Exchange Commission or the foreign equivalent and the relevant page numbers of the filings that contain the information on each person that holds a 10 percent or greater beneficial interest. N.J.S.A. 52:25-24.2.

Vendors {Bidders} using *NJSTART* to submit a Quote {Proposal} shall make the appropriate certification on the "Maintain Terms and Categories"

⁶ N.J.A.C. 17:12-2.8 outlines the Division's authority to consider a Vendor's {Contractor's} record of poor performance, which is also discussed in Bid Solicitation section 6.10 *Poor Performance*.

Tab within its profile by checking the applicable box and, if required, completing and attaching the shortened Ownership Disclosure Form. Vendors {Bidders} not using **NJSTART** to submit a Quote {Proposal} must complete the full Ownership Disclosure Form located on the Division's website. This form is also available in **NJSTART** (www.njstart.gov).

Vendors {Bidders} may refer to the QRGs "Vendor Forms" and "Attaching Files" for instructions on submitting the forms required by this section of the Bid Solicitation {RFP} through **NJSTART**. Vendors {Bidders} may also refer to the QRG "Vendor Categories and Certifications" for additional instructions on completing shortened versions of required forms by completing certifications on the "Maintain Terms and Categories" Tab within its profile in **NJSTART**. QRGs are located on the **NJSTART** Vendor Support Page.

Vendors {Bidders} utilizing **NJSTART** should designate one (1) version of the Ownership Disclosure Form as the Primary Form. In the event that a Vendor {Bidder} fails to attach an Ownership Disclosure Form, or the attached Ownership Disclosure Form is deemed deficient, the Division may access the Primary Form and consider it as part of the Quote {Proposal}. Note: The Primary Form must have a Date Created within six (6) months of the Quote {Proposal} submission deadline to be considered valid.

In order to make this process of complying with the legislative ownership disclosure requirement easier, the Division provides to the bidding community with an *Ownership Disclosure Form* to be completed, signed and submitted with the Quote. 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. So long as the statutorily required information is included "prior to" or within the Quote, there is technical compliance with the statute and the Bid Solicitation.

Accordingly, as explained in the Recommendation Report, American Asphalt Company, Inc. (American Asphalt) was initially rejected for failure to include an *Ownership Disclosure Form* within its Quote. Recommendation Report, p. 5. However, further review revealed American Asphalt submitted an accurate, signed, and dated *Ownership Disclosure Form* to the Division in response to a separate Bid Solicitation two days before the Quote submission deadline for this Bid Solicitation. Therefore, the automatic rejection was rescinded as American Asphalt complied with the requirements of Bid Solicitation section 4.4.1.2.1, outlined above. The Division withdrew the Notice of Proposal Rejection issued to Jer-Car, Inc. and R. Marinho Enterprises Corporation after determining both Vendors {Bidders} submitted the required ownership information within their Quotes. Recommendation Report, p. 6. While these Vendors {Bidders} did not submit the information on the form of the *Ownership Disclosure Form*, the ownership disclosure information was within the four corners of the Quote because both had submitted a completed *Two-Year Chapter 51/Executive Order 117 Vendor Certification and Disclosure of Political Contributions Form*. As such, the Division determined that all three Vendors {Bidders} substantially complied with N.J.S.A. 52:25-24.2 and Bid Solicitation section 4.4.1.2.1 *Ownership Disclosure Form* and properly rescinded the Notice of Proposal Rejection. See Schlumberger Indus., Inc. v. Borough of Avalon, 252 N.J. Super. 202, 212 (App. Div. 1991), certif. denied, 130 N.J. 8 (1992).

In contrast, experience information has no statute or regulation allowing the Division to consider a Vendor's {Bidder's} positive past performance during the substantive evaluation of a Vendor's {Bidder's}

Quote. Nor does the Bid Solicitation provide a basis to consider positive past performance information from outside of the Quote. See Bid Solicitation § 6.7 *Evaluation Criteria* (stating Quotes would be evaluated based, in part, on “Experience of firm (Attachment #2): The Vendor’s {Bidder’s} documented experience in successfully completing Blanket P.O.s {Contracts} of a similar size and scope in relation to the work required by this Bid Solicitation {RFP}.”). The experience information was a requirement mandated by the New Jersey Department of Transportation’s scope of work, and as noted above, failure to include experience information as required by the Bid Solicitation places Central Jersey in a position of advantage over other Vendors {Bidders} who might have bid on the project had they known they could avoid demonstrating the required two years’ experience plowing or spreading on public roadways. For these reasons, Central Jersey’s request that the Division consider its incumbent status as “material compliance” with the Bid Solicitation’s requirement to submit experience information on Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form must be rejected.

C. Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form Was Not Materially Misleading

Next, Central Jersey argues the Bid Solicitation section 4.4.3 *Submittals* was unclear because it used the term “Snow Sections” and “optional graders and loaders” when discussing the requirement to submit Bid Solicitation Attachment #1 – Vendor {Bidder} Equipment Form and Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form. Central Jersey concluded that because it was only bidding on “spreading services,” Bid Solicitation section 4.4.3 *Submittals* did not apply.

However, Bid Solicitation section 4.4.3 *Submittals* states “[t]he 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.” (Emphasis added). The capitalized term “Snow Sections” was defined in the Bid Solicitation to mean “[a] predetermined section of the highway requiring snow plowing and/or spreading services.” Bid Solicitation § 2.3 *Blanket P.O. {Contract}-Specific Definitions/Acronyms* (emphasis added). Accordingly, the plain language of the Bid Solicitation is clear that Vendors {Bidders} submitting a Quote for spreading services on a specific Snow Section were required to submit a completed Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form with its Quote.⁷

Central Jersey’s supplemental protest augments this argument, stating Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form “had no logical connection to the scope of work for which [Central Jersey] submitted a quote. It would be unjust to deem a quote non-responsive when the vendor/bidder has complied with all requirements that are relevant to the scope of work for which it bid.” First, it is noted that this argument is a challenge to a specification, and it is therefore untimely submitted. *N.J.A.C. 17:12-3.2(b)* requires challenges to specifications be asserted “only after the Division has formally responded to questions posed during the RFP-established question and answer period and in sufficient time to permit a review of the merits of the protest and to take appropriate action as may be necessary, prior to the scheduled deadline for proposal submission.” (Emphasis added). Here, the question and answer period closed on February 16, 2018, and no Vendors {Bidders} submitted questions regarding Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form. The deadline for Quote submission was March 16, 2018. Therefore, because this challenge was only asserted on August 29, 2018 following the issuance of an NOI, this argument is rejected as untimely.

⁷ It is noted that Central Jersey’s Quote included seven completed Bid Solicitation Attachment #1 – Vendor {Bidder} Equipment Forms for each of the Snow Sections upon which it was bidding. The requirement to submit Bid Solicitation Attachment #1 – Vendor {Bidder} Equipment Forms also stems from Bid Solicitation section 4.4.3 *Submittals*. Therefore, Central Jersey’s argument that it did not understand that Bid Solicitation section 4.4.3 *Submittals* applied to Quotes for spreading services is unpersuasive.

Second, addressing the merits of Central Jersey’s assertion, the Bid Solicitation’s plain language required this form to be completed and submitted for all Vendors {Bidders} bidding on any Snow Section, which included spreading services. Further, while the first question on Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form asks “Number of years plowing snow,” the third question advises Vendors {Bidders} that “[i]f you do not possess experience plowing public roadways, please document any plowing or spreading experience you possess[.]” Contrary to Central Jersey’s contention, the questions on the form are not lacking a “logical” connection to spreading services. This conclusion is further supported by the results of the procurement, where only 8 of 136 Vendors {Bidders} failed to include a completed Bid Solicitation #2 – Vendor {Bidder} Experience Form within the Quote.

Next, Central Jersey further argues that the Bid Solicitation was misleading by noting that the **NJSTART** Procurement Program Checklist provided with the Bid Solicitation did not include the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form. Therefore, because the form was not included on the Checklist, Central Jersey states it “did not include it with [the Quote] package.”

Review of the **NJSTART** Procurement Program Checklist reveals a number of cautionary statements advising Vendors {Bidders} that additional submission requirements set forth in the Bid Solicitation may apply. For example, the **NJSTART** Procurement Program Checklist states that it is “a guide” that is “advisory in nature” and, in bold text advises that “[i]t is the Vendor’s {Bidder’s} responsibility to ensure that all requirements of the Bid Solicitation {RFP} have been met.”



Also, in bold red text, the **NJSTART** Procurement Program Checklist concludes with the following language:

Vendors (Bidders) must ensure that all requirements of the Bid Solicitation (RFP) have been met as the Bid Solicitation (RFP) language supersedes this advisory checklist in the event of an error or omission.

Therefore, while it is true that the **NJSTART** Procurement Program Checklist did not specifically include the Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form, all Vendors {Bidders} were expressly notified that the Bid Solicitation may require additional submissions.

D. There Were No **NJSTART System-Wide Issues Impacting Quote Submission**

Central Jersey’s supplemental protest states “it appears from a review of [Central Jersey]’s Quote submission that the **NJSTART** eProcurement system was not functioning properly in uploading [Central Jersey]’s documents. Two different documents, the Disclosure of Investment Activities in Iran and Statement of Bidder/Vendor Ownership, were uploaded multiple times in submitting [Central Jersey]’s Quote. In this regard, we would point out that the **NJSTART** homepage has a public bulletin informing

users of technical issues with the site.” It is noted that Central Jersey does not represent that it was prevented from uploading the required Bid Solicitation Attachment #2 – Vendor {Bidder} Experience Form.

The Division has no record or indication of any down time or system-wide issues impacting *NJSTART* on March 15 or 16, 2018. Further, as noted above, 131 Vendors {Bidders} were able to submit Quotes via *NJSTART* in response to the Bid Solicitation, further supporting the conclusion that there was no system-wide issue that prevented the upload or otherwise interfered with the submission of Quotes via *NJSTART*. Central Jersey itself was able to upload eighteen separate files, including two copies each of the *Disclosure of Investment Activities in Iran Form* and the *Ownership Disclosure Form*. Central Jersey’s supplemental protest references a public bulletin regarding issues with forms functionality within *NJSTART*, but this public bulletin was posted on May 14, 2018, fifty-nine days after the Quote submission deadline, to address an issue preventing the input of forms data into *NJSTART*-native versions of forms. This public bulletin addressed an internet browser compatibility issue where some users were presented with an error message that prevented the input of data into *NJSTART*-native forms. The issue did not impact the uploading of files. Further, the issue arose after the Quote submission deadline for the subject Bid Solicitation. Accordingly, for the reasons outlined above, even though Central Jersey does not assert that it was prevented from uploading a completed Bid Solicitation Attachment #2 – Vendor {Bidder} Equipment Form, I find that there were no system-wide issues impacting *NJSTART* Quote submissions.

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, 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.

Sincerely,



Maurice A. Griffin
Acting Director

MAG:REG

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