



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
PROCUREMENT BUREAU
33 WEST STATE STREET
P. O. BOX 230
TRENTON, NEW JERSEY 08625-0230
<https://www.njstart.gov>

ELIZABETH MAHER MUOIO
Acting State Treasurer

MAURICE A. GRIFFIN
Acting Director

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

January 24, 2018

Via Electronic Mail [rhamilton@triusonline.com] and USPS Regular Mail

Robert C. Hamilton
Executive VP
Trius, Inc.
5049 Industrial Rd.
Farmingdale, NJ 07727

Re: I/M/O Bid Solicitation #: 17DPP00116 Trius, Inc.
Protest of Notice of Intent to Award
Bid Solicitation Title: T3074 – Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms, Mounted on Truck Chassis

Dear Mr. Hamilton:

This letter is in response to your correspondence of November 3, 2017, on behalf of Trius, Inc. (hereinafter “Trius”), which was received by the Division of Purchase and Property’s (hereinafter “Division”) Hearing Unit. In that letter, Trius protests the Division’s Procurement Bureau’s (hereinafter “Bureau”) October 20, 2017 Notice of Intent to Award (hereinafter “NOI”) a Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter “Blanket P.O.”) to Bucks County International Inc. (hereinafter “Bucks County”) and H.A. DeHart & Son, Inc. (hereinafter “H.A. DeHart”) for Bid Solicitation {Request for Proposal} #17DPP00116: T3074 – Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms, Mounted on Truck Chassis (hereinafter “Bid Solicitation”). In the protest, Trius first asserts that it should be awarded a contract because “the Freightliner chassis based [Tymco] 500x being proposed in Trius, Incorporated’s bid constitutes a significantly different model offering than that of Bucks County International which is [a Tymco 500x based] on an International chassis.” Trius protest, p. 1. Second, Trius asserts that the award to H.A. Dehart should be invalidated because the sweeper proposed does not meet the Bid Solicitation’s requirements and because H.A. Dehart impermissibly supplemented its Quote {Proposal} (hereinafter “Quote”) after bid opening. Trius protest, p. 3.

BACKGROUND

By way of background, on February 23, 2017, the Bureau issued the Bid Solicitation on behalf of the State of New Jersey and Cooperative Purchasing Partners to solicit Quotes for heavy duty regenerative air street sweepers with twin gutter brooms, mounted on a truck chassis. Bid Solicitation § 1.1 *Purpose and Intent*. Vendors {Bidders} were advised that the sweepers would be used in a variety of functions including the sweeping of highways, interstates, city streets, and parking lots. Bid Solicitation § 3.4.1 *Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms, Mounted on Truck Chassis*. The intent of the Bid Solicitation was to award a Blanket P.O. for “each Make/Model” of sweeper meeting the

specifications. Bid Solicitation § 1.1 *Purpose and Intent*. The Bid Solicitation advised Vendors {Bidders} that “[t]he unit specified [in the Bid Solicitation] is comparable to a product offered by Schwarze or Tymco, however, any sweeper that meets or exceeds the specifications will be considered.” Bid Solicitation § 3.4.1 *Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms, Mounted on Truck Chassis*. Vendors {Bidders} were instructed that the unit must “be [the] standard manufacturer’s product line available to the general public,” Bid Solicitation § 3.2.2 *Blanket P.O. {Contract} Specific Requirements*, and that it must include all “upgrades and/or accessories which are necessary to make the unit conform to these specifications,” Bid Solicitation § 3.3.4 *Vehicle Specifications – General Provisions*. Taken together, custom fabricated sweepers were prohibited, but manufactured sweepers generally available to the public that were configured or configurable with upgrades and accessories were acceptable.

Following an Electronic Question and Answer Period, the Bureau posted Bid Amendment 1 on March 23, 2017, and Bid Amendment 2 on March 20, 2017, both answering questions received from potential bidders and posting revised Bid Solicitation documents. Bid Amendment 2 also postponed the Quote Submission Due Date to April 11, 2017.

On April 11, 2017, the Proposal Review Unit opened three (3) Quotes received by the submission deadline of 2:00 p.m. Quotes from Bucks County, H.A. DeHart, and Truis were forwarded to the Bureau for review to determine compliance with the requirements of the Bid Solicitation. After initial review of the Quotes, the Bureau determined that a clarification of the Quotes submitted by Bucks County and H.A. DeHart was required.

A. Bucks County Clarifications

Bucks County submitted a Quote via the *NJSTART* eProcurement website which was comprised of all Bid Solicitation-required forms, a copy of the Bid Solicitation and all posted Bid Amendments, and a Bid Solicitation-required price sheet with a listing of available manufacturer’s options. Bucks County’s price sheet established the make, model, and year of the Unit¹ being bid as follows:

PRICE SHEET - T-3074, Bid# 17DPP00116 - Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms, Mounted on Truck Chassis						
Price Line	Item Description	Unit Price	Quantity	Unit of Measure	Total Price	Delivery Days After Receipt of Order
1	Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms Mounted on Truck Chassis as Specified in Section 3.4.1 of the Bid Solicitation (RFP)	\$264,894.00	1	Each	\$264,894.00	(4) units per month beginning 180 days A/R/O
	Make Tyco model 500x heavy					
	Model duty regenerative air					
	Year street sweeper w/ twin gutter brooms mounted on 2018 International 4300-15B Chassis					

¹ The Bid Solicitation defines the term “Unit” as a “...Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms, Mounted on Truck Chassis, as specified herein, made available for outright purchase as a new, unused vehicle under a Blanket P.O. {Contract} established as a result of this Bid Solicitation {RFP}.” Bid Solicitation § 2.2 *Blanket P.O. {Contract}-Specific Definitions/Acronyms*.

Bucks County's price sheet document also included a page of manufacturer's options for the sweeper and chassis, along with a letter from Bucks County stating "[t]he Tymco 500x Sweeper as offered meets or exceeds all specifications with no exception."²

However, Bucks County did not submit "product literature, [or] manufacturer's specification sheets" or "manufacturer's documentation for extended warranty coverages and limitations" with its Quote as indicated in Bid Solicitation § 4.4.3.3 *Product Literature/Manufacturer's Specifications/Manufacturer's Options Price List*, which states:

The Vendor {Bidder} must submit product literature, manufacturer's specification sheets and manufacturer's pre-printed options price list for the unit it proposes to furnish. . . . The Vendor {Bidder} should also provide manufacturer's drawing, schematics and blueprints, if available.

If a Vendor {Bidder} does not provide the product literature, manufacturer's specification sheets and manufacturer's pre-printed options price list for price line item 5, the State reserves the right to request such product literature / manufacturer's specifications for price line 1 or the information from the Vendor {Bidder}. The Vendor {Bidder} must respond to such request by providing all requested information within forty-eight (48) hours. If the information requested is not received within forty-eight (48) hours, the Quote {Proposal} shall be rejected.

Vendors {Bidders} must submit manufacturer's documentation for extended warranty coverages and limitations along with corresponding price lists to meet the requirements for Price line 6.

If a Vendor {Bidder} does not provide the manufacturer's extended warranty price list for price line item 6, the State reserves the right to request such information from the Vendor {Bidder}. The Vendor {Bidder} must respond to such request by providing all requested information within forty-eight (48) hours. If the information requested is not received within forty-eight (48) hours, the Quote {Proposal} shall be rejected.

[Bid Solicitation § 4.4.3.3 *Product Literature/Manufacturer's Specifications/Manufacturer's Options Price List.*]

Accordingly, on July 5, 2017, the Bureau requested Bucks County provide "all manufacturer's specifications/product literature for the Tymco 500x, including cab and chassis specifications, offered on

² As indicated above, Bucks County inserted "(4) units per month beginning 180 days A/R/O" in the "Delivery Days After Receipt of Order" column of the price sheet. It is noted that the Using Agencies are not buying four units per month and no minimum or maximum volume of orders is guaranteed. Bid Solicitation § 3.1 *Blanket P.O. {Contract} Utilization*. Further, pursuant to Bid Solicitation § 4.1 *Quote {Proposal} Preparation and Submission* "[a]fter award of Blanket P.O. {Contract} . . . if the result of the application of a Vendor {Bidder} proposed term or condition included in the Quote {Proposal} would diminish the State's rights, the Vendor {Bidder} proposed term or condition will be considered null and void."

Price line 1” along with all “manufacturer’s documentation for extended warranty coverages and limitations along with corresponding price lists for Price line 6.”³

Bucks County responded in the time permitted, providing the Bureau with (1) product literature for the Tymco 500x Regenerative Air Sweeper, (2) general specifications for the Tymco 500x Regenerative Air Sweeper, (3) chassis cut sheet specifications for the Tymco 500x Regenerative Air Sweeper including the International 4300 chassis and available Freightliner M2-106 chassis, and (4) the requested warranty information and extended warranty price lists. See Bucks County July 7, 2017 clarification response.

However, the Bureau determined it still lacked specific information regarding the unit proposed. Therefore, on August 11, 2017, it sent Bucks County a second clarification letter stating, in part:

Accordingly, please submit all manufacturer’s specifications/product literature for the Tymco 500X offered on Price line 1, specific to the following Bid Solicitation {RFP} sections: Section 3.4.1.4 Dust Control System, Section 3.4.1.5 Operator Controls, Section 3.4.1.6 Hydraulic System, Section 3.4.1.8 Pick-Up Head, Section, 3.4.1.9 Mnin Broom, Section 3.4.1.10, Section Automatic Sweep Interrupt (ASI) System, Section 3.4.1.13 Sweeper Flushing and Cleaning System, and Section 3.4.1.14 Lights & Warning System.

On August 14, 2017, Bucks County provided additional information regarding the Tymco 500x sweeper “organized in table format with different sections identified for the sections requesting additional information . . . provided by the manufacturer, TYMCO, Inc.” See Bucks County August 14, 2017 clarification response.

The Bureau determined it was still unclear from the manufacturer’s information whether the Tymco 500x proposed by Bucks County met all of the Bid Solicitation’s specifications. Accordingly, on September 20, 2017, the Bureau sent Bucks County a third clarification letter. The Bureau cited Bid Solicitation § 6.5 *Oral Presentation and/or Clarification of Quote {Proposal}*, which states, in relevant part:

Vendors {Bidders} may be asked to clarify certain aspects of its Quote {proposal}. A request for clarification may be made in order to resolve minor ambiguities, irregularities, informalities or clerical errors. Clarifications cannot correct any deficiencies or material omissions, or revise or modify a Quote {Proposal}, except to the extent that correction of apparent clerical mistakes results in a modification.

The September 20, 2017 letter then cited six (6) Bid Solicitation technical requirements and asked whether Bucks County’s “Quote {Proposal} price of \$264,894 include[d]” the cited functionality. For example, Bucks County was asked to confirm that the Tymco 500x included “[a] water tank that either has baffles built-in OR is a multiple tank design, as specified in Section 3.4.1.4 of the Bid Solicitation {RFP}.” By letter dated September 26, 2017, the requested response date, Bucks County confirmed the Tymco 500x

³ It is noted that product literature, manufacturer’s specification sheets, manufacturer’s pre-printed options lists, and manufacturer warranty coverage and limitations would be pre-printed at the time of Quote submission by the Vendor {Bidder}, and therefore represents known information at the Quote submission due date. The post-Quote opening request and submission of this information is within the bounds of clarification permitted by N.J.A.C. 17:12-2.7(e) and Bid Solicitation § 6.5 *Oral Presentation and/or Clarification of Quote {Proposal}* as the submission of this pre-printed material “explains or amplifies” the information the Vendor {Bidder} included within its Quote. In re Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995).

Sweeper included the enumerated functionality.⁴ See Bucks County September 26, 2017 clarification response.

B. H.A. DeHart Clarifications

H.A. DeHart submitted a Quote via the *NJSTART* eProcurement website which was comprised of all Bid Solicitation-required forms, a copy of the Bid Solicitation and all posted Bid Amendments, product literature for a number of makes and models of sweeper being bid, warranty and manufacturer's options documentation, and a Bid Solicitation-required price sheet including available manufacturer's options and extended warranties. H.A. DeHart's Quote included product literature and options lists for a number of Schwarze sweepers: A8 Twister, A4 Storm, A7 Tornado, A9 Monson, SuperVac Updraft, M6 Avalanche Single Engine, and M6 Avalanche Twin Engine.

After reviewing the Quote the Bureau determined that only the Schwarze A8 Twister (hereinafter "A8 Twister") was responsive to the Bid Solicitation's requirements. All other makes/models proposed by H.A. DeHart were potentially nonresponsive to the Bid Solicitation's requirements and therefore ineligible for award.⁵ With respect to the A8 Twister, the Bureau determined it needed clarification. The Quote reflected the A8 Twister model offered two alternative chassis, the Peterbilt 220 33K 220HP RH Steer '17 and the Peterbilt 200 33K 220HP Dual Steer '17, but the standard chassis was not clearly identified.⁶ Accordingly, by letter dated July 5, 2017, the Bureau relied on Bid Solicitation § 4.4.3.3 *Product Literature/Manufacturer's Specifications/Manufacturer's Options Price Lists*, and requested H.A. DeHart "indicate the make, model and model year of the [standard] chassis associated with . . . Price line 1." The letter also requested H.A. DeHart "provide the manufacturer's specifications for the Schwarze A8 Twister offered on Price line 1, including manufacturer's specifications for the [standard] cab and chassis offered and for the Peterbilt 220."

On July 7, 2017, H.A. DeHart responded, identifying the "Freightliner, Model M2-106, 2018 Year Model Chassis" as the standard chassis represented on Price line 1. See H.A. DeHart July 7, 2017 clarification response. It also included the A8 Twister manufacturer specifications, the Freightliner chassis manufacturer specifications, and the Peterbilt chassis manufacturer specifications that the Bureau requested. *Ibid.* The A8 Twister manufacturer specifications outlined the major functionality and characteristics of the model based on the following major systems categories: sweeper engine, hydraulic

⁴ The pre-printed product literature and manufacturer's specification sheets failed to address a number of the technical specifications set forth in the Bid Solicitation Section 3.0 *Scope of Work*. This is unsurprising, as the literature is prepared in advance of the publication of the Bid Solicitation for purposes other than responding to the Bid Solicitation. Accordingly, the Bureau appropriately sought additional clarification regarding the proposed Tymco 500x sweeper. The request and submission of this additional information is within the bounds of clarification permitted by *N.J.A.C.* 17:12-2.7(e) and Bid Solicitation § 6.5 *Oral Presentation and/or Clarification of Quote {Proposal}* as it merely "explains or amplifies" the information the Vendor {Bidder} included within its Quote. *On-Line Games, supra*, 279 *N.J. Super.* at 597. Further, it is noted that the Bureau used the same clarification approach with H.A. DeHart, as described in detail below.

⁵ The nonresponsive determinations were based on a variety of deviations between the Quoted specifications and the Bid Solicitation technical specifications. These conclusions are not being challenged in this protest.

⁶ H.A. DeHart's Quote included warranty documentation and extended protection plan information for the Freightliner M2 chassis, although this chassis was not clearly identified on the product literature or price sheet.

system, dust separator, hopper, blower, pickup head, gutter brooms, dust control system, operating controls and displays, safety equipment, accessories, paint color, sweeper warranty, and delivery. Ibid. For example, in relevant part, an excerpt of the A8 Twister manufacturer specifications for the gutter brooms were as follows:

GUTTER BROOMS

- _____ A. Dual gutter brooms shall be 44" minimum diameter, flattened wire filled vertical digger type for removing debris from gutter area.
- _____ B. Gutter brooms to be hydraulic motor driven with in-cab controlled rotation speed independent from engine speed and shall be positioned laterally and vertically by a hydraulic cylinder and springs.
- _____ C. Each gutter broom shall have an adjustment to allow downward compensation for bristle contact, pattern and wear and shall be full floating to follow street contour.
- _____ D. Each gutter broom shall have lateral flexibility to swing inward 15" under the chassis when encountering the impact of an immovable object thus avoiding damage to the broom assembly.

The Bureau determined the manufacturer's specifications/product literature lacked specific information to determine if the A8 Twister met the Bid Solicitation specifications. Therefore, on August 11, 2017, the Bureau sent a second clarification letter requesting the following:

Accordingly, please provide product literature and manufacturer's specifications for the Schwarze A8 Twister offered on Price line 1, specific to the following Bid Solicitation (RFP) sections : Section 3.4.1.2 Auxiliary Engine, Section 3.4.1.2 Dust Separator, Section 3.4.1.4 Dust Control System, Section 3.4.1.5 Operator Controls, Section 3.4.1.6 Hydraulic System, Section 3.4.1.7 Gutter Side Broom, Section 3.4.1.8 Pick-Up Head, Section, 3.4.1.9 Main Broom, Section 3.4.1.10, Section Automatic Sweep Interrupt (ASI) System, Section 3.4.1.11 Hopper, Section 3.4.1.12 Blower, Section 3.4.1.13 Sweeper Flushing and Cleaning System, and Section 3.4.1.14 Lights & Warning System.

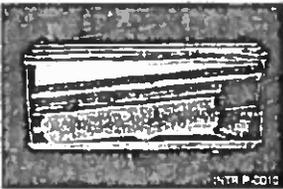
On August 15, 2017, H.A. DeHart responded and provided another copy of the A8 Twister product literature which it had included with its Quote along with another copy of the Schwarze A8 Twister manufacturer specification with added text responding to the specific functionality identified by the Bureau. See H.A. DeHart August 15, 2017 clarification response. Regarding the request for product literature and manufacturer's specifications specific to Bid Solicitation § 3.4.1.4 *Main Broom*, H.A. DeHart added text to the previously cited gutter brooms specification as follows:

- _____ D. Each gutter broom shall have lateral flexibility to swing inward 15" under the chassis when encountering the impact of an immovable object thus avoiding damage to the broom assembly. (Manufacturers details corresponding to Section 3.4.1.9 Main Broom – As gutter brooms are fully retracted, they serve as the Main Broom, or we can provide a separate non-published alternate Main Broom at no additional cost – see attached)

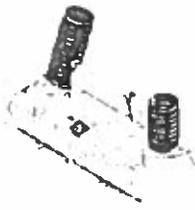
The August 15, 2017 clarification response included the following cut sheet describing the “Mechani-Pneumatic Sweeping Head:”

Manufacturer's Specification 3.4.1.9 Main Broom
Schwarze Mechani-Pneumatic Head

Dealer only document – non-published alternate
Note: This option is special order only and is not intended for all customers. Consult your Schwarze representative before ordering in place of Gutter broom extension override.



Mechani-Pneumatic Sweeping Head
The Mechani-pneumatic Powerhood™ is a new innovation in sweeping. Schwarze Industries invented the patented concept of positioning the broom in the front of the sweeping hood (also called 'sweeping head'), rather than at the rear. This unique design means the broom scrubs the sweeping surface directly in front of the sweeping hood's full-width blast orifice. The angled scroll broom has been specifically engineered to enhance its windrowing ability. This combination of broom design and broom location provides the Schwarze exclusive Powerhood with the capability of transferring large amounts of material to the pickup side of the sweeping hood. The Mechani-pneumatic PowerhoodSM also features an adjustable blast orifice, allowing the orifice air stream velocity to be easily adjusted according to individual operator preference



On September 20, 2017, the Bureau sent H.A. DeHart a third clarification letter, citing Bid Solicitation § 6.5 *Oral Presentation and/or Clarification of Quote {Proposal}*, and enumerating fourteen (14) various Bid Solicitation technical specifications and asking H.A. DeHart whether its “Quote {Proposal} price” included functionality addressing the Bid Solicitation requirements. For example, H.A. DeHart was asked, in part, whether the A8 Twister featured “[a] dump control switch located on the exterior of the unit, as specified in Section 3.4.1.5 of the Bid Solicitation {RFP}.” By letter dated September 26, 2017, H.A. DeHart confirmed the A8 Twister did include the enumerated functionality. See H.A. DeHart September 26, 2017 clarification response.

On October 20, 2017, the Bureau issued an NOI advising all bidders that it was the State's intent to award two Blanket P.O.s, one to Bucks County for the Tymco 500x and another to H.A. DeHart for the Schwarze A8 Twister. The Bureau's award recommendation stated the intended award to Bucks County for the Tymco 500x included “both the International and Freightliner chassis options” and the award to H.A. DeHart for the A8 Twister included “both Freightliner and Peterbilt chassis options.” Trius was not awarded a Blanket P.O. because it submitted a Quote for the Tymco 500x and its price was higher than the Quote submitted by Bucks County. On November 3, 2017, Trius submitted its protest to the Division. The Hearing Unit provided H.A. DeHart an opportunity to respond to the protest, which was provided on November 8, 2017.

DISCUSSION

I. Trius Did Not Propose a Different Make/Model of Tymco 500x Sweeper

In its protest, Trius first asserts that “the Freightliner chassis based 500x being proposed in Truis, Incorporated’s bid constitutes a significantly different model offering than that of Bucks County International which is on an International chassis.” Trius protest, p. 1. It argues that “preserving the option of which chassis to choose would add value to all of the Cooperative Purchasing Participants, especially when doing so would occur at no cost to the [S]tate.” Ibid.

As noted above, Bid Solicitation § 1.1 *Purpose and Intent*, and § 7.2 *Final Blanket P.O. {Contract} Award*, explained the State intended to award one (1) Blanket P.O. “for each Make/Model that meets the specifications.” The Bid Solicitation did not define the term “Make/Model.” But, in light of other relevant provisions of the Bid Solicitation, it is clear that the primary focus of the technical specifications was the heavy duty regenerative air sweeper components rather than the chassis upon which the sweeper components were mounted.

The Bid Solicitation explained the goal was “to establish a term Blanket P.O. {Contract} to procure the specified units. . . .” Bid Solicitation § 3.1 *Blanket P.O. {Contract} Utilization*. The term “Unit” is defined as “. . . Heavy Duty Regenerative Air Street Sweeper with Twin Gutter Brooms, Mounted on Truck Chassis, as specified herein, made available for outright purchase as a new, unused vehicle under a Blanket P.O. {Contract} established as a result of this Bid Solicitation {RFP}.” Bid Solicitation § 2.2 *Blanket P.O. {Contract}-Specific Definitions/Acronyms*. While the Bid Solicitation enumerated specific minimum specifications for the cab and chassis, it expressly noted that the chassis was to “provide the foundation for the unit sought.” Bid Solicitation § 3.4.1.1 *Cab and Chassis*.

The Quotes similarly reflect a primary focus on the sweeper components. The product literature for both the Tymco 500x and A8 Twister include three columns of text dedicated to brooms, sweeping engines, electronic and hydraulic systems, dust control systems, pick-up head specifications and other details of the sweeping components while dedicating minimal lines of text to the chassis. It is clear from the Bid Solicitation that the overriding purpose was to obtain a heavy duty regenerative air street sweeper. The type of chassis is secondary at best.

Accordingly, I find that the Bid Solicitation reflected an intent to award a Blanket P.O. to each make/model of sweeper components meeting the technical specifications. The chassis upon which those components are mounted represent optional foundations. Therefore, Trius’s argument that a Tymco 500x sweeper mounted on Freightliner chassis represents a significantly different Make/Model than a Tymco 500x sweeper mounted on an International chassis is rejected. Because Bucks County submitted a lower price for the Tymco 500x sweeper than Trius, the Bureau’s intended award to Bucks County is upheld.

However, the Bureau’s intended award to Bucks County must be limited to the Tymco 500x based on the International Chassis. Bucks County expressly submitted a Quote for the Tymco 500x “mounted on a 2018 International 4300-ISB Chassis.” See Bucks County Price Sheet, line 1. It was not until the July 7, 2017 clarification response when Bucks County submitted the product literature requested by the Bureau regarding the Tymco 500x sweeper components did Bucks County mention the “available” Freightliner M2-106 chassis. See Bucks County July 7, 2017 clarification response. Even then, the remainder of the documentation submitted by Bucks County with the July 7, 2017 clarification response applied only to the International chassis, including standard warranty information and a price list for optional service contracts. Ibid. Standard warranty information and extended warranty coverage information for the Freightliner M2-106 chassis was never requested or provided.

The Division's regulations, case law, and Bid Solicitation § 6.5 *Oral Presentation and/or clarification of Quote {Proposal}*, prohibit Vendors {Bidders} from supplementing, revising, or modifying Quotes during the post-opening clarification process. N.J.A.C. 17:12-2.7(e); On-Line Games, supra, 279 N.J. Super. at 597. "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 is interdicted by the RFP." On-Line Games, supra, 279 N.J. Super. at 597. Here, the Bureau erred when it made an award based on product documentation detailing two "available" chassis within Bucks County's July 7, 2017 clarification response where the Quote only included one chassis. Accordingly, the award to Bucks County is upheld, but modified to reflect the Tymo 500x sweeper mounted on the International 4300-ISB chassis only.

II. H.A. DeHart's Proposal Did Not Contain a Material Deviation

Second, Trius protests the State's intent to award H.A. DeHart a Blanket P.O. for the A8 Twister sweeper. Trius protest, p. 1. Trius contends the A8 Twister does not meet the Bid Solicitation's requirement that the sweeper possess a main broom as required by Bid Solicitation § 3.4.1.9 *Main Broom*. Trius protest, p. 2. Trius interprets Bid Solicitation § 3.4.1.9 *Main Broom*, to require a "center broom." Ibid. Trius asserts the A8 Twister does not include a "center broom," rather it relies on "Gutter Broom Extension Override" (hereinafter "GEO") functionality to swing the left and right gutter brooms in front of the pickup head. Ibid. It asserts this deviates from the "center broom" requirement that the deviation is material because "using the GEO in place of a main broom radically reduces the overall sweeping path and places the sweeper in dangerously close proximity to any vertical structures such as Jersey barriers, signposts, other vehicles etc. and therefore defeat [sic] the productivity of the machine." Trius protest, p. 3. Trius concludes, therefore, that H.A. DeHart's Quote is nonresponsive and submission of an unpublished alternative main broom via clarification response was a prohibited post-bid opening supplement. Ibid.

In response, H.A. DeHart states "our gutter brooms incorporate a GEO (Gutter Broom Extension) function, which is our 'Main Broom.'" H.A. DeHart protest response, p. 1. H.A. DeHart notes this functionality "eliminates the expensive cost of yet another small 12" x 79" tube broom to maintain and replace frequently at an approximate cost of \$600.00 plus labor." H.A. DeHart protest response, p. 1-2. It stresses that it provided a "very detailed and specific brochure on the Schwarze A8 Twister in our bid package . . . [which] clearly states, without question, Gutter Broom Extension Override. 'Increased usability of gutter brooms and expands the versatility in various applications, while eliminating the need for a center broom.'" H.A. DeHart protest response, p. 2. H.A. DeHart disagrees with Trius's contention that the "GEO (Gutter Broom Extension) reduces the overall sweeping pattern" and otherwise places the sweeper in close proximity to structures undermining the machine's effectiveness. D.A. DeHart protest response, p. 3. H.A. DeHart states "[m]ost sweeping will be with both Gutter Brooms in the outward position, and the sweep head at its normal location. The only time the GEO feature would need to be used is to break up any hardened or packed material towards the center of the roadway." Ibid. H.A. DeHart contends the A8 Twister, as proposed with the GEO functionality, "meets the specifications" of Bid Solicitation § 3.4.1.9, *Main Broom*, as written and that the "cut sheet brochure on a separate non-published alternate Main Broom . . . offered at no additional cost" is simply "to illustrate that the State has choices and [H.A. DeHart is] flexible in supply the best set up for the States [sic] needs with the lowest cost of operation. The State can choose between GEO without Broom in Head, GEO with Broom in Head, or Broom in Head only without GEO." H.A. DeHart protest response, p. 2.

Accordingly, there are two issues presented: (A) whether Bid Solicitation § 3.4.1.9 *Main Broom*, required a dedicated "center" broom in addition to a left and right gutter broom and (B) whether H.A. DeHart's Quote for the A8 Twister was responsive in this regard.

A. Bid Solicitation § 3.4.1.9, *Main Broom*, Required a Dedicated Center Broom

First, read in the context of the remainder of the Bid Solicitation's technical specifications, I find that Bid Solicitation § 3.4.1.9 *Main Broom*, does in fact require a separate, dedicated, "center" broom, separate from the left and right gutter brooms.

Bid Solicitation § 3.4.1.9 *Main Broom*, states, in whole:

3.4.1.9 MAIN BROOM

Control of the rotation and positioning shall be accomplished by cab mounted controls.

The broom shall be driven hydraulically.

A separate hydraulic pump shall be provided for all broom functions.

The broom pattern and down pressure shall be adjustable.

The remainder of the technical specification adds context for these requirements. For example, Bid Solicitation § 3.4.1.5 *Operator Controls*, describes the various operating controls "mounted inside the truck cab and readily accessible to the operator in either right or left driving positions." In relevant part, the required controls included:

Unit controls, meters and gauges shall consist of, but is not limited to: right gutter broom, left gutter broom, right and left gutter broom tilt, right and left gutter broom drop-down controls, gutter broom variable speed control, in-cab dump switch, pick-up head, center broom, front curtain lifter, warning lights, water system switches, low water light, hour meter, leaf pressure bleeder control and work light, lighted switches.

[Bid Solicitation § 3.4.1.5 *Operator Controls* (emphasis added).]

Similarly, the hydraulic system requirements included minimum technical specifications impacting the "center broom:"

3.4.1.6 HYDRAULIC SYSTEM

The hydraulic system shall be adequate for use within the design requirements of the unit meeting minimum requirements listed.

The hydraulic reservoir shall be a minimum of 25-gallons capacity. Hydraulic oil shall be Mobil DTE 25 synthetic or comparable for extended change intervals and reduced maintenance.

....

The dual hydraulic pump shall provide for dual hydraulic systems consisting of the standard unit system and a separate center broom system.

[Bid Solicitation § 3.4.1.6 *Hydraulic System* (emphasis added)].

Reading Bid Solicitation § 3.4.1.9 *Main Broom*, to require anything other than a dedicated, separate “center broom” apart from the left and right gutter brooms would render other language in the Bid Solicitation’s technical specifications meaningless.⁷ Accordingly, such an interpretation is rejected. I find that Bid Solicitation § 3.4.1.9 *Main Broom*, discussed technical specifications for a dedicated center broom.

B. H.A. DeHart’s Quote Did Not Contain A Deviation From the Bid Solicitation

Preliminarily, the Bid Solicitation requires Vendors {Bidders} to submit “all information requested on the Bid Solicitation’s {RFP’s} pricing lines in sufficient detail as to allow the State to determine the firm, fixed Quote {Proposal} pricing and the precise product or services being offered . . . with no possible misinterpretation of the price or product/service being offered by the Vendor {Bidder}.” Bid Solicitation § 4.4.5 *Price Schedule/Sheet*. Vendors {Bidders} are also required to submit product literature, manufacturer’s specification sheets, and manufacturer’s pre-printed options price lists for the unit proposed, although the Bid Solicitation reserved the right for the Bureau to request such information after bid opening.⁸ Bid Solicitation § 4.4.3.3 *Product Literature/Manufacturer’s Specifications/Manufacturer’s Options Price List*. The product literature, manufacturer’s specification sheets, and pre-printed options price lists are requested so that the Bureau can evaluate the product’s technical compliance with the Bid Specification.

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.’” On-Line Games, *supra*, 279 N.J. Super. at 594 (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. However, the “preliminary inquiry is whether the bid deviates from the RFP. If there is no deviation, the bid must be deemed conforming.” On-Line Games, *supra*, 279 N.J. Super. at 594.

⁷ It is noted that a number of questions regarding the technical specifications were submitted during the Electronic Question and Answer Period, but there were no questions submitted regarding Bid Solicitation §§ 3.4.1.5 *Operator Controls*, 3.4.1.6 *Hydraulic System*, or 3.4.1.9 *Main Broom*.

⁸ As described earlier, I note that this information would be pre-printed at the time of Quote submission and therefore represents known information at the Quote submission due date.

H.A. DeHart clearly identified that it proposed a Schwarze A8 Twister and it included product literature describing the unit, including available chassis options, within its Quote. However, it was unclear from that product documentation whether the A8 Twister included dedicated center/main broom functionality. The Hearing Unit's independent review of the product literature included in H.A. DeHart's Quote reveals inconsistent and conflicting information on this issue:



While one page states “Optional Equipment: Gutter Broom Extension OverrideSM: Increased usability of gutter brooms and expands the versatility in various applications, while eliminating the need for a center broom,” the following page describes a “90”x36” Sweeping Head: Increased productivity with a larger area of influence (quicker transfer and no bulldozing).” As it was unclear whether the A8 Twister included a “main broom” within the meaning of Bid Solicitation § 3.4.1.9, the Bureau appropriately sought clarification on the discrepancy from H.A. DeHart. See On-Line Games, supra, 271 N.J. Super. at 597 (“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.”).

H.A. DeHart's July 6, 2017 and August 14, 2017 clarification responses collectively confirmed that both possible interpretations of the product literature were correct; the A8 Twister could potentially feature the GEO functionality without a center broom and it could include the Mechani-Pneumatic Sweeping Head, i.e., a center broom. H.A. DeHart's offer of the Mechani-Pneumatic Sweeping Head functionality mentioned in the product literature was not a post-opening supplement because the “sweeping head” was discussed within the product literature submitted with H.A. DeHart's Quote.

H.A. DeHart's August 14, 2017 clarification response detailing the Mechani-Pneumatic Head functionality expressly stated it was a “non-published alternate” that was “special order only” and “not intended for all customers.” It also advised consulting “your Schwarze representative before ordering in place of Gutter broom extension override.” Trius argues this language means that when the Twister A8 is equipped with the Mechani-Pneumatic Head, it will not also have the GEO functionality which is similarly required by the Bid Solicitation. Trius protest, p. 2-3. Not so. The cut sheet only requests the manufacturer be contacted when the Mechani-Pneumatic Sweeping Head is ordered in place of the GEO functionality. The cut sheet does not say that the Mechani-Pneumatic Sweeping Head cannot be equipped with the GEO functionality. This interpretation is confirmed by H.A. DeHart's response to this protest which explained that “[t]he State can choose between GEO without Broom in Head, GEO with Broom in Head, or Broom in Head only without GEO.”⁹

Furthermore, the Bid Solicitation required the unit “be [the] standard manufacturer's product line available to the general public,” Bid Solicitation § 3.2.2 *Blanket P.O. {Contract} Specific Requirements*, and include all “upgrades and/or accessories which are necessary to make the unit conform to these specifications,” Bid Solicitation § 3.3.4 *Vehicle Specifications – General Provisions*. Therefore, the Bid

⁹ However, the A8 Twister will only meet the minimum Bid Solicitation technical specifications when equipped with the Mechani-Pneumatic Head as envisioned by Bid Solicitation § 3.3.4 *Vehicle Specifications – General Provisions* (“Units provided shall be manufacturer's standard units with the upgrades and/or accessories which are necessary to make the unit conform to these specifications.”).

Solicitation prohibited custom fabricated sweepers, but did not prohibit sweeper manufacturers from meeting the minimum specifications with upgrades and accessories. The A8 Twister meets these requirements. The A8 Twister is the standard manufacturer's product line available to the general public. The Mechani-Pneumatic Head option, albeit non-published and special order, is not a custom product, but rather is an upgrade/accessory necessary to make the unit conform to the specifications. Bid Solicitation § 3.2.2 *Blanket P.O. {Contract} Specific Requirements*, and § 3.3.4 *Vehicle Specifications – General Provisions* prohibit Vendors {Bidders} from submitting Quotes for custom-built Units, they do not prohibit Vendors {Bidders} from combining available options to meet the Bid Solicitation's base specifications. There is no deviation from the Bid Solicitation's requirements.

In light of these findings, the awards to Bucks County for the Tymco 500x, as modified above, and to H.A. DeHart for the Schwarze A8 Twister are upheld. This is my final agency decision. Thank you for your company's continuing interest in doing business with the State of New Jersey.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: REG

c: J. Kerchner
K. Thomas
G. Gerstenacker
C. Murphy
D. Warren