



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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August 24, 2018

Via Electronic Mail [andmexcavating@gmail.com] and USPS Regular Mail

Richard Michaluk, Jr.
A&M Paving and Excavating, LLC
11 Linabary Lane
Chester, NJ 07930

Re: I/M/O Bid Solicitation #18DPP00205 A&M Excavating, LLC
Protest of Notice of Intent to Award
T0777 Snow Plowing and Spreading Services

Dear Mr. Michaluk:

This letter is in response to your correspondence of August 24, 2018, on behalf of A&M Excavating, LLC (A&M) to the Division of Purchase and Property's Hearing (Division) Unit. In that correspondence A&M protests the August 24, 2018, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) indicating an intent to award a 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).

BACKGROUND

By way of background, on January 30, 2018, the Bureau issued the Bid Solicitation on behalf of the New Jersey Department of Transportation (NJDOT), to solicit Quotes from qualified Vendors

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

{Bidders} to provide snow plowing and spreading services on all State interstates and highways under the jurisdiction of NJDOT. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award Statewide Blanket P.O.s to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation are most advantageous to the State, price and other factors considered. Ibid.

On February 28, 2018, the Bureau issued Bid Amendment #1 responding to the questions posed by potential Vendors {Bidders}. On March 16, 2018, the Division's Proposal Review Unit opened 164 Quotes received through the State's *NJSTART* eProcurement system and/or hardcopy format by the submission deadline of 2:00 pm eastern time. Thirty-two Quotes were automatically rejected by the Proposal Review Unit for failure to conform to the mandatory administrative requirements for Quote submission.

In response to the Notice of Proposal Rejection, on April 12, 2018, A&M wrote to the Division's Hearing Unit stating "I am providing you with my Ownership Disclosure form. I am sorry that it was missing but it should be in with NJSTART, the information was entered I thought when I registered. Please let me know if this information is good for the contract." With the protest, A&M included a completed and signed *Ownership Disclosure Form*. On April 23, 2018 the Division issued its final agency decision noting in part:

Notwithstanding A&M's interest in competing for this procurement, to allow A&M to submit the completed and signed *Ownership Disclosure Form* after bid opening would violate the Legislative requirement outlined in N.J.S.A. 52:25-24.2, a requirement that this Division is not authorized to waive. 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.

The remaining Quotes were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria* which states:

The following evaluation criteria categories, not necessarily listed in order of significance, may be used to evaluate Quotes {Proposals} received in response to this Bid Solicitation {RFP}. The evaluation criteria categories may be used to develop more detailed evaluation criteria to be used in the evaluation process.

- A. Experience of firm (Attachment #2): The Vendor's {Bidder's} documented experience in successfully completing Blanket P.O. {Contracts} of a similar size and scope in relation to the work required by this Bid Solicitation {RFP};
- B. Vendor Equipment (Attachment #1): The quantity and type of Vendor {Bidder} trucks and ability to provide equipment; and
- C. Price: The Vendor's {Bidder's} hourly rate. See Section 6.7.1 below.

With respect to the evaluation of the Vendors' {Bidders'} Quote pricing, Bid Solicitation Section 6.7.1 *Vendor's {Bidder's} Price Schedule* states:

The Bureau will utilize a weighted price model. The price model will be date-stamped and entered into the record before Quote {Proposal} opening.

One (1) or multiple awards will be made to the Vendor {Bidder} submitting the lowest hourly rate for each Snow Section and meeting, at a minimum, the criteria for experience and equipment set forth in this Bid Solicitation {RFP}, in the following order:

Snow Plowing and Hauling Services:

- 1st – Vendors {Bidders} supplying all required Class A trucks with equipment;
- 2nd – Vendors {Bidders} supplying all required Class A trucks without equipment;
- 3rd – Vendors {Bidders} supplying all required Class B trucks with equipment;
- 4th – Vendors {Bidders} supplying all required Class B trucks without equipment;
- 5th – Vendors {Bidders} supplying fewer than the required number of Class A trucks with equipment; and
- 6th – Vendors {Bidders} supplying fewer than the required number of Class B trucks without equipment.

For example, Vendors {Bidders} submitting responsive Quotes {Proposals} and able to supply all required Class A trucks with Vendor {Bidder} owned equipment, will be awarded a Blanket P.O. {Contract} before the Vendors {Bidders} supplying Class A trucks without equipment.

Spreading Services:

- 1st – Vendors {Bidders} supplying all required Class R trucks with an on board wetting system;
- 2nd – Vendors {Bidders} supplying all required Class R trucks;
- 3rd – Vendors {Bidders} supplying all required Class Q trucks with an on board wetting system;
- 4th – Vendors {Bidders} supplying all required Class Q trucks;
- 5th – Vendors {Bidders} supplying all required Class P trucks with an on board wetting system;
- 6th – Vendors {Bidders} supplying all required Class P trucks;
- 7th – Vendors {Bidders} supplying V Box trucks with an on board wetting system;
- 8th – Vendors {Bidders} supplying V Box trucks;
- 9th – Vendors {Bidders} supplying mid-body style trucks with an on board wetting system; and
- 10th – Vendors {Bidders} supplying mid-body style trucks.

For example, Vendors {Bidders} submitting responsive Quotes {Proposals} and able to supply all required Class R trucks, with an on board wetting system, will be awarded a Blanket P.O. {Contract} before the Vendors {Bidders} supplying Class R trucks without an on board wetting system.

The evaluation of Quotes received and submission of Quote pricing was conducted in three phases as set forth in Bid Solicitation Section 1.1 *Purpose and Intent* which states:

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 Sections 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 {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.

In accordance with the procedure set forth in Bid Solicitation Section 1.1 *Purpose and Intent*, after the review and evaluation of all Quotes received in response to Bid Solicitation Phase 1 was completed, on June 5, 2018, the Bureau issued a preliminary notice. That preliminary notice advised the Vendors {Bidders} which snow plowing sections would be awarded based upon the Phase 1 submitted Quotes. The preliminary notice also provided Vendors {Bidders} the opportunity to withdraw a submitted Quote or a preliminarily awarded price line. Four Vendors {Bidders} withdraw a submitted Quotes for some or all of the snow plowing section originally submitted during Phase 1. Thereafter, the Bureau commenced Phase 2 to solicit Quote pricing for those snow plowing sections for which no responsive Quotes had been received. On June 11, 2018, requests for Phase 2 pricing were sent to all Vendors {Bidders} determined to be responsive prior to Phase 1, with a Phase 2 Quote pricing submission due date of June 18, 2018 at 2:00 p.m.

After the review and evaluation of all Quotes received in response to the Bid Solicitation Phase 2 was completed, on June 25, 2018, the Bureau issued a second preliminary notice. That second preliminary notice advised the Vendors {Bidders} which snow plowing sections would be awarded based upon the Phase 1 and Phase 2 submitted Quotes. The second preliminary notice also provided Vendors {Bidders} the opportunity to withdraw a submitted Quote or a preliminarily awarded price line. Thereafter, the Bureau commenced Phase 3 to solicit Quote pricing for those snow plowing sections for which no responsive Quotes had been received in either Phase 1 or Phase 2. Requests for Phase 3 pricing were sent to all responsive Vendors {Bidders} on June 26, 2018 with a Phase 3 Quote pricing submission due date of June 28, 2018 at 2:00 p.m.

After the review and evaluation of all Quotes received in response to the Bid Solicitation Phase 3 was completed, on July 2, 2018, the Bureau issued a third preliminary notice. That third preliminary notice advised the Vendors {Bidders} which snow plowing sections would be awarded based upon the Phase 1, Phase 2 and Phase 3 submitted Quotes. The third preliminary notice also provided Vendors {Bidders} the opportunity to withdraw a submitted a Quote or a preliminarily awarded price line.

Thereafter, on August 22, 2018, the Bureau issued a Recommendation Report which recommended Blanket P.O. awards to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation are most advantageous to the State, price and other factors considered.² On August 24, 2018, the NOI was issued advising all Vendors {Bidders} that it was the State's intent to award a Blanket P.O.s consistent with the Bureau's Recommendation Report.

On August 24, 2018, the Division received A&M's protest. In that letter, A&M stated:

This is Ricky Michaluk, I have been a spreading contractor of the State for probably 15 years. The yards I spread for were crew 218 Netcong, 228 Rockaway, 332 Bridgewater. I bid all of these yards again with on board wetting systems and I was rejected at the [beginning] for not having an Ownership Disclosure Form with my bid. When I was informed of this I emailed and faxed this form to the State along with notifying them that the NJSTART program would not take it at the time. I do not know what to

² The list of Vendors {Contractors} who are recommended to receive Blanket P.O. awards are listed in the attachment to the Bureau's August 22, 2018 Recommendation Report.

do now, who should I talk to, can this be taken care of [?] Any information would be grateful.

In consideration of A&M's August 24, 2018 protest, I have reviewed the record of this procurement, including the Bid Solicitation, A&M's Quote and prior protest, the April 23, 2018 Final Agency Decision, the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed decision.

DISCUSSION

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 shall³ conform to the following requirements or be 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 in Bid Solicitation Section 4.0 *Quote {Proposal} Preparation and Submission* which states in pertinent part:

Vendor's {Bidder's} failure to complete, sign and submit the forms in Section 4.4.1.2 shall be cause to reject its Quote {Proposal} as non-responsive.

[Bid Solicitation § 4.4.1.2 *NJ Standard Bid Solicitation {RFP} Forms Required With The Quote {Proposal}*.]

Among those forms required to be submitted with the Quote is the *Ownership Disclosure Form* discussed in Bid Solicitation Section 4.4.1.2.1.

With respect to ownership, the New Jersey Legislature, in implementing N.J.S.A. 52:25-24.2, mandated that a Vendor {Bidder} must supply its ownership information, prior to or with its Quote, to be eligible to enter into a Blanket P.O. with the State.

³ "Shall or Must – Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a Quote {Proposal} as non-responsive." Should or May – "Denotes that which is permissible or recommended, not mandatory." Bid Solicitation § 2.2 *General Definitions*.

As an alternative to the submission of the *Ownership Disclosure Form*, as noted in Bid Solicitation Section 4.4.1.2.1, Vendors {Bidders} using **NJSTART** to submit a Quote are required to make the appropriate certification regarding ownership disclosure on the “Maintain Terms and Categories” Tab within its profile. With respect to ownership, Vendors {Bidders} are able to select one of the following descriptors:

Category: Ownership Disclosure

Description: N.J.S.A. 52:25-24.2 requires disclosure of the names and addresses of those individuals, partnerships and/or corporations owning a 10% or greater interest in the bidding entity (“interest owners”). Further, if any of these interest owners is itself a partnership or corporation, you must disclose the names and addresses of the interest owners of that partnership or corporation.

Please select at most one category value

Select

The bidder is a non-profit entity and is exempt from the ownership disclosure requirement. See Disclosure of Non-Profit Officers and Directors below. (No Ownership Disclosure form is required.)

There are no individuals, partnerships or corporations with a 10% or greater interest in the bidding entity, therefore the bidder is exempt from the ownership disclosure requirement. (No Ownership Disclosure form is required.)

Neither statement is applicable. A current, true and complete Statement of Bidder Ownership on the attached form has been or will be uploaded to the vendor profile prior to the submission deadline and is intended to accompany the bidder's submission.

As shown in the screenshot below, A&M did complete the Ownership Disclosure category as required. However, A&M’s response to the Ownership Disclosure category required that it complete and submit the *Ownership Disclosure Form* either with its Quote or attach the form to its Vendor Profile within **NJSTART**.

Category: Ownership Disclosure

Description: N.J.S.A. 52:25-24.2 requires disclosure of the names and addresses of those individuals, partnerships and/or corporations owning a 10% or greater interest in the bidding entity (“interest owners”). Further, if any of these interest owners is itself a partnership or corporation, you must disclose the names and addresses of the interest owners of that partnership or corporation.

Neither statement is applicable. A current, true and complete Statement of Bidder Ownership on the attached form has been or will be uploaded to the vendor profile prior to the submission deadline and is intended to accompany the bidder's submission.

As shown in the screenshot below, A&M did not upload the *Ownership Disclosure Form* to its profile.

Vendor Profile - A&M Paving and Excavating LLC

Organization Information Users Address Commodity Codes and Services Regions Terms & Categories **Attachments** Vendor Performance

Attachments Information

No Attachments found for this vendor.

Forms

No Form Attachments

Nor did A&M include the form with its submitted Quote. In uploading its Quote, as shown in the screen shot below, A&M attached the following documents:

- Attachment 1 T0777 - Revised Snow Plowing and Spreading Services-NJDOT_218
- Attachment 1 T0777 - Revised Snow Plowing and Spreading Services-NJDOT_228
- Attachment 1 T0777 - Revised Snow Plowing and Spreading Services-NJDOT_229
- Attachment 1 T0777 - Revised Snow Plowing and Spreading Services-NJDOT_332
- Attachment 2 T0777 - Revised Snow Plowing and Spreading Services-NJDOT
- Business Registration Certificate
- Certificate of Employee Information Report

- Office and Acceptance Page T0777
- Sections_1
- Sections_2
- Sections_3
- Sections_4

Quote 00001941 - A&M Paving and Excavating LLC

General Info Questions Submittals Terms & Conditions Attachments Evaluation Remarks Summary

Files

Name	Description	Confidential	Order	Attached By	Attached Date
Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_218.pdf (view details)	Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_218.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_228.pdf (view details)	Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_228.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_229.pdf (view details)	Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_229.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_332.pdf (view details)	Attachment 1 T0777 - Revised Snow Plowing and Spreading Services NJDOT_332.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Attachment 2 T0777 - Revised Snow Plowing and Spreading Services NJDOT.pdf (view details)	Attachment 2 T0777 - Revised Snow Plowing and Spreading Services NJDOT.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Business Registration Certificate.pdf (view details)	Business Registration Certificate.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Certificate of Employee Information Report.pdf (view details)	Certificate of Employee Information Report.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Offer and Acceptance Page T0777.pdf (view details)	Offer and Acceptance Page T0777.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Sections_1.pdf (view details)	Sections_1.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Sections_2.pdf (view details)	Sections_2.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Sections_3.pdf (view details)	Sections_3.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018
Sections_4.pdf (view details)	Sections_4.pdf	<input checked="" type="checkbox"/>	0	Richard Vothau	05/14/2018

Forms

No Form Attachments

[Save & Continue](#) [Close Window](#)

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None of the information included in A&M's Quote provided information regarding its ownership as required by N.J.S.A. 52:25-24.2.

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). "If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all." Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 222 (Law Div. 1974). The question to be answered is whether or not a bidder's failure to comply completely with the statutory ownership disclosure requirement is a material deviation which would render a bid nonresponsive. C&H Industrial Services, Inc. v. City of Vineland, 2014 N.J. Super Unpub. Lexis 1187, at *13 (App. Div. May 23, 2014). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the court in Twp. of River Vale v. Longo Constr. Co. for determining materiality. 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-waivable irregularity." In re Protest of Award of On-Line Games Prod. And Operation Servs. Contract, 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.]

Based upon the relevant case law, I find that A&M's Quote contains a material deviation from the requirements of the solicitation making A&M's Quote nonresponsive. With respect to the previously mentioned River Vale factors, I note that the Courts have determined "noncompliance with N.J.S.A. 52:25-24.2 deprives the [contracting entity] of its assurance that the contract will be entered in to performed and guaranteed according to its specified requirements" because the failure to fully disclose 10% owners deprive the contracting entity and the public of the information with which it can be made aware of the real parties in interest, identify conflicts of interest, and the information necessary to assess the capability, financial stability and moral integrity of the bidder. C&H, supra, Lexis 1187 at *14-15; citing, George Harms, supra, 161 N.J. Super. at 372. Further, noncompliance with the statutory requirement "places the non-compliant bidder in a position of advantage over other bidders who might have bid on the project had they known they could avoid timely filing of the disclosure statement or that it would be waived." C&H, supra, Lexis 1187 at *16; citing, Muirfield, supra, 336 N.J. Super. at 136-37.

In reviewing a Quote submitted in response to a Bid Solicitation, the Division does not have the power to waive the legislative requirement that a Vendor {Bidder} provide its ownership information prior to or accompanying the Quote submission. Only the New Jersey Legislature can change a requirement it has mandated. If the requirements of N.J.S.A. 52:25-24.2 and N.J.A.C. 17:12-2.2 are not met, a Quote must be rejected. These statutes and regulations mandate stringent enforcement to maintain the equal footing of all Vendors {Bidders} and to ensure the integrity of the State's bidding process.

Here, unfortunately, A&M submitted a Quote without the *Ownership Disclosure Form* attached. Notwithstanding A&M's interest in competing for this procurement, to allow A&M to submit the completed and signed *Ownership Disclosure Form* after bid opening would violate the Legislative requirements outlined in N.J.S.A. 52:25-24.2, a requirements that the Division is not authorized to waive.

CONCLUSION

Based upon the foregoing, I find no reason to disturb the Bureau's recommendation. Accordingly, I sustain the Proposal Review Unit's Notice of Proposal Rejection and the August 24, 2018 Notice of Intent to Award. This is my final agency decision with respect to the protest submitted by A&M.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your business with **NJSTART** at www.njstart.gov, the State of New Jersey's eProcurement system. I encourage you to log into **NJSTART** to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities. Please monitor the Division's and the **NJSTART** websites for future bidding opportunities for these services

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: P. Michaels
L. Spildener
M. Groninger