



# State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY  
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September 19, 2019

Via Electronic Mail [dldisler@pbnlaw.com] and USPS Regular Mail

David L. Disler, Esq.  
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Re: I/M/O Bid Solicitation #18DPP00205-Atlantic Recycling Group  
Protest of Notice of Termination  
T0777 for Snow Plowing and Spreading Services, Blanket P.O. #18-PROS10050

Dear Mr. Disler:

This letter is in response to your letters dated April 18 and May 7, 2019 on behalf of Atlantic Recycling Group (ARG) to the Division of Purchase and Property's (Division) Hearing Unit, protesting the Division's Procurement Bureau's (Bureau) April 8, 2019 letter in which it informed ARG of its intent to terminate the Master Blanket Purchase Order (Blanket P.O.) awarded to ARG in connection with Bid Solicitation #18DPP00205:T0777 for Snow Plowing and Spreading Services (Bid Solicitation). In the Bureau's April 8, 2019 letter, it advised ARG that it intended to terminate ARG's Blanket P.O. because ARG did not have on board wetting systems for its trucks at the time of the bid opening, despite the fact that ARG's submitted Quote indicated that it has an on board wetting systems for all trucks on the spreading price lines for which it received a Blanket P.O. award. Specifically, the Bureau sought to terminate the following spreading price lines that had been awarded to ARG:

Price Line #	Location
315	Crew #215 West Orange Yard
322	Crew #222 Jersey City Yard
334	Crew #312 Sayerville Yard
335	Crew #313 Hazlet Yard
339	Crew #318 Freehold Yard
341	Crew #320 Ocean Yard
346	Crew #327 Lakewood Yard
348	Crew #329 Keasbey Yard

ARG protests the termination and argues that "it would be inappropriate to terminate ARG's contract with DOT since ARG has fully performed under the contract, met every request made by DOT, and supplied the required equipment as set forth in the bid solicitation." ARG's letter to the Division dated April 18, 2019, p.1.

By way of background, on January 30, 2018, the Bureau issued the Bid Solicitation on behalf of 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 the NJDOT. Bid Solicitation § 1.1 *Purpose and Intent*. The Bureau intended to award Blanket P.O.s to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation, were most advantageous to the State, price and other factors considered. Ibid.

On March 1, 2018, the Bureau issued Bid Amendment #1, which included answers to questions, deletions/revisions to the Price Sheet/Schedule, revisions to Attachment #1 – Vendor {Bidder} Equipment Form (Attachment 1) and other modifications to the Bid Solicitation. Specifically, Bid Amendment #1 advised potential Vendors {Bidders} that:

It is the sole responsibility of the Vendor {Bidder} to be knowledgeable of all of the additions, deletions, clarifications, and modifications to the Bid Solicitation and/or the New Jersey Standard Terms and Conditions relative to this Bid Solicitation as set forth in all Bid Amendments.

The revised Bid Solicitation Sections 1.1 and 6.7.1 advised all potential Vendors {Bidders} that one (1) or multiple awards would 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 developed by the subject matter experts of the NJDOT, as set forth in the Bid Solicitation, in the following order of preference:

**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.

[Bid Solicitation Section 1.1 *Purpose and Intent*.]

During the Question and Answer period, a potential Vendor {Bidder} asked a question regarding the Bureau's preference for the number of Class R and Class Q trucks with an onboard wetting system. See Bid Amendment #1. The Bureau responded as follows:

5	Preference/Substitution of Different Class Trucks	<p><b>1. On a section that asks for 6 Class R trucks and 2 Class Q trucks, if someone bids with 5 Class R trucks with onboard wetting system and 2 Class Q trucks with wetting system and someone else bids with 7 Class R trucks with onboard wetting system, which is preferred?</b></p> <p>Preference will be given to the Vendor {Bidder} supplying all required Class R trucks and Class Q trucks with an on board wetting system, provided it meets, at a minimum, the criteria for experience and equipment.</p> <p>Please refer to Section 6.7.1 of the Revised Bid Solicitation (RFP), Spreading Services which states the following:</p> <p>Spreading Services:</p> <p>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; and          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.</p> <p>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.</p> <p><b>2. Is substitution acceptable?</b></p> <p>This question cannot be answered as posed.</p>
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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. Those Quotes which conformed to the administrative requirements for Quote submission were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation. On May 28, 2019, during the course of evaluating ARG’s Quote, the Bureau sent ARG a letter seeking clarification of the following items:

**Clarification Item #1**

Review of Quote Attachment #1, Vendor {Bidder} Equipment Form, for price line 322, indicates your firm is providing the State with Two (2) Class R Trucks, *equipped with a wetting system*, at \$385.00 per one (1) hour and Two (2) Class P Trucks, *equipped with a wetting system*, at \$285.00 per one (1) hour. Your firm has also indicated the spreading equipment associated with these vehicles is both “Tailgate Mounted” and “V Box”.

**For price line 322, please confirm the type of spreading equipment for each vehicle class offered.**

**Clarification Item #2**

Review of Quote Attachment #1, Vendor {Bidder} Equipment Form, for price line 334, indicates your firm is providing the State with One (1) Class R Truck, *equipped with a wetting system*, at \$345.00 per one (1) hour and Five (5) Class Q Trucks, *equipped with a wetting system*, at \$274.00 per one (1) hour. Your firm has also indicated the spreading equipment associated with these vehicles is both "Tailgate Mounted" and "V Box".

**For price line 334, please confirm the type of spreading equipment for each vehicle class offered.**

**Clarification Item #3**

Review of Quote Attachment #1, Vendor {Bidder} Equipment Form, for price line 335, indicates your firm is providing the State with Four (4) Class Q Trucks, *equipped with a wetting system*, at \$263.00 per one (1) hour. Your firm has also indicated the spreading equipment associated with these vehicles is both "Tailgate Mounted" and "V Box".

**For price line 335, please confirm the type of spreading equipment for the Four (4) vehicles offered.**

**Clarification Item #4**

Review of Quote Attachment #1, Vendor {Bidder} Equipment Form, for price line 339, indicates your firm is providing the State with Five (5) Class R Trucks, *equipped with a wetting system*, at \$285.00 per one (1) hour. Your firm has also indicated the spreading equipment associated with these vehicles is both "Tailgate Mounted" and "V Box".

**For price line 339, please confirm the type of spreading equipment for the Five (5) vehicles offered.**

**Clarification Item #5**

Review of Quote Attachment #1, Vendor {Bidder} Equipment Form, for price line 341, indicates your firm is providing the State with Seven (7) Class R Trucks, *equipped with a wetting system*, at \$252.00 per one (1) hour. Your firm has also indicated the spreading equipment associated with these vehicles is both "Tailgate Mounted" and "V Box".

**For price line 341, please confirm the type of spreading equipment for the Five (5) vehicles offered.**

**Clarification Item #6**

Review of Quote Attachment #1, Vendor {Bidder} Equipment Form, for price line 346, indicates your firm is providing the State with Three (3) Class Q Trucks, *equipped with a wetting system*, at \$258.00 per one (1) hour. Your firm has also indicated the spreading equipment associated with these vehicles is both "Tailgate Mounted" and "V Box".

**For price line 346, please confirm the type of spreading equipment for the Five (5) vehicles offered.**

**Clarification Item #7**

Review of Quote Attachment #1, Vendor {Bidder} Equipment Form, for price line 348, indicates your firm is providing the State with Six (6) Class R Trucks, *equipped with a wetting system*, at \$345.00 per one (1) hour and Two (2) Class Q Trucks, *equipped with a wetting system*, at \$274.00 per one (1) hour. Your firm has also indicated the spreading equipment associated with these vehicles is both “Tailgate Mounted” and “V Box”.

**For price line 348, please confirm the type of spreading equipment for each vehicle class offered.**

[Bureau’s letter to ARG, dated May 29, 2018, pp. 1-3. Emphasis added.]

On the same day, ARG responded to the Bureau’s clarification request, and confirmed that the type of trucks and spreading equipment it would provide for each price line was what was listed in the Bureau’s May 29, 2018 letter. ARG did not raise any concern regarding the Bureau’s statements that each truck for spreading services was equipped with an on board wetting system. See ARG’s letter to Bureau, dated May 29, 2018.

After completing the evaluation of the Quotes received, on August 22, 2018, the Bureau completed 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. On August 24, 2018, the Bureau issued a Notice of Intent to Award 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. The Blanket P.O. awards were finalized on September 21, 2018. The Recommendation Report recommended awarding ARG a Blanket P.O. for spreading price lines 315, 322, 334, 335, 339, 341, 346, and 348.

Subsequent to the award of the Blanket P.O. to ARG, NJDOT indicates that on or about November 13, 2018, during a verbal conversation between a NJDOT Crew Supervisor and ARG, NJDOT learned that ARG did not have an on board wetting equipment installed on its trucks, despite the fact that its Quote indicated otherwise. An email confirmation between NJDOT and ARG followed in which ARG confirmed that it did not have wetting equipment installed on its trucks:

From: Thomas Ippolito <[thomasippolito@hotmail.com](mailto:thomasippolito@hotmail.com)>  
Sent: Tuesday, November 13, 2018 9:05:59 AM  
To: Campbell, Douglas  
Subject: [EXTERNAL] Re: Clarification

Hi Doug,

I was puzzled to see the onboard wetting because I thought we bid with out onboard wetting, now see only Lakeswood's bid came with out onboard wetting

To answer your question we do not have onboard wetting at this time.

Thomas Ippolito  
Direct: [732-278-5944](tel:732-278-5944)  
Fax: [866-124-8978](tel:866-124-8978)  
[thomasippolito@hotmail.com](mailto:thomasippolito@hotmail.com)

Please don't keep me a secret... a referral is the best compliment I can receive.

The future belongs to those who believe in their dreams

Eleanor Roosevelt

On Nov 13, 2018, at 7:38 AM, Campbell, Douglas <[Douglas.Campbell@dot.nj.gov](mailto:Douglas.Campbell@dot.nj.gov)> wrote:

Good morning Madone,

I am in receipt of your letter requesting clarification, however, I also requested clarification as well. The bid ARG supplied to Treasury listed your equipment as having on-board wetting capabilities. It is my understanding that NONE of your trucks are so equipped. Please confirm the status of your trucks having functional on-board wetting systems.

Thank you.

*Douglas Campbell*

NJDOT Winter Operations Unit  
1035 Parkway Ave  
Trenton, NJ 08625  
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c. 609.203.0543

On November 15, 2018, NJDOT filed a Formal Complaint<sup>1</sup> with the Division's Contract Compliance & Audit Unit (CCAU), advising that:

ARG bid the spreading under the auspices of having on-board wetting system (OBW). As a result of the methodology utilized to award contracts based on NJDOT preferences, ARG was awarded multiple price lines, despite having much greater rates than any other bidder, solely on belief that ARG equipment had OBW capabilities. Upon a conversation with a NJDOT Crew Supervisor, and later confirmed through email, Thomas Ippolito, Owner of ARG, admitted that none of his equipment had OBW system. As such, NJDOT is requesting the contracts of ARG be immediately terminated, and the awarded section be offered to the lowest bidder.

On or about November 15, 2018, NJDOT also notified the Bureau of NJDOT's request to terminate its Blanket P.O. with ARG for the awarded price lines.

On April 8, 2019, after receiving a request from NJDOT that certain price lines be canceled, the Bureau completed a Recommendation Report, based on the information provided by NJDOT, and recommended that ARG's spreading price lines, 315, 322, 334, 335, 339, 341, 346, and 348, be terminated as ARG did not have the on board wetting equipment on its trucks for spreading services, which it represented it had in its Quote. ARG's affirmation that it had the capability to provide on board wetting

<sup>1</sup> ARG submitted its response to CCAU on November 29, 2018.

systems on its trucks in its Quote resulted in the bypass of other Vendors {Bidders} who had submitted Quotes at lower prices, but did not have the capability to provide on board wetting systems on their trucks. On the same day, based upon NJDOT's request, the Bureau sent a letter to ARG notifying it of the termination of price lines 315, 322, 334, 335, 339, 341, 346, and 348.

In its April 18, 2019 protest, ARG argues that "it would be inappropriate to terminate ARG's contracts with the [NJDOT] since ARG has fully performed under the contract, met every request made by the [NJDOT], and supplied the required equipment as set forth in the bid specifications." ARG's letter to the Division, dated April 18, 2019, p.1. In relevant part, ARG raises the following issues in its protest:

- On January 30, 2018, the DOT issued Bid Solicitation #18DPP00205 – T0777 for Snow Plowing and Spreading Services. The specifications were subsequently revised on March 1, 2018. Section 1.2 of the bid specifications, titled "Background," makes clear that this is a "re-procurement of services similar to those provided under the [previously bid] Blanket P.O.s {Contracts}, presently due to expire on April 30, 2018." ARG has been providing these services to the DOT since 2012. As a result, it is familiar with what was required under the prior Blanket P.O.s.

Unfortunately, it appears this statement is misleading as it relates to "wetting." The DOT has used the same "wetting" process since ARG began providing these services. . . . When bidding on the present contracts, ARG assumed the same process would continue. Nowhere in the bid specifications did it indicate that a new wetting process would be used by the DOT or explain what an on board wetting system entailed. Instead, the only equipment that is discussed in the bid specifications for spreading trucks are an "automated synchronization (ground speed control), adjustable controls inside the cab of the truck, and spill plates on the tailgate." See Section 3.15. This is in stark contrast to the detailed description for plowing equipment found in Section 3.12.3. Similarly, while the price sheet for snow plowing indicated there would be separate bids for those bidding with plowing equipment and those bidding without plowing equipment, no such distinction was made for on board wetting equipment in the price sheet for spreading bids.

As a result, while many of ARG's trucks had the on board wetting equipment installed and all of its trucks were able to provide on board wetting, ARG assumed it would be providing the same services and using the same "wetting" method as it had been done in the past. This assumption was based on the language in the contract that indicated that vendors would be bidding on "services similar" to those provided in the prior contracts, the fact that the bid specifications are entirely devoid of any details regarding on board wetting, and that no distinction is made in the price sheet for the vendors who would be providing on board wetting equipment and those who would not be providing this equipment.

- Once awarded these bids, but prior to the start of the Winter Season, ARG's principal, Thomas Ippolito, made several calls to his regions' crew supervisors to request that ARG's trucks be inspected to ensure

they meet the DOT's requirements. In prior years the practice was that the DOT would inspect the trucks before the start of the season so the contractors could correct any issues before performing the requisite services. However, prior to this season, Mr. Ippolito's calls went unanswered and his messages went unreturned. Mr. Ippolito then followed up with Douglas Campbell at the DOT. Mr. Campbell advised Mr. Ippolito that the crew supervisors were given discretion this year on whether to inspect the trucks or waive the inspection. As a result, unlike prior years, the crew supervisors waived the inspection of ARG's trucks despite Mr. Ippolito specifically requesting that his trucks be inspected to avoid any issues during the season.

Unfortunately, such an issue arose that could have been resolved if the requested inspection had taken place.

- Instead, following the start of the season, it was discovered that there was confusion resulting from a question submitted on the Revised Vendor Equipment Form, which stated: "Are you able to provide on board wetting?" ARG read this question literally and answered in the affirmative, since all of its trucks are "able to provide" on board wetting. While not specified in the bid specifications, the DOT has interpreted this question to mean that the bidder's trucks not only had the capability to perform on board wetting, but that the bidder would be performing these services. This interpretation defies the plain meaning of the question and is inconsistent in how the DOT has interpreted similar language on the same form.

While ARG disagrees with the DOT's interpretation of the bidding documents, when the DOT communicated to ARG it was taking the position that its trucks required an on board wetting system, ARG immediately took on the added expense of purchasing and installing the additional equipment. While ARG maintains that it properly responded to the questions in the bid specifications, it still voluntarily took on this added expense in order to maintain its positive relationship with the DOT.

- While ARG disagrees with the DOT's interpretation of the bidding documents, when the DOT communicated to ARG it was taking the position that its trucks required an on board wetting system, ARG could have either: (1) refused to equip all of its trucks and performed the contract it believes it was awarded; (2) sought to have the contract terminated, forcing the DOT to scramble to find a replacement contractor in the middle of winter; or (3) demanded a higher hourly rate to take on the additional expense of equipping all of its vehicles. However, instead of choosing these options, ARG honored its commitment to the State (without increasing its price), and took on the added expense of purchasing and installing the additional equipment.

While it had no legal obligation to do so, ARG believed it was better to comply with the DOT's request, rather than fight over the bidding documents and endanger what it believed was a positive relationship. Notwithstanding this good faith gesture, the DOT has rejected ARG's



post award compliance. This contradicts the previous position taken by the DOT that post award compliance is allowed under Bid Solicitation #18DPP00205 – T0777. This was exemplified in the Division of Purchase and Property’s September 5, 2018 response to a bid protest letter submitted by Frank Kahyaoglu of Caner Transportation, LLC. In the letter, Mr. Kahyaoglu challenged a snow plowing award made to AIT Express. The challenge was based on AIT Express owning only 1 truck at the time of the bid, whereas the bid specifications required over 30 trucks to perform the work. The Division did not appear to dispute Mr. Kahyaoglu’s claim that AIT Express did not have sufficient trucks or equipment to perform the services. Instead, it argued that the “Bid Solicitation did not require that a Vendor {Bidder} own the trucks necessary to perform the services required at the time of Quote opening. Rather, it is incumbent on the Vendor {Contractor}, post award, to have the equipment available to perform the work required.” (emphasis added).

Similar to what was permitted for AIT Express, ARG purchased the equipment to comply with the DOT’s interpretation of the contract “post award” as soon as the DOT notified ARG that it interpreted the bid documents to require ARG have these additional equipment requirements. While ARG disagrees with what is required under its contract with the DOT, it nevertheless purchased and installed the requested equipment, thereby complying with the DOT’s interpretation. While the State previously claimed that “post award” purchases of equipment were permissible under this Bid Solicitation, the DOT refuses to provide ARG with the same treatment. As set forth above, ARG’s response to the disputed question was correct and reasonable. Notwithstanding, as soon as the DOT provided its interpretation, ARG purchased the equipment rather than fight with the DOT. Therefore, it would be unreasonable and unfair to allow one contractor to make a “post award” purchase of equipment, while not affording ARG the same opportunity. Under these circumstances, the “post award” purchase of the equipment must be permitted.

- The DOT argues that ARG would not have been awarded any of the spreading contracts if ARG utilized the DOT’s interpretation in completing the Revised Equipment Form. This position is incorrect. As set forth above and in Mr. Ippolito’s certification, ARG was committed to installing the requisite equipment on its trucks. Had the DOT properly communicated its position to ARG regarding the on board wetting equipment (such as by establishing this expectation in the bid specification, inspecting the trucks, or through any other form of communication), ARG would have ensured that the on board wetting equipment was installed prior to the start of the Winter Season. However, to be clear, having this knowledge regarding the on board wetting equipment would not have affected ARG’s bid. Instead, ARG still would have answered the Revised Bid Form in the exact same manner and bid the exact same prices. As a result, ARG would have been awarded the same contracts by the DOT --with the only difference being that it would have had the on board wetting equipment installed on its trucks a few weeks earlier.

In its May 7, 2019 letter to the Division, ARG further argued:

- In ARG's prior correspondence, ARG indicated that nearly identical questions were submitted on the Revised Equipment Form for both Snow Plowing Services and Spreading Services. Specifically, the questions asked "Are you able to provide your own plows?" and "Are you able to provide on board wetting?" Since the questions appear on the same page, on the same form, and are worded almost identically, it would be reasonable to conclude these questions would be interpreted in the same manner.

However, the Department of Transportation ("DOT") has interpreted these questions differently. In seeking to terminate its contracts with ARG, the DOT argues that checking "Yes" to the question for Spreading Services means that the Vendor "will" be providing the equipment. However, this position contradicts how the DOT interpreted the nearly identical question for Snow Plowing Services. Specifically, Vendors who checked "Yes" to the above question were permitted to bid on only providing trucks to perform the services, without providing the equipment.

For example, Salomone Bros. Inc. ("Salomone") answered "Yes" to the above question for price lines 21, 41, 43, 44, and 46, and was awarded these five contracts. For these five price lines, Salomone gave the DOT a choice, it could provide only the trucks (and no equipment) for a bid price of \$165.00 per hour or it could provide the trucks and the equipment for a price of \$195.00 per hour. Similarly, Mathis Construction Co. Inc. ("Mathis") and Puglia Excavating LLC ("Puglia") answered "Yes" to being "able to provide" the equipment, but submitted bids to perform the work without the equipment. Specifically, Mathis was awarded price lines 197 and 293. For these bid, Mathis answered "Yes" to the above question, but bid both a rate for "truck only" (\$225.00/hour & \$184.00/hour) and "truck & equipment" (\$370.00/hour & \$270.00/hour). Puglia was awarded price line 283. For this bid, Puglia answered "Yes" to the above question, but bid a rate for "truck only" (\$255.00) and "truck and equipment" (\$335.00).

Naturally, if answering "Yes" to the question "are you able to provide" the equipment means that a Vendor "will" be providing the equipment, then the bids for "truck only" and "truck & equipment" should be the same for all three of the above Vendors (since all three Vendors answered "Yes" to question). Instead, the difference in bid price for each Vendor's bids is significant. In fact, if the DOT equated answering "Yes" to mean that a Vendor "would" provide the equipment, then it should have awarded the lower rates for each of these Vendors since -- according to the DOT's position -- both require the Vendor provide the trucks and the equipment. Instead, the DOT awarded the higher "truck & equipment" rate. As a result, it was irrelevant to the DOT that the Vendors answered "Yes" on the Revised Equipment Form for purposes of whether the Vendors would or would

not be providing the equipment. Instead, the differentiating factor was that Vendors each submitted a bid on the price sheet for “truck & equipment.”

In consideration of ARG’s protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the protest, the relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest submitted by ARG. I set forth herein my final agency decision.

The Bid Solicitation Section 1.2 *Background* advised the Vendor {Bidder} community that the specifications of the subject procurement had changed. In relevant part:

This is a re-procurement of services similar to those provided under the following Blanket P.O.s {Contracts}, presently due to expire on April 30, 2018:

1. Snow Plowing and Hauling Services Statewide for the NJDOT (T-0777); and
2. Calibrated Spreading Services for Icing Chemicals and Abrasives NJDOT (T-1415).

Vendors {Bidders} interested in the current Blanket P.O. {Contract} specifications and pricing information may review the current Blanket P.O.s {Contracts} (T-0777 & T-1415) at <http://www.state.nj.us/treasury/purchase/pricelists.shtml> and are cautioned that this new Bid Solicitation {RFP} addresses current requirements.

[Emphasis added.]

In its April 18, 2019 letter, ARG states that it believed that the on board wetting systems to be employed by NJDOT would be the same system employed in previous years. See, ARG’s letter to the Division, dated April 18, 2019, p.1-2. ARG’s assertion in this regard is misplaced. While Bid Solicitation Section 1.2 *Background* does state that the current procurement was similar (i.e., not the same as) to the past Blanket P.O.s, it clearly indicates the past Blanket P.O.s were to expire on April 30, 2018 and it cautioned Vendors {Bidders} that the new Bid Solicitation addressed current requirements. It was ARG’s responsibility to carefully review the Bid Solicitation’s requirements and raise any questions during the Question and Answer Period, if there were any ambiguities. Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period* and Bid Solicitation Section 1.4.2 *Vendor {Bidder} Responsibility* state:

The Vendor {Bidder} assumes sole responsibility for the complete effort required in submitting a Quote {Proposal} in response to this Bid Solicitation {RFP}. No special consideration will be given after Quotes {Proposals} are opened because of a Vendor’s {Bidder’s} failure to be knowledgeable as to all of the requirements of this Bid Solicitation {RFP}.

Moreover, Bid Solicitation Section 1.1 *Purpose and Intent* and Section 6.7.1 *Vendor’s {Bidder’s} Price Schedule*, contains a detailed breakdown of Spreading Services to be provided and the preference system to be applied:

**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.

In addition, Attachment 1 required Vendors {Bidders} to indicate whether they were able to provide an on board wetting system:

ATTACHMENT 1                      SNOW PLOWING AND SPREADING SERVICES-NJDOT  
BID SOLICITATION (RF) 18DPP00205  
VENDOR (BIDDER) EQUIPMENT FORM

**The Vendor (Bidder) must complete and submit one (1) form for each Section Offered**

Vendor (Bidder) Name: \_\_\_\_\_

**SNOW PLOWING SERVICES ONLY**

Snow Section: \_\_\_\_\_

Number of Class A Trucks                      \_\_\_\_\_

Number of Class B Trucks                      \_\_\_\_\_

Are you able to provide your own plows?    YES \_\_\_ or NO \_\_\_

If yes, how many?                                      \_\_\_\_\_

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**SPREADING ONLY**

Crew #: \_\_\_\_\_

Number of Class P Trucks                      \_\_\_\_\_

Number of Class Q Trucks                      \_\_\_\_\_

Number of Class R Trucks                      \_\_\_\_\_

Type of spreading equipment                      Tailgate mounted or V Box

Are you able to provide on board wetting?    YES \_\_\_ or NO \_\_\_

Are your vehicles capable of offloading unused material quickly after an event?  
YES \_\_\_ or No \_\_\_

It is true that the Price Sheet did include separate price lines for those bidding with plowing equipment and for those bidding without plowing equipment, and that no such option was provided to those Vendors {Bidders} bidding with or without an on board wetting equipment. However, the language of the

Bid Solicitation Section 1.1 *Purpose and Intent* and Section 6.7.1 *Vendor's {Bidder's} Price Schedule*, as well as the answer provided to question 5 of the Bid Amendment #1 was clear. The methodology used to evaluate the Quotes received mandated that those Vendors {Bidders} who were capable of supplying trucks for spreading services with an on board wetting system would be given a preference over those Vendors {Bidders} supplying trucks without an on board wetting system, regardless of the price proposed. For each spreading price line for which ARG submitted a Quote it included Attachment 1, indicating that it was capable of providing the on board wetting system for each of its trucks.

Additionally, in its May 29, 2018, the Bureau sought clarification from ARG for a total of seven (7) items, all of which specified that trucks "equipped with a wetting system" were to be provided to the State by ARG. In its response to the Bureau, ARG did not dispute or raise any concerns regarding the State's description of the trucks being "equipped with a wetting system."

It is disingenuous for ARG to argue that "nowhere in the bid specifications did it indicate that a new wetting process would be used by the DOT or explain what an on board wetting system entailed." ARG's letter to the Division, dated April 18, 2019, p.2. A review of the record reveals that ARG's assumption that "it would be providing the same services and using the same 'wetting' method as it had been done in the past" is misplaced, because it incorrectly interpreted the requirement of the Bid Solicitation.

Next, ARG states that,

Once awarded these bids, but prior to the start of the Winter Season, ARG's principal, Thomas Ippolito, made several calls to his regions' crew supervisors to request that ARG's trucks be inspected to ensure they meet the DOT's requirements. In prior years the practice was that the DOT would inspect the trucks before the start of the season so the contractors could correct any issues before performing the requisite services. However, prior to this season, Mr. Ippolito's calls went unanswered and his messages went unreturned. Mr. Ippolito then followed up with Douglas Campbell at the DOT. Mr. Campbell advised Mr. Ippolito that the crew supervisors were given discretion this year on whether to inspect the trucks or waive the inspection. As a result, unlike prior years, the crew supervisors waived the inspection of ARG's trucks despite Mr. Ippolito specifically requesting that his trucks be inspected to avoid any issues during the season.

Unfortunately, such an issue arose that could have been resolved if the requested inspection had taken place.

[ ARG's letter to the Division, dated April 18, 2019, p. 2 ]

Bid Solicitation Section 3.12.1 *Vendor {Contractor} Superintendent Requirements* states that:

The Vendor {Contractor} shall provide a Superintendent who shall<sup>2</sup> be responsible for overseeing all snow plowing Operations, including, but not necessarily limited to:

...

C. Inspection of Vendor {Contractor} equipment [.]

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<sup>2</sup> Pursuant to Bid Solicitation {RFP} Section 2.2 *General Definitions* "Shall – Denotes that which is a mandatory requirement."

The record reveals that the NJDOT did not inspect ARG's equipment prior to November 2018. In fact, not until a verbal conversation took place between ARG and a NJDOT crew supervisor in November 2018 did the NJDOT learn that ARG did not have on board wetting systems readily available. On November 13, 2018, after learning that ARG did not have on board wetting systems on its trucks, NJDOT sent an email to ARG seeking confirmation that it did not have a "functional on-board wetting system." NJDOT's email to ARG, dated November 13, 2018. On the same day, ARG replied and confirmed that it did "not have onboard wetting system at this time." ARG's email to NJDOT, dated November 13, 2018. Regardless of when NJDOT performed the equipment inspection, it would not have changed the undisputed fact that ARG did not have the on board wetting equipment installed at the time of the bid opening. ARG could not later correct this fact, as doing so put ARG at an unfair advantage over other Vendors {Bidders}.

In its protest, ARG argues that:

ARG has continued to fully perform under its contract with the DOT and has met every request made by the DOT. Specifically, for each and every snow storm this Season, ARG has complied with every directive issued by the crew supervisors. For example, during the first storm, ARG timely arrived at the DOT facility, had its trucks filled and sprayed, and properly salted each of its regions. In fact, despite many its trucks having an on board wetting system installed, not one crew supervisor requested that ARG utilize its on board wetting system during this storm. It was not until the DOT advised ARG that all of its trucks must have an on board wetting system that ARG was even aware that crew supervisors may make a request for the trucks to utilize this method of wetting, rather than the traditional method. As a result, ARG immediately purchased and installed the equipment for the remainder of its trucks. However, at no time did ARG fail to comply with any request made by the DOT or its crew supervisors. Instead, ARG has fully performed its contract with the DOT and has purchased and installed all equipment required under the contract, including the equipment specifically set forth in Section 3.15 of the bidding specifications and the on board wetting equipment that the DOT requested it have.

[ARG's letter to the Division, dated April 18, 2019, p. 3].

Neither the Bureau nor the NJDOT has provided any facts indicating that ARG failed to meet any requests made by the NJDOT, or that ARG failed to perform under the contract after learning that it should have had on board wetting equipment installed on its trucks for spreading services. However, in its protest, and in the November 13, 2018 email exchange between NJDOT and ARG, ARG confirmed that it did not have on board wetting systems installed on all of its trucks at the time of the award, despite indicating so in its Quote. In fact, in its November 13, 2018 email to NJDOT, ARG stated it "was puzzled to see the onboard wetting because I thought we Bid without onboard wetting." ARG then confirmed that it did not have on board wetting capabilities "at this time." ARG's email to NJDOT, dated November 13, 2018.

Bid Solicitation Section 1.2 *Background*, clearly states that:

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.

[Emphasis added.]

It is not disputed that at the time ARG submitted its Quote, on March 16, 2018, it did not have an on board wetting system, despite so indicating in its Quote for all of the eight (8) spreading price lines it was awarded. In fact, at the time when the spreading price lines were awarded to ARG, it still did not have an on board wetting systems installed on all of its trucks. Not until November 13, 2018, did ARG realize that it should have had on board wetting systems installed, as promised in its Quote. ARG argues that its purchase and installation of the on board wetting systems post-bid opening to comply with the Bid Solicitation requirements should be permissible. Supplying trucks with on board wetting system however, was a material requirement of the Bid Solicitation. Allowing ARG to obtain and install on board wetting systems after all bids have been opened “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.” See Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994). Waivers of a Bid Solicitation deviation which would permit “post-bid . . . manipulation of the results have been declared unlawful.” Suburban Disposal, Inc. v. Twp. of Fairfield, 383 N.J. Super. 484, 494 (App.Div.2006). “Such post-bid manipulations are repugnant to our public bidding laws.” Id. at 493.

Because ARG’s representation at the time of its Quote submission was that it had the on board wetting systems available for all of its trucks, ARG was given preference over other Vendors {Bidders} for lines 315, 335, 346 and 348 during the bid evaluation process, as prescribed by the Bid Solicitation Section 1.2 *Background*. However, based upon the information learned after the Blanket P.O.s were awarded, ARG should not have been afforded this preference because it did not have the on board wetting systems, contrary to the representations made in its Quote. As such, the Blanket P.O. for lines 315, 335, 346 and 348 should be cancelled.

A different outcome results from ARG’s award of price lines 322, 334, 339 and 341. A review of the record reveals that ARG would have been awarded price lines 322, 334, 339 and 341 notwithstanding its indication of having on board wetting systems at the time of the Quote submission. Specifically, for price lines 322 and 334, ARG was the only Vendor {Bidder} who submitted a Quote capable of supplying the number of trucks that these price lines required. For price line 339, ARG was the only responsive Vendor {Bidder} whose submitted Quote which included the required equipment. The two (2) remaining responsive Vendors {Bidders} for price line 339 expressed disinterest in serving the price line. For price line 341, ARG was, at the time of the Quote opening date, the only responsive bidder which could supply all the required trucks, since the two (2) remaining Vendors {Bidders} did not have the necessary number of trucks to service for this price line. Therefore, bearing the State’s best interest in mind, ARG’s Blanket P.O.s for price lines 322, 334, 339 and 341 should not be cancelled, since ARG would have been awarded these price lines notwithstanding its indication of having on board wetting systems at the time of the Quote submission and no other bidder submitted Quotes for these price lines.

In light of the findings set forth above, I sustain ARG’s protest in part and deny in part. I remand this matter back to the Bureau to take the appropriate action consistent with the final agency decision. 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 business with **NJSTART** at [www.njstart.gov](http://www.njstart.gov), the State of New Jersey's new eProcurement system.

Sincerely, .



Maurice A. Griffin  
Acting Director

MAG: RD

c: A. Davis  
R. Regan  
K. Popso  
K. Centofanti