



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR

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April 16, 2020

Via Electronic Mail [lmoffa@mmwr.com] and USPS Regular Mail

Louis R. Moffa, Jr.
Partner and General Counsel
Montgomery McCracken Walker & Rhoads LLP
457 Haddonfield Rd., Suite 600
Cherry Hill, NJ 08002

Re: I/M/O Bid Solicitation # 19DPP00424 PSI Services, LLC.
Protest of Notice of Intent to Award
Bid Solicitation Title: T2631 - Cosmetology and Hairstyling License Examinations, L&PS

Dear Mr. Moffa:

This letter is in response to your correspondence of February 3, 2020, on behalf of PSI Services, LLC (PSI) to the Division of Purchase and Property's (Division) Hearing Unit. By way of that letter, PSI protests the Notice of Intent (NOI) issued by the Division's Procurement Bureau (Bureau) issued on January 24, 2020 for Bid Solicitation #19DPP00424 T2631 Cosmetology and Hairstyling License Examinations, L&PS (Bid Solicitation).

By way of background, on October 10, 2019, the Bureau issued the Bid Solicitation on behalf of the Board of Cosmetology and Hairstyling (Board), Division of Consumer Affairs, Office of the Attorney General, Department of Law and Public Safety, to solicit Quotes for the "provision of theory examinations via computer based testing (CBT) and paper and pencil testing for each of the following professional categories: cosmetologists and hairstylists, skin care specialists (esthetician), manicurist, beautician, barber, braider, and teacher for all listed." (Bid Solicitation § 1.1 *Purpose and Intent*.) The intent of this Bid Solicitation was to award a Master Blanket Purchase Order (Blanket P.O.) to that responsible Vendor {Bidder} whose Quote, conforming to this Bid Solicitation was most advantageous to the State, price and other factors considered. Ibid.

On November 12, 2019, the Bureau posted Bid Amendment {Addendum} #1, providing answers to questions received and posting a revised Bid Solicitation, entitled "T2631 Revised Bid Solicitation 111219".

On November 21, 2019, the Division's Proposal Review Unit opened two (2) Quotes submitted through the State's *NJSTART* eProcurement system and received by the submission deadline of 2:00 p.m. eastern time. Both Quotes were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*.

After conducting a review of PSI's Quote, the Bureau determined that PSI's Quote was non-responsive due to a material deviation on the *Ownership Disclosure Form*. (Evaluation Committee Report at 2). More specifically, the Bureau found that PSI failed to provide a completed *Ownership Disclosure Form* contrary to Bid Solicitation Section 4.4.1.2.1 *Ownership Disclosure Form*. The Bureau stated in the Award Recommendation Report that Part 1 of PSI's *Ownership Disclosure Form* indicated that there were

“individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest” in PSI Services. PSI Services then responds in Part 2 that there are entities or individuals owning 10% or greater in some of the entities listed in Part 1, but declined to provide the additional required information because “Waud funds are a collection of private equity funds, and thus the information of the specific holders within each fund is highly confidential information.”¹

On January 24, 2020, the Bureau issued the NOI, advising all Vendors {Bidders} of its intent to make a Blanket P.O. award to Prometric LLC (Prometric). On February 3, 2020, in response to the NOI, PSI sent the Division an email, protesting the NOI for the following reasons:

Along with its ODF, Prometric submitted a Supplemental Response to Part 2 In that Supplemental Response, Prometric purports to give a complete description of the layers of its ownership. The last line of that submission states, “None of the institutional investors in The Baring Asia Private Equity Fund VI, L.P.2 or The Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest.” There is no mention of individual, corporate or other types of “investors” in those Funds. Indeed, there is no definition or explanation of what Prometric means by “institutional investors.” Like the flawed “family of companies” disclosure, Prometric’s reference solely to “institutional investors” is vague and incomplete, if not misleading and inaccurate.

As a result, Prometric’s bid is materially defective and non-responsive due to an incomplete and/or inaccurate ODF, and that bid must be rejected.

[PSI’s February 3, 2020 protest letter at 2-3.]

In consideration of PSI’s protest, I have reviewed the record of this procurement, including the Bid Solicitation, Vendors’ Bidders’} Quotes and protest, the relevant statutes, regulations, and case law. The issues raised in PSI’s protest with respect to the conformity of Prometric’s Quote to the Bid Solicitation are sufficiently clear such that review of the written record 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. I set forth herein the Division’s Final Agency Decision.

The review of Prometric’s Quote reveals that it submitted the following information on its *Ownership Disclosure Form*:

¹ PSI has not protested Bureau’s determination PSI’s Quote was non-responsive due to a material deviation on the *Ownership Disclosure Form* and is not eligible for an award.

PART 1

Are there any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor (Bidder)? YES NO

If you answered, "YES" above, you must disclose the following: (a) the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class; (b) all individual partners in the partnership who own a 10 percent or greater interest therein; or, (c) all members in the limited liability company who own a 10 percent or greater interest therein.

NAME	PROMETRIC HOLDINGS INC.			
ADDRESS 1	1501 S. CLINTON STREET			
ADDRESS 2				
CITY	BALTIMORE	STATE	MD	ZIP 21224

PART 2

Of those entities disclosed above owning a 10% or greater interest in the Vendor (Bidder), are there any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest of those listed entities? YES NO

If you answered, "YES" above, you must disclose the following: (a) the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class; (b) all individual partners in the partnership who own a 10 percent or greater interest therein; or, (c) all members in the limited liability company who own a 10 percent or greater interest therein. Please note that this disclosure shall be continued until names and addresses of every non-corporate stockholder, and individual partner, and member, exceeding the 10 percent ownership criteria established in this act, has been identified.

Name of the entity listed above to which the disclosure below applies: PROMETRIC HOLDINGS INC.

NAME	SARBACANE TOPCO, INC.			
ADDRESS 1	1501 S. CLINTON STREET			
ADDRESS 2				
CITY	BALTIMORE	STATE	MD	ZIP 21223

SUPPLEMENTAL RESPONSE

OWNERSHIP DISCLOSURE FORM

BID SOLICITATION #: 19DPP00424 VENDOR: PROMETRIC LLC

PART 2

Sole shareholder of Sarbacane Topco, Inc. is Prometric SuperHoldCo, Inc. c/o Prometric LLC, 1501 S. Clinton Street, Baltimore, MD 21224

Sole shareholder of Prometric SuperHoldCo, Inc. is Safari Aggregator, L.P. c/o Maples Corporate Services Limited, P.O. Box 309, Ugland House, South Church Street, George Town, Grand Cayman KY1-1104, Cayman Islands

The Baring Asia Private Equity Fund VI, L.P.2 is a 58.78% owner of Safari Aggregator, L.P. The Baring Asia Private Equity Fund VI, L.P.1 is a 40.82% owner of Safari Aggregator, L.P. c/o Maples Corporate Services Limited, P.O. Box 309, Ugland House, South Church Street, George Town, Grand Cayman KY1-1104, Cayman Islands

None of the institutional investors in The Baring Asia Private Equity Fund VI, L.P.2 or The Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest.

PSI argues in its protest that Prometric's response that "[n]one of the institutional investors in The Baring Asia Private Equity Fund VI, L.P.2 or The Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest" is flawed, because "[t]here is no mention of individual, corporate or other types of "investors" in those Funds. Indeed, there is no definition or explanation of what Prometric means by "institutional investors." Like the flawed "family of companies" disclosure, Prometric's reference solely to "institutional investors" is vague and incomplete, if not misleading and inaccurate." (PSI February 3, 2020 protest at 2-3).

Disclosure of a Vendor's {Bidder's} ownership is statutorily required information that must be submitted with the Vendor's {Bidder's} Quote. The New Jersey Legislature, in implementing N.J.S.A. 52:25-24.2 mandated the requirements that a Vendor {Bidder} must comply with in order to enter into a contract with the State. N.J.S.A. 52:25-24.2 states in pertinent part:

No corporation, partnership, or limited liability company shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation, said partnership, or said limited liability company there is submitted a statement setting forth the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be. **If one or more such stockholder or partner or member is itself a corporation or partnership or limited liability company, the stockholders holding 10 percent or more of that corporation's stock, or the individual partners owning 10 percent or greater interest in that partnership, or the members owning 10 percent or greater interest in that limited liability company, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, and member, exceeding the 10 percent ownership criteria established in this act, has been listed.**

[Emphasis added.]

To make the process of complying with the statutory requirements easier, the Division provides the bidding community with the *Ownership Disclosure Form*.

As noted above, in its *Ownership Disclosure Form*, Prometric indicated that "[n]one of the institutional investors in [t]he Baring Asia Private Equity Fund VI, L.P.2 or [t]he Baring Asia Private Equity Fund VI, P.P.1 hold a 10% or greater interest." N.J.S.A. 52:25-24.2 requires that "[t]he disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, and member, exceeding the 10 percent ownership criteria established in this act, has been listed." Here, based on the information provided by Prometric, it is unclear whether by "institutional investors" Prometric meant that there are no noncorporate stockholders, or individual partners, or members in the Baring Asia Private Equity Fund VI, L.P.2 or the Baring Asia Private Equity Fund VI, P.P.1 who hold a 10% or greater interest or whether "institutional investors" refers to corporations, partnerships and limited liability companies as referenced in the statute.

The Appellate Division in In the Matter of Protest of Scheduled Award of Term Contract T2813 RFP 12-X-22361 Laboratory Testing Service, Equine Drug Testing, held that the Division “is charged with fulfilling its statutory duties, which includes ensuring compliance with N.J.S.A. 52:25-24.2.” No. A-1336-12, 2013 N.J. Super. Unpub. LEXIS 1698, at *29-30 (App. Div. July 10, 2013). “While a bidder may properly be permitted to clarify or explain the contents of its proposal post-opening, supplying an essential missing item from a bid is not permissible.” Id. at *20 (citing In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, 279 N.J. Super. 566, 597-98 (App. Div. 1995)). For example, in Stano v. Soldo Construction Co., 187 N.J. Super. 524 (App. Div. 1983), the court found no violation of the ownership disclosure requirements where the bidder “had provided an accurate shareholders’ statement, but due to the complexity of the facts it was unavoidably confusing. The later clarification was simply intended to aid the county in its interpretation of the statement and was permissible.” Id. at 539. Similarly, in Schlumberger Industries, Inc. v. Borough of Avalon, 252 N.J. Super. 202 (App. Div. 1991), the court found no violation of the ownership disclosure requirements where the bidder was a publicly traded company that contracted with the municipality on previous occasions, and, therefore, its corporate structure was known to the municipality. Id. at 207. Conversely, in Muirfield Construction Co., Inc. v. Essex County Improvement Authority, 336 N.J. Super. 126 (App. Div. 2000), the court found the bidder’s failure to disclose an individual’s 11% ownership interest was a material and incurable defect. Id. at 130.

In this case, to determine whether Prometric complied with the requirements of N.J.S.A. 52:25-24.2, the Bureau should have clarified whether by stating that “none of the institutional investors in the Baring Asia Private Equity Fund VI, L.P.2 or the Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest” Prometric means that there are no “noncorporate stockholder, and individual partner, and member exceeding the 10 percent ownership criteria” in the Baring Asia Private Equity Fund VI, L.P.2 and the Baring Asia Private Equity Fund VI, L.P.1. In other words, the Bureau must determine whether Prometric provided an accurate statement of ownership that merely needed clarification because of its complexity, as in Stano, or if, as in Muirfield, Prometric’s ownership disclosure is incurably defective.

In the light of the findings set forth above, I remand this matter back to the Bureau for further review and clarification. 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, the State of New Jersey’s new eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RD

c: J. Loughran
R. Regan
M. Dunn