



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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November 19, 2020

Via Electronic Mail Only lmears@petrochoice.com

Leonard Mears, Territory Sales Manager – East Region
PetroChoice, LLC
837 Cherry Street
P.O. Box 5066
Avoca, PA 18641

Re: I/M/O Bid Solicitation #20DPP00484 PetroChoice, LLC
Protest of Notice of Intent to Award
T0097 Automotive Lubricants

Dear Mr. Mears:

This final agency decision is in response to your email of November 2, 2020 on behalf of PetroChoice, LLC (PetroChoice) to the Division of Purchase and Property's (Division) Hearing Unit. In that correspondence, PetroChoice protests the Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) on October 21, 2020. The NOI advised all Vendors {Bidders} of the Division's intent to award Master Blanket Purchase Orders (Blanket P.O.s) to four Vendors {Bidders} whose submitted Quotes were responsive to the requirements of Bid Solicitation #20DPP00484 - T0097 Automotive Lubricants (Bid Solicitation). PetroChoice was not among the Vendors {Bidders} listed for award.

By way of background, on February 3, 2020, the Bureau issued the Bid Solicitation on behalf of the State Agencies, Quasi-State Entities and other Cooperative Purchasing Program participants. The purpose of the Bid Solicitation was to solicit Quotes for Automotive Lubricants: Engine Oils, Diesel Engine Oils, Gear Oils, Greases, Automatic Transmission Fluids (ATF), Tractor Hydraulic/Transmission Fluids, Hydraulic Oils, Diesel Exhaust Fluids (DEF), Antifreeze and Windshield Washer Fluids. Bid Solicitation §1.1 *Purpose and Intent*. In accordance with Bid Amendment #7, a revised Bid Solicitation was posted on June 2, 2020 to address those questions that were raised during the Question and Answer Period permitted by Bid Solicitation § 1.3.1 *Electronic Question and Answer Period*. 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 June 19, 2020, the Division's Proposal Review Unit opened six Quotes received by the submission deadline of 2:00 pm eastern time.¹

¹ Quotes were received from David Weber Oil, LLC, Romeo Enterprises, Auto Plus Auto Parts, Taylor Oil Company, and PetroChoice who submitted two Quotes.

The record of this procurement reveals that on its submitted preprinted price list / catalog pricing documents that were required by Bid Solicitation Section 4.4.3.1 Submittals, PetroChoice included the statement “Quote good for 30 days post preparation date. All pricing information is confidential.” With respect to the submission of pricing, Bid Solicitation Section 4.4.3.1 reminded Vendors {Bidders} that “[t]he price list and/or catalog submitted must clearly indicate the products and brands offered and the firm, fixed pricing associated with the products, such that the applicable Bid Solicitation category/price line may be determined.” Moreover, with respect to submitted price lists, Vendors {Bidders} are only permitted to update price lists once during a 12-month period. See Bid Solicitation Section 3.9 *Price List Updates*. More importantly, the Bid Solicitation advised all potential Vendors {Bidders} that “[e]ach Vendor {Bidder} is required to hold its prices firm through issuance of Blanket P.O.” See, Bid Solicitation § 4.4.5 *State Supplied Price Sheet*, emphasis added. Based upon the statements contained in the submitted Quote documents, the Bureau concluded that PetroChoice’s Quote “failed to meet the mandatory requirements set forth in the Bid Solicitation.” See, Recommendation Report, dated October 20, 2020, p. 9. More specifically, the Recommendation Report noted,

[PetroChoice’s] statement presents a material deviation under a River Vale analysis because the State cannot be assured that the Blanket P.O. will be entered into, performed and guaranteed according to its specified requirements (firm-fixed price). Additionally, waiving the requirement would adversely affect competitive bidding by placing PetroChoice in a position of advantage over other Vendors {Bidders} by only being required to hold pricing for thirty (30) days versus the term of the Blanket P.O.

After the review and evaluation of all Quotes received in response to the Bid Solicitation was completed, the Bureau prepared a Recommendation Report which recommended Blanket P.O. awards to four Vendors {Bidders}. PetroChoice was not among the Vendors {Bidders} listed for award. The Recommendation Report reveals that the Bureau found that PetroChoice’s Quote “failed to meet the mandatory requirements set forth in the Bid Solicitation.” See, Recommendation Report, dated October 20, 2020, p. 9. On October 21, 2020, the NOI was issued advising all Vendors {Bidders} that it was the State’s intent to award Blanket P.O.s consistent with the Bureau’s Recommendation Report dated October 20, 2020.

On November 2, 2020, the Division received PetroChoice’s protest stating:

I am writing to protest the results of the Master Blanket Purchase Order Title: T0097 – Automotive Lubricants. I provided a price sheet with PetroChoice letterhead that mistakenly contained the phrase “Quote is only valid for 30 Days”. This was not factual, and the pricing is in fact valid for the entire term of the contract. If at all possible I can resubmit the price sheet without the phrasing if the State of New Jersey can accept. Please let me know if there are any questions, or if I can assist in anyway at all.

In consideration of PetroChoice’s protest, I have reviewed the record of this procurement, including the Bid Solicitation, PetroChoice’s submitted Quotes, 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 Final Agency Decision on the merits of the protest. I set forth herein the Division’s Final Agency Decision.

As noted above, PetroChoice’s submitted preprinted price list contained a statement “Quote good for 30 days post preparation date. All pricing information is confidential.” The Bureau found that this

statement rendered the Quote non-responsive under the courts holding in Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207 (Law Div. 1974). The question before me is whether the deviation is material or if it can be waived. To be deemed non-responsive, PetroChoice's Quote would have to materially deviate from the requirements of the Bid Solicitation such that the Bureau would have no assurances that the contract would be performed consistent with the requirements of the RFP. In determining whether a material deviation exists, 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." River Vale, 127 N.J. Super. at 222. 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 River Vale for determining materiality. "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.]

Here PetroChoice reserved for itself the ability to amend its pricing, a reservation which is contrary to the Appellate Division's decision in In Re Request for Proposals #17DPP00144, 454 N.J. Super. 527 (App. Div. 2018). In In Re Request for Proposals #17DPP00144, the intended awarded submitted a Quote which included the following statement:

[Bidder] accepts all terms and conditions of this bid with the following additional language:

- Section 5.18 – Agree, as it applies to changes that impact administrative fees as outlined in this provision, provided that Vendor reserves the right to modify Financial Contracted Terms based on changes by the State in formulary or any carve out of services set forth in the Agreement, including but not limited to Specialty Pharmacy services.

There, in reviewing the submitted Quote statement, the Division concluded that the reservation of rights noted above did not result in a material deviation from the requirements of the Bid Solicitation. The Division believed that the statement should not be afforded any weight as the matter had been addressed during the question and answer period and through the order of precedence contained within the Bid Solicitation which specified that the terms and conditions of the Bid Solicitation, as amended by Bid Amendment would prevail over the intended awardee submitted Quote. The Appellate Division disagreed noting:

As explained in On-Line Games, it does not matter whether a bidder's deviation from a pricing term actually affected the bidding: "[o]mission of

a cost item can be material even if it is unlikely that it could have affected the relative positions of the bidders, because it necessarily undermines the common standard of competition.

[Id. at 568, citing, In the Matter of Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 601-602 (App. Div. 1995).]

Further, the Appellate Division stated

Applying the two-part River Vale test, Optum's reservation of the right to change its pricing in response to Plan Design changes both deprived the State of the assurance the Contract would be entered into and performed according to the specified requirements of Section 3.7.1A and Standard Term 5.4A, and adversely affected competitive bidding by allowing Optum to bid with a pricing privilege not provided to other bidders.

...

Optum's additional language also provided it a clear competitive advantage over the other potential bidders by permitting it to offer price terms while reserving the right to change them in the event of anticipated Plan Design changes to the Formulary or any reduction in the scope of work, including but not limited to Specialty Pharmacy services.

[In re Request for Proposals #17DPP00144, 454 N.J. Super. 527, 565-567.]

Here, similar to the intended awardee's statement in In re Request for Proposals #17DPP00144, PetroChoice, by noting that the pricing was only good for 30 days, reserved for itself the ability to unilaterally increase the pricing.

Although the Division has broad discretion to select among qualified and responsive Vendors {Bidders} in public contracting matters, the discretion afforded to the Director, "is not limitless." See, In re Request for Proposals #17DPP00144, 454 N.J. Super. at 559. "In line with the policy goal of thwarting favoritism, improvidence, extravagance, and corruption, the Division may not award a contract to a bidder whose proposal deviates materially from the RFP's requirements." Ibid., quoting, Barrick v. State, 218 N.J. 247, 258-59 (2014). For that reason, the Division's governing regulations mandate stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State's bidding process. Notably, "a proposal that is not...responsive to the material requirements of the RFP shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal." N.J.A.C. 17:12-2.7(c). If the Division were to waive the requirement that pricing be held firm through the contract award, as required by Bid Solicitation § 4.4.5 *State Supplied Price Sheet*, the State would be deprived of any assurance that the Vendor {Bidder} would perform the Blanket P.O. according to the requirements of the Bid Solicitation. As noted above, Vendors {Bidders} were required to hold pricing firm through the issuance of the Blanket P.O. Here PetroChoice reserved for itself the ability to amend its pricing at a time of its choosing. A benefit not afforded to other Vendors {Bidders}. Permitting this deviation places PetroChoice in a position of advantage over other Vendors {Bidders} who, in submitting their Quotes conformed to the requirements of the Bid Solicitation. Accordingly, PetroChoice's Quote contains a material deviation.

Further, in the protest, PetroChoice requested that it be permitted to submit revised price lists, which remove the offending language. PetroChoice cannot now amend its Quote submission, to revise the

price list, as doing so would be contrary to the Court's holding in In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995). In On-Line Games the Appellate Division held that "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 was interdicted by the RFP". PetroChoice's request to change the submitted price lists, would result in an alteration of the submitted Quote.

While the Division encourages competition and appreciates the time and effort put forth by PetroChoice in preparing and submitting a Quote; in light of the findings set forth above, I have no choice but to uphold the Bureau's determination that PetroChoice's Quote was not responsive to the requirements of the Bid Solicitation. Accordingly, I sustain the October 21, 2020 NOI. 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. 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. This is my final agency decision on this matter.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas
S. Ghorbani