



## State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY  
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August 25, 2020

*Via Electronic Mail Only* [TedSliwinski@gmail.com](mailto:TedSliwinski@gmail.com)

Theodore Sliwinski, Esq.  
45 River Road  
East Brunswick, NJ 08816

Re: I/M/O Bid Solicitation #20DPP00525 Messercola Excavating, Inc.  
Request for Reconsideration – Protest of Notice of Intent to Award  
T0777 Snow Plowing and Spreading Services - NJDOT

Dear Mr. Sliwinski:

This letter is in response to your August 18, 2020, correspondence to the Division of Purchase and Property's (Division) Hearing Unit, submitted on behalf of Messercola Excavating, Inc. (Messercola). In that correspondence, Messercola requests that the Division reconsider the merits of its July 17, 2020, protest and requests an in-person hearing for the purpose of presenting fact witnesses.

By way of background, on April 9, 2020, the Bureau issued the Bid Solicitation on behalf of the 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 NJDOT. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award Statewide Contracts 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 9, 2020, the Division's Proposal Review Unit opened 215 Quotes, submitted by 197 Vendors {Bidders}. The Quotes were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*. After the review and evaluation of all Quotes was completed, the Bureau prepared a Recommendation Report which recommended Maser Blanket Purchase Order (Blanket P.O. or Contract) awards to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation were most advantageous to the State, price and other factors considered.

With respect to Messercola's submitted Quote, the Bureau's July 9, 2020, Recommendation Report noted that Messercola submitted a Quote for both snow plowing and spreading services. *See* Recommendation Report, p. 60. The Recommendation Report further indicated that the submitted Quote was responsive to the mandatory requirements of the Bid Solicitation. *Ibid.* However, the Bureau recommended bypassing Messercola for a Blanket P.O. award stating:

**Messercola Excavating Co Inc. (Messercola)**

Messercola was awarded the current T0777 contract under Blanket P.O. #18-PROS1-00482. Price Lines #104 and #144 were terminated by the Division at the request of NJDOT. The basis for this termination was Termination for Cause – Failure to Perform for the following violations of the Blanket P.O.

1. On November 15, 2018 and November 18, 2018, Messercola did not report for services as required for Price Lines #104 and #144. Based upon this violation of the terms of the Blanket P.O., as well as Messercola's confirmation that it was no longer able to provide the contractually obligated services for Price Lines #104, and #144, the Division terminated Messercola's Blanket P.O. for Price Lines #104 and #144.

Due to the critical nature of the subject services, and the significant public safety risks associated with a Vendor's failure to perform these services, it is not in the State's best interest to enter into a Blanket P.O. with Messercola due to the Vendor's {Bidder's} history of poor performance in November 2018, which resulted in its Blanket P.O. being terminated for cause for the referenced price lines. The Bureau recommends that Messercola be bypassed for poor performance in accordance with N.J.A.C. 17:12-2.8, and be removed from consideration for award.

[Recommendation Report, p. 100.]

On July 13, 2020, the Notice of Intent to Award letter (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.

On July 17, 2020, the Division received Messercola's protest challenging the Bureau's decision to by-pass Messercola for award. In that protest letter Messercola stated in part:

The bidder has several strong grounds to appeal. First, the bidder contests any finding that they engaged in poor performance. The event dates were November 15, 2018, and November 18, 2018. The contractor did not receive adequate time to respond to the job site. Additionally, on 11/18/18 there was not even a chance of precipitation or a chance for temperatures to be even close to below freezing. This was the date of a major snow storm. It is important to emphasize that during this time period Messercola Excavating, Inc. has been adequately performing on 14 different other contracts, and they have received satisfactory reviews.

....

Fifth, Messercola Excavating, Inc. is requesting an in person hearing to present their case to Maurice Griffin, the Acting Director.

....

Seventh, Messercola Excavating, Inc. has several State Supervisors who will attest to their many years of excellent service. These witnesses are as follows:

- \* Jeff Evanylo Central Region Operations Supervisor [phone number redacted]
- \* Rich Christensen North Region [phone number redacted]
- \* Chuck Parizeau Crew Supervisor Elizabeth [phone number redacted]
- \* Anthony Ennas Central Region Director [phone number redacted]
- \* Willie Martin junior - Crew 331 [phone number redacted]
- \* Christopher Lockwood - Crew 221 [phone number redacted]

On August 4, 2020, the Division issued the final agency decision sustaining the July 13, 2020, NOI and the Bureau's decision to bypass Messercola for poor performance in accordance with N.J.A.C. 17:12-2.8.<sup>1</sup>

On August 18, 2020, Messercola submitted a letter to the Division requesting that the Division reconsider the merits of its July 17, 2020, protest. Additionally, Messercola requested a hearing to present fact witnesses. Messercola alleges that the "witnesses will substantiate by clear and convincing evidence that Messercola Excavating did not fail to show up for any snow storms." Messercola's proposed fact witnesses are Christopher Feintheil, Jeff Evanylo and Anthony Ennos.

In requesting reconsideration, Messercola has not brought to light any new or additional information which could not have been not included in its original protest, nor has it set forth any facts demonstrating that the Division's final agency decision was arbitrary, unreasonable or capricious. I note that reconsideration

should be utilized only for those cases which fall into that narrow corridor in which either 1) the [tribunal] has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [tribunal] either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .

Alternatively, if a litigant wishes to bring new or additional information to the [tribunal's] attention which it could not have provided on the first application, the [tribunal] should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the [tribunal] must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

[Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), citing, D'Atria v. D'Atria, N.J. Super. 392, 402-402 (Ch. Div. 1990)(stating "[r]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice.)]

Additionally, the Division's governing regulations do not contemplate requests for reconsideration. Rather, upon issuance of the final agency decision, the appropriate course of action would be to file an appeal with the Superior Court Appellate Division. N.J.A.C. 17:12-3.1 (b). While Messercola may not be entitled to reconsideration under the law, for the sake of completeness I will address the request here.

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<sup>1</sup> The Division's August 4, 2020, Final Agency Decision is available at: <https://www.state.nj.us/treasury/purchase/pdf/decisions/2020/IMOBidSolicitation20DPP00525MessercolaExcavating.pdf>.

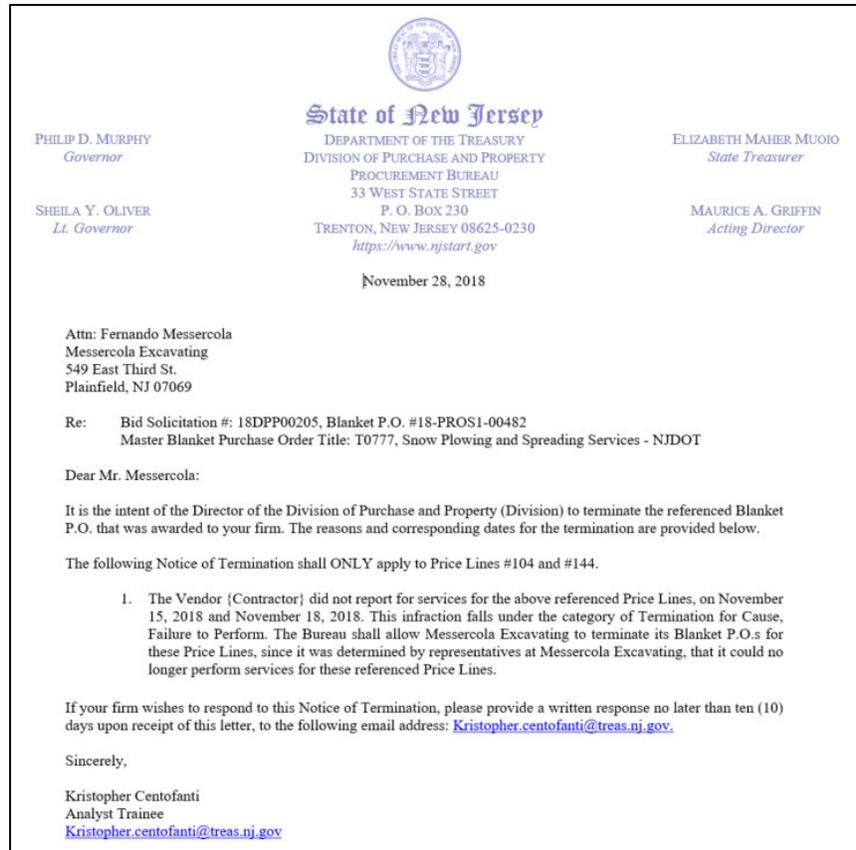
First, with respect to Messercola's request for an in-person presentation, as noted in the August 4, 2020, final agency decision, pursuant to N.J.A.C. 17:12-3.3(e), "[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director." Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). The issues raised in Messercola's protest were sufficiently clear such that a review of the record of this procurement 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 Messercola on the written record, as such an in-person hearing is not warranted.

Second, as discussed in the August 4, 2020 final agency decision, on or about October 1, 2018, Messercola was awarded Blanket P.O. #18-PROS1-00482 for snow plowing services; specifically, price lines 104 and 144. See Bureau's July 30, 2018, Recommendation Report. See July 30, 2018, Recommendation Report pgs. 60-61. On November 21, 2018, NJDOT wrote to the Division and requested the cancellation of Messercola's Blanket P.O. #18-PROS1-00482 for cause in accordance with the State of New Jersey's Standard Terms and Conditions (SSTC) Section 5.7 *Termination of Contract*. Specifically NJDOT's letter stated, in pertinent part:

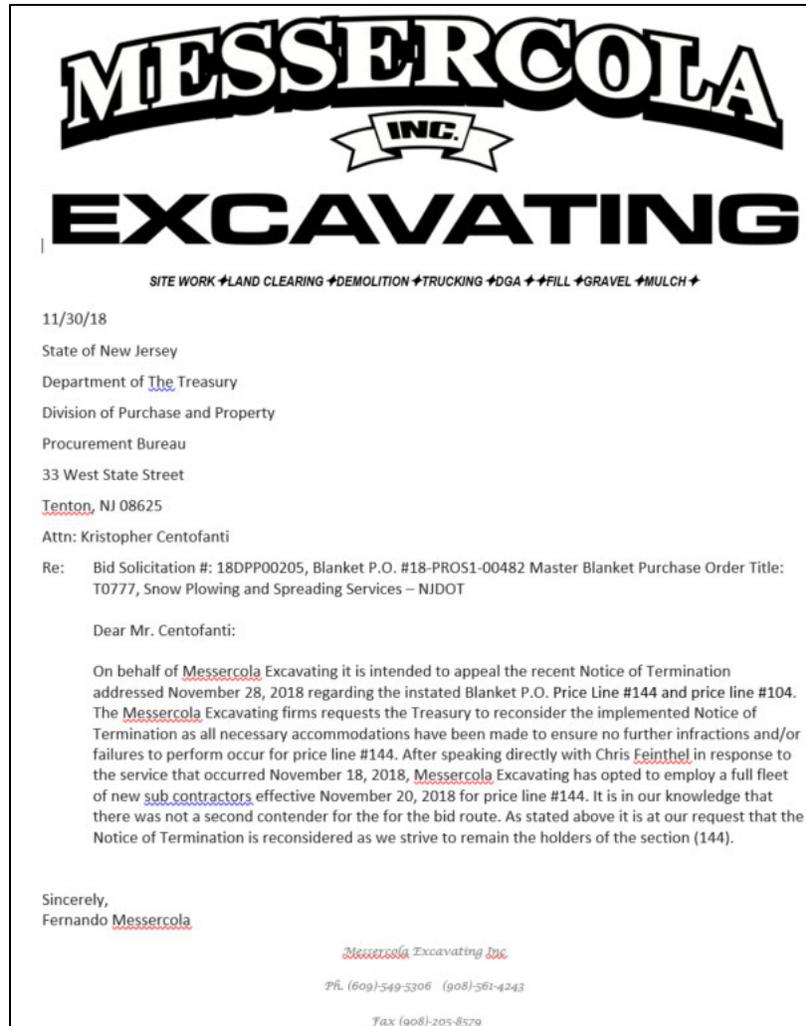
Messercola Excavating, Contract 18-PROS1-00482. Messercola Excavating has multiple awards with NJDOT, and we are seeking ONLY to terminate the price lines 104 and 144 for the reasons listed herein. On two separate occasions, 11.15.18 and 11.18.18, Messercola was called to respond to the sections associated with the aforementioned price lines. On both occasions, the contractor failed to arrive. Justin Messercola was contacted on 11.20.18 for the purposes of determining their state of readiness as they relate to the aforementioned price lines. In his response, Justin Messercola indicated that those two price lines were sub-contracted to other companies, and those companies failed to ensure their equipment was ready. Justin Messercola made no excuses for the poor performance, and also indicated that replacement sub-contractors could not be readily procured by Messercola Excavating, and as such, is requesting NJDOT and DPP permit Messercola Excavating to terminate their contract, as they relate to those two price lines only. Messercola Excavating will be preparing a formal request for termination of those two price lines, at which time NJDOT will forward such correspondence to DPP. Furthermore,

In accordance with the requirements of Bid Solicitation Section 3.8 *Vendor {Contractor} Readiness and Call-Out*, on November 15, 2018 and November 18, 2018, NJDOT made a "call-out" to Messercola. NJDOT indicated that Messercola failed to report as required and to provide snow plowing services for the snow sections associated with price lines 104 and 144. Messercola's failure to report for two call-outs was a violation of Bid Solicitation § 3.17.5 *Performance* and formed the basis of NJDOT's request to terminate.

Based upon NJDOT's request and the Bureau's review of NJDOT's letter, on November 28, 2018, the Bureau wrote to Messercola advising it of the Division's intent to cancel Messercola's Blanket P.O. for Price Lines 104 and 144. See screenshot below.



On November 30, 2018, Messercola wrote to the Bureau advising “all necessary accommodations have been made to ensure no further infractions and/or failures to perform occur”. See screenshot below.



Thereafter, on January 7, 2019, the Bureau completed a Recommendation Report for Bid Solicitation #18DPP00205, which recommended that the Blanket P.O. for price line 144 be awarded Atlantic Recycling Group, LLC (ARG). On January 8, 2019, the Bureau issued the NOI advising the affected Vendors {Bidders} that it was the State’s intent to award price line 144 to ARG. On January 10, 2019, the Division’s Hearing Unit received Messercola’s letter protesting the cancelation of the Blanket P.O. and re-award of price line 144 to ARG.<sup>2</sup> In the protest, Messercola stated that the failure to report was not a result of its own inaction, but rather that of its subcontractor. *See* screenshot below.

<sup>2</sup> Messercola did not protest the cancelation of the Blanket P.O. for price line 104.

Fernando Messercola, President  
Messercola Excavating  
549 E. 3<sup>rd</sup> St.  
Plainfield, NJ 07060

01/10/2019  
RE: Price Line 144, Contract T0777

Mr. Centofanti,

It is the desire of Messercola Excavating to retain the referenced section, providing the NJDOT with six (6) Class A trucks, for plowing in Crew 320 Ocean.

The issue that caused NJDOT to request our removal from that section has been rectified, and the Director of Central Region, for NJDOT, has spoken to us directly regarding this matter. We explained to the Director that our poor performance early on was a result of miscommunication with our sub-contractor, and the late promulgation of the contracts, coupled with an early winter event, was also a factor that should have been taken into consideration. Upon the conclusion of our conversation, the Director of Central Region felt that Messercola Excavating was more than capable of fulfilling our contractual obligation for this section. To that end, we have had our trucks inspected by NJDOT, and all are ready to respond should the need arise.

It is also our understanding that NJDOT has requested a reversal of our removal, thereby permitting Messercola Excavating to continue providing services for the aforementioned, and other sections, for which we are under contract.

Messercola Excavating respectfully requests the NJ Department of Treasury to consider these facts, as well as the desire of the NJDOT, in its determination to permit Messercola Excavating to continue servicing this route.

Regards,

Fernando Messercola



The record for Messercola's Blanket P.O. #18-PROS1-00482 reveals that contrary to the New Jersey State Standard Terms and Conditions § 5.8 *Subcontracting or Assignment*, Messercola never informed the State nor sought permission to utilize a subcontractor for any of its awarded snow plowing lines. While not identified as a reason for termination, Messercola's failure to advise the State of its intent to use a subcontractor is a violation of the State's Standard Terms and Condition which states that the "contractor may not subcontract other than as identified in the contractor's proposal without the prior written consent

of the Director.” SSTC § 5.8 *Subcontracting or Assignment*. Importantly, even if Messercola had received approval to use a subcontractor to perform a portion of the awarded work, Messercola was nonetheless responsible for ensuring that the work was performed in accordance with the Bid Solicitation’s requirements.

On April 30, 2019, the Division issued its final agency decision<sup>3</sup> which sustained the January 8, 2019, Notice of Intent to Award certain price lines to ARG and Messercola’s Blanket P.O. #18-PROS1-00482 for price lines 104 and 144 was canceled. Messercola did not further appeal the Division’s January 8, 2019 final agency decision.

If Messercola disputed the facts that lead to the cancellation of its Blanket P.O. #18-PROS1-00482, its opportunity to dispute the facts and present witnesses was in connection with that protest. Importantly, with respect to Messercola’s Blanket P.O. #18-PROS1-00482, Messercola never disputed the fact that there was a failure to appear, nor did it claim that there were fact witnesses who would attest that Messercola had appeared at the November 15, 2018 and November 18, 2018 call-out’s contrary to NJDOT’s records. In fact, as shown in the screenshot’s above, Messercola’s confirms that there was failure to appear for the November 15, 2018 and November 18, 2018.

In the July 17, 2020, protest of the July 13, 2020 NOI, in support of its position that it should not be bypassed, Messercola stated

The event dates were November 15, 2018, and November 18, 2018. The contractor did not receive adequate time to respond to the job site. Additionally, on 11/18/18 there was not even a chance of precipitation or a chance for temperatures to be even close to below freezing. This was the date of a major snow storm.

[Emphasis added.]

As noted above, price lines 104 and 144 were for snow plowing services. Therefore, Messercola was required to respond to the call-out. Even if there was no snow, in accordance with the terms of Bid Solicitation #18DPP00205, Messercola was required to respond to the call-out.

Now, in the request for reconsideration, Messercola claims that NJDOT’s records were in error and that it did appear for the snow call-out November 15, 2018 and November 18, 2018. Specifically, Messercola states “witnesses will substantiate by clear and convincing evidence that Messercola Excavating did not fail to show up for any snow storms.” See Messercola’s August 18, 2020 letter. Messercola’s changing factual scenario is not the new or additional information which could not have previously been provided to the Division for review and consideration contemplated by the Court in Cummings when granted a request for reconsideration. Rather, it is changed factual scenario. Information which if true, would have been known by Messercola at the time that it challenged the cancelation of its Blanket P.O. and when it submitted the July 17, 2020 protest.

Based upon the foregoing, I find no reason to disturb the Bureau’s recommendation for award and the July 13, 2020 NOI. Accordingly, I sustain the August 4, 2020 final agency decision. Thank you for your company’s continuing interest in doing business with the State of New Jersey. I encourage you to monitor the New Jersey Department of Transportation’s website and the Division’s **NJSTART**

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<sup>3</sup> The Division’s April 30, 2019, Final Agency Decision is available at:  
<https://www.state.nj.us/treasury/purchase/pdf/decisions/2019/IMOBidSolicitation18DPP00205MessercolaExcavating,Inc.pdf>

eProcurement website for future bidding opportunities for any unawarded price lines for these services. You should also 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.

Sincerely,



Maurice A. Griffin  
Acting Director

MAG: RUD

c: M. Dunn  
R. Regan  
K. Popso  
K. Centofanti