



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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May 19, 2021

Via Electronic Mail Only christopher.mcauliffe@morganlewis.com

Christopher McAuliffe, Esq.
Morgan, Lewis & Block LLP
502 Carnegie Center
Princeton, NJ 08540

Re: I/M/O Bid Solicitation #20DPP00538 Atlantic Salt, Inc.
Protest of Notice of Intent to Award
T0213 – Rock Salt, Treated Salt and Solar Salt – Statewide

Dear Mr. McAuliffe:

This final agency decision is in response to your letter on behalf of Atlantic Salt, Inc. (Atlantic) which was received by the Division of Purchase and Property’s (Division) Hearing Unit on April 21, 2021. In that letter, Atlantic protests the Procurement Bureau’s (Bureau) April 13, 2021, Notice of Intent to Award letter (NOI) issued for Bid Solicitation #20DPP00538 - T0213 Rock Salt, Treated Salt and Solar Salt – Statewide (Bid Solicitation).

By way of background, on April 14, 2020, the Bureau issued the Bid Solicitation on behalf of the State of New Jersey, Department of Transportation. The purpose of the Bid Solicitation was to solicit Quotes for the supply and delivery of bulk quantities of rock salt, treated rock salt, solar salt for road de-icing, treated solar salt for road de-icing, and solar salt for water treatment, as well as bagged quantities of rock salt, solar salt for road de-icing, solar salt for water treatment and calcium chloride. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State’s intent to award a primary and secondary Master Blanket Purchase Order (Blanket P.O.) for 133 of the 134 price lines¹ listed in the Bid Solicitation to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation, are most advantageous to the State, price and other factors considered. *Ibid*.

¹

Price Line Numbers	Description
1 - 71	New Jersey Department of Transportation (NJDOT) Locations and Commitment Totals
72 – 94	Quasi-State Entity Locations and Commitment Totals
95 - 112	Local Municipality Locations and Commitment Totals
113 -133	County Pricing for Non-Committed Locations
134	Monthly Salt Storage Fee (*for Bulk Product Only)

BACKGROUND

On June 16, 2020, the Division's Proposal Review Unit opened eleven (11) Quotes submitted by the submission deadline of 2:00 p.m. eastern time. After conducting a preliminary review of the Quotes received, those Quotes which conformed to the mandatory requirements for Quote submission were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.6 *Evaluation Criteria*.

After completing its review and evaluation, on April 1, 2021, the Bureau prepared a Recommendation Report that recommended that Blanket P.O.s be awarded to Atlantic; Chemical Equipment Labs of DE, Inc. (Chemical); Morton Salt, Inc. (Morton); Riverside Construction Materials, Inc. (Riverside); East Coast Sale Dist. Inc., (East Coast); and American Rock Salt, Co. LLC (American). On April 13, 2021, the Bureau issued the NOI advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s consistent with the April 1, 2021, Recommendation Report.²

On April 20, 2021, prior to the close of the protest period, Atlantic submitted a protest challenging the NOI. By way of summary, Atlantic states that the Division violated its "rules and statutory obligations" because it did not award the Blanket P.O.s with reasonable promptness as required by N.J.S.A. 52:34-12. Atlantic states as a result of the Division's silence, delay and inaction, it assumed that its Quote had been rejected. Atlantic's protest, pgs. 1, 9. By way of remedy, Atlantic requests that NOI be declared invalid, that the Bid Solicitation be declared null and void, and that Atlantic be permitted to withdraw its Quote.

In consideration of Atlantic's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, Atlantic's protest, 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.

DISCUSSION

A. Extension of Atlantic's current Blanket P.O. 40199

In support of its position that the NOI be declared invalid and that the Bid Solicitation be declared null and void, Atlantic asserts that the Bureau repeatedly solicited and accepted goods and services from Atlantic under different terms and conditions than those set forth in the Bid Solicitation. Atlantic states that it believed that the Bureau had rejected its Quote when it repeatedly extended the current Blanket P.O. and that the State exceeded the permitted contract term when it extended the contract for an additional year. Atlantic's protest, p. 7-9. Unfortunately, Atlantic's reading of the terms and conditions of the current Blanket P.O. is mistaken.

First, as to the term of the Blanket P.O. and permitted extensions, Atlantic's current Blanket P.O. with the State (Blanket P.O. No. 40199) included the following language regarding the term:

BID SOLICITATION § 5.2 CONTRACT TERM AND EXTENSION OPTION

The term of the contract shall be for a period of two (2) years and six months to expire on April 30, 2018. The anticipated "Contract Effective Date" is provided on the signatory page accompanying this RFP. If delays in the procurement process result in a change to the anticipated Contract

² On April 20, 2021, Chemical wrote to the Bureau and requested that it be permitted to withdraw its Quote. That request to withdraw was accepted by the Bureau.

Effective Date, the Bidder agrees to accept a contract for the full term of the contract. The contract may be extended up to two (2) years with no single extension exceeding one (1) year, by the mutual written consent of the Contractor and the Director at the same terms, conditions, and pricing at the rates in effect in the last year of the contract or rates more favorable to the State.

BID SOLICITATION § 5.3 CONTRACT TRANSITION

In the event that a new contract has not been awarded prior to the contract expiration date, as may be extended herein, it shall be incumbent upon the Contractor to continue the contract under the same terms and conditions until a new contract can be completely operational. At no time shall this transition period extend more than one-hundred-eighty (180) days beyond the expiration date of the contract.

In addition, the applicable State of New Jersey Standard Terms and Conditions (SSTC) associated with that Blanket P.O. No. 40199 stated:

SSTC § 5.3 CONTRACT TERM AND EXTENSION OPTION

If, in the opinion of the Director, it is in the best interest of the State to extend a contract, the contractor shall be so notified of the Director's Intent at least thirty (30) days prior to the expiration date of the existing contract. The contractor shall have fifteen (15) calendar days to respond to the Director's request to extend the term and period of performance of the contract. If the contractor agrees to the extension, all terms and conditions including pricing of the original contract shall apply unless more favorable terms for the State have been negotiated.

Atlantic references three extensions on Blanket P.O. No. 40199 that were requested by the Bureau. Specifically, a three month extension from May 1, 2020 to July 31, 2020; a three month extension from August 1, 2020 to October 31, 2020; and a six month extension from November 1, 2020 to April 30, 2021. Atlantic's protest Exhibits D, E and F. Atlantic states that these extensions violated Bid Solicitation Section 5.3 which only permitted a transition period of 180-days. However, a careful review of the extension letters reveals that the extensions were requested and agreed to by Atlantic pursuant to SSTC Section 5.3 which permits the Director to request an extension to the term and period of performance of the Blanket P.O. An extension request pursuant to SSTC Section 5.3 is separate and apart from the transition period referenced in Bid Solicitation Section 5.3. Atlantic agreed to the terms contained in the SSTCs when it entered into Blanket P.O. No. 40199 with the State. Therefore, the Bureau did not exceed the term when it requested that Atlantic extend its Blanket P.O. in accordance with the State's Standard Terms and Conditions.

Additionally, a review of the record of this procurement reveals that while evaluating the Quotes received in response to the Bid Solicitation, the Bureau wrote to each of the current Vendors asking if each of them was willing to extend the current Blanket P.O. for an additional time period requested. The Bureau requested those Blanket P.O. extensions to ensure that the State and Cooperative Purchasing Program Participants would have the ability to purchase necessary quantities of bulk and bagged rock salt during the 2020/2021 winter season in order to ensure the health, safety and welfare of the traveling public, while this Bid Solicitation was under review and being finalized for award. Those extensions specifically advised the current vendors that the extension term was until a new Blanket P.O. was awarded or until the end of the extension term, whichever comes first. Therefore, Atlantic's belief that its Quote had been rejected due to the extension of the current Blanket P.O. was mistaken.

B. Communications with the Procurement Bureau

In further support of its position that its Quote had been rejected, Atlantic took the Bureau's silence during the evaluation process as a rejection of its Quote. Specifically, Atlantic refers to the Bureau not responding to Atlantic's June 23, 2020, request for an unofficial bid tabulation. However, the Bid Solicitation specifically advised the bidding community that "[i]f the Bureau contemplates negotiation, Quote prices will not be publicly read at the Quote opening. Only the name and address of each Vendor {Bidder} will be publicly announced at the Quote opening." Bid Solicitation § 6.8 *Negotiation and Best and Final Offer (BAFO)*. This is to ensure that a single or even multiple bidders do not receive information that is not available to all other similarly situated Vendors {Bidders}. Therefore, in order to maintain a level playing field and to guard against the perception of favoritism in the evaluation process, consistent with its governing laws, the Division does not release Quote pricing prior to the issuance of the NOI, where, like in this procurement, the Bureau contemplated requesting Best and Final Offers.

The New Jersey Courts have long recognized that the purpose of the public bidding process is to "secure for the public the benefits of unfettered competition." *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 313 (1994). To that end, the "public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good." *Borough of Princeton v. Board of Chosen Freeholders*, 169 N.J. 135, 159-60 (1997). The objective of New Jersey's statutory procurement scheme is "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." *Barrick v. State of New Jersey*, 218 N.J. 247, 258 (2014) (citing *Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop.*, 99 N.J. 244, 256 (1985)). Accordingly, the Division's governing regulations mandate that "[f]or RFPs having a negotiation component, only the names and addresses of the bidders will be publicly announced at the proposal opening" and that "[d]uring the course of negotiations, no bidder's technical proposal or pricing shall be revealed to any other bidder or to any person who is not a member of the evaluation committee or Division staff involved with the conduct of the negotiations." See *N.J.A.C. 17:12-2.6(e)* *N.J.A.C. 17:12-2.7(j)(4)* respectively. Had Bureau released the bid tabulation to Atlantic it would have been in a position of advantage over other Vendors {Bidders} in responding the Bureau's request for a best and final offer.

I note that while the Bureau did not respond to Atlantic's request for the unofficial bid tab, there were other communications from the Bureau to Atlantic related to the Bid Solicitation.³ Specifically, on June 26, 2020, the Bureau requested that Atlantic complete and submit the confidentiality letter; on July 10, 2020, the Bureau requested that Atlantic submit the completed *Offer and Acceptance Page*; and, on August 7, 2020, the Bureau requested that Atlantic submit a Best and Final Offer. Admittedly, subsequent to the Bureau's request for a Best and Final Offer, the Bureau did not reach out to Bidders regarding the Bid Solicitation; however, at no time did Atlantic inquire as to the status of the evaluation. Had it done so, it would have been advised that all Quotes remained under evaluation. Accordingly, Atlantic erroneously believed that its Quote had been rejected.

C. Evaluation and Award

As noted above, Atlantic requests that NOI be rescinded and the Bid Solicitation canceled because of the length of time that it took for the Division to issue the NOI. Atlantic contends that the State has exceeded any reasonable time allocation between the Quote opening date and the intended date to award this contract. In support of its position, Atlantic states that under the Local Public Contracts Law, contracts are to be awarded within 60 days. See *N.J.A.C. 40A:11-24(a)*. Atlantic, however, fails to realize that the State is not governed by Local Public Contract Law. The governing law here, *N.J.S.A. 52:34-12a.(g)* does

³ Apart from communications related to the Bid Solicitation, the Bureau also communicated with Atlantic regarding the extensions to Blanket P.O. 40199 on July 7, 2020 and October 9, 2020.

not mandate a specific timeframe within which awards shall be made. Rather, the goal of New Jersey's statutory and regulatory laws governing State procurement is that an "award shall be made with reasonable promptness, after negotiation with bidders where authorized, by written or electronic notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered." *N.J.S.A.* 52:34-12a.(g). "Courts have interpreted this provision as conferring broad discretion on the Director of the Division of Purchase and Property to determine which bid will be most advantageous to the State. *State v. Ernst & Young, L.L.P.*, 386 N.J. Super. 600, 619 (App. Div. 2006). "The reasonableness of the time period for an award of a State contract will obviously be dependent on the facts and circumstances of the particular procurement." *In re Bellmawr Truck Repair Co.*, 2017 N.J. Super. Unpub. LEXIS 308, *6, 2017 WL 490529, citing, *Barrick v. State*, 218 N.J. 247, 253, (2014) (upholding an award made sixteen months after the submission of bids). Bidders are put on notice of this through Bid Solicitation Section 7.2 *Final Award* which states in part "Blanket P.O. awards will be made with reasonable promptness by written notice to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation, are most advantageous to the State, price, and other factors considered." The Bureau did not specify an award date in the Bid Solicitation as there are a number of factors that can delay the time it takes for the Bureau to complete the evaluation of Quotes received, including the complexity of the Bid Solicitation, the total number of Quotes received and whether there is a need to request clarification or additional information from any Vendor {Bidder}.

The Bid Solicitation was issued on April 14, 2020; on June 16, 2020 the Proposal Review Unit opened eleven (11) Quotes. On August 7, 2020, the Bureau requested Best and Final Offers from the Vendors {Bidders}, with responses due no later than August 12, 2020. This Bid Solicitation sought pricing for nine different categories of salt to be delivered to over 100 discrete locations across the State, and a review of 134 price lines in total for each of the 11 Quotes that were submitted. In reviewing the Quotes submitted, the Bureau took all reasonable steps to conduct a thorough Quote evaluation and to make an award as expeditiously as possible for to those Vendors {Bidders} whose Quotes were most advantageous to the State, price and other factors considered.

The time between the submission of Quotes and the issuance of the NOI left all Vendors {Bidders} on an even playing field at the time of Quote submission through the issuance of the NOI. All Vendors {Bidders} were aware that prices quoted were to remain firm to through the issuance of the Blanket P.O. See Bid Solicitation Section 4.4.5 *State-Supplied Price Sheet*, and State of New Jersey Standard Terms and Conditions Section 6.1 *Price Fluctuation During Contract* states in part that "[u]nless otherwise agreed to in writing by the State, all prices quoted shall be firm through issuance of contract or purchase order and shall not be subject to increase during the period of the contract." Notably, the Bid Solicitation did not specify a date certain when the Blanket P.O. would begin. Rather, Bid Solicitation Section 5.2 *Blanket P.O. Term and Extension Option* stated in part "[i]f delays in the procurement process result in a change to the anticipated Blanket P.O. Effective Date, the Vendor {Bidder} agrees to accept a Blanket P.O. for the full term of this Blanket P.O." To that end, "[t]he award of a contract pursuant to *N.J.S.A.* 52:34-12(g) generally will not be disturbed absent a showing of bad faith, corruption, fraud or gross abuse of discretion." *Ibid.*, citing, *Commercial Cleaning Corp. v. Sullivan*, 47 N.J. 539, 549 (1966).

Here, Atlantic offers nothing more than its own opinion that the time from Quote opening to the issuance of the NOI was too long a period for the award of this contract. It fails to offer any facts to support that its perceived delay restricted competition or favored particular bidders; or how the Bureau's actions demonstrate "bad faith, corruption, fraud or gross abuse of discretion" such that the NOI should be set aside and the Bid Solicitation declared null and void.

D. Request to Withdraw

Finally, Atlantic requests that it be permitted to withdraw its submitted Quote and lists a number of reasons why its request should be granted. Bid Solicitation Section 1.4.7.2 *Quote Withdrawal After Quote Opening But Prior to Blanket P.O. Award*, permits a Bidder to withdraw a Quote if the request “is made in good faith, and the State will not be significantly prejudiced by granting the withdrawal of the Quote beyond the loss of the benefit of the bargain to the State of the withdrawing Vendor’s {Bidder’s} offer.”

Albeit erroneously, Atlantic’s believed that its Quote and been rejected. Based upon that mistaken assumption, Atlantic took steps to secure contracts with other entities, and did not account for the State’s Rock Salt, Treated Salt and Solar Salt needs in contracting with its suppliers and shipping agents. Atlantic’s protest, pgs. 10-12. Atlantic states that the company must transport salt from the mines in Northern Chile or the salt lagoons of Mexico which require a six to twelve week supply pipeline. Atlantic protest, pgs. 3-4. Based upon the significant changes to the freight and fuel markets, Atlantic cannot now negotiate contracts with its shipping partners in order to meet the State’s needs at the prices originally Quoted. Atlantic’s protest, p. 7.


Atlantic has provided information to support the requested withdrawal such that I do not believe the request has been made in bad faith. Accordingly, the Division grants Atlantic’s request to withdraw its Quote.

CONCLUSION

Based upon the foregoing, Atlantic’s request that the NOI be declared invalid and the Bid Solicitation null and void in denied. However, Atlantic’s request to withdraw its Quote is granted. Therefore, this matter is remanded back the Bureau for the issuance of an amended NOI to re-award those price lines for which Atlantic was listed as either the primary or secondary Vendor {Contractor}.⁴ This is my final agency decision with respect to the protest submitted by Atlantic.

Thank you for your company’s continuing interest in doing business with the State of New Jersey and for registering your company with [NJSTART](http://www.njstart.gov) at www.njstart.gov. I encourage you to log into [NJSTART](http://www.njstart.gov) to select any and all commodity codes for procurements you may be interested in submitting a Quote for, and to ensure that contact information is up to date, so that you may receive notification of future bidding opportunities.

Sincerely,


Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas
S. Ghorbani
D. Warren

⁴ The Bureau will also be required to issue amended NOI to re-award those price lines for which Chemical was listed as either the primary or secondary Vendor {Contractor}.