



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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May 27, 2014

Rebecca Moll Freed, Esq.
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New York, NY 10006

**RE: *American Hose & Hydraulics, Inc.
Reconsideration of Ineligibility Determination***

Dear Ms. Freed:

I am in receipt of your letter dated February 5, 2014, wherein you seek reconsideration of an initial ineligibility determination by the Chapter 51 Unit of the Division of Purchase and Property ("Division") that determined American Hose & Hydraulics, Inc. ("American Hose") ineligible to receive a State Contract award under T-2188, pursuant to the provisions of P.L. 2005, c. 51 (codified at N.J.S.A. 19:44A-20.13, et seq.) ("Chapter 51"). The basis for this determination is a \$1,600 contribution (the "Contribution") that was made by American Hose on April 26, 2013, to the Passaic County Democratic Committee, a county political party committee. American Hose does not deny that contribution was made, but instead, asserts several arguments in support of its request for reconsideration.

Chapter 51 prohibits the State of New Jersey ("State"), or any of its purchasing agents or agencies or its independent authorities, from contracting with business entities that have solicited or made any contribution in excess of \$300 to any candidate committee or election fund of any candidate for, or any holder of the public office of the Governor, or to any State or county political party committee within specified time frames. The legislative findings associated with Chapter 51 place the utmost importance on the State's compelling interests in prohibiting the award of government contracts to business entities that are contributors to certain political parties and holders of public office. N.J.S.A. 19:44A-20.13. The State is charged with the duty of assuring the public that the selection of State contracts is based upon merit and not political contributions made by such contractors. Ibid. The legislative intent is to safeguard not only against political contributions that pose the risk of improper influence or purchase of access, but also against those contributions that create the perception or appearance thereof. Id.

In support of its request for reconsideration, American Hose asserts several arguments including: the contribution was "inadvertent," a public exigency exception should be applied to permit the award; American Hose should be eligible to receive task orders under the contract that do not exceed \$17,500; American Hose should be eligible to receive task orders in excess of \$17,500 under the Contract after October 26, 2014; it would be "ultra vires" for the Division to deem American Hose ineligible for contracts with local public entities; and the State should grant a one-time exemption to American Hose. For the reasons set forth herein, the ineligibility determination made by the Chapter 51 unit is upheld.

On June 25, 2013, American Hose submitted a proposal in response to the Division's Request for Proposal No. 14-X-23107 for Parts and Repairs for Road Maintenance Equipment (T-2188). The solicitation advised that the Contract would be extended to the State's Cooperative Purchasing Partners. The underlying Request for Proposal required that prior to the award of any Contract, the intended awardee of the contract shall submit Chapter 51 and Executive Order 117 Vendor Certification and Disclosure of Political Contributions forms. American Hose was selected as the intended awardee for seven contract price line groups for parts and repairs for hydraulic pumps, motors, fittings and hoses. American Hose submitted its Chapter 51 and Executive Order 117 Vendor Certification and Disclosure of Political Contributions forms disclosing and certifying to the above political Contribution. (See Letter from Rebecca Moll Freed, Esq., to Jignasa Desai-McCleary, Director, dated February 5, 2014, ["Reconsideration Request"], Exhibit G).

American Hose asserts that the Contribution was "inadvertent," because "given that the \$1,600 sponsorship included: golf for four (4) golfers, a hole sponsorship, brunch and a cocktail/buffet, American Hose did not realize that its payment to the PCDC [Passaic County Democratic Committee] constituted a political contribution subject to pay-to-play-restrictions". (Reconsideration Request, Page 2.) However, the front of the check shows that American Hose made its check payable to the Passaic County Democratic Committee. The back of the check shows that American Hose's contribution was endorsed "PAY TO THE ORDER OF LAKELAND BANK FOR DEPOSIT ONLY PASSAIC COUNTY DEMOCRATIC COMMITTEE". (See a copy of the front and back of American Hose's check, Reconsideration Request, Exhibit A.) American Hose also attached to its Request for Reconsideration a copy of the Invitation that it received to the Passaic County Democratic Committee's Annual Golf Classic. (Reconsideration Request, Exhibit B.) The Invitation references the Passaic County Democratic Committee in seven (7) places and requests that all checks be made payable to the Passaic County Democratic Committee. I find the Invitation straightforward and not subject to any misinterpretation as to the fact that the county political party committee was sponsoring the event and that checks should be made payable to it. Chapter 51 prohibits the State from contracting with business entities that have solicited or made a contribution in excess of \$300 to any candidate committee or election fund of any candidate for, or any holder of the public office of the Governor, or to any State or county political party committee within specified time frames, regardless of the circumstances surrounding the gathering by which the contribution was obtained. As such, there is no factual or legal basis in this inadvertency argument to overturn the Chapter 51 Unit's determination.

American Hose also argues that based on the nature of the services provided under the Contract (parts and repairs for road maintenance equipment), Chapter 51's public exigency exception applies to the Contract. In support of its argument, American Hose alleges that upon information and belief: "... American Hose is the only vendor that is able to respond to requests in an emergency situation by offering twenty-four (24) hour emergency breakdown services, a 90,000 square foot state of the art facility where all repairs can be made under one roof and free pickup and delivery service for all hydraulic repairs." Chapter 51's public exigency provision provides: "This Act shall not prohibit the awarding of a contract when the public exigency requires the immediate delivery of goods or performance of services as determined by the State Treasurer." N.J.S.A. 19:44A-20.22.

I have reviewed American Hose's arguments for a public exigency exemption from Chapter 51 requirements and find them unpersuasive. While the lack of a contract with American Hose under T-2188, Parts and Repairs for Road Maintenance Equipment, may be inconvenient for some State using agencies and cooperative purchasing participants, it does not rise to the level of a public exigency. American Hose maintains that it is the only vendor capable of providing certain repair services and the only vendor capable of providing repairs on an expedited, "emergency" basis. American Hose likens itself to a sole source in this regard. However, other contract awardees can provide all or most of the same services. Those services that cannot be purchased from contract vendors may be acquired through other means.

American Hose was being considered for an award of seven contract price line groups for parts and repairs for hydraulic pumps, motors, fittings and hoses; five groups for five particular brands of original equipment manufacturer ("OEM") parts and repairs; one for non-original equipment manufacturer ("non-OEM") parts; and one for non-OEM repairs. Of all of these proposed price line groups, only two will not be awarded to other contractors: Group 98, Permco OEM parts and repairs, and Group 103, White OEM parts and repairs. Contracts will be awarded for each of the other groups, which may be used to purchase these parts and repair services.

Although Permco and White parts and repairs will not be available under the Contract, there are other options. Both State agencies and Cooperative Purchasing Partners may purchase non-OEM parts and repairs for these brands using the Contract. In many cases, non-OEM parts and repairs are equivalent to and less expensive than OEM parts and repairs. Also, if non-OEM parts or service will not suffice for a particular repair, a State using agency may use the Agency's delegated purchasing authority ("DPA") up to \$36,000, or may petition to raise the threshold if necessary, and, if deemed to be an emergency, may be able to request a waiver to purchase OEM parts. In fact, the agency may even use American Hose to provide the parts and services not otherwise available on the State Contract if the total value of the transaction is less than Chapter 51's statutory amount of \$17,500. N.J.S.A. 19:44A-20.15. Further, the State's purchase history indicates a high likelihood that the DPA authority will be sufficient. Since 2010, the Permco purchases have averaged \$13,000 per year and never exceeded \$24,500. The White purchases have totaled \$1,236 for the entire period 2010-2013. Finally, a cooperative purchasing participant may conduct its own procurement to purchase these OEM parts and repairs for these two brands.

Although using agencies may like or prefer expedited service to get their equipment repaired quickly, it is difficult to imagine a situation of public exigency because a backhoe or grader, for example, cannot be repaired overnight. American Hose cites the example of a sanitation truck it repaired on an expedited basis for a municipality (Reconsideration Request, Page 6) as reason to declare a public exigency exception. However, this does not, in my opinion, rise to the level of public exigency, especially where there are other contract and non-contract alternatives. Finally, this Contract has no provision or requirement for expedited service, no overtime rates and no shift differentials, so it is unclear how American Hose would provide these expedited services under the Contract. It would be atypical for contractors to provide these services without added charges.

American Hose contends that if the Division determines the public exigency exception does not apply, it should be eligible for task orders under the Contract that do not exceed \$17,500 in value. However, the value of a contract is determined by the total estimated value of the price lines awarded to the vendor, not by the value of each individual purchase under the contract. In fact, the Division cannot divide the purchases made under the Contract in an effort to circumvent the application of Chapter 51. According to the terms of the statute, the State is precluded from entering into a contract with an entity that has made an ineligible political contribution where the value of the contract exceeds \$17,500. N.J.S.A. 19:44A-20.14.

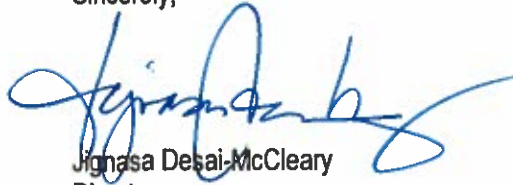
American Hose also asserts a similar argument to permit the award for purchases in excess of \$17,500 after October 26, 2014, the date American Hose's ineligibility from the Contribution expires. Assuming that no additional ineligible political contributions are made by American Hose, it may be considered again for the award of a State contract beginning October 27, 2014. However, since the due date for the proposals submitted in response to the subject solicitation was June 25, 2013, American Hose is ineligible for award under T-2188 as a result of its \$1,600 contribution to the Passaic County Democratic Committee on April 26, 2013. See In re Langan Eng'g & Envtl. Servs., Inc., 425 N.J. Super. 577, 588 (App. Div. 2012) (holding that an ineligible contribution made within the eighteen month period preceding the date upon which bids were due precludes award of contract). The Division may not make an award of a contract for purchases made after a date set in the future for the sole purpose of circumventing the provisions of Chapter 51.

Next, American Hose asserts that it should receive an award under T-2188 so that it can remain on the contract "... for purchases made by non-State government entities". (Reconsideration Request, Page 7.) American Hose contends that since the provisions of Chapter 51 do not apply to local government entities, it should be permitted to remain on the Contract for purchases by the State's Cooperative Purchasing Partners. American Hose further asserts that the Division's failure to do so would be "ultra vires" as the Division does not have the authority to preclude purchases by the Cooperative Purchasing Partners on Chapter 51 grounds. While the Division may extend some of its contracts for use by the Cooperative Purchasing Partners, the Division does not require that the Cooperative Purchasing Partners use a State contract. The Division in no way determines what or how the Cooperative Purchasing Partners obtain the goods and services they need. The Division merely makes some of its contracts available to those local entities for use. When awarding all contracts, the Division is required to abide by all of the State procurement laws and regulations, including Chapter 51. Thus, even when awarding contracts that are extended to the Cooperative Purchasing Partners, the Division cannot award a contract to any entity that has made an ineligible contribution according to Chapter 51, absent a determination that public exigency requires an exception.

American Hose's final argument is that it be afforded a "one-time exemption". American Hose sets forth that it is a family-owned business with 102 employees that has provided service to the State for over fifteen years. American Hose advises that this Contract comprises 6% of American Hose's total revenue and that the loss of this Contract would result in "grave harm" to the company. (Reconsideration Request, Page 9.) American Hose cites to instances where the federal Securities and Exchanges Commission ("SEC") and the New Jersey State Investment Council ("SIC") under the provisions of their pay-to-play rules and regulations, respectively, not Chapter 51, have allowed a "one-time exemption" for purported inadvertent contributions that were subsequently refunded. American Hose requests that the Division should exercise "sound business judgment" granting that American Hose be exempt from the Contribution because it was inadvertent, received a full refund and would best serve the taxpayers of the State by allowing American Hose to continue to provide high quality services. The Division does not operate under the SEC's rules or the SIC's regulations. Rather, as American Hose cites in the Reconsideration Request at Page 8: "The Division's authority to render ineligibility determinations is limited to Chapter 51." In contrast to the authorities cited by American Hose, Chapter 51 does not provide for a "one-time exemption" or give the State the discretion argued for. In fact, Chapter 51's provisions are so stringent that a refund of a contribution must not only be requested, but also received within a thirty-day period following the contribution. The thirty-day period has been strictly construed by the courts. In re Earle Asphalt CO., 401 N.J. Super. 310, 329 (App. Div. 2008), aff'd, 198 N.J. 143 (2009). I do note that while there is a strict period limitation after the contribution on the refund exception, there is no cap on the availability of the exception, i.e. "one-time". In the instant case, American Hose requested a refund over nine months after the Contribution had been made. Accordingly, the Division does not have the legal authority to grant a "one-time exemption" for American Hose.

This is an unfortunate matter. On behalf of the State, I thank American Hose for the service it provided under the predecessor contract. However, for the reasons set forth above, I am unable to overturn the ineligibility determination rendered by the Chapter 51 Unit as to American Hose.

Sincerely,



Jignasa Desai-McCleary
Director

Copy to: Margaret Quinn, Division of Purchase and Property
Katherine Antinoro, Division of Purchase and Property
Vance Bequer, Division of Purchase and Property
Robert Shaughnessy, Division of Property Management and Construction