



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 29, 2021

Via Electronic Mail info@gelmanlawfirm.com

David Gelman, Esq.
Gelman Law, LLC
850 Route 70 West
Cherry Hill, NJ 08002

Re: I/M/O Bid Solicitation #20DPP00556 Johnson's Specialized Transportation, Inc.
T3118 – Emergency Winter Season Towing Services – NJDOT
Protest of Notice of Intent to Award

Dear Mr. Gelman:

This final agency decision is in response to your September 2, 2021 correspondence on behalf of Johnson's Specialized Transportation, Inc. (JSTI), to the Division of Purchase and Property's Procurement Bureau (Bureau) (the "JSTI protest"), which was forwarded to the Division's Hearing Unit for review. In that correspondence, JSTI protests the August 20, 2021, Notice of Intent to Award (NOI) issued by the Bureau indicating an intent to award a Master Blanket Purchase Orders (Blanket P.O.s) to several Vendors {Bidders} for Bid Solicitation #20DPP00556 – T3118 Emergency Winter Season Towing Services (Bid Solicitation). Specifically, JSTI protests the award of Price Lines 29-34 to Hamilton Auto Clinic, LLC (HAC).

By way of background, on December 22, 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 emergency towing and roadside services at all locations identified on the State-Supplied Price Sheet during the Winter Season, from October 1st through April 30th. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award 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, for each Price Line listed on the State-Supplied Price Sheet. Ibid.

In accordance with Bid Solicitation § 1.3.1 *Electronic Question and Answer Period*, an electronic portal enabling the Bureau to receive questions was available to all potential Vendors {Bidders} until 2:00 p.m. on January 15, 2021. On January 25, 2021, the Bureau issued Bid Amendment #1 responding to the questions posed by potential Vendors {Bidders}. On February 5, 2021, the Division's Proposal Review Unit opened eighteen (18) Quotes received through the State's **NJSTART** eProcurement system by the submission deadline of 2:00 pm eastern time. All of the received Quotes were found by the Proposal Review Unit to conform to the mandatory administrative requirements for Quote submission.

Accordingly, these eighteen (18) Quotes were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation § 6.7 *Evaluation Criteria* which states:

The following evaluation criteria categories, not necessarily listed in order of significance, will be used to evaluate Quotes received in response to this Bid Solicitation.

- A. Experience of Vendor {Bidder} (Attachment #1): The Vendor {Bidder} must have at least two (2) years of experience performing towing services on public roadways in order to be considered for award of that service; and
- B. Price: The Vendor's {Bidder's} pricing provided on the State-Supplied Price Sheet for each price line. See Section 6.7.1, subsections included, for information regarding the pricing evaluation methodology.

Seventeen (17) of the eighteen (18) Quotes evaluated by the Bureau were found to be responsive to all mandatory requirements of the Bid Solicitation; the Bureau further determined that each of the seventeen (17) Vendors {Bidders} met the minimum experience requirements of two (2) or more years of providing towing services on public roadways.

With respect to the evaluation of the Vendors' {Bidders'} Quote pricing, Bid Solicitation § 6.7.1 *Vendor's {Bidder's} State-Supplied Price Sheet* states:

The Division intends to award to one (1) responsive Vendor {Bidder} per price line for towing services. The Division will evaluate and rank based upon pricing, from lowest to highest.

In accordance with Bid Solicitation § 6.7.1, the Division evaluated and ranked based upon pricing, from lowest to highest. No changes were made to the ranking as the result of the negotiation and best and final offer procedure undertaken in accordance with Bid Solicitation § 6.8 *Negotiation and Best and Final Offer (BAFO)*.

Thereafter, on August 17, 2021, the Bureau issued a Recommendation Report which recommended Blanket P.O. awards to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation are most advantageous to the State, price and other factors considered.¹ On August 20, 2021, the NOI was issued advising all Vendors {Bidders} of the State's intent to award Blanket P.O.s consistent with the Bureau's Recommendation Report.

On September 3, 2021, the Division received JSTI's protest challenging the intended Blanket P.O. awards to HAC. By way of summary, JSTI alleges that "[i]t is well known that" HAC does not have the equipment necessary to perform under the terms of the Bid Solicitation for the Price Lines it is to be awarded. Furthermore, JSTI alleges that "a bidder must fully complete the application . . . [by giving] a complete and accurate list of any and all subcontractors along with all of their information", and, because "[HAC] did not provide such information", JSTI protests "to prevent and reverse [HAC]'s award" JSTI further writes that it "suspects" that HAC "substantially underestimated completed contracts amounts." See JSTI Protest, pp. 1-2.

¹ The list of Vendors {Bidders} who are recommended to receive Blanket P.O. awards are listed in the Bureau's August 17, 2021 Recommendation Report.

The Bureau sent a copy of the JSTI Protest to HAC via email on September 16, 2021, offering it the opportunity to respond in writing to the assertions made in the JSTI Protest. The Managing Member of HAC, Ms. Erica Makuch submitted an affidavit September 23, 2021, stating that “[t]here are no subcontractors that provide towing services for HAC and in particular no subcontractors to be utilized with respect to the aforesaid contract.” Ms. Makuch asserts that HAC owns equipment that is “more than sufficient”, including “four (4) heavy towing vehicles”, and “has more than enough experience and trained staff to handle the three (3) sections for which it bid.”

In consideration of the JTSI protest, I have reviewed the record of this procurement, including the Bid Solicitation, the 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.

As noted above, JTSI alleges that a Vendor {Bidder} “must give a complete and (sic) accurate list of any and all subcontractors . . . [and HAC] did not provide such information as is required under the application”. JTSI further claims HAC does not have sufficient vehicles to perform the contract work, without using subcontractors.

A Vendor’s {Bidder’s} use of a subcontractor is governed by Bid Solicitation § 4.4.1.3 *Subcontractor Utilization Plan* which states in pertinent part

Vendors {Bidders} intending to use a Subcontractor shall submit a Subcontractor Utilization Plan form. . . .

For a Quote that does NOT include the use of any Subcontractors, by signing the Bid Solicitation Offer and Acceptance Page, the Vendor {Bidder} is automatically certifying that in the event the award is granted to the Vendor’s {Bidder’s} firm and the Vendor {Bidder} later determines at any time during the term of the Blanket P.O. to engage Subcontractors to provide certain goods and/or services, pursuant to Section 5.8 of the SSTC, the Vendor {Bidder} shall submit a Subcontractor Utilization Plan form for approval to the Division in advance of any such engagement of Subcontractors.

HAC did submit the Subcontractor Utilization Plan form with its Quote. The form indicated that HAC was not using any subcontractors. By signing the Bid Solicitation Offer and Acceptance Page, HAC certified that, in the event it determines to engage subcontractors, it would submit a Subcontractor Utilization Plan form for approval to the Division in advance of any such engagement, as is required by Bid Solicitation § 4.4.1.3.

Moreover, the Bid Solicitation sets forth a procedure for the substitution or addition of subcontractors. As stated at Bid Solicitation § 5.7 *Substitution or Addition of Subcontractors*:

The Vendor {Contractor} may not subcontract other than as identified in the Vendor’s {Contractor’s} proposal without the prior written consent of the Director. The Vendor {Contractor} shall forward a written request to substitute or add a Subcontractor or to substitute its own staff for a Subcontractor to the State Contract Manager for consideration. If the State Contract Manager approves the request, the State Contract Manager will forward the request to the Director for final approval. No substituted or

additional Subcontractors are authorized to begin work until the Vendor {Contractor} has received written approval from the Director.

If it becomes necessary for the Vendor {Contractor} to substitute a Subcontractor, add a Subcontractor, or substitute its own staff for a Subcontractor, the Vendor {Contractor} will identify the proposed new Subcontractor or staff member(s) and the work to be performed. The Vendor {Contractor} must provide detailed justification documenting the necessity for the substitution or addition.

[Ibid. (emphasis added)].²

HAC has not sought approval for the use of subcontractors, and, in the affidavit submitted in response to the JSTI Protest, HAC has indicated that it does not anticipate using subcontractors for this Blanket P.O. If subcontractors are to be used, HAC will need to comply with the procedure set out at Bid Solicitation § 5.7.

Further, even if HAC, or any other Vendor {Contractor}, receives approval to use a subcontractor to perform a portion of the awarded work, the Vendor {Contractor} is nonetheless responsible for ensuring that the work is performed in accordance with the Bid Solicitation's requirements as the State has no contractual relationship with the subcontractor. See, SSTC § 5.9 *No Contractual Relationship Between Subcontractors and State* stating "Nothing contained in any of the contract documents, including the RFP and vendor's bid or proposal shall be construed as creating any contractual relationship between any subcontractor and the State."

Based upon the foregoing, I find no reason to disturb the Bureau's recommendation. Accordingly, I sustain the August 20, 2021, Notice of Intent to Award. This is my final agency decision with respect to the protest submitted by JSTI.

² Similarly, The State of NJ Standard Terms and Conditions state that:

"[t]he contractor may not subcontract other than as identified in the contractor's proposal **without the prior written consent of the Director**. Such consent, if granted in part, shall not relieve the contractor of any of his/her responsibilities under the contract, nor shall it create privity of contract between the State and any subcontractor. If the contractor uses a subcontractor to fulfill any of its obligations, the contractor shall be responsible for the subcontractor's: (a) performance; (b) compliance with all of the terms and conditions of the contract; and (c) compliance with the requirements of all applicable laws."

[See SSTC at § 5.8 (emphasis added)].

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your company with **NJSTART** at www.njstart.gov, the State of New Jersey's eProcurement system. 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.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD/EEL

c: R. Regan
K. Popso
Hamilton Auto Clinic, LLC