



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
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June 1, 2023

Via Electronic Mail only to Scott.Salerni@mannington.com

Scott Salerni, Vice President & General Counsel
Mannington Mills, Inc.
75 Mannington Mills Road
Salem, NJ 08079-0030

Re: I/M/O Request for Quotation (RFQ) #: 1592404S Mannington Mills, Inc.
Protest of Notice of Intent to Award
G2005 Carpet and Floor Covering, Supplies and Installation - Statewide

Dear Mr. Salerni:

This final agency decision is in response to your protest of May 4, 2023, on behalf of Mannington Mills, Inc. (Mannington) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that email, Mannington protests the Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Request for Quotation #1592404S - G2005 Carpet and Floor Covering, Supplies and Installation - Statewide (RFQ). Specifically, Mannington alleges that the Bureau erroneously determined Mannington was non-responsive because it was not registered for Public Works Certification, in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq., at the time of the Quote due date, and also non-responsive for failing to bid firm, fixed percentage discounts for Price Lines 1, 2, 4 and 5, as required in RFQ Section 3.8. By way of remedy, Mannington requests that it be permitted to remedy the actions causing it to be non-responsive, and be awarded as a vendor on the Contract.

By way of background, on October 25, 2022, the Bureau issued the RFQ on behalf of various Using Agencies. RFQ Section 1.1 *Purpose and Intent*. The purpose of the RFQ was to solicit Quotes for various types of Carpet and Floor Covering products (including recycled products), related supplies and installation services necessary to meet the needs of various Using Agencies. Ibid. It is the State's intent to award Contracts to those responsible Bidder(s) whose Quotes, conforming to this RFQ are most advantageous to the State of New Jersey (State), price and other factors considered. Ibid.

In accordance with the RFQ instructions, potential Bidders were permitted to submit questions to the Bureau, through the Division's NJSTART eProcurement system, by 2:00 pm eastern time first on November 4, 2022, and again on December 23, 2022. RFQ Section 2.1 *Question and Answer Period*. Through the posting of Bid Amendment #7 on January 17, 2023, the Bureau answered all six (6) questions received.

On February 15, 2023, the Division’s Proposal Review Unit opened three Quotes that were received by the submission deadline of 2:00 pm eastern time. After conducting an administrative review of the Quotes received, the Division’s Proposal Review Unit released the Quotes to the Bureau for further review and evaluation consistent with the requirements of RFQ Section 8.6 *Evaluation Criteria*.

After completing the evaluation of the Quotes received on February 15, 2023, the Bureau prepared a Recommendation Report which indicated that the Quote submitted by Mannington was deemed non-responsive for failing to meet the requirements of RFQ Section 3.3, *Public Works Contractor Registration*. The Recommendation Report notes that Mannington was not listed in the Registered Public Works Contractors, which was verified by the New Jersey Department of Labor on or about April 18, 2023. Recommendation Report Pgs. 6-7. Additionally, Mannington was found non-responsive because it did not bid firm, fixed percentage discounts for Price Lines 1, 2, 4 and 5, as required in RFQ Section 3.8. Recommendation Report Pgs. 7-8.

On April 20, 2023, the Bureau issued the NOI advising that the Blanket P.O. would be awarded to Interface Americas, Inc., and Shaw Industries, Inc.¹

In response to the NOI, on May 4, 2023, Mannington submitted a letter of protest to the Division challenging the following non-responsive determinations:

Non-responsive Determination #1:

Mannington was not registered for Public Works Certification, in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq, at the time of the Quote due date.

* * * * *

Non-responsive Determination #2:

Mannington did not bid firm, fixed percentage discounts for Price Lines 1, 2, 4 and 5, as required in RFQ Section 3.8.

[Mannington Protest Letter, Pgs. 1 and 3.]

Per N.J.A.C. 17:12-3.3(d), any “protest accepted by the Director shall be resolved by written decision on the basis of the Director’s review of the written record including, but not limited to, the written protest, the terms, conditions and requirements of the RFP, the proposals submitted in response to the RFP, the evaluation committee report and/or the award recommendation document, pertinent administrative rules, statutes, and case law, and any associated documentation the Director deems appropriate.” In-person presentations are fact-finding for the benefit of the Director and she has the sole discretion to determine if an in-person presentation is necessary to reach an informed decision on the matter(s) of the protest. N.J.A.C. 17:12-3.3(e). 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). In

¹ The Bureau determined that Mannington was non-responsive to Bid Solicitation Section 3.3, *Public Works Contractor Registration*, which required at Quote opening that “the Vendor {Bidder} and Subcontractors performing public work as defined in N.J.S.A. 34:11-56.26 must be registered in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq.” Mannington did not have an active public works registration at the time of Quote opening, and was not found on the List of Registered Public Works Contractors, as verified on April 18, 2023, by the Department of Labor.

consideration of Mannington's Protest, I have reviewed the record of this procurement, including the RFQ, the Quotes received, Evaluation materials, Mannington's Protest, prior final agency decisions, 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 on the written record. As such, an in-person hearing is not warranted and Mannington's request for an in-person presentation is hereby denied. I set forth herein the Division's final agency decision.

Mannington argues that it held the prior contract for over ten (10) years, and "has not held PWCRA since 2013." Mannington Protest Letter Pg. 2. Additionally, Mannington has been supplying materials and installation during that time period through its partnership with subcontractors with PWCRA, and that it bid on the current contract with subcontractors with PWCRA. Id. Finally, Mannington points out that Shaw Industries allegedly did not have its PWCRA at the time of Quote opening.

First, I note that the State of New Jersey Standard Terms and Conditions Section 2.13 *Compliance - Laws*, Section 2.10 under prior versions, requires that "[t]he contractor must comply with all local, State and Federal laws, rules and regulations applicable to this contract and to the goods delivered and/or services performed hereunder." Therefore, to the extent that a Contractor must have a Public Works Contractor Registration Certificate, the terms of the Contract already mandate that as an on-going requirement. Thus, Mannington's failure to maintain the required certification contrary to the terms of the contract is not a reason to ignore the requirement during this contract procurement.

RFQ Sections 3.3 and 4.5 outlined the Public Works Contractor Registration requirements. Those sections state, in pertinent part:

At the time of the Quote due date, the Bidder and Subcontractors performing public work as defined in N.J.S.A. 34:11-56.26 must be registered in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq.

[RFQ Section 3.3.]

The NJ State Prevailing Wage Act, N.J.S.A. 34:11-56.25 et seq. applies to public work and building services performed under this procurement. This Act establishes wage standards for all workers performing public work and building services for properties or premises owned or leased by the State, requiring the payment of the State Prevailing Wage rate to all employees performing those duties. See N.J.S.A. 34:11-56.25 to -56.47; N.J.S.A. 34:11-56.58 to -56.70. Prevailing wages amounts are listed by county. It is the responsibility of the Contractor to comply with the requirements of the State Prevailing Wage Act as well as adhere to the requirements of the Fair Labor Standards Act (FLSA) during the duration of this Contract and any extensions exercised. Prevailing wages by county can be found on the wage determinations website at <https://www.nj.gov/labor/wagehour/wagerate/CurrentWageRates.html>.

[RFQ Section 4.5.]

Bid Amendment #7, dated January 17, 2023, in response to a question submitted during the Question and Answer Period, with respect to the requirements of RFQ Section 3.3, RFQ Section 4.5, and RFQ Section 9.0, provided the following guidance to potential bidders:

3	Section 3.3; Section 4.5, Section 4.13 and Section 9.0	<p>In order to obtain a Public Works Registration Certificate, we are required to provide a certified apprenticeship program in the State of NJ. Since the dealers will be doing the installation, is this a required form from the manufacturer?</p> <p>As per RFQ Section 3.3, at the time of the Quote due date, the Bidder and Subcontractors performing public work as defined in N.J.S.A. 34:11-56.26 must be registered in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq. This registration is required for all trade categories required to perform work as listed in this RFQ.</p> <p>As such, the manufacturer as Bidder is required to be registered in accordance with the Public Works Contractor Registration Act (PWCRA), N.J.S.A. 34:11-56.48 et seq.</p> <p>Additionally, the Bidder should provide proof of Public Works registration with their Quote submission, including proof of Public Works registration for all Dealers/Distributors and Subcontractors.</p> <p>Furthermore, as per RFQ Section 9, Dealer/Distributor is defined as: <i>"A Company authorized by a Bidder or Contractor as having the contractual ability to accept and fulfill orders and receive payments directly on behalf of the Contractor that is awarded a Contract. Any authorized Dealer/Distributor must agree to all terms and conditions contained within the RFQ and must agree to provide all products and services in accordance with the Contract specifications, terms, conditions and pricing."</i></p> <p>Specifically, please note that, as per RFQ Section 4.13, Dealers/Distributors must comply with the requirements of the NJ State Prevailing Wage Act,</p>
		<p>N.J.S.A. 34:11-56.25 et seq. as it applies to public work and building services performed under this procurement.</p> <p>Questions regarding Public Works Contractor Registration should be addressed to: Contractor Registration New Jersey Department of Labor and Workforce Development, Division of Wage and Hour Compliance PO Box 369, Trenton, NJ 08625-0389 Tel: 609-292-9464 Fax: 609-633-8591</p> <p>For additional information, please reference the following web site: https://www.nj.gov/labor/wagehour/regperm/pw_cont_req.html</p> <p>Please see revised RFQ entitled "G2005 Revised RFQ 1.17.2023".</p>

Thus, potential bidders were not only notified of the requirement by the RFQ's mandatory "must" language,² but the requirement was highlighted as part of the responses provided in Bid Amendment #7.

As noted in RFQ Section 3.3, the contractor must be registered in accordance with the Public Works Contractors Registration Act at the time of the Quote due date. This requirement stems from the statute cited in the RFQ section, which specifically states:

No contractor shall bid on any contract for public work as defined in section 2 of P.L.1963, c.150 (C.34:11-56.26), or for which payment of the

² The RFQ makes clear that certain requirements are mandatory and not subject to discretion. Specifically the RFQ Section 9.0 *Glossary* states:

Must – Denotes that which is a mandatory requirement.
Shall – Denotes that which is a mandatory requirement.

prevailing wage is required by any other provision of law, unless the contractor is registered pursuant to this act. No contractor shall list a subcontractor in a bid proposal for the contract unless the subcontractor is registered pursuant to P.L.1999, c.238 (C.34:11-56.48 et seq.) at the time the bid is made. No contractor or subcontractor, including a subcontractor not listed in the bid proposal, shall engage in the performance of any public work subject to the contract, unless the contractor or subcontractor is registered pursuant to that act.

[N.J.S.A. 34:11-56.51]

While I recognize Mannington may not have intended to act contrary to the RFQ and statutory requirements, its Quote failed to meet the requirements for Public Works registration under both the RFQ and statutory requirements. New Jersey's courts, when reviewing questions of statutory interpretation, have stated that

When the Legislature's language is clear and unambiguous, and subject to only one interpretation, we apply the statute's plain meaning. Bosland, supra, 197 N.J. at 553-54, 964 A.2d 741; DiProspero, supra, 183 N.J. at 492-93, 874 A.2d 1039; O'Connell v. State, 171 N.J. 484, 488, 795 A.2d 857 (2002). But when the statutory language is ambiguous and subject to more than one reasonable interpretation, we must look to extrinsic evidence, such as legislative history, judicial interpretation, and rules of statutory construction. Bosland, supra, 197 N.J. at 553-54, 964 A.2d 741; DiProspero, supra, 183 N.J. at 493-94, 874 A.2d 1039; State v. Fortin, 178 N.J. 540, 607, 843 A.2d 974 (2004).

[In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Management Services, 436 N.J. Super. 350, 368 (App. Div. 2014).]

Here, the registration requirements are clear that a contractor must be registered with a Public Works Registration Certificate prior to submitting a bid for a public works contract. I do not have the authority to make a determination that is contrary to the clear wording of the legislation. Only the New Jersey Legislature can change a statutory requirement that it has mandated.

Mannington also contends that the Bureau erred by finding it non-responsive for not bidding firm, fixed percentage discounts for Price Lines 1, 2, 4 and 5, as required in RFQ Section 3.8. A review of Mannington's State Supplied Price Sheet shows that Mannington inserted the following statement in the "Percentage (%) Discount (-)" field" on Price Lines 1, 2, 4 and 5: "Prices listed on Mannington's GSA Price List are ceiling prices and will be negotiated on a project by project basis." Mannington explains that its

intention was to offer discounts to New Jersey agencies on a project-by-project basis based on the volume or size of the project, and this also allow budgets to be held for a longer duration of time. This discount will vary and the response in boxes 1, 2, 4, & 5 would not allow for a range but required a fixed specific amount. By entering "0%" or some other fixed percentage, Mannington would not be accurately certifying its response to the relevant boxes which it would not want to do if the information is not correct. A "0%" discount would not fairly represent the factors comprising

Mannington's complete pricing bid that are "most advantageous to the State of New Jersey (State), price and other factors considered."

[Mannington Protest Letter Pg. 3.]

While I again recognize Mannington may not have intended to act contrary to the RFQ, its Quote failed to meet the requirements for completing the State Supplied Price Sheet under the RFQ's requirements. Mannington has requested an opportunity to rectify the situation by submitting a Best and Final Offer (BAFO), but this process is only applicable to responsive bidders, and is not an opportunity to provide clarification or revisions.

While minor irregularities can be waived pursuant to the authority vested by N.J.A.C. 17:12-2.7(d), it is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Stemin, 25 N.J. 317,324 (1957). In Meadowbrook Carting Co. v. Bor. 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, *supra*, for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). "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 the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No.95-X-20175, 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.]

"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." *Id.* at 222.

Here, unfortunately, Mannington submitted a Quote without being registered under the PWCRA, and with information on the State Supplied Price Sheet that did not meet the specifications outlined in Section 3.8. Even if Mannington were permitted to provide a revised State Supplied Price Sheet and provide proof of certification under the PWCRA, so the State could be assured that the Blanket P.O. could be performed in accordance with the specified requirements, providing Mannington with the opportunity to modify its bid documents post-Quote opening would adversely affect competitive bidding by placing Mannington in a position of advantage over the other bidders, including those who may not have bid because they were not registered at the time of Quote opening, and would undermine the necessary common standard of competition. River Vale, *supra*, 127 N.J. at 216. Mannington's failure to include the proper information with its Quote submission as requested by the Bureau is a material deviation from the requirements of the RFQ. See N.J.A.C. 17:12-2.2(a)(6).

Finally, Mannington states that Shaw Industries was not registered under the PWCRA at the time of Quote opening. A review of the New Jersey Public Works Registered Contractors for registration between March 4, 2021, and May 16, 2023, displays the following information regarding Shaw Industries:

New Jersey Public Works Registered Contractors


WAGE AND HOUR DISCLAIMER: This list of registered Public Works contractors and subcontractors is provided for informational purposes only. The New Jersey Department of Labor and Workforce Development, Wage & Hour Division and Contract Compliance makes the official Public Works Contractor Registration status determinations. For specific and current registration information status, contact Wage & Hour Division and Contract Compliance at pwcr@dol.nj.gov or 609-292-9464.

Search Business Name		Business Name	Reg. Date	Exp. Date	Address	City	State	Zipcode	County	Certificate #
<input type="text" value="shaw"/>		Bradshaw Construction Corporation	12/08/2022	12/07/2024	175 W Liberty Rd	Sykesville	MD	21784	Maryland	632527
Registration Date 3/4/2021 5/16/2023		Shaw Industries, Inc.	03/22/2022	03/21/2023	P.O. Drawer 2128, MD: 095-03	Dalton	GA	30721	Whitfield	687431
Address <input type="text" value="Search"/>		Shaw's Complete Security	04/05/2022	04/04/2023	74 South Washington Ave	Bergenfield	NJ	07621	Bergen	605832
City <input type="text" value="Search"/>		Shawmut Design and Construction	03/15/2022	03/14/2023	560 Harrison Avenue	Boston	MA	02118	Suffolk	720154
State <input type="text" value="Sea"/>										
Zip Code <input type="text" value="Search"/>										
Certificate # <input type="text" value="4"/>										
# of Contractors										
Reset		Map View								
Contractors with Crafts										

Based upon this information, Shaw Industries was registered as of February 15, 2023, the date of Quote opening, as required by RFQ Section 3.8 and Section 4.5, and was eligible for award under the terms of the RFQ's specifications.

The Division encourages competition and appreciates the time and effort put forth by Mannington in preparing and submitting a Quote; however, in light of the findings set forth above, I have no choice but to uphold the Bureau's determination that Mannington's Quote was non-responsive.

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,

 Cory K. Kestner
 Chief Hearing Officer

- c. K. Thomas
- C. Murphy
- A. Puza