



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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March 23, 2018

Via Electronic Mail [eblanc@pnrw.com] and USPS Regular Mail

Gerard N. von Dohlen, President
Newark Refrigerated Warehouse, Inc.
Avenue C and Vanderpool Street
Newark, NJ 07114

Re: I/M/O Bid Solicitation #: 18DPP00195 Newark Refrigerated Warehouse, Inc.
Protest of Notice of Intent to Award
Bid Solicitation Title: T0303 Food Storage Facilities: Department of Agriculture

Dear Mr. von Dohlen:

This letter is in response to your correspondence of March 12 and 13, 2018, on behalf of Newark Refrigerated Warehouse, Inc. (hereinafter “Newark”), which was received by the Division of Purchase and Property’s (hereinafter “Division”) Hearing Unit. In those letters, Newark protests the Division’s Procurement Bureau’s (hereinafter “Bureau”) March 9, 2018 Notice of Intent to Award (hereinafter “NOI”), which notified Newark that its Quote {Proposal}¹ (hereinafter “Quote”) for the Northern Region (Zone B) was deemed nonresponsive and that Zone B of Bid Solicitation {Request for Proposal} #18DPP00195: T0303 Food Storage Facilities: Department of Agriculture (hereinafter “Bid Solicitation”) would be re-

¹ For consistency, this final agency decision uses terminology employed by the State of New Jersey’s **NJSTART** eProcurement system. For ease of reference, the following is a table which references the **NJSTART** term and the statutory, regulatory, and/or legacy term.

NJSTART Term	Statutory, Regulatory, and/or Legacy Term
Bid Solicitation	Request For Proposal
Bid Amendment	Addendum
Change Order	Contract Amendment
Master Blanket Purchase Order	Contract
Offer and Acceptance Page	Signatory Page
Quote	Proposal
Vendor {Bidder}	Bidder
Vendor {Contractor}	Contractor

advertised in a supplemental procurement.² In the protest, Newark notes it has performed the services that are the subject to the Bid Solicitation for the State of New Jersey for thirty-four (34) years, and challenges the conclusion that its Quote was nonresponsive. See, March 12, 2018 protest letter.

BACKGROUND

By way of background, on December 29, 2017, the Bureau issued the Bid Solicitation on behalf of the State of New Jersey, Department of Agriculture, Division of Food and Nutrition, to solicit Quotes for the storage of donated United State Department of Agriculture (USDA) food (USDA Food), under the National School Lunch Program (NSLP), Child and Adult Care Feeding Program (CACFP), and the Summer Food Service Program (SFSP) (collectively the “Programs”). Bid Solicitation § 1.1 *Purpose and Intent*. With the State split between two zones, a Southern Zone A and a Northern Zone B, the intent of the Bid Solicitation was to award a single Master Blanket Purchase Order (Blanket P.O.) for each zone. Ibid. Substantively, the Bid Solicitation sought warehousing services, including storage of dry, cooler, and freezer food commodities, inventory management, and coordination of receipt and pick-up by carriers and requesting agencies for all counties within the awarded zone. Bid Solicitation § 1.2, *Background*.

While the Bid Solicitation invited Vendors {Bidders} to submit written questions during the Electronic Question and Answer Period, the Bureau received none. The Bid Solicitation advised all Quotes were due by February 9, 2018.

On February 9, 2018, the Proposal Review Unit opened two (2) Quotes received by the submission deadline of 2:00 p.m. Quotes from Safeway (Zone A) and Newark (Zone B) were forwarded to the Bureau for review to determine compliance with the requirements of the Bid Solicitation. After initial review of the Quotes, the Bureau determined that a clarification of the Quote submitted by Newark was required.

Specifically, Newark submitted a State-supplied price sheet as required by Bid Solicitation Section 4.4.5, *Price Schedule/Sheet*. However, the State-supplied price sheet did not include costs or charges on price lines 00025 through 00029, the price lines detailing costs for unloading charges, re-cooping, reworking and repacking charges, and disposal charges, as shown:

North Zone B					
00016	Dry Storage: Price Per Split Month Basis				
00017	Cooler Storage: Price Per Split Month Basis	CWT	\$ 0.776	\$ 0.807	\$ 0.840
00018	Frozen Storage: Price Per Split Month Basis	CWT	\$ 1.065	\$ 1.108	\$ 1.153
			\$ 1.445	\$ 1.503	\$ 1.564
00019	Dry Storage: Price Per Last-Half Of First Month				
00020	Cooler Storage: Price Per Last-Half Of First Month	CWT	\$ 0.974	\$ 1.013	\$ 1.054
00021	Frozen Storage: Price Per Last-Half Of First Month	CWT	\$ 1.106	\$ 1.151	\$ 1.197
			\$ 1.469	\$ 1.528	\$ 1.590
00022	Dry Storage: Handling Charge In & Out (Onetime Charge)	CWT	\$ 3.119	\$ 3.244	\$ 3.374
00023	Cooler Storage: Handling Charge In & Out (Onetime Charge)	CWT	\$ 4.752	\$ 4.942	\$ 5.140
00024	Frozen Storage: Handling Charge In & Out (Onetime Charge)	CWT	\$ 4.752	\$ 4.942	\$ 5.140
00025	Dry Storage: Unloading Charge (Onetime Charge for Freight)	CWT	\$	\$	\$
00026	Cooler Storage: Unloading Charge (Onetime Charge for Freight)	CWT	\$	\$	\$
00027	Frozen Storage: Unloading Charge (Onetime Charge for Freight)	CWT	\$	\$	\$
00028	Recooping, Reworking & Repacking Charge	CASE	\$	\$	\$
00029	Disposal Charge (damaged)	CASE	\$	\$	\$
00030	Cooler Storage: Fresh Storage - Price Per One Half-Month Basis	CWT	\$ 1.106	\$ 1.151	\$ 1.197

Accordingly, by letter dated February 13, 2018, the Bureau requested Newark “clarify whether it is your firm’s intention to offer these Price Lines to the State at ‘\$0.00’ or ‘No Cost’ or if the blank is meant

² The NOI also advised that Safeway Freezer Storage, LLC (“Safeway”) was being awarded a Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter “Blanket P.O.”) for the Southern Region (Zone A). Newark does not protest that award.

to indicate that your firm is offering the State ‘No Bid’ on those line items.” The February 13, 2018 letter cautioned Newark, noting “[t]he process of clarification is not an opportunity for you to supplement, revise, modify, or correct any deficiencies or material omissions in your Quote {Proposal}. Any response or portion of a response that attempts to supplement, revise, modify, or correct any deficiencies or material omissions in your Quote {Proposal} will be given no effect. Accordingly, please restrict your response to answering the question(s) posed above.”

By letter dated February 14, 2018, Newark responded to the Bureau’s clarification request, stating: “Yes there is an unloading charge if the pallets come in over 72 inches in height. We will charge \$12.00 per pallet to breakdown any pallets that are over 72 inches in height, as these will not fit in our storage space. This charge is by the pallet regardless of storage type.” Accompanying the letter, Newark included a revised price sheet reflecting the following edits to price lines 00025 through 00029 as shown:

North Zone B					
00016	Dry Storage: Price Per Split Month Basis	CWT	\$ 0.776	\$ 0.807	\$ 0.840
00017	Cooler Storage: Price Per Split Month Basis	CWT	\$ 1.065	\$ 1.108	\$ 1.153
00018	Frozen Storage: Price Per Split Month Basis	CWT	\$ 1.445	\$ 1.503	\$ 1.564
00019	Dry Storage: Price Per Last-Half Of First Month	CWT	\$ 0.974	\$ 1.013	\$ 1.054
00020	Cooler Storage: Price Per Last-Half Of First Month	CWT	\$ 1.106	\$ 1.151	\$ 1.197
00021	Frozen Storage: Price Per Last-Half Of First Month	CWT	\$ 1.469	\$ 1.528	\$ 1.590
00022	Dry Storage: Handling Charge In & Out (Onetime Charge)	CWT	\$ 3.119	\$ 3.244	\$ 3.374
00023	Cooler Storage: Handling Charge In & Out (Onetime Charge)	CWT	\$ 4.752	\$ 4.942	\$ 5.140
00024	Frozen Storage: Handling Charge In & Out (Onetime Charge)	CWT	\$ 4.752	\$ 4.942	\$ 5.140
00025	Dry Storage: Unloading Charge (Onetime Charge for Freight)	CWT	See attached	See attached	See attached
00026	Cooler Storage: Unloading Charge (Onetime Charge for Freight)	CWT	See attached	See attached	See attached
00027	Frozen Storage: Unloading Charge (Onetime Charge for Freight)	CWT	see attached	See attached	See attached
00028	Recooping, Reworking & Repacking Charge	CASE	SN/C	N/C	N/C
00029	Disposal Charge (damaged)	CASE	N/C	N/C	N/C
00030	Cooler Storage: Fresh Storage - Price Per One Half-Month Basis	CWT	\$ 1.106	\$ 1.151	\$ 1.197

The Bureau determined, as documented in the March 5, 2018 Recommendation Report, that Newark’s clarification response rendered its Quote nonresponsive because “Newark supplemented its Quote by including additional pricing that was not previously demonstrated in its original Quote submission.” The Bureau reviewed Safeway’s Quote, determined it was responsive, conducted a Best and Final Offer negotiation, and concluded it would recommend Safeway for an award of a Blanket P.O. for the Southern Region (Zone A). However, because there was no responsive Vendor {Bidder} for the Northern Region (Zone B), the Bureau determined it would re-advertise for Quotes in a supplemental procurement. All Vendors {Bidders} were notified of the Director’s intent to award and re-procure by NOI dated March 9, 2018.

By letters dated March 12 and 13, 2018, Newark submitted a formal protest of the NOI. In its protest, Newark asserted:

Port Newark Refrigerated Warehouse and Newark Refrigerated Warehouse have performed the State school food distribution program for Northern New Jersey (Zone B) for 34 years and bid several times during that period. Our bid in response to: Bid Solicitation (RFP) 18DPP00195 T0303 Food Storage and Facilities was responsive as it has been in the past so we insist that you award us a Master Blanket Purchase Order (Blanket PO) {Contract} for the Northern Region (Zone B). A copy of our bid with the bid receipt is attached. A copy is also attached of our answers to your additional questions. We could [(sic)] like to meet ASAP to receive the contract award.

[March 12, 2018 Protest letter.]

Newark's March 13, 2018 protest letter reiterated that its March 12, 2018 letter was a formal protest of the "failure to award" Newark a Blanket P.O. for Zone B.

Following the filing of the protest, on March 13, 2018, Newark contacted the Bureau requesting a debriefing to discuss the nonresponsive determination as permitted by the NOI. See von Dohlen letter dated March 13, 2018. Prior to the telephone conference, on March 16, 2018, Newark wrote to the Bureau advising that it wanted to discuss the following during the scheduled debriefing:

With respect to your assertion that we tried to improve our bid by including an unloading charge, in our original bid, as we have in the past about 7 times, we left the line item regarding unloading blank so we did the same for this bid. Why was our answer acceptable for 34 years and now unacceptable? Why didn't you call and ask us?

[Blanc email dated March 16, 2018.]

On March 19, 2018, the date of the scheduled debriefing, Newark forwarded an additional itemized list of 21 discussion points. See Blanc email dated March 19, 2018.

Following the debrief, Newark submitted the itemized list of discussion points to the Hearing Unit, and reiterated its "position that we were unjustly held to be nonresponsive." See Blanc email dated March 19, 2018. Newark stated:

1. The State changed its policy without notifying us. For years the State ignored our leaving questions 25-27 blank and this year disqualified us for this omission. Nowhere and at no time did the State tell us that failure to fill out these lines would disqualify us.
2. If the State interprets our answer to their additional question about these charges to be a change and, if we billed them for these charges, the State has every right to simply not pay them.
3. The State drafted the agreement and administered it, the State by law and logic is responsible for any ambiguity and arbitrary conduct.
4. Over the last several bid cycles, the State discussed these matters with us and this year the State did not. We can document this point and, in fact, have because we had to give the State the relevant emails which the State claimed not to have for last year's conversations. The Treasury employee who negotiated with us is no longer at Treasury and was replaced by someone unfamiliar with last year's conduct.
5. In any case, the State is trying to disqualify us for a minor clerical error in a complicated, State generated document, and program plus the State made errors.
6. The State's pricing formula is completely different from industry standards making the process unnecessarily difficult and error prone. For instance, PA uses the standard industry pricing formula.
7. When the State asked us to "clarify our intent..." it did not notify us that any perceived change would result in our disqualification.
8. The State is not acting in its own interest because on June 29 it could have a major problem as it does not have the 6 month extension right.
9. People don't bid this contract because it is labor intensive and difficult to administer. Any mistakes will result in the schools not getting the

food they need when they need it and spoilage will result (such as not using FIFO).

10. Additionally, as this incident demonstrates with great clarity, the State is very difficult to do business with.
11. If the trucks delivering to the schools do not have access to the preselected and sorted freight before 7 AM, they can't deliver that day increasing trucking cost and placing the food at risk. The trucks delivering to the schools have a brief delivery window, say 10 am to perhaps 2 PM.
12. Several trucking companies elected to switch to our facility from South Jersey because our service is much better and more reliable.
13. We are the only bidder and have been for some time. Given no alternatives, we could increase the pricing and/or not bid at all. Remember no emergency 6 month extension.
14. Northern New Jersey is very short of warehouse space, particularly refrigerated and especially frozen, so the situation will only get worse and prices higher. The selected warehouse must handle frozen, refrigerated, and dry in one facility.
15. If the State awards this contract to a warehouse which doesn't perform, it wouldn't find out until Oct. or Nov. when inventory levels in the non-performing warehouse will be too large to move while delivering to the schools. The State will have to work with the non-performing warehouse until next July. By the way, we are 70% of the program.
16. We serve the large and less affluent cities such as Newark, Jersey City, Elizabeth, and Paterson. Failure to deliver to these cities will result in a large political and public outcry directed at the Treasury department.
17. The warehouse handling this program before us in 1984 was in PA. and most of the food we received from that warehouse was spoiled and out of date.
18. The State substituted a lawyer presumably because the State must think legal action is possible.³
19. As we have said, we have no intention of charging for unloading.
20. The State's letter of Feb. 13, 2018 (attached), explicitly states: "Any response or portion of a response that attempts to supplement, revise, modify, or correct any deficiencies or material omissions in your Quote (Proposal) will be given no effect."
21. Given these facts, do you believe your disqualifying us is either defensible or in the Treasury and State's best interest? Obviously, the schools and their elected representatives wouldn't think so. Our local elected officials certainly do not think so.

³ Rachel Doobrajh, Esq., the Division's Assistant Division Counsel, participated on the debriefing call to ensure the Procurement Bureau only discussed the current procurement and provided information consistent with the Division's enabling legislation and regulations.

DISCUSSION

A. Newark's Quote Contained a Material Deviation From the Bid Solicitation

Preliminarily, the Bid Solicitation required Vendors {Bidders} to submit pricing on the State-supplied price sheet/schedule accompanying the Bid Solicitation. Bid Solicitation § 4.4.5 *Price Schedule/Sheet*. Vendors {Bidders} were instructed that “the Vendor {Bidder} must bid all of the items in the Zone (s) they are bidding. Northern (Zone B) and Southern (Zone A). One (1) award will be made for each Zone. Failure to submit a bid for any item in the specific Zone being bid, will result in the Bidders submission being found non-responsive for that Zone.” Bid Solicitation § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*.⁴

Newark complied with Bid Solicitation § 4.4.5, *Price Schedule/Sheet*, and submitted pricing on the State-supplied price sheet. However, Newark failed to comply with Bid Solicitation Section 4.4.5.2, *Price Sheet/Schedule Attachment Instructions*, because it did not “bid all of the items” within the Zone it was bidding. Because Newark was bidding on Zone B, the Bid Solicitation required Newark to fill in all of the items on price lines 00016 through 00030. But, as identified by the February 13, 2018 clarification letter, Newark did not fill in lines 00025 through 00029. Newark left these price lines blank.

The Bureau correctly identified that the blank price lines may have meant Newark intended to bid “no charge” for that price line. Therefore, in light of the potential ambiguity, the Bureau’s February 14, 2018 clarification letter appropriately sought to clarify Newark’s intent regarding those blank lines.⁵ But, in its February 14, 2018 response, Newark did not confirm that the blank lines in fact meant “no charge.” Rather, Newark explained that there was a \$12.00 unloading charge for breaking down pallets that were more than 72 inches tall.⁶ This distinction is important because the Division’s governing statutes, regulations, and case law, as described in detail below, prohibit Vendors {Bidders} from changing their Quotes after the Quote opening deadline. If Newark intended the blank price lines to mean “no charge” that intent could have been confirmed without it being deemed a “change” to its Quote. However, if the blank lines mean anything other than “no charge,” the change would be a prohibited deviation from the Quote Newark submitted prior to the Quote opening deadline.

⁴ To the extent that Newark asserts that “nowhere and at no time” was it told that failure to fill out the price lines would render its Quote nonresponsive, this argument is rejected based on the plain language of Bid Solicitation § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*. See Blanc email dated March 19, 2018, Item 1.

⁵ It is noted that the Bureau’s February 13, 2018 clarification letter warned Newark that “[t]he process of clarification is not an opportunity for you to supplement, revise, modify, or correct any deficiencies or material omissions . . . [and a]ny response or portion of a response that attempts to supplement, revise, modify, or correct any deficiencies or material omissions in your Quote {Proposal} will be given no effect.” Therefore, to the extent that Newark asserts that the clarification letter failed to “notify us that any perceived change would result in our disqualification,” this argument is rejected because the letter in fact notified Newark that it was prohibited from changing its Quote, as did Bid Solicitation § 6.4 *Clarification of Quote {Proposal}/State’s Right to Request Further Information*. See Blanc email dated March 19, 2018, Item 7.

⁶ To the extent that Newark asserts that it had “no intention of charging for unloading,” this argument is rejected as contrary to the plain language of the February 14, 2018 clarification response outlining unloading charges. See Blanc email dated March 19, 2018, Item 19.

The heart of this issue, therefore, is the timing of Newark's disclosure of the \$12.00 charge. The State-supplied price sheet anticipated that Vendors {Bidders} would assess unloading charges and included price lines for that purpose. However, it was only after Quote opening, in response to a clarification request, that Newark confirmed that there was in fact a charge for these services. Newark erred when it asserted the charge after Quote opening rather than including the charge with its initial Quote on price lines 00025, 00026, and 00027.

The Division's regulations, case law, and Bid Solicitation Section 6.4 *Clarification of Quote {Proposal} / State's Right to Request Further Information*, prohibit Vendors {Bidders} from supplementing, revising, or modifying Quotes during the post-opening clarification process. N.J.A.C. 17:12-2.7(e); In re Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175 (hereinafter "On-Line Games"), 279 N.J. Super. 566, 597 (App. Div. 1995). "In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which is interdicted by the RFP." On-Line Games, supra, 279 N.J. Super. at 597. Here, the Bureau appropriately determined that Newark's clarification response was an impermissible post Quote opening change or modification to its Quote.

As noted above, the Bid Solicitation required all elements of pricing be stated within the State-supplied price sheet and Newark's February 14, 2018 clarification response confirmed that Newark intended to levy charges that were not included on the State-supplied price sheet provided with its Quote. Therefore, the change must be given no effect. N.J.A.C. 17:12-2.7(e). Newark's Quote, then, is left with a deviation from the Bid Solicitation's requirements because Bid Solicitation § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*, required Vendors {Bidders} to bid on "all of the items in the Zone (s) they are bidding."⁷

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Sternin, 25 N.J. 317, 324 (1957). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test for determining materiality as set forth by the court in Township of River Vale v. Longo Construction Co., 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-waiveable irregularity.'" On-Line Games, supra, 279 N.J. Super. at 594 (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.]

⁷ To the extent that Newark asserts that this error was "a minor clerical error in a complicated, State generated document," the argument is rejected because the error was not a minor clerical error. See Blanc email dated March 19, 2018, Item 5. Rather, Newark intended to charge the State unloading fees, but failed to include them in the Quote. This resulted in a substantive, material change in the total price Newark intended to charge the State for storage services.

“If the non-compliance is substantial and thus non-waiveable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” Id. at 222.

Newark’s deviation from Bid Solicitation Section 4.4.5.2 *Price Sheet/Schedule Attachment Instructions* is material. Newark intended to charge the State of New Jersey additional fees for services beyond those included within its Quote. Waiving the requirement that these charges be included on the State-supplied price sheet at the time of Quote submission would deprive the State of assurance that the contract would be entered into, performed, and guaranteed according to its specifications because Newark would be free to assert charges and fees that were not disclosed at the time the original Quote was submitted. Waiving the requirement would also place Newark in a position of advantage of other potential bidders and undermine the necessary standard of competition because Newark’s submitted Quote appears to be less expensive to the State than it really is, when all fees are considered. Accordingly, the deviation is material and non-waivable, a conclusion echoed by the Bid Solicitation Section 4.4.5.2, *Price Sheet/Schedule Attachment Instructions*, which expressly notified Vendors {Bidders} that “[f]ailure to submit a bid for any item in the specific Zone being bid, will result in the Bidders submission being found non-responsive for that Zone.”

B. Newark’s Supplemental Assertions

As noted above, Newark supplemented its protest with a number of additional arguments in support of its position that it should be awarded a Blanket P.O. To the extent the assertions were not addressed above, they are addressed below.

Newark argues that to the extent its clarification response regarding the fees was “a change,” that the “State has every right to simply not pay them” or to give the change “no effect.” See Blanc email dated March 19, 2018, Items 2 and 20. However, Newark’s failure to include the intended unloading charges within price lines 00025, 00026, and 00027 with its Quote, as outlined above, is a deviation from the requirements of Bid Solicitation § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions* that renders the entire Quote non-responsive. Therefore, even if the State could disregard or ignore Newark’s February 14, 2018 clarification response, the State-supplied price sheet contained a non-waiveable material deviation. New Jersey law requires the Division reject non-conforming Quotes because “a non-conforming bid is no bid at all.” River Vale, supra, 127 N.J. at 222.

Relatedly, Newark argues that the Bid Solicitation documents were “drafted” and “administered” by the State and concludes that “the State by law and logic is responsible for any ambiguity and arbitrary conduct.” See Blanc email dated March 19, 2018, Item 3. To the extent that the Bid Solicitation was ambiguous, excessive of industry requirements,⁸ or excessively labor intensive or difficult to administer,⁹ the Division included an Electronic Question and Answer (“eQ&A”) period where interested Vendors {Bidders} could submit all questions, inquiries, and exceptions to the New Jersey Standard Terms and Conditions and/or mandatory requirements of the Bid Solicitation. Bid Solicitation § 1.3.1 *Electronic Question and Answer Period*; 1.3.1.1 *Exceptions to the State of NJ Standard Terms and Conditions (SSTC)*. Therefore, while Newark may be correct in its description of the Bid Solicitation, the Division received no questions, inquiries, or exceptions seeking to change or improve it. Any potential Vendor {Bidder} was free to propose changes, exceptions, or clarifications to the Bid Solicitation to reduce any perceived excessive requirements, ambiguity, or industry incongruity during the eQ&A. However, none participated. While Newark asserts it “is very difficult to do business with” the State, see Blanc email dated March 19, 2018, Item 10, and the Division acknowledges that public bidding may at times onerous, complicated, and

⁸ See Blanc email dated March 19, 2018, Item 6.

⁹ See Blanc email dated March 19, 2018, Item 9.

costly, Vendor {Bidder} participation in the procurement process is essential and notably lacking from this procurement. The Division is unable to correct any ambiguity or misunderstandings unless Vendors {Bidders} raise questions, concerns, or issues to the Division's attention in the manner and means provided.

Next, Newark makes a number of comparisons to prior procurements conducted by the Division, arguing that the State changed its prior practices. See Blanc email dated March 19, 2018, Items 1 and 4. Newark first argues that "[f]or years," it had left "questions 25-27 blank" and this year that resulted in its disqualification. *Id.* at Item 1. However, the Bid Solicitation stated that even though it was a reprocurement of similar services provided under an existing contract, "this new Bid Solicitation {RFP} addresses current requirements." Bid Solicitation § 1.2 *Background*. So, even if prior State-supplied price sheets that Newark was required to use in prior procurements permitted price lines to be left blank, or where the Bureau was able to confirm pricing details with Vendors {Bidders} after Quote submission, the present Bid Solicitation did not and all Vendors {Bidders} must be held to the same common standard of competition for the current Bid Solicitation. It is noted however, that in response to the prior procurement of this Blanket P.O. conducted under Bid Solicitation # 13-X-22528, Newark submitted the following State-supplied price sheet, in relevant part:

LINE#	DESCRIPTION/MFGR/BRAND	EST QUANTITY	UNIT	% DISCOUNT	UNIT PRICE
25	COMM CODE: 971-70-019055 (REAL PROPERTY RENTAL OR LEASE) ITEM DESCRIPTION: DRY STORAGE: UNLOADING CHARGE PER C.W.T. (ONETIME CHARGE FOR FREIGHT NOT ON PALLETS OR SLIPSHEETS) NORTH ZONE B	1	CWT	N/A	
26	COMM CODE: 971-70-019056 (REAL PROPERTY RENTAL OR LEASE) ITEM DESCRIPTION: COOLER STORAGE: UNLOADING CHARGE PER C.W.T. (ONETIME CHARGE FOR FREIGHT NOT ON PALLETS OR SLIPSHEETS) NORTH ZONE B	1	CWT	N/A	
27	COMM CODE: 971-70-019057 (REAL PROPERTY RENTAL OR LEASE) ITEM DESCRIPTION: FROZEN STORAGE: UNLOADING CHARGE PER C.W.T. (ONETIME CHARGE FOR FREIGHT NOT ON PALLETS OR SLIPSHEETS) NORTH ZONE B	1	CWT	N/A	

Thus, it is true that Newark, in fact, left these price lines blank in the past. But, Section 4.4.5 *Price Schedule / Sheet* of Bid Solicitation 13-X-22528 did not include the directive in the current Bid Solicitation that required potential Vendors {Bidders} to "bid all of the items" within the zone being bid. The current Bid Solicitation included additional directions for completing the State-supplied price sheet beyond those included in prior solicitations, which all Vendors {Bidders} were required to follow.

Newark also asserts a number of points, both highlighting Newark's extensive history of performance, identifying the State's difficulty in soliciting or shifting these services to a different vendor, and expressing the conclusion that not awarding a contract to Newark is not in the State's best interest. See Blanc email dated March 19, 2018, Items 8, 11 – 17, and 21. These factual statements may be true. While the Division agrees that these services are critically important to the State of New Jersey and the recipients of the Programs, New Jersey courts have held that "the integrity of the bidding process is more important than any isolated savings the State may obtain through an irregular proceeding." On-Line Games, supra, 279 N.J. Super. at 603. Courts have held that

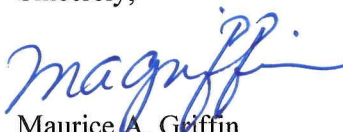
. . . there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions [which] may not under any circumstances be waived.

[Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 412 (1975).]

Such is the case here, for the reasons explained above. Therefore, notwithstanding the critical nature of the services at issue, the Division is simply without the discretion to disregard the irregularity and award Newark a Blanket P.O.

In light of these findings, I find no reason to disturb the Bureau's recommendation. Accordingly, I sustain the March 9, 2018 NOI. This is my final agency decision. Thank you for your company's continuing interest in doing business with the State of New Jersey.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: REG

c: A. Davis
K. Anderson-Thomas
J. McGowan