



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. Box 039

TRENTON, NEW JERSEY 08625-0039
<https://www.njstart.gov>
Telephone (609) 292-4886 / Facsimile (609) 984-2575

FORD M. SCUDDER
Acting State Treasurer

JIGNASA DESAI-MCCLEARY
Director

CHRIS CHRISTIE
Governor

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Lt. Governor

August 25, 2016

Via Email [dmichelman@michelmanbricker.com] and regular USPS Mail

David Michelman, Esq.
Michelman & Bricker, P.C.
2207 Chestnut Street
Philadelphia, PA 19103

RE: Protest of Amended Notice of Intent to Award
RFP #16-X-23961: Laundry Chemicals Statewide

Dear Mr. Michelman:

This correspondence is in response to your letter dated December 23, 2015, on behalf of Diamond Chemical Co., Inc. (Diamond), received by the Hearing Unit of the Division of Purchase and Property (Division). In that letter, Diamond protests the December 2, 2015 amended Notice of Intent to Award (Amended NOI) a contract to Accses NJ/CNA (Accses) for Group 2/ price lines 2 – 11, which was issued by the Division's Procurement Bureau (Bureau) for the above referenced solicitation. Diamond contends that its product proposed for price line 4, DBC 2010, conforms to the specifications and that Accses' proposal for several of the price lines bid does not conform to the specifications set forth in Request for Proposal #16-X-23961: Laundry Chemicals Statewide. Diamond requests that the Division review the same.

In consideration of this protest, I have reviewed the record of this procurement, including the Request for Proposal (RFP), the proposals submitted, 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 submitted by Diamond.

By way of background, this RFP was issued by the Bureau on behalf of various State using agencies to solicit proposals for environmentally preferable biodegradable laundry chemicals in accordance with the requirements of Executive Order #76. (RFP § 1.1 *Purpose and Intent*.) Specifically, this RFP sought 12 different laundry chemicals, which are divided into three groups. Group 1 is for the Dry Chemical System (price line 1); Group 2 is for the Liquid Chemical System (price lines 2 -11); and, Group 3 is for the Solid Encapsulated Detergent (price line 12). It is the intent of the Bureau to award one contract per group, to the responsible bidder, whose proposal, conforming to the RFP is most advantageous to the State, price and other factors considered. (RFP § 1.1 *Purpose and Intent*.) The State intends to extend the contract(s) awarded to cooperative purchasing partners. (RFP § 1.1 *Purpose and Intent*.)

On July 1, 2015, five proposals received by the submission deadline were opened by the Proposal Review Unit. On September 23, 2015, the Bureau issued a Notice of Intent to Award (NOI) indicating that a contract would be awarded to Diamond for all price lines. On October 1, 2015 the Division

received a protest from Interline Brands, Inc./SupplyWorks (SupplyWorks) challenging the intended contract award to Diamond. Specifically, SupplyWorks alleged that Diamond's proposal for three of the line items was deficient for the following reasons:

- RFP Section 3.3 *Liquid Heavy Duty Alkaline Building (Price Line 00003)*
SupplyWorks alleges that Diamond's proposal does not comply with the specifications because the NaOH levels set forth on the Safety Data Sheet (SDS) exceed the levels specified in the RFP.
- RFP Section 3.4 *Detergent/Bleach Combination Liquid Laundry Detergent (Price Line 00004)*
SupplyWorks alleges that Diamond's proposal does not comply with the specifications because Diamond's proposal does not conform to U.S. Department of Transportation's (DOT) regulations that require chemicals exceeding 8.0% hydrogen peroxide be classified as a rapid oxidizer and labeled as such. Supplyworks alleged that Diamond's product did not meet the DOT's labeling requirements.
- RFP Section 3.7 *Liquid Antibacterial Softener/Sanitizer (Price Line 00007)*
SupplyWorks alleges that Diamond's proposal does not comply with the specifications because the product proposed by Diamond for this line item does not have a valid U.S. Environmental Protection Agency (EPA) Registration Number.

After review, on November 25, 2015, the Division issued a final agency decision concluding that Diamond's proposal for price lines 3 and 7 conformed to the requirements of the RFP. However, as to Diamond's proposal for price line 4,

The record is unclear whether the figures provided by Diamond related to the final total percentage (%) of H₂O₂ contained in the finished product DBC 2010, product code #29065, whether a diluted solution of H₂O₂ is being added to the formulation that represents 35 to 45% of the constituents and whether this product meets the minimum specification requirement of 5% available oxygen.

[November 25, 2015 Final Agency Decision.]

Accordingly, the Bureau was directed to conduct a further review and evaluation of the proposals submitted and request clarification from Diamond as necessary to ensure that the proposed product conformed to all applicable regulations.

On November 30, 2015 the Bureau wrote to Diamond requesting clarification regarding the product proposed for price line 4. On that same date, Diamond responded stating:

This letter is in response to your questions regarding the final percentage of H₂O₂ and available Oxygen contained in our finished product DBC 2010, product code# 29065.

1. The final percentage of H₂O₂ (Hydrogen Peroxide) in our finished product DBC 2010 is approximately 12.3%.
2. Hydrogen Peroxide is used to manufacture the finished product.
3. DBC 2010 product code # 29065 absolutely meets the minimum specification requirement of 5% available oxygen and also meets all of the other specifications.

The product DBC 2010 meets all applicable specifications listed in Table 1 – Chemical Composition of Line Item 3.4 Detergent/Bleach Combination Liquid Laundry detergent (Price Line 00004) and as a result we hereby request that the Division of Purchase and Property award the contract to Diamond Chemical Co.

[Diamond’s November 30, 2015 clarification letter.]

Based upon the information provided in response to the request for clarification, the Bureau, in consultation with Distribution and Support Services (DSS), found that Diamond’s proposal for price line 4 did not conform to the RFP requirements. Because price lines 2 – 11 were to be awarded as group, even though Diamond’s remaining proposed products conformed to the RFP requirements, Diamond was found not to be eligible for a contract award for this group.

On December 2, 2015, the Bureau issued an Amended NOI stating that a contract would be awarded to Accses for Group 2 representing price line 2 – 11.

On December 23, 2015, Diamond wrote to the Division protesting the Amended NOI. Specifically, Diamond claims that its proposed product for price line 4 – Detergent/Bleach Combination Liquid Laundry Detergent conformed to the RFP requirements, and that the Bureau’s determination that its proposal for line item 4 was non-responsive was in error. In addition, Diamond contends that its product, DBC 2010, is properly labeled according to the applicable Department of Transportation regulations. Moreover, with respect to the proposal submitted by Accses, Diamond states that Safety Data Sheets (SDS) submitted by Accses do not conform to the applicable federal laws, as the SDS’ do not include the required content. Therefore, the Amended NOI to Accses for Group 2 (line items 2 – 11) must be rescinded.

As to price line 4 – Detergent/Bleach Combination Liquid Laundry Detergent, the RFP required that a contractor provide

...a combination liquid laundry detergent and color-safe bleach. This product shall be designed for brightening whites and colors without the use of chlorine bleach in order to extend the useful life of fabrics. This product shall contain fluorescent brightening agents and anti-redeposition agents. This product shall be designed for use in automatic dispensing systems.

[RFP § 3.4.1 *Scope*.]

In addition, RFP § 3.4.3.2 *Chemical and Physical Requirements* required that the detergent/bleach compound conform to the following requirements:

TABLE 1 – CHEMICAL COMPOSITION

COMPONENT	MINIMUM PERCENTAGE
Nonionic Surfactant Content	15.0%
Compatible Anti-Redeposition Agent	1.5%
Fluorescent Whitening Agent	0.1%
Available Oxygen	5.0%

In its protest, Diamond alleges that the Bureau's finding that its proposal was non-responsive is in error. Diamond specifically states:

The Division's finding that the percentage of hydrogen peroxide was excessive is in error because the approximate 12.3% percent of hydrogen peroxide (H_2O_2) yields an available oxygen content of approximately 5.78%:

Molecular weight of H_2O_2 = 34; molecular weight of oxygen = 16
16/34 equals 47% available oxygen;
47% available oxygen x 12.3% = 5.78% available oxygen

This 5.78% exceeds the minimum five (5%) percent required in the bid specification. An amount *under* 10.65% hydrogen peroxide (H_2O_2) would not meet the available oxygen specification (10.65% H_2O_2 x .47 = 5.0% available oxygen). Diamond has proposed a product which would clearly meet the State's requirement of minimum five percent (5%) available oxygen and because there is no maximum amount of available oxygen set forth in the bid specification, the product is clearly in specification.

[Diamond December 23, 2015 Protest letter.]

In response, DSS states that Diamond has misinterpreted the specification requirements. Specifically, DSS states that Diamond has based its calculation of the available oxygen based upon a single atom of oxygen rather than the O_2 molecule contained in hydrogen peroxide. Using the correct molecule, O_2 , the available oxygen is:

O_2 molecule (16 + 16 = 32 molecular weight)
representing the total Available Oxygen content

Molecular Weight of H_2O_2 = 34; Molecular Weight of O_2 = 32.
32/34 = 94 % Available Oxygen.

94% Available Oxygen x 12.3 % H_2O_2 = 11.56 % Available Oxygen

The product could have contained as little as 5.32 % H_2O_2 in order to comply with the intended Available Oxygen (O_2) molecular minimum requirement of 5.0 %.

The Hearing Unit's independent review of this matter indicates that the RFP required a minimum level of available oxygen of 5.0%. The RFP did not specify a maximum level of available oxygen; therefore, regardless of which calculation of available oxygen is correct, Diamond's proposed product conforms to the RFP requirements as it exceeds the minimum oxygen required by the specifications.

With respect to product labeling, on January 26, 2016, Diamond supplemented its protest letter with a laboratory report from Stresau Laboratory, Inc. (Stresau) an independent lab that performed an analysis for Diamond's DBC 2010. In its report, Stresau states that Diamond's product, DBC 2010, was subject to the Division 5.1 Oxidizer testing in accordance with the Code of Federal Regulations, Title 49, and the United Nations Transport of Dangerous Goods-Manual of Tests and Criteria. Stresau's report detailed the testing procedures, the assessment criteria and the test results. Based upon the testing performed, Stresau concluded that Diamond's product, DBC 2010, is not considered a Division 5.1 Liquid Oxidizer as defined by Code of Federal Regulations, Title 49 or the United Nations Transport of Dangerous Goods criteria. Based upon the testing performed, Diamond states that its product is properly

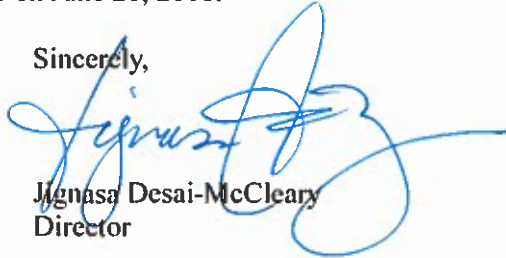
classified and labeled. DSS does not dispute the results of the Stresau laboratory report or Diamond's conclusion regarding classification or labeling of DBC 2010.

The Hearing Unit determined that based upon this independent testing and DSS' acceptance of the same, that Diamond's proposal of DBC 2010 for price line 4 is responsive to the specifications. Accordingly, I direct the Bureau to rescind the Amended NOI to reinstate the original September 23, 2015 NOI awarding all price lines items to Diamond.

Finally, in its protest, Diamond alleged that the Safety Data Sheets (SDS) submitted by Accses New Jersey do not comply with the applicable federal laws and therefore the Amended NOI to Accses for Group 2 (line items 2 – 11) must be rescinded. However, because Diamond's proposed product for price line 4 has been deemed responsive, I need not address these allegations contained in Diamond's protest. This is my final agency decision with respect to the protest submitted by Diamond.

Thank you for your company's 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, the State of New Jersey's new eProcurement system, which went live on June 20, 2016.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ignasa Desai-McCleary", is written over the typed name and title.

Ignasa Desai-McCleary
Director

JDM: RUD

c: J. Kerchner
C. Murphy
H. Diamond, President, Diamond Chemical
J. McKinley, Business Development Manager - Accses NJ