



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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January 8, 2019

Via Electronic Mail [bware@setina.com] and USPS Regular Mail

Brett Ware
Setina Manufacturing Company
2926 Yelm Highway SE
Olympia, WA 98501

Re: I/M/O Bid Solicitation # 17DPP00046 Setina Manufacturing Company
Protest of Notice of Intent to Award
T0106 Law Enforcement Firearms, Equipment and Supplies

Dear Mr. Ware:

This letter is in response to your correspondence of October 31, 2018, on behalf of Setina Manufacturing Company (Setina) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that correspondence, Setina protests the October 19, 2018, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #17DPP00046: Law Enforcement Firearms, Equipment and Supplies (Bid Solicitation).¹

By way of background, on February 7, 2017, the Bureau issued the Bid Solicitation on behalf of State Using Agencies and Cooperative Purchasing Partners to solicit Quotes for sixteen categories for law enforcement equipment and supplies. Bid Solicitation § 1.1 *Purpose and Intent* and Bid Solicitation § 3.1 *Law Enforcement Equipment and Supplies Categories*.

¹ 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.

| <i>NJSTART</i> 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 |

On April 20, 2017, the Proposal Review Unit opened 102 Quotes received by the submission deadline of 2:00 p.m. After conducting a preliminary review of the Quotes received, those Quotes which conformed to the administrative requirements for Quote submission were forwarded to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation § 6.6 *Evaluation Criteria*.

On September 13, 2018, the Bureau completed 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. On October 19, 2018, the NOI was issued advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s. On October 25, 2018, Setina wrote to the Division's Hearing Unit stating in part:

In reviewing the State of New Jersey's intent to award under contract T0106 17DPP00046, it has come to our attention that there are conditions that have qualified Setina Manufacturing Company's bid as "non-responsive." I am writing in regard to circumstances surrounding a Manufacturer's direct bid with named distributors that inhibits the bidder from providing an Hourly Rate Price Line.

It is not commonly the role of the manufacturer to dictate the labor rate of its distributors. Setina Manufacturing has listed named distributors within our submitted bid package, whom all hold a contracted labor rate under 12 & 12A Vehicle Siren Systems and Vehicle Light Systems and Associated Accessories and Installation and Repair Rate independently of all Manufacturer's. It was the position of Setina Manufacturing to defer Hourly Rate Price Line to the chosen named distributors.

This intent was to prevent manufacturer control or influence of independent contracted companies and corporations. Additionally, it would alleviate the need for any contractor to handle a varying number of differing hourly rates dependent upon the vastly differing equipment chosen by the purchasing agency.

In consideration of Setina's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the submitted Quotes, Setina's protest, 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. I set forth herein the Division's Final Agency Decision.

The record of this procurement reveals that Setina submitted a Quote for Category 12 – Vehicle Siren Systems & Vehicle Light Systems and Associated Accessories. Specifically, Setina submitted a Quote for its own Brand. See, price line 140 on the screenshot below.

| CATEGORY 12 - VEHICLE SIREN SYSTEMS & VEHICLE LIGHT SYSTEMS AND ASSOCIATED ACCESSORIES | | | | | | | | | |
|-------------------------------------------------------------------------------------------|-----------------------|-----------------------------------------------|--------------|-----------------|------------------------|-----------------------------|---------------------------------------------|-------------------|----------------------------------------------------------|
| | Brand/Equivalent | Markup/Discount from Manufacturers Price List | % Percentage | Price List Type | Price List File Name | Price List Publication Date | Price List Page # Relating to the Brand Bid | Delivery Days ARO | Cash Discount for Expedited Payment, See Section 4.4.5.6 |
| 133 | Able 2 | | | | No Bid | | | | |
| 134 | Code 3 | | | | No Bid | | | | |
| 135 | Federal Signal | | | | No Bid | | | | |
| 136 | Gamber Johnson | | | | No Bid | | | | |
| 137 | Hads | | | | No Bid | | | | |
| 138 | Jotto Public Safety | | | | No Bid | | | | |
| 139 | Pro-Gard Products LLC | | | | No Bid | | | | |
| 140 | Setina Manufacturing | Discount | 22.00% | Retail | J Part Number Price Li | 1/18/2017 | All | 30 | |
| 141 | Troy Products | | | | No Bid | | | | |
| 142 | Whelen Police | | | | No Bid | | | | |
| 143 | Equivalent Brand Line | | | | | | | | |
| | Equivalent Brand Line | | | | | | | | |
| | Equivalent Brand Line | | | | | | | | |
| | Equivalent Brand Line | | | | | | | | |
| CATEGORY 12A - VEHICLE SIREN SYSTEMS & VEHICLE LIGHT SYSTEMS INSTALLATION AND REPAIR RATE | | | | | | | | | |
| | Brand/Equivalent | Vehicle Installation & Repair Hourly Rate | | | | | | | |
| 144 | Able 2 | No Bid | | | | | | | |
| 145 | Code 3 | No Bid | | | | | | | |
| 146 | Federal Signal | No Bid | | | | | | | |
| 147 | Gamber Johnson | No Bid | | | | | | | |
| 148 | Hads | No Bid | | | | | | | |
| 149 | Jotto Public Safety | No Bid | | | | | | | |
| 150 | Pro-Gard Products LLC | No Bid | | | | | | | |
| 151 | Setina Manufacturing | No Bid | | | | | | | |
| 152 | Troy Products | No Bid | | | | | | | |
| 153 | Whelen Police | No Bid | | | | | | | |
| 154 | Equivalent Brand Line | | | | | | | | |
| | Equivalent Brand Line | | | | | | | | |
| | Equivalent Brand Line | | | | | | | | |
| | Equivalent Brand Line | | | | | | | | |

To assist Vendors {Bidders} in completing the price sheet, the Bid Solicitation advised that when a Vendor Bidder submits Quote pricing for Category 12, the Vendor {Bidder} is required to submit hourly rates for consulting services, installation, hardware/software configuration, training and repair services. First, Bid Solicitation § 1.1 *Purpose and Intent* stated in part “for equivalent brand products in Category(ies) 12-16 which require associated services, the associated services must also be offered for the brand to be considered for an award.”² Emphasis added. Second, Bid Solicitation § 4.4.5.2 *Price Sheet Attachment Instructions* stated in part:

Vendors {Bidders} submitting pricing for Category(ies) 12, 13, 14, 15 and/or 16 must bid a not to exceed hourly rate for consulting services, installation, hardware/software configuration, training and repair services in the corresponding Category(ies) 12A, 13A, 14A, 15A and/or 16A. Vendors {Bidders} shall enter the not to exceed hourly rate for the specific brand (including any equivalent brand) bid in Category 12, 13, 14, 15 and/or 16 on the Price Sheet. A Vendor’s {Bidder’s} entry in the “Hourly Rate” column shall be considered an (sic) not to exceed hourly rate. For example, entry of “50” shall be considered “\$50 per hour”. If a Vendor {Bidder} leaves blank the “Hourly Rate”, it will be considered that the Vendor {Bidder} provided no Quote {Proposal} for that price line item.

[Bid Solicitation § 4.4.5.2.1, emphasis added.]

The Division’s administrative regulations that govern the advertised procurement process require that in submitting a Quote, the Vendor {Bidder} must include all required certifications, forms and attachments completed and signed as required by the Bid Solicitation. N.J.A.C. 17:12-2.2. Moreover, the

² “Shall or Must – Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a Quote {Proposal} as non-responsive.” Bid Solicitation § 2.1.1 *General Definitions*.

NJSTART system does not prevent a Vendor {Bidder} from submitting a Quote without all of the required forms and documents completed and attached as mandated by the specifications. The responsibility for ensuring that all necessary forms and other submittals, are properly completed and uploaded into **NJSTART** necessarily and appropriately rests solely with the Vendor {Bidder}; as such the Bid Solicitation advised:

The Vendor {Bidder} assumes sole responsibility for the complete effort required in submitting a Quote {Proposal} in response to this Bid Solicitation {RFP}. No special consideration will be given after Quotes {Proposals} are opened because of a Vendor's {Bidder's} failure to be knowledgeable as to all of the requirements of this Bid Solicitation {RFP}.

[Bid Solicitation § 1.4.2 *Vendor {Bidder} Responsibility.*]

Accordingly, Setina, having submitted a Quote for Category 12 – Vehicle Siren Systems & Vehicle Light Systems and Associated Accessories, was also required to submit an hourly rate for consulting services, installation, hardware/software configuration, training and repair services in Category 12A. Unfortunately, Setina did not submit the hourly rates as required. Therefore, the Bureau deemed Setina's Quote non-responsive. Recommendation Report p. 42, 60-61.

| STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY DIVISION OF PURCHASE AND PROPERTY | | RECOMMENDATION REPORT |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Evaluated Quotes That Were Non-Responsive or Not Eligible for Award | | |
| Non-Responsive Quotes: | | |
| Quotes were reviewed to confirm compliance with all mandatory requirements. The following Vendors' (Bidders') Quotes were deemed non-responsive, either fully (all price line items bid) or partially (as noted), as they failed to meet some or all of the mandatory requirements set forth in the Bid Solicitation. | | |
| Setina Manufacturing Company (Setina) | Category 12 & 12A, Price Lines 140 and 151, Setina Manufacturing | <p>Setina did not offer a Quote for the Hourly Rate Price Line (inserted "NO BID" on the Price Sheet); instead, Setina only offered a Quote for the Brand Price Line (Percentage Markup or Discount).</p> <p>Bid Solicitation Section 1.1 states, in pertinent part: "For equivalent brand products in Category(ies) 12-16 which require associated services, the associated services must also be offered for the brand to be considered for an award."</p> <p>Bid Solicitation Section 4.4.5.2.1 states, in pertinent part: "Vendors (Bidders) submitting pricing for Category(ies) 12, 13, 14, 15 and/or 16 must bid a not to exceed hourly rate for consulting services, installation, hardware/software configuration, training and repair services in the corresponding Category(ies) 12A, 13A, 14A, 15A and/or 16A. Vendors (Bidders) shall enter the not to exceed hourly rate for the specific brand (including any equivalent brand) bid in Category 12, 13, 14, 15 and/or 16 on the Price Sheet. A Vendor's (Bidder's) entry in the "Hourly Rate" column shall be considered a not to exceed hourly</p> <p>rate. For example, entry of "50" shall be considered "\$50 per hour". If a Vendor (Bidder) leaves blank the "Hourly Rate", it will be considered that the Vendor (Bidder) provided no Quote (Proposal) for that price line item."</p> <p>Further, Bid Solicitation Section 4.4.5.2.3 states, in pertinent part: "If an equivalent to the listed brands is offered in Category(ies) 12, 13, 14, 15, and/or 16 pricing to install, repair and service the corresponding equivalent brand offered must be entered onto the corresponding equivalent brand price line in Category(ies) 12A, 13A, 14A, 15A, and/or 16A."</p> <p>Bid Solicitation Section 7.2 states, in pertinent part: "Vendors (Bidders) awarded brands under Category(ies) 12, 13, 14, 15 and/or 16 will also be awarded the associated brand price line for consulting services, installation, hardware/software configuration, training and repair services. Using Agencies may, but are not required to utilize Category(ies) 12A, 13A, 14A, 15A and/or 16A."</p> |

In order for Setina's Quote to be considered responsive, Setina's failure to submit the required hourly rate for consulting services, installation, hardware/software configuration, training and repair services in Category 12A, would have to be deemed as a minor irregularity. Minor irregularities can be waived pursuant to the authority vested in N.J.A.C. 17:12-2.7(d) and Bid Solicitation RFP § 1.4.10, *Quote {Proposal} Acceptances and Rejections*. 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 set forth by the court in Twp. of River Vale v. Longo Constr. Co. 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, Setina's failure to submit the required hourly rate for consulting services, installation, hardware/software configuration, training and repair services in Category 12A is a material deviation from the requirements of the Bid Solicitation. Without the required pricing having been submitted, the State would have no assurance that the Blanket P.O. would be performed and guaranteed according to the specified requirements.³ Moreover, if the State were to accept Setina's Quote without the required hourly rate, Setina would be placed in a position of advantage over those Vendors {Bidders} who did submit a Quote with the required information and those Vendors {Bidders} who did not submit a Quote for this Category knowing that they were unable to provide the required consulting services, installation, hardware/software configuration, training and repair services.

In light of the findings set forth above, I find no reason to overturn the Bureau's determination that Setina's submitted Quote was non-responsive to the requirements of the Bid Solicitation. This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put forth in preparing and submitting the Quote.

³ In its October 23, 2018 correspondence, Setina acknowledge that it did not provide an hourly rate for associated services sought by the Bid Solicitation as it intended to defer hourly rate pricing to the distributors.

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,

A handwritten signature in blue ink that reads "magriff".

Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas