



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 19, 2019

Via Electronic Mail [sb@monteirolaw.com] and USPS Regular Mail

Ricardo J. Monteiro, Esq.
Law Offices of Ricardo Monteiro, LLC
62-64 Magazine Street,
Newark, New Jersey 07105

Re: I/M/O Bid Solicitation #18DPP00205 J. Montez Trucking Co., Inc.
Protest of Notice of Termination
T0777 for Snow Plowing and Spreading Services, Blanket P.O. #18-PROS1-00470

Dear Mr. Monteiro:

This letter is in response to your correspondence dated September 9, 2019, on behalf of J. Montez Trucking, Co., Inc. (Montez) to the Division of Purchase and Property's (Division) Hearing Unit, protesting the Division's Procurement Bureau's (Bureau) September 6, 2019, letter in which it informed Montez of its intent to terminate the Master Blanket Purchase Order (Blanket P.O.), for Price Lines 15, 24 and 323, awarded to Montez in connection with Bid Solicitation #18DPP00205: T0777 for Snow Plowing and Spreading Services (Bid Solicitation).

By way of background, on January 30, 2018, the Bureau issued the Bid Solicitation on behalf of New Jersey Department of Transportation (NJDOT) to solicit Quotes from qualified Vendors {Bidders} to provide snow plowing and spreading services on all State interstates and highways under the jurisdiction of the NJDOT. Bid Solicitation § 1.1 *Purpose and Intent*. The Bureau intended to award Blanket P.O.s to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation, were most advantageous to the State, price and other factors considered. *Ibid*.

On March 1, 2018, the Bureau issued Bid Amendment #1, which included answers to questions, deletions/revisions to the Price Sheet/Schedule, revisions to Attachment #1 – Vendor {Bidder} Equipment Form (Attachment 1) and other modifications to the Bid Solicitation {RFP}.

On March 16, 2018, the Division's Proposal Review Unit opened 164 Quotes received through the State's **NJSTART** eProcurement system and/or hardcopy format by the submission deadline of 2:00 pm eastern time. 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.

After completing the evaluation of the Quotes received, on August 22, 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. The Recommendation Report recommended awarding Montez a Blanket P.O. for Price Lines 15, 24 and 323. On August 24, 2018, the Bureau issued a Notice of Intent to Award advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s consistent with the Bureau's Recommendation Report. The Blanket P.O. awards were finalized on September 21, 2018.

On January 9, 2019, NJDOT filed Formal Complaint No. 19-01-04 with the Division's Contract Compliance & Audit Unit (CCAU), advising that on three separate occasions, Montez failed to provide the required number of trucks requested:

1. On November 17, 2018, Montez was two trucks short;
2. On November 19, 2018, Montez was 3 trucks short; and
3. On January 7, 2019, Montez refused to provide any of his five trucks.

[See, CCAU Formal Complaint No. 19-01-04, pg. 1.]

On January 16, 2019, Montez replied to CCAU, explaining the reasons for failure to provide the required number of trucks. See, CCAU Formal Complaint No. 19-01-04, pg. 1-2). Nowhere in its response did Montez dispute the fact that it indeed failed to supply the required trucks. On January 25, 2019, CCAU issued its decision with respect to Formal Complaint No. 19-01-04 finding against Montez for poor performance for failing to arrive for the January 7, 2019 event with the required number of trucks. Ibid. CCAU also indicated that NJDOT should refer to Bid Solicitation Section 3.8 *Vendor {Contractor} Readiness and Call –Out* for guidance regarding Montez' failure to supply the required number of trucks on November 17 and 19, 2018. Ibid.

On January 23, 2019, NJDOT filed Formal Complaint No. 19-01-11 with the CCAU, alleging that 7 out of 15 of Montez's trucks were late for a plowing event, one truck failed to show up, and all trucks failed to arrive with ballast, contrary to the requirements outlined in Bid Solicitation Section 3.12.1 *Vendor {Contractor} Superintend Requirements*, subsection B(c) and Section 3.12.2 *Snow Plowing Truck Requirements*, subsection C (2). See CCAU Formal Complaint No. 19-01-11, pg. 1. Montez responded to the CCAU on February 6, 2019, admitting that number of its trucks were indeed late or did not show up, and that its trucks had no ballast as required by Bid Specification. See CCAU Formal Complaint No. 19-01-11, pg. 1-2. On March 27, 2019, CCAU issued its decision with respect to Formal Complaint No. 19-01-11, finding against Montez for violation of Bid Solicitation Section 3.12.1 and 3.12.2. Ibid.

On March 3, 2019, NJDOT filed a third complaint against Montez, alleging that on March 1 and 3, 2019, Montez failed to report to duty with the required number of trucks in violation of Bid Solicitation Section 3.8 *Vendor {Contractor} Readiness and Call –Out* and Section 3.14.1 *Spreading Requirements*, subsections A and B. See, CCAU Complaint No. 19-03-01. On March 21, 2019, Montez replied to CCAU, alleging that its subcontractor, Shirley Express, LLC. was failing to perform, and that Montez was no longer able to meet the requirements for Price Lines #15 and 24. Ibid. Accordingly, on April 4, 2019, CCAU issued its decision with respect to Formal Complaint No. 19-03-01 finding against Montez for failure to perform. Ibid.

On September 6, 2019, based upon a request from NJDOT, the Bureau's sent a Notice of Termination to Montez, advising that it intended to terminate Montez' Blanket P.O.s for price Line 15, 24 and 323 pursuant to Bid Solicitation Section 9.0 *State of New Jersey Standard Terms and Conditions*, section 5.7 (B)(1) and (B)(2) *Termination of Contract*, based on the following:

1. On November 17, 2019, November 19, 2019, and January 7, 2019, the Vendor {Contractor} failed to supply the required number of trucks for the below referenced price line. Thus, the basis for this termination is Failure to Perform.

Price Line #	Location
323	North Crew: #223 Elizabeth Yard

2. On January 23, 2019, the Vendor {Contractor} was late with seven (7) out of 15 trucks, with one (1) truck not showing up at all, and all trucks were without ballasts, for the below referenced price line. Additionally, on March 3, 2019, the Vendor {Contractor} failed to report with all 15 of the required trucks for the below referenced price line. Thus, the basis for this termination is Failure to Perform and Poor Performance.

Price Line #	Location
24	North Crew: #215 West Orange: 5215262

3. On March 1, 2019 and March 3, 2019, the Vendor {Contractor} failed to report with all 10 of the required trucks for the below referenced price line. Thus, the basis for this termination is Failure to Perform.

Price Line #	Location
15	North Crew: #213 Lodi: 5213263

[See September 6, 2019 Notice of Termination.]

On September 9, 2019, Montez submitted a letter protesting the termination of Price Line 323 for the following reasons:

Relative to price lines #s 25 and 15, our client has to enlist the services of subcontractors. Our client understands that the ultimate responsibility lies with it and not the subcontractors but unfortunately, the subcontractors were not able to perform as contracted. Relative to price line #323, same is fully manned with our client's trucks. 2018, in reliance on this contract, our client purchased four (4) brand new trucks and salt spreaders with wet system. Relative to the incidents complained of, our client, submitted the attached response to Sheila Beers, wherein you were copied. The aforementioned new equipment was being used for the 1st time on November 17, 2018. Unfortunately, due to equipment malfunctions only three (3) of the required five (5) trucks were able to operate. Parts were ordered but not received in time, two (2) days later, for the November 19, 2018, event, wherein our client only had two (2) trucks available. There were no problems from that date until January 7, 2019, wherein no trucks

were available. The weather was not calling for snow and our client did not get any call from the yard in advance, as usual.

[See September 9, 2019 Montez Protest Letter, pg. 1.]

In consideration of Montez' protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the CCAU complaints, the protest, the relevant statutes, regulations, and case law. This review 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 Montez. I set forth herein my final agency decision.

While Montez's letter does not protest the cancellations of Price Lines 15 and 24, in both its response to the CCAU compliant and in its protest Montez states that the failure to report was not a result of its own inaction, but rather that of its subcontractor. With respect to a Vendor's {Contractor's} use of a subcontractor, Bid Solicitation § 4.4.1.3 *Subcontractor Utilization Plan* requires that "Vendors {Bidders} intending to use a Subcontractor shall submit a Subcontractor Utilization Plan form." With its Quote Montez did not submit the Subcontractor Utilization Plan form. If after award Montez desired to use a subcontractor to perform any portion of the services sought, it was required to inform and seek approval from the Division. See, Bid Solicitation Section 4.4.1.1.2 *No Subcontractor Certification* stating:

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. {Contract} 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.

The State Standard Terms and Conditions § 5.8 *Subcontracting or Assignment* further discusses a Vendor's {Contractor's} use of subcontractors stating in part:

Subcontracting: The 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;

At no time after the Blanket P.O. award did Montez request permission to or advise the State that it intended to use a subcontractor to perform a portion of the awarded work. Montez' failure to advise the State of its intent to use a subcontractor is a violation of the State's Standard Terms and Condition which state that the "contractor may not subcontract other than as identified in the contractor's proposal without the prior written consent of the Director." SSTC § 5.8 *Subcontracting or Assignment*. Further, even if Montez had received approval to use a subcontractor to perform a portion of the awarded work, as Montez points out in its reply documents, it was nonetheless responsible for ensuring that the work was performed in accordance with the Bid Solicitation's requirements.

Bid Solicitation Section 9.0 *State of New Jersey Standard Terms and Conditions*, section 5.7 *Termination of Contract* in relevant part states:

B. For Cause:

1. Where a contractor fails to perform or comply with a contract or a portion thereof, and/or fails to comply with the complaints procedure in N.J.A.C. 17:12-4.2 et seq., the Director may terminate the contract, in whole or in part, upon ten (10) days' notice to the contractor with an opportunity to respond; and
2. Where in the reasonable opinion of the Director, a contractor continues to perform a contract poorly as demonstrated by e.g., formal complaints, late delivery, poor performance of service, short-shipping, so that the Director is required to use the complaints procedure in N.J.A.C. 17:12-4.2 et seq., and there has been a failure on the part of the contractor to make progress towards ameliorating the issue(s) or problem(s) set forth in the complaint, the Director may terminate the contract, in whole or in part, upon ten (10) days' notice to the contractor with an opportunity to respond.

In its September 9, 2019 letter, Montez does not dispute the fact that it failed to comply with the requirements of the Bid Solicitation/Blanket P.O. on multiple occasions and failed to perform as outlined in NJDOT's Formal Complaints. For Price Line 323, Montez alleges that it was due to equipment malfunction that it failed to comply with Bid Solicitation requirements. (See September 9, 2019 Montez Protest Letter). Additionally, in its responses to CCAU complaints, while Montez provided these explanations as to why on a number of occasions its trucks were either late or a no show, it confirmed that all NJDOT complaints alleged against it were true.

Bid Solicitation Section 3.8 *Vendor {Contractor} Readiness and Call –Out* requires that

All trucks must be fully operational and ready to report for a Call-Out by October 1st of each year of the Blanket P.O. {Contract}.

Upon receipt of a Call-Out, the Vendor {Contractor} shall assemble the required number of trucks and/or equipment at the Assembly Location designated by NJDOT. The Vendor {Contractor} shall be prepared to begin snow plowing Operations and/or spreading services within the following timeframe:

- A. Vendors {Contractors} awarded a Blanket P.O. {Contract} in Phase One (1) Of the Procurement must report within two (2) hours of a Call-Out;
- B. Vendors {Contractors} awarded a Blanket P.O. {Contract} in Phase Two (2) of the Procurement must report within three (3) hours of a Call-Out; and
- C. Vendors {Contractors} awarded a Blanket P.O. {Contract} in Phase Three (3) of the Procurement must report within three (3) hours of a Call-Out.

With respect to price line 323, based upon a review of the DOT's complaint, Montez's response and CCAU's letter finding, there is no dispute that Montez failed to comply with requirements of Bid Solicitation Section 3.8. On November 17, 2019, November 19, 2019, and January 7, 2019, the Vendor {Contractor} failed to supply the required number of trucks. Montez was given multiple opportunities to rectify its performance and comply with the specifications of the Bid Solicitation/Blanket P.O. It failed to do so. Therefore, the record supports the Bureau's decision to terminate Montez' Blanket P.O. #18-PROS1-00470 for Price Lines 15, 24 and 323 for failure to perform and comply with the Blanket P.O.

In light of the findings set forth above, I sustain the Bureau's Notice of Termination. This is my final agency decision on this matter.

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, the State of New Jersey's new eProcurement system.

Sincerely,


Maurice A. Griffin
Acting Director

MAG: RD

c: A. Davis
R. Regan
K. Popso
K. Centofanti