



## 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

PHILIP D. MURPHY  
*Governor*

SHEILA Y. OLIVER  
*Lt. Governor*

ELIZABETH MAHER MUOIO  
*State Treasurer*

MAURICE A. GRIFFIN  
*Acting Director*

October 3, 2019

Via Electronic Mail [katowingandrecovery@gmail.com] and USPS Regular Mail

Keith Albinson, Owner  
K&A Towing and Recovery, LLC  
76 County Route 639  
Sussex, NJ 07461

Re: I/M/O Bid Solicitation #19DPP00334 K&A Towing and Recovery, LLC  
T2171 – Vehicle Towing and Roadside Services  
Protest of Notice of Intent to Award

Dear Mr. Albinson:

This letter is in response to your correspondence of August 15, 2019, on behalf of K&A Towing and Recovery, LLC (K&A) to the Division of Purchase and Property's (Division) Hearing Unit protesting the August 9, 2019, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau). In the protest letter, K&A requested that the Division cancel and re-bid Bid Solicitation #19DPP00334 T2171 – Vehicle Towing and Roadside Services (Bid Solicitation). The record of this procurement reveals that the Bureau deemed K&A's Quote non-responsive to the requirements of the Bid Solicitation because it was not certified as a Small Business Enterprise as of the Quote opening date.

By way of background, on January 18, 2019, the Bureau issued the Bid Solicitation on behalf of the Bureau of Transportation Services, Division of Administration, Department of the Treasury (Transportation), to solicit Quotes from qualified Vendors {Bidders} to provide vehicle towing and roadside repair services. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award up to five Blanket P.O.s in each county to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation is most advantageous to the State, price and other factors considered. *Ibid*. On February 28, 2019, the Bureau issued Bid Amendment #1 extending the Quote submission deadline to April 3, 2019. On March 25, 2019, the Bureau issued Bid Amendment #2 responding to the questions received from potential Vendors {Bidders} and extending the Quote submission deadline to April 11, 2019.

On April 11, 2019, the Division's Proposal Review Unit opened 34 Quotes received by the submission deadline of 2:00 pm eastern time. On July 30, 2019, after completing its review and evaluation of the Quotes received, the Bureau completed a recommendation report which recommended Blanket P.O. awards be made to sixteen Vendors {Bidders} whose submitted Quotes were most advantageous to the State, price and other factors considered. On August 9, 2019, the Bureau issued the NOI advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s to the following Vendors {Bidders}:

A&B Auto Repair	Jack's Auto Service
A-1 Towing	John's Main Auto Body
Bergen Brookside Towing	Johnson Specialized Transportation
City Wide Towing	Nick's Towing Service
Donald Rzepka (a/l Al's Auto Body)	P.P.T.D. LLC
GJ Auto Repair & Service	Puleio's Service Center
Glendola Service Center	SHT Corporation
Hy-Way Towing & Collision	TruckMasters Inc.

On August 15, 2019, K&A submitted a protest to the Division's Hearing Unit. In the protest letter, K&A state that:

Being that 15 of the 16 company's (sic) disqualified some that have handled this work of many years for the state that an email should have been sent out and allowed the company's (sic) the time to submit the letter needed.

That the bid was extended passed the dead line to open and another month added to the extension that would have allowed the company's (sic) to send in the certificate needed.

Looking at the bid and the companies that are potentially awarded the counties (sic), there is no way for them to efficiently handle the area or response time that it will require by the state. And if subcontractors are used then there I no background checks done and these persons would be towing state police and government cars.

In the protest, K&A raises the following questions:

- (1) Why was Truck Master's Inc. permitted to clarify its ownership after the Quote opening date?
- (2) How will the State know if a Vendor {Contractor} employs subcontractors to perform part of the work? Why would the State permit subcontractors as they won't be held to the same standard?
- (3) How could the current contract have been extended for so many years? And how can the current contract be extended when the current Bid Solicitation has been awarded?

In consideration of K&A's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, 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 K&A. I set forth herein my final agency decision.

In 1983 the New Jersey Legislature enacted the "Set-Aside Act for Small-Businesses, Female Businesses and Minority Businesses." See, N.J.S.A. 52:32-17 et seq. The law required that the Division, when setting contracts aside for award to Small Business Enterprises advise the bidding community of the same and reject all Quotes from those businesses that are not certified as of the Quote opening date. See, N.J.S.A. 52:32-25. The regulations promulgated by the Department of the Treasury regarding Small Business Set-Asides similarly states "[i]f a business is to be eligible to bid on a specific set-aside contract or participate in the subcontracting target programs for purposes of this chapter, it must be registered as a small or veteran-owned business by [Division of Revenue and Enterprise Services (DORES)] on or before the date the bid or proposal is due at the State contracting agency." See, N.J.A.C. 17:13-3.2. A review of

the subject Bid Solicitation reveals that all Vendors {Bidders} were put on notice that awards would be confined to those businesses certified as Small Business Enterprise as of the Quote opening date. Specifically, the Bid Solicitation stated that:

Pursuant to the provisions of N.J.S.A. 52:32-17 and N.J.A.C. 17:13 this is a full Set-Aside Blanket P.O. for Category I, II, & III for Small Businesses. The Vendor {Bidder} must<sup>1</sup> be registered as a qualifying small business with the Division of Revenue and Enterprise Services, Small Business Registration and M/WBE Certification Services Unit by the date the Quote is received and opened. Evidence that the Vendor {Bidder} has registered as a small business should be submitted with the Quote. Vendors {Bidders} should verify its Small, Minority, Veteran, and Women Owned Business Certification status on the “Maintain Terms and Categories” Tab within its profile in *NJSTART*. In the event of an issue with a Vendor’s {Bidder’s} Small, Minority, Veteran, and Women Owned Business Certification status, *NJSTART* provides a link to take corrective action.

Inasmuch as this is a full or partial set-aside Blanket P.O., the Vendor {Bidder} should provide, as part of its response to this Bid Solicitation, proof of its current registration as a qualifying small business with the New Jersey Division of Revenue and Enterprise Services, Small Business Registration and M/WBE Certification Services Unit. Application and registration requirements are presented on the web at <http://www.nj.gov/njbusiness/contracting/> or by contacting that agency as indicated below during business hours.

New Jersey Department of the Treasury  
Division of Revenue and Enterprise Services  
Small Business Registration and M/WBE Certification Services Unit  
33 West State Street – Fifth Floor  
PO Box 026  
Trenton, NJ 08625-0026  
Telephone: 609-292-2146  
Fax #: 609-292-8764

**\*\* IF THE VENDOR {BIDDER} IS AN INCUMBENT VENDOR {CONTRACTOR} AND/OR HAS PREVIOUSLY REGISTERED OR BEEN CERTIFIED UNDER THE FORMER SBE/MBE/WBE PROGRAM, THE VENDOR {BIDDER} SHOULD ENSURE IT IS REGISTERED ON THE DAY OF QUOTE RECEIPT WITH THE DIVISION OF REVENUE AND ENTERPRISE SERVICES, SMALL BUSINESS REGISTRATION AND M/WBE CERTIFICATION SERVICES UNIT TO BE ELIGIBLE FOR AWARD.**

**IN ORDER TO EXPEDITE THE SMALL BUSINESS REGISTRATION PROCESS FOR THIS PROCUREMENT, THE VENDOR {BIDDER} MAY FAX A COPY OF BID SOLICITATION PAGE ONE (1) REFLECTING THE QUOTE SUBMISSION DATE ALONG WITH**

---

<sup>1</sup> “Must – Denotes that which is a mandatory requirement.” See, Bid Solicitation Section 2.2 *General Definitions*.

**THE COMPLETED SMALL BUSINESS REGISTRATION FORM TO THE NEW JERSEY DIVISION OF REVENUE AND ENTERPRISE SERVICES, SMALL BUSINESS REGISTRATION AND M/WBE CERTIFICATION SERVICES UNIT TO THE FAX NUMBER ABOVE.**

[Bid Solicitation Section § 4.4.1.4.1 *Small Business Set-Aside Blanket P.O.* Emphasis added.]

Further, the Bid Solicitation notified Vendors Bidders that they could verify their certification status in **NJSTART**. Specifically, Bid Solicitation Section 4.4.1.4 *Small Business Registration For Set-Aside Blanket P.O.*

Vendors {Bidders} should verify its Small, Minority, Veteran, and Women Owned Business Certification status on the “Maintain Terms and Categories” Tab within its profile in **NJSTART**. In the event of an issue with a Vendor’s {Bidder’s} Small, Minority, Veteran, and Women Owned Business Certification status, **NJSTART** provides a link to take corrective action.

Moreover, in response to a question posed by a potential Vendor {Bidder}, in Bid Amendment #2, the Bureau confirmed the requirement that a Vendor {Bidder} must be registered as Small Business Enterprise by the Quote opening date.

#	Bid Solicitation Section Reference	Question (Bolded) and Answer
7	Section 4.4.1.4.1 Small Business Set-Aside Blanket P.O.	<p><b>My firm has always been a small business. Is it really necessary for me to be registered in order to submit a bid?</b></p> <p>YES. The Vendor {Bidder} must be registered as a qualifying small business with the Division of Revenue and Enterprise Services, Small Business Registration and M/WBE Certification Services Unit by the date the Quote is received and opened. Evidence that the Vendor {Bidder} has registered as a small business should be submitted with the Quote.</p> <p>Please refer to Section 4.4.1.4.1 for more information related to this Bid Solicitation’s Small Business Set-Aside requirements.</p>

A review of the records maintained by DORES reveals that K&A was not certified as a Small Business Enterprise on April 11, 2019, the Quote opening date. In fact, the State’s records reveal that K&A applied for and received its initial certification as a Small Business Enterprise on August 9, 2019, the same date that the NOI was issued by the Bureau. Accordingly, K&A was not eligible for a Blanket P.O. award as it was not certified as a Small Business Enterprise on April 11, 2019, the Quote opening date as required by law. See, N.J.S.A. 52:32-25 (stating, “when a contract or portion thereof has been designated as a set-aside, invitations for bids shall be confined to businesses designated by the department as appropriate for the set-aside and bids from other bidders shall be rejected.”) Unfortunately, the Division does not have the power to waive the legislative requirement that a Vendor {Bidder} be certified as a Small Business Enterprise as of the Quote opening date. Only the New Jersey Legislature can change a requirement it has mandated. I note that K&A does not dispute the fact that it was not certified as a Small Business Enterprise as of the Quote opening date as required.

With respect to K&A's statement that another Vendor {Bidder}, Truck Masters, Inc. (Truck Masters) was permitted to clarify certain information contained within the submitted Quote, I note that the New Jersey Legislature has mandated that a Vendor {Bidder} must supply its ownership information, prior to or with its Quote, to be eligible to enter into a Blanket P.O. with the State. N.J.S.A. 52:25-24.2. In order to make the process of complying with the legislative requirement easier, the Division provides to the bidding community an *Ownership Disclosure Form* to be completed, signed and submitted with the Quote. The record of this procurement reveals that with its submitted Quote, Truck Masters included both its *Ownership Disclosure Form* and the *Two-Year Chapter 51 Form*. On its *Ownership Disclosure Form* Truck Masters indicated that there were no "individuals, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor {Bidder}." However, on its *Two-Year Chapter 51 Form*, also submitted with the Quote, Truck Masters indicated there was one individual who owned 100% of Truck Masters. As such, an ambiguity existed within Truck Masters' submitted Quote. In In re Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, the court held that "[t]he RFP specifically approved of bidders' clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. 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 was interdicted by the RFP." 279 N.J. Super. 566, 597 (App. Div. 1995), emphasis added. Accordingly, the Bureau requested that Truck Masters clarify the ambiguity between the two documents included with the submitted Quote. While the Division's provides the bidding community with the *Ownership Disclosure Form*, the submission of the form itself is not necessary to comply with the statutory requirement of providing the ownership information with submitted Quote. The Bureau's request that Truck Masters clarify the ambiguity in its submitted Quote and its acceptance of Truck Masters' response was permitted by law.

Second, with respect to K&A's allegation that any Vendor {Contractor} may use a subcontractor to complete a portion of the contracted services, I note that a Vendor's {Contractor's} use of a subcontractor is governed by 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 respect to the Quote submitted by Johnson Specialized, Johnson Specialized did submit the Subcontractor Utilization Plan form; however, the form indicated that Johnson Specialized was not using any subcontractors. If after award Johnson Specialized desires to use a subcontractor to perform any portion of the services sought, it is required to inform and seek approval from the Division. See, Bid Solicitation § 4.4.1.3 *Subcontractor Utilization Plan* 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. 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 of New Jersey Standard Terms and Conditions (SSTC) § 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;

Further, even if Johnson Specialized, or any other Vendor {Contractor}, receives approval to use a subcontractor to perform a portion of the awarded work, the Vendor {Contractor} is nonetheless responsible for ensuring that the work is performed in accordance with the Bid Solicitation's requirements as the State has no contractual relationship with the subcontractor. See, SSTC § 5.9 *No Contractual Relationship Between Subcontractors and State* stating "Nothing contained in any of the contract documents, including the RFP and vendor's bid or proposal shall be construed as creating any contractual relationship between any subcontractor and the State."

With respect to the extension of the current Blanket P.O.s and the award of new Blanket P.O.s in response to the subject Bid Solicitation, I note that the subject Bid Solicitation did not specify an award date. With respect to the extension of Blanket P.O.s under Bid Solicitation #12-X-22504, the Hearing Unit's review of all of the relevant documents reveals that the current Blanket P.O.s (Bid Solicitation #12-X-22504) had a base term of three years, with two one-year extensions. See, Bid Solicitation #12-X-22504 Section 5.2 *Contract Term and Extension Option*. The New Jersey Standard Terms and Conditions associated with Bid Solicitation #12-X-22504 included additional extension language as follows:

**CONTRACT TERM AND EXTENSION OPTION** - If, in the opinion of the Director, it is in the best interest of the State to extend a contract, the contractor shall be so notified of the Director's Intent at least thirty (30) days prior to the expiration date of the existing contract. The contractor shall have fifteen (15) calendar days to respond to the Director's request to extend the term and period of performance of the contract. If the contractor agrees to the extension, all terms and conditions including pricing of the original contract shall apply unless more favorable terms for the State have been negotiated.

The Director, during the term of Bid Solicitation #12-X-22504, determined that it was in the State's best interest to extend the existing Blanket P.O.s. As permitted, those Vendors {Contractors} agreeing to the extension had their Blanket P.O.s extended through the current expiration date of November 30, 2019.<sup>2</sup> Contrary to K&A's belief, the Bureau did not extend the current Blanket P.O.s pursuant to Bid Solicitation Section 5.3 *Contract Transition* which states "[i]n the event that a new contract has not been awarded prior to the contract expiration date, as may be extended herein, it shall be incumbent upon the contractor to continue the contract under the same terms and conditions until a new contract can be completely operational. At no time shall this transition period extend more than 120 days beyond the expiration date of the contract." While the 120-day transition period is available, the Bureau has not invoked it.

Finally, as to the disqualification of Vendors {Bidders} who did not have the Small Business Enterprise certification at the time of Quote opening, a review of those Vendors {Bidders} who submitted Quotes in response to the Bid Solicitation reveals that of the 34 Quote received, eleven of the sixteen Vendors {Bidders} who are listed for award received the Small Business Enterprise certification between Quote advertising date (January 18, 2019) and the Quote opening date (April 11, 2019.) The remaining five Vendors {Bidders} who are listed for award were previously certified. Of those Vendors {Bidders} who are ineligible for a Blanket P.O. award, six have never applied for a Small Business Enterprise

---

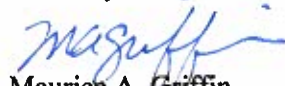
<sup>2</sup> The last extension associated with Bid Solicitation #12-X-22504 from September 1, 2019 through November 30, 2019, was necessary to provide the Division's Hearing Unit with sufficient time to resolve those protests received in response to the NOI for the subject Bid Solicitation.

certification; seven were revoked/expired prior to the Quote opening date; two applied and received their Small Business Enterprise certifications after the NOI was issued; and, three were ineligible for other reasons. As noted above, the subject Bid Solicitation was advertised on January 8, 2019. The Quote opening date was April 11, 2019. There was an intervening period of over three months in which Vendors {Bidders} could have sought and received certification as a Small Business Enterprise. Had Vendors {Bidders} availed themselves of this opportunity, as directed by the Bid Solicitation, they would have been eligible for a Blanket P.O. award.

Based on the findings set forth above, I sustain the Bureau's August 9, 2019 NOI. This is my final agency decision.

Thank you for your company's interest in doing business with the State of New Jersey and for registering your business with **NJSTART** at [www.njstart.gov](http://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,



Maurice A. Griffin  
Acting Director

MAG: RUD

c: A. Davis  
R. Regan  
E. Castaldo