



State of New Jersey

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Lt. Governor

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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May 7, 2020

Via Electronic Mail Only lmoffa@mmwr.com

Louis R. Moffa, Jr.
Partner and General Counsel
Montgomery McCracken Walker & Rhoads LLP
457 Haddonfield Rd., Suite 600
Cherry Hill, NJ 08002

Re: I/M/O Bid Solicitation # 19DPP00424 PSI Services, LLC
Bid Solicitation Title: T2631 - Cosmetology and Hairstyling License Examinations, L&PS
Request for Reconsideration

Dear Mr. Moffa:

This letter is in response to your email of April 30, 2020, on behalf of PSI Services, LLC (PSI) to the Division of Purchase and Property's (Division) Hearing Unit. By way of that correspondence, PSI protests the April 28, 2020 award of a Master Blanket Purchase Order (Blanket P.O.) to Prometric LLC (Prometric) for Bid Solicitation #19DPP00424 T2631 Cosmetology and Hairstyling License Examinations, L&PS (Bid Solicitation). Specifically, PSI's April 30, 2020 correspondence states:

My client received a notice yesterday that an award had been made to Prometric in this matter (Bid # 19DPP00424, T2631- Cosmetology and Hairstyling License Examinations, L&PS). We did not previously receive another notice of a proposed award, or any further information about any additional information submitted to clarify Prometric's ownership as required by the Final Agency Decision. That action seems inconsistent with Final Agency Decision. If there was a mistake, please let us know.

Otherwise, please consider this our protest of the award to Prometric again. The proper action should have been to cancel and re-solicit which would have allowed all bidders to fix their respective errors and re-submit.

Thank you for your attention to this matter.

In response to PSI's email I note that there was not a new Notice of Intent to Award (NOI) issued by the Bureau on or about April 30, 2010. Rather, on April 28, 2020 the Bureau awarded the Blanket P.O. consistent with the February 3, 2020 NOI. Accordingly, there is nothing for PSI to protest.

However, the Division has accepted PSI's April 30, 2020 email as a request for reconsideration. In consideration of PSI's request for reconsideration, I have reviewed the record of this procurement, including

the Bid Solicitation, submitted Quotes, PSI's protest and request for reconsideration, 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 determination on the merits of PSI's request for reconsideration.

First, with respect to PSI's request for reconsideration I note that reconsideration

should be utilized only for those cases which fall into that narrow corridor in which either 1) the [tribunal] has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [tribunal] either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .

Alternatively, if a litigant wishes to bring new or additional information to the [tribunal's] attention which it could not have provided on the first application, the [tribunal] should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the [tribunal] must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

[Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996), citing, D'Atria v. D'Atria, N.J. Super. 392, 402-402 (Ch. Div. 1990)(stating "[r]econsideration is a matter within the sound discretion of the Court, to be exercised in the interest of justice.).]

In its April 30, 2020 email, PSI has not brought to light any new or additional information which was not included in its original protest. Rather, PSI simply disagrees with the Division's decision to award a Blanket P.O. to Prometric.

By way of background, on October 10, 2019, the Bureau issued the Bid Solicitation on behalf of the Board of Cosmetology and Hairstyling (Board), Division of Consumer Affairs, Office of the Attorney General, Department of Law and Public Safety. The purpose of the Bid Solicitation was to solicit Quotes for the "provision of theory examinations via computer based testing (CBT) and paper and pencil testing for each of the following professional categories: cosmetologists and hairstylists, skin care specialists (esthetician), manicurist, beautician, barber, braider, and teacher for all listed." (Bid Solicitation § 1.1 *Purpose and Intent.*) The intent of the Bid Solicitation was to award a Blanket P.O. to that responsible Vendor {Bidder} whose Quote, conforming to this Bid Solicitation was most advantageous to the State, price and other factors considered. Ibid.

On November 21, 2019, the Division's Proposal Review Unit opened two (2) Quotes submitted through the State's **NJSTART** eProcurement system and received by the submission deadline of 2:00 p.m. eastern time. Both Quotes were forwarded to the Bureau for review and evaluation. As part of its evaluation, the Bureau reviewed the *Ownership Disclosure Form* submitted by each Vendor {Bidder}. With respect to the disclosure of a company's ownership structure, the Bid Solicitation stated in part:

4.4.1.2.1 Ownership Disclosure Form

Pursuant to N.J.S.A. 52:25-24.2, in the event the Vendor {Bidder} is a corporation, partnership or limited liability company, the Vendor {Bidder} must complete an Ownership Disclosure Form.

A current completed Ownership Disclosure Form must be received prior to or accompany the submitted Quote. A Vendor's {Bidder's} failure to submit the completed and signed form with its Quote will result in the rejection of the Quote as non-responsive and preclude the award of a Blanket P.O. to said Vendor {Bidder} unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six (6) months prior to the Quote submission deadline for this procurement. If any ownership change has occurred within the last six (6) months, a new Ownership Disclosure Form must be completed, signed and submitted with the Quote.

In the alternative, to comply with this section, a Vendor {Bidder} with any direct or indirect parent entity which is publicly traded may submit the name and address of each publicly traded entity and the name and address of each person that holds a 10 percent or greater beneficial interest in the publicly traded entity as of the last annual filing with the federal Securities and Exchange Commission or the foreign equivalent, and, if there is any person that holds a 10 percent or greater beneficial interest, also shall submit links to the websites containing the last annual filings with the federal Securities and Exchange Commission or the foreign equivalent and the relevant page numbers of the filings that contain the information on each person that holds a 10 percent or greater beneficial interest. N.J.S.A. 52:25-24.2.

With respect to Quote submitted by Prometric, the *Ownership Disclosure Form* included the information shown on the screenshots below¹:

PART 1	
Are there any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor [Bidder]? <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO	
If you answered, "YES" above, you must disclose the following: (a) the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class; (b) all individual partners in the partnership who own a 10 percent or greater interest therein; or, (c) all members in the limited liability company who own a 10 percent or greater interest therein.	
NAME	PROMETRIC HOLDINGS INC.
ADDRESS 1	1501 S. CLINTON STREET
ADDRESS 2	
CITY	BALTIMORE STATE MD ZIP 21224

¹ PSI did not dispute the Bureau's determination that its submitted *Ownership Disclosure Form* failed to conform to the requirements of the Bid Solicitation and N.J.S.A. 52:25-24.2 rendering its Quote non-responsive in either its February 3, 2020 Protest or its April 30, 2020 request for reconsideration.

<u>PART 2</u>	
Of those entities disclosed above owning a 10% or greater interest in the Vendor (Bidder), are there any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest of those listed entities?	
YES	<input checked="" type="checkbox"/>
NO	<input type="checkbox"/>
If you answered, "YES" above, you must disclose the following: (a) the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class; (b) all individual partners in the partnership who own a 10 percent or greater interest therein; or, (c) all members in the limited liability company who own a 10 percent or greater interest therein. Please note that this disclosure shall be continued until names and addresses of every non-corporate stockholder, and individual partner, and member, exceeding the 10 percent ownership criteria established in this act, has been identified.	
Name of the entity listed above to which the disclosure below applies: PROMETRIC HOLDINGS INC.	
NAME	SARBACANE TOPCO, INC.
ADDRESS 1	1501 S. CLINTON STREET
ADDRESS 2	
CITY	BALTIMORE STATE MD ZIP 21223

<u>SUPPLEMENTAL RESPONSE</u> <u>OWNERSHIP DISCLOSURE FORM</u>	
BID SOLICITATION #: 19DPP00424	VENDOR: PROMETRIC LLC
<u>PART 2</u>	
Sole shareholder of Sarbacane Topco, Inc. is Prometric SuperHoldCo, Inc. c/o Prometric LLC, 1501 S. Clinton Street, Baltimore, MD 21224	
Sole shareholder of Prometric SuperHoldCo, Inc. is Safari Aggregator, L.P. c/o Maples Corporate Services Limited, P.O. Box 309, Ugland House, South Church Street, George Town, Grand Cayman KY1-1104, Cayman Islands	
The Baring Asia Private Equity Fund VI, L.P.2 is a 58.78% owner of Safari Aggregator, L.P. The Baring Asia Private Equity Fund VI, L.P.1 is a 40.82% owner of Safari Aggregator, L.P. c/o Maples Corporate Services Limited, P.O. Box 309, Ugland House, South Church Street, George Town, Grand Cayman KY1-1104, Cayman Islands	
None of the institutional investors in The Baring Asia Private Equity Fund VI, L.P.2 or The Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest.	

Based upon the information provided, the Bureau concluded that Prometric had made a full disclosure with respect to its corporate structure; and therefore, determined that Prometric's Quote was responsive to the requirements of the Bid Solicitation.

Accordingly, on January 24, 2020, the Bureau issued the NOI, advising all Vendors {Bidders} of its intent to make a Blanket P.O. award to Prometric. On February 3, 2020, in response to the NOI, PSI submitted a protest to the Division which in part stated as follows:

Along with its ODF, Prometric submitted a Supplemental Response to Part 2 In that Supplemental Response, Prometric purports to give a complete description of the layers of its ownership. The last line of that submission states, "None of the institutional investors in The Baring Asia Private Equity Fund VI, L.P.2 or The Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest." There is no mention of individual, corporate or other types of "investors" in those Funds. Indeed, there is no definition or explanation of what Prometric means by "institutional investors." Like the flawed "family of companies" disclosure, Prometric's reference solely to "institutional investors" is vague and incomplete, if not misleading and inaccurate.

As a result, Prometric's bid is materially defective and non-responsive due to an incomplete and/or inaccurate ODF, and that bid must be rejected.

[PSI's February 3, 2020 protest letter at 2-3.]

After review and consideration of PSI's protest, on April 16, 2020, the Division issued a final agency decision, remanding the matter back to the Bureau for further review and clarification of Prometric's submitted *Ownership Disclosure Form*. More specifically, the final agency decision directed the Bureau:

to determine whether Prometric complied with the requirements of N.J.S.A. 52:25-24.2, the Bureau should have clarified whether by stating that "none of the institutional investors in the Baring Asia Private Equity Fund VI, L.P.2 or the Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest" Prometric means that there are no "noncorporate stockholder, and individual partner, and member exceeding the 10 percent ownership criteria" in the Baring Asia Private Equity Fund VI, L.P.2 and the Baring Asia Private Equity Fund VI, L.P.1. In other words, the Bureau must determine whether Prometric provided an accurate statement of ownership that merely needed clarification because of its complexity, as in Stano, or if, as in Muirfield, Prometric's ownership disclosure is incurably defective.

In accordance with the Division's final agency decision, on April 17, 2020, the Bureau wrote to Prometric requesting clarification regarding the information submitted on its *Ownership Disclosure Form*. Specifically, the Bureau's letter stated:

The Division of Purchase and Property ("Division") is in receipt of the Quote submitted by Prometric LLC ("Company") in response to the above-referenced Bid Solicitation.

This letter is to request that your Company submit a clarification with respect to the submitted Quote. In accordance with N.J.A.C. 17:12-2.7(e) and as specified in Bid Solicitation Section 6.4, *Clarification of Quote {Proposal}/State's Right to Request Further Information* the Procurement Bureau requests a written response to this clarification request in order to determine whether the submitted Quote should be further considered for an award of a Master Blanket Purchase Order.

In its *Ownership Disclosure Form*, your Company indicated that:

"[n]one of the institutional investors in [t]he Baring Asia Private Equity Fund VI, L.P.2 or [t]he Baring Asia Private Equity Fund VI, L.P.1 hold a 10% or greater interest."

N.J.S.A. 52:25-24.2 requires that "[t]he disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, and member, exceeding the 10 percent ownership criteria established in this act, has been listed." Here, based on the information provided by Prometric, it is unclear whether by "institutional investors" Prometric meant that there are no noncorporate stockholders, or individual partners, or members in the Baring Asia Private Equity Fund VI, L.P.2 or the Baring Asia Private Equity Fund VI, L.P.1 who hold a 10% or greater interest.

Please clarify whether your statement quoted above means that there are no "noncorporate stockholder, and individual partner, and member

exceeding the 10 percent ownership criteria: in the Baring Asia Private Equity Fund VI, L.P.2 and the Baring Asia Private Equity Fund VI, L.P.1.

In response the Bureau's clarification request, on April 21, 2020 Prometric responded to the Bureau advising that “[a]ll of the limited partner owners of LP1 and LP2 are institutional investors and none hold a 10% or greater interest. There is no natural person who holds an interest of 10% or more in LP1 and LP2.” Based upon this response, the Bureau concluded that Prometric’s originally submitted *Ownership Disclosure Form* complied with the requirements of the N.J.S.A. 52:25-24.2 and proceeded with the award of the Blanket P.O.

In connection with PSI’s request for reconsideration, the Division’s Hearing Unit undertook an independent review of Prometric’s originally submitted *Ownership Disclosure Form* and Prometric’s response to the clarification request. Based on that review, I agree with the Bureau’s conclusion that Prometric made a full disclosure of its ownership structure as required by N.J.S.A. 52:25-24.2 in the *Ownership Disclosure Form* submitted with its Quote. Therefore, Prometric’s Quote is responsive to the requirements of the Bid Solicitation and it is eligible for an award of a Blanket P.O. Here, because the Division’s April 16, 2020 final agency decision did not rescind the January 24, 2020 NOI, and because the Bureau’s clarification and review did not result in a change to the January 24, 2020 NOI, the Bureau was not required to issue a second NOI, and as such, there was no additional protest period. However, I note that had the Bureau issued a second NOI, the outcome of PSI’s protest, like the decision in connection with this request for reconsideration, would be the same. In the light of the foregoing, I uphold the Bureau’s award of a Blanket P.O. to Prometric.

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: RUD

c: J. Loughran
R. Regan
M. Dunn