



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

KIM GUADAGNO
Lt. Governor

September 16, 2016

Via Email [meca@stevenslee.com] and USPS Regular Mail

Maeve E. Cannon, Esq.
Stevens & Lee
100 Lenox Drive, Suite 200
Lawrenceville, NJ 08648

Re: Protest of Notice of Intent to Award
RFP# 17-X-24300: Certified Court Reporters/Certified Real Time Court Reports - Statewide

Dear Ms. Cannon:

This letter is in response to your correspondence of June 30, 2016, on behalf of John F. Trainor, Inc. (Trainor) to the Hearing Unit of the Division of Purchase and Property (DPP) protesting the Procurement Bureau's (Bureau) June 15, 2016, Notice of Intent to Award (NOI) a contract for Solicitation# 17-X-24300: Certified Court Reporters/Certified Real Time Court Reports - Statewide. In the protest Trainor requests that its proposal be reinstated after its appeal to the Department of the Treasury's Division of Minority and Women's Business Development (Minority and Women's BD) has been resolved, and in the alternative, requests that matter be rebid as the solicitation was fatally flawed. (See, June 30, 2016 letter attached hereto as Attachment 1).

By way of background, the subject Request for Proposal (RFP) was issued on March 31, 2016, by the Bureau on behalf of State Using Agencies and Cooperative Purchasing Partners to solicit proposals for Certified Court Reporters/Certified Real Time Court Reporters for hearings and depositions, and for use by the Department of Labor and Workforce Development - Division of Worker's Compensation (DWC). Three addenda were posted to this solicitation on March 31, 2016, April 8, 2016 and, April 19, 2016. Addendum #1 clarified the bid opening date; addendum #2 made additions, deletions, clarifications and modifications to the RFP; and, Addendum #3, dated April 19, 2016 responded to questions posed by the potential bidders regarding the solicitation.

In accordance with RFP § 4.4.7 *Price Sheet Instructions*, bidders were permitted to submit a proposal to provide these services for one or multiple regions. For purposes of this solicitation, the State has been divided into three (3) regions as follows:

Region 1 - North	Region 2 - Central	Region 3 - South
Price Lines: 1, 2, 3, 4, 5, 6, 7, 8 and 9	Price Lines: 10, 11, 12, 13, 14, 15, 16, 17 and 18	Price Lines: 19, 18, 20, 21, 22, 23, 24, 25, 26 and 27
Bergen	Hunterdon	Atlantic
Essex	Mercer	Burlington
Hudson	Middlesex	Camden
Morris	Monmouth	Cape May

Passaic	Ocean	Cumberland
Sussex	Somerset	Gloucester
Union		Salem
Warren		

To be eligible for an award, bidders were required to submit a price proposal for all price lines associated with a particular region.

It is the intent of the Bureau to award multiple contracts per region to those responsible bidders whose proposals, conforming to the RFP, are most advantageous to the State, price and other factors considered.¹ (RFP § 1.1 *Purpose and Intent*.) The multiple awards are necessary to ensure that the needs of the State agencies using this contract will be met.²

On April 28, 2016, the eleven proposals received by the submission deadline were opened by DPP's Proposal Review Unit. One proposal was deemed non-responsive by the Proposal Review Unit for failure to submit the Disclosure of Investigations Form and the Ownership Disclosure Form. A review of the remaining ten proposals by the Bureau resulted in four proposals, including Trainor's, being deemed non-responsive for failure to be registered as a Small Business at the time of the proposal opening. Specifically, the Bureau found that Trainor's failure to have a Small Business Enterprise Certification at the time of the proposal opening deadline resulted in its proposal not meeting the requirements of RFP § 4.4.1.4 *Small Business Registration for Set-Aside Contracts*.

On June 15, 2016, the Bureau issued the NOI indicating that it was the intent of DPP to award contracts as follows:

Region 1 - North	Region 2 - Central	Region 3 - South
J.H. Buehrer	J.H. Buehrer	J.H. Buehrer
JerseyShore Reporting	JerseyShore Reporting	JerseyShore Reporting
William O'Brien	William O'Brien	William O'Brien
State Short Hand	Rosenberg and Associates	Rosenberg and Associates
Rosenberg and Associates	State Short Hand	State Short Hand
Guy J Renzi	Guy J Renzi	Guy J Renzi

Since at the time of the proposal opening on April 28, 2016, Trainor was not Small Business Registered, it was not listed among the intended awardees. On June 27, 2016, Trainor submitted a letter to Nina Moseley, Senior Director of Minority and Women's BD (Moseley) seeking to have its Small Business Registration reinstated retroactive to the date of lapse.³

Subsequently, on June 30, 2016, Trainor filed the instant protest with DPP in which it admitted issues with its Small Business Registration status at the time of proposal opening. (See, June 30, 2015 letter, pg. 1-2). Trainor requests that DPP stay the contract award until the resolution of its appeal by

¹ This RFP was a re-procurement for services similar to those provided under T2767 for Certified Court Reporters/ Certified Real Time Court Reports - Statewide, a small business set aside contract, which is scheduled to expire on October 30, 2016 and T1061 for the Certified Court Reporting Contract for the DWC, which expired on January 31, 2016. (RFP § 1.2 *Background*.) Both T2767 and T1061 were multiple award contracts.

² The Method of Operation instructs using agencies to utilize the lowest priced available contractor to provide the service at the scheduled time.

³ On June 30, 2016 Moseley issued a decision stating that Trainor's Small Business Registration would not be reinstated retroactively.

Moseley. In addition, and in the alternative, Trainor states that the solicitation was fatally flawed and must be reprocured because the RFP did not indicate how the multiple contract awards would be made or the number of awards that would be necessary to meet DPP's needs. Trainor argues that this multiple contract award was made contrary to the applicable statute and regulations.⁴

In consideration of this protest, I have reviewed the record of this procurement, including the Request for Proposal (RFP), the proposals submitted and 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. I set forth herein the Division's final agency decision.

A. Small Business Registration.

Trainor is not eligible for a contract award as it did not conform to a mandatory requirement of the RFP that it be Small Business Registered at the time of proposal opening. This requirement is clearly set forth in the RFP and Trainor, despite having notice of how to obtain and maintain its Small Business Registration, failed to be registered at the time that proposals were due.

With respect to the requirement for Small Business Registration, RFP § 4.4.1.4.1 *Small Business Set-Aside Contracts* stated:

This is a Set-Aside Contract for Category I, II, or III for Small Businesses. **The 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 proposal is received and opened.** Evidence that the Bidder has registered as a small business should be submitted with the proposal.

[Emphasis added.]

Further, RFP § 4.4.1.4 *Small Business Registration for Set-Aside Contracts* further notified bidders that:

Pursuant to the provisions of N.J.S.A. 52:32-17 and N.J.A.C. 17:13, this contract, or a portion thereof, has been designated as a set-aside contract for small business. As such, as indicated on page one (1) of this document, eligibility to bid is limited to Bidders that meet statutory and regulatory requirements and have had their eligibility determined by the New Jersey Division of Revenue and Enterprise Services, Small Business Registration and M/WBE Certification Services Unit.

...

**** IF THE BIDDER IS AN INCUMBENT CONTRACTOR AND/OR HAS PREVIOUSLY REGISTERED OR BEEN CERTIFIED UNDER THE FORMER SBE/MBE/WBE PROGRAM, THE BIDDER SHOULD ENSURE IT IS REGISTERED ON THE DAY OF PROPOSAL RECEIPT AND OPENING WITH THE DIVISION OF REVENUE AND ENTERPRISE SERVICES, SMALL BUSINESS REGISTRATION AND M/WBE CERTIFICATION SERVICES UNIT**

⁴ On September 15, 2016, DPP received a supplemental letter from Trainor regarding DWC's alleged failure to use Trainor for court reporting services. Nothing in that supplemental letter related to Trainor's instant protest or affects the decision set forth herein.

UNDER THE SMALL BUSINESS PROGRAM TO BE ELIGIBLE FOR AWARD.

Moreover, in response to a question posed by a potential bidder, in Addendum #3, the Bureau confirmed the requirement that bidders have a Small Business Registration at the time of proposal opening. Specifically,

#	Page #	RFP Section Reference	Question	Answer
27	29	4.4.1.4	Is this bid limited to businesses based only in New Jersey due to the small business set aside and description of small business in Section 2.1 General Definitions?	This RFP is designated as a Small Business Set Aside, in order to be considered responsive, bidders must hold a State of New Jersey Small Business Registration Certificate. See Sections 4.4.1.4 and 4.4.1.4.1 of the RFP. Any proposal submitted by a bidder who does not hold a Small Business Registration Certificate at the time of the bid opening date regardless of their location will be considered non responsive.

It is also important to note that the Set-Aside Act for Small Businesses, Female Businesses, and Minority Businesses mandates, *inter alia*, the establishment of an annual review process of Small Business Registrations:

a. The department shall establish reasonable regulations appropriate for controlling the designation of prospective small business bidders... shall maintain lists of designated businesses.

...

c. The department shall establish a procedure for annually reviewing the lists and determining whether the businesses on the lists shall continue to be designated as small businesses, minority businesses and female businesses.

[N.J.S.A. 52:32-24.]

To that end, the governing regulations state as follows:

e. Annually the business shall submit, prior to the anniversary of the registration notice, an annual verification statement, in which it shall attest that there is no change in the ownership, revenue eligibility or control of the business.

1. If the business fails to submit the annual verification statement by the anniversary date, the registration will lapse and the business will be removed from the State's small business database. If the business seeks to be registered, it will have to reapply and pay the \$ 100.00 application fee.

[N.J.A.C. 17:13-3.1(e).]

The regulation specifically states that allowing a registration to lapse for failure to timely submit the annual verification statement will result in removal from the State's small business database. The regulation also makes clear that any business that has been removed from the State's small business database will have to reapply and pay the full \$100 application fee.

Here, given that Trainor's Small Business Registration was not in effect at the time of the bid opening on April 30, 2016, Trainor is not eligible for a contract award as it did not conform to a mandatory requirement of the RFP that it be Small Business Registered at the time of proposal opening.⁵ While Trainor states that its Small Business Registration had not been revoked as stated by the Bureau, but rather, had "lapsed;" for the purposes of eligibility for contract award this is a meaningless distinction. No matter the reason, since at the time of proposal opening Trainor was not Small Business Registered, it was ineligible for award.

B. Multiple Award

In its protest, Trainor also alleges that this solicitation was fatally flawed because the RFP "failed to properly identify the nature of the multiple awards to be made," and was inconsistent with the multiple award statute and DPP's regulations. (June 30, 2016 protest letter.)

N.J.S.A. 52:34-12.1 states in pertinent part:

- a. When awarding contracts pursuant to section 7 of P.L.1954, c.48 (C.52:34-12), the Director of the Division of Purchase and Property may make awards to multiple bidders, to furnish the same or similar materials, supplies, services or equipment, where multiple bidders are necessary:
 - (1) to furnish the quantities required by using agencies;
...
 - (6) when the director determines that multiple awards are necessary to serve the State's interests.
...
- b. Where multiple contracts have been awarded pursuant to subsection a. of this section, a using agency shall make purchases from that contractor whose contract terms and conditions are most advantageous to the agency, price and other factors considered.

These requirements have been incorporated into DPP's governing regulations which state in pertinent part that:

- d. Pursuant to the provisions of N.J.S.A. 52:34-12.1, the Director may structure an RFP for formal, advertised, sealed bidding to be awarded to multiple bidders to meet the anticipated needs of State agencies and, if the State contracts are to be extended to Cooperative Purchasing Program participants pursuant to N.J.A.C. 17:12-2.3, the anticipated needs of Cooperative Purchasing Program participants, based upon one or more of the following criteria:

⁵ DPP is aware that Trainor has filed an appeal of Moseley's decision concerning its Small Business Registration. Because that appeal is before the Appellate Division of the Superior Court and not before DPP, I do not address the substance of Trainor's arguments concerning its Small Business Registration.

1. The anticipated quantities of products and/or services required by using agencies;
- ...
7. Any other factors that the Director determines make multiple awards necessary to serve the State's interests.

[N.J.A.C. 17:12-1A.1(d).]

The current contract for Certified Court Reporters/Certified Real Time Court Reporters – Statewide (T2767), which expires on October 30, 2016, is a multiple award, small business set-aside contract, with five vendors having been awarded contracts, one of which is the protesting bidder, Trainor.⁶ In addition, three vendors, including the protesting bidder Trainor, were awarded contracts for T1061 for the Certified Court Reporting Contract for the DWC, which expired on September 30, 2015.⁷

Prior to this latest solicitation being advertised, the Bureau contacted the using agencies to determine the level of staffing utilized for certified court reporter and real time court reporters services.⁸ According to a survey of the current contractors for these services, on average, twenty-two court reporters are being used per agency, with an average of 16 hours of court reporter services per day. In fiscal year 2015, the State used approximately 4,400 hours of court reporter services.

This contract is designated as a small business set-aside, and based upon the number of court reporters and hours utilized, it was determined by the Division that multiple vendors are necessary to meet the needs of the State's Using Agencies and the Cooperative Purchasing Partners as permitted by the governing statute and regulation. Specifically, the multiple vendor awards will:

- Provide the anticipated quantities services required by using agencies, and ensure prompt access to providers of service;
- Provide for the needs of using agencies to purchase services compatible with those previously purchased;
- Provide for the needs of using agencies for the standardization of services;
- Provide expeditious and cost-effective delivery of service to multiple using agencies Statewide; and
- Provide for the continuation of services (the using agencies are providing time sensitive, legislatively mandated, critical services and multiple contractors will help ensure the availability of services).

On March 18, 2016, prior to this solicitation being advertised, the procurement specialist requested and received authorization for multiple vendor awards. (See, Request for Multiple Vendor Award dated March 18, 2016, Attachment 2.) The multiple vendor awards allow for the flexibility and the ability to meet the quantity of services required by the State's Using Agencies and Cooperative Purchasing Partners.

Accordingly, consistent with the prior multiple contract awards for these and similar services and the survey conducted for this solicitation, the RFP advised potential bidders that multiple contract awards would be made. Specifically, RFP § 1.1 *Purpose and Intent* states in pertinent part that “the intent of this

⁶ These vendors are Class Act Reporting Agency, LLC; Guy J. Renzi & Assoc.; J.H. Buehrer & Assoc.; John F. Trainor, Inc.; and, State Shorthand Reporting.

⁷ The other vendors are JerseyShore Reporting, LLC and William C. O'Brien Associates, Inc.

⁸ The usage survey was conducted with State using agencies and does not account for usage by the Cooperative Purchasing Partners.

RFP is to award contract(s) to those responsible Bidder(s) whose proposal(s), conforming to this RFP are most advantageous to the State, price and other factors considered.” (Emphasis added.) RFP § 7.2 *Final Contract Award* also notified bidders that this contract is for multiple awards. Moreover, in response to a question posed by a potential bidder, in Addendum #3, the Bureau further confirmed the State’s intent to award multiple contracts per region as follows:

#	Page #	RFP Section Reference	Question	Answer
2	5	1.1	How many agencies per region will be awarded this RFP	It is the States intention to award multiple contracts per region. The State reserves the right, per Section 7.2, to reject any or all proposals when the Treasurer or the Director determines that it is in the public interest to do so for pricing or other factors.

Thus, in accordance with the RFP and Addendum, bidders were advised of the State’s intent to award multiple contracts.

In support of its position that this procurement was “fatally flawed,” Trainor relies upon the Appellate Division’s decision in James Petrozello Company, Inc. v. Township of Chatham, et al., 75 N.J. Super. 173 (App. Div. 1962).⁹ However, the matter before me is distinguished from that before the Appellate Division in Chatham which involved the selection of only one contractor by a local entity under the local public contract law. As noted by the New Jersey Supreme Court, the Chatham court “struck down the award of a garbage contract where the township withheld for its own later determination an estimate of future growth within the municipality during the life of the proposed contract, an estimate which had the capacity, under the formula employed, to establish who would be the lowest bidder. The court pointed out that had this estimate been made before soliciting bids, the opportunity for indulging favoritism would have been removed.” Terminal Constr. Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 410 (1975).

In addition to different facts and governing statutes, in the matter before me, the issue is not the methodology employed by the Bureau in reviewing the proposals submitted and the potential to indulge in favoritism based upon data and formulas as was the issue in Chatham. Rather, the issues raised by Trainor involve notice of and adherence to DPP’s authority to make multiple awards. DPP’s authorizing statute and governing regulations grant it the authority to make multiple contract awards. Consistent with this authority, the Bureau followed the requirements necessary to advertise a multiple award contract. The RFP and answers to bidder questions provided potential bidders with notice that it was the State’s intent to make multiple contract awards. Moreover, as a current vendor for the very services at issue, for which multiple contracts were also awarded, Trainor’s assertion that it was not on notice of the multiple

⁹ In Chatham, the township advertised for and received proposals for the collection of garbage and other refuse from the properties within the municipality. Bidders were required to submit a lump sum proposal for the collection and disposal of all garbage and refuse from existing structures, and to submit a unit price for the per month charge for various categories of structures which may be constructed in the future. Id. at 175. In reviewing the proposals submitted the township added the unit price bids to the lump sum bid. Using the projected construction as the basis for comparison, the township adopted a resolution indicating that a contract would be awarded to Roselle as the lowest bidder. Id. at 177. Plaintiff, James Petrozello Company, filed an appeal alleging that the “township did not inform prospective bidders that the unit price quotations for future construction would be taken into consideration along with the lump sum base bid in determining who was the lowest bidder.” Id. at 178. The Appellate Division concluded that “by failing to indicate estimates before bids were received, it lay within the arbitrary power of the township committee to favor either of these two low bidders.” Id. at 180.

award nature of the contract seems untenable. In addition, there is no requirement that the number of contract awards be specified in the RFP; rather, the RFP indicated that an award would be made to those responsible and responsive bidders. RFP § 1.1 *Purpose and Intent*. Requiring the announcement of a specific number of contracts would not have altered the manner in which the bid proposals were reviewed, as was the issue addressed in Chatham, but instead would have deprived the State of its authority to award contracts based upon price and other factors.

Further, with respect to contract usage, RFP § 3.6 *Method of Operation* states “the Using Agency shall utilize the contractor who has the lowest cost and approved [Certified Court Reporters/Certified Real Time Court Reporters] available for the scheduled appearances. Only if that contractor is unable to provide approved [Certified Court Reporters/Certified Real Time Court Reporters] is the Using Agency permitted to go to the next lowest contractor and so on.” Contract awards were made to responsive and responsible bidders, and both the bidders and using agencies were aware of the process for utilizing the contracts once awarded.

C. Request for Stay of Protest Period is Denied

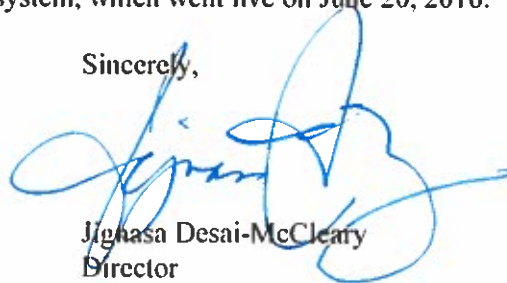
In its protest, Trainor asks that the contract award be stayed pending the resolution of its appeal for retroactive reinstatement of its Small Business Registration. Trainor has failed to adequately demonstrate that a stay of the bid protest period is warranted under the factors for injunctive relief set forth by the Supreme Court in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). Even under the more relaxed and less rigid analysis of the Crowe factors set forth in Waste Mgmt. of New Jersey v. Morris Cnty. Munic. Utils. Auth., 433 N.J. Super. 445, 453 (App. Div. 2013), I find that Trainor has failed to establish that injunctive relief is appropriate in this case.

Trainor has failed to allege, much less demonstrate irreparable harm. Moreover, for the reasons set forth above, I find that Trainor has failed to show a reasonable probability of success on the merits of its protest and of its appeal of its Small Business Registration status. Finally, I find that Trainor has failed to demonstrate that the balance of the relative hardships to the parties would result in greater harm to Trainor if a stay is not granted. Crowe, 90 N.J. at 132-34. I note that should the Appellate Division provide relief, then Trainor can simply be added to the multiple award contract.

It is unfortunate that the attempt to support small business was not met by due diligence on the part of a small business that has previously served the State. However, in light of the findings set forth above, I find no reason to vacate or stay the Bureau’s NOI. This is my final agency decision with respect to the protest submitted by John F. Trainor, Inc.

Thank you for your prior service, 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 new eProcurement system, which went live on June 20, 2016.

Sincerely,



Jighasa Desai-McCleary
Director

JD-M: RUD

c: K. Woolford
D. Delaney