



State of New Jersey

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July 13, 2015

Via Electronic [astevens7@csc.com] and USPS Regular Mail

John F. Kilgore, Director, Global BPO
CSC Covansys Corporation
10975 Grandview, Suite 500, Box #11
Overland Park, KS 66210

Re: Protest of Notice of Proposal Rejection
RFP 15-X-22135: Fiscal Agent for Division of Mental Health and Addiction Services

Dear Mr. Kilgore:

This letter is in response to your letter dated May 1, 2015, on behalf of CSC Covansys Corporation (CSC), in which you protest the Notice of Proposal Rejection for Solicitation #15-X-22135: Fiscal Agent for Division of Mental Health and Addiction Services (RFP). The purpose of the RFP is to solicit proposals for a Fiscal Agent to manage billing and develop a client service tracking system that will serve the Substance Abuse Fee-for-Service initiatives within the Division of Mental Health. (RFP § 1.1 – Purpose and Intent). On April 23, 2015, proposals were opened in response to this RFP. With its proposal, CSC included a cover letter stating in pertinent part:

...

On receipt of New Jersey Department of Addiction Services (the Department) RFP 15-X-2135, CSC, the incumbent, submitted its questions and exceptions as required during the question and answer period. Upon notification of what exceptions the Department would and would not accept, CSC carefully considered the contractual obligations contained within the RFP and the statement of acceptance of those terms on the signature page.

While CSC appreciates the opportunity to provide services to the Department, and the exceptions that the Department accepted, CSC has determined that the liability associated with two particular provisions, as written, is prohibitive and could not be accepted without modification. Therefore, CSC, with its submission, is proposing an alternate exception that CSC believes would be acceptable to both CSC and the Department. Those provisions and exceptions are detailed below.

In addition, due to the structure and acceptance of terms language on the Signature Page, and CSC's inability to accept some terms as written, and CSC's desire to negotiate those provisions to reach a mutually acceptable

compromise, CSC is submitting it (sic) proposal for services without execution of the Signature Page. Notwithstanding CSC's declination to sign the Signature page of the RFP, CSC believes that the Department, pursuant to provisions 1.4.5 and 1.4.10 maintains the ability to consider CSC's submission compliant, since through these provisions the Department has the authority to negotiate with a bidder and the Director enjoys the authority to waive irregularities or omissions from a submission.

...

[Excerpt of CSC's April 21, 2015, Proposal Cover Letter.]

In its April 21, 2015 proposal cover letter, CSC proposed two changes to RFP Section 5: Special Contractual Terms and Conditions. First, CSC proposed deleting the following language of RFP Section 5.17: Modifications and Changes to the State of NJ Standard Terms and Conditions (SSTC), related to limitation of liability, in its entirety: "[t]he Contractor's breach of its obligations of confidentiality described in RFP Section 5.9.1". (RFP § 5.17.1 Indemnification; SSTC § 4.1.1 Limitation of Liability (a)(ii)). In support of its request to delete the language, CSC stated it "cannot accept the carve-out provision from the limitation on liability. CSC is agreeable to working with the Department to reach a mutually acceptable cap for this provision, but CSC cannot accept unlimited liability." (CSC April 21, 2015 cover letter).

Second, CSC proposed that the following language be replaced "[t]he Contractor shall assume total financial liability incurred by the Contractor associated with any breach of confidentiality." (RFP § 5.9.1 Data Confidentiality). CSC proposed the following replacement language, "[s]ubject to any other provisions contained herein, including clause 4.1.1 Limitation of Liability, the Contractor shall assume financial liability for any breach of confidentiality by the Contractor." (CSC April 21, 2015 cover letter). In support of this second request, CSC stated that it "cannot accept unlimited liability, thus proposes subjecting this provision to an agreed upon limitation." (*Ibid.*)

Upon conducting the initial intake review of CSC's proposal, the Division of Purchase and Property's Proposal Review Unit found that the *Signatory Page* was not signed by a representative of CSC. As such, a Notice of Proposal Rejection was issued.

In the May 1, 2015 protest letter, CSC acknowledges that the proposal was submitted with an unsigned *Signatory Page*. In support of its position that the submission of an unsigned *Signatory Page* with an explanatory cover letter was sufficient to conform the requirement of the RFP that a signed *Signatory Page* be submitted, CSC states:

Upon review of the RFP, and during the permitted question and answer period, CSC submitted its questions, as well as exceptions to certain contractual terms and conditions of the RFP. Several exceptions were rejected by the Department. Notwithstanding those rejections, and CSC's ultimate inability to accept some of the terms and conditions of the RFP as written and without negotiations, CSC decided to respond to the RFP. Upon submitting its proposal, CSC noted in a cover letter to the Department that CSC cannot accept the language of two provisions for which CSC's exceptions were rejected. Since CSC cannot accept the language as written, CSC declined (with explanation) to execute the Signature Page of the RFP. While CSC did not execute the Signature Page, CSC believes its cover letter advising the Department of its desire (yet inability) to submit the signed Signature Page, is sufficient to satisfy or conform to the basis of the Signature Page and requirements for a compliant proposal.

Therefore, based on the above, and the Director's ability to waive, and/or accept proposals containing irregularities, CSC requests that the Director reconsider the rejection of CSC's proposal, accept CSC's proposal and enter into negotiations with CSC to reach mutually agreeable language for the two provisions at issue.

[Excerpt of CSC's May 1, 2015, Protest Letter.]

In consideration of this protest, I have reviewed the record of this procurement, including the RFP, CSC's proposal, and 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 by CSC. I set forth herein my Final Agency Decision.

First, in addressing this protest, I note that the standard for awarding State contracts is established by N.J.S.A. 52:34-12, which states in pertinent part that:

- a. Whenever advertising is required: . . . (g) award shall be made with reasonable promptness, after negotiation with bidders where authorized, by written or electronic notice to that responsible bidder whose bid, conforming to the invitation for bids, **will be most advantageous to the State, price and other factors considered.**

[N.J.S.A. 52:34-12(a)(g), *emphasis added.*]

This standard is reiterated in RFP Section 1.1, which provides that "[t]he intent of this RFP is to award a contract to that responsible Bidder whose proposal, **conforming to the RFP is most advantageous to the State, price and other factors considered.**" (RFP § 1.1 Purpose and Intent, *emphasis added*). Notwithstanding this standard for awarding State contracts, prior to the bid opening, during the Question and Answer period, the Division entertains all bidder requests for modifications to the Standard Terms and Conditions, exceptions to the requirements of the RFP and allows bidders and opportunity to suggest alternate terms and conditions for consideration by the Division. Specifically,

In the event that the bidder/offeror would like to present terms and conditions that are in conflict with either these terms and conditions or those set forth in the RFP, the bidder/offeror **must**¹ present those conflicts during the Question and Answer period for the State to consider. Any conflicting terms and conditions that the State is willing to accept will be reflected in an addendum to the RFP. The State's terms and condition shall prevail over any conflicts set forth in a bidder/offeror's proposal that were not submitted through the question and answer process and approved by the State.

[SSTC § 1 Standard Terms and Conditions Applicable to the Contract, *emphasis added.*]

Moreover, with respect to proposals for alternate language, the RFP requires that "[q]uestions regarding the State of NJ Standard Terms and Conditions and exceptions to mandatory requirements must be posed during this Electronic Question and Answer period and should contain the Bidder's

¹ RFP Section 2.1 General Definitions defines "Shall or Must" as that which "[d]enotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive."

suggested changes.” (RFP § 1.3.1 Electronic Question and Answer Period, *emphasis in the original*.) As permitted and required, CSC submitted questions with proposed alternate language during this question and answer period. On March 31, 2015, the Procurement Bureau issued Addendum #7 responding to 90 questions posed by potential bidders. That Addendum included additions, deletions, clarifications and modifications to the RFP based upon some the questions posed.

After expiration of the question and answer period, CSC now requests more changes to the RFP, and conditions its proposal on these changes through its April 21, 2015 cover letter to its proposal. With respect to the first request for a change to the RFP language referenced in CSC’s April 21, 2015 proposal cover letter to RFP Section 5.17.1 Indemnification; SSTC Section 4.1.1 Limitation of Liability, during the question and answer period a bidder proposed deleting RFP Section 5.17.1 Indemnification in its entirety and replacing it with:

5.17.1 INDEMNIFICATION

Section 4.1 of the State’s Standard Terms and Conditions is deleted and replaced with the following: The Contractor’s liability to the State and its employees in third party suits shall be as follows: a) The Contractor shall defend, indemnify, and hold harmless the State of NJ, the contracting agency, and their officers, employees, and agents from and against all liability, loss, damage, cost, and expense, including all attorney’s fees, and all claims, suits, and demands therefore, arising out of or resulting from the negligent acts or omissions of the Contractor or the Contractor’s employees, officers, agents, or subcontractors under this Contract which result in damage to real property or physical injury (including death) of a person.

4.1.1 LIMITATION OF LIABILITY Notwithstanding anything to the contrary in RFP clause 5.17 Modifications and Changes to the State of NJ Standard Terms, the Contractor’s liability shall be limited to direct damages. To the extent the Contractor is liable for consequential damages, the Vendor’s liability for such damages shall not exceed, cumulative and in the aggregate, the amount paid by the State to the Contractor for the preceding twelve (12) months of the contract.

[Addendum 7, Part 1, Item 84 – Bidder’s proposed alternate language].

After review and consideration, the deletion of the standard RFP language and replacement with the alternate language was rejected by the Bureau. However, the Bureau did revise the language in RFP Section 5.17.1 Indemnification; SSTC Section 4.1.1 Limitation of Liability to reduce the aggregate fees to be paid by the Contractor to the State for damages from 300% to 200%. (Addendum 7, Part 2, Item 7).

With respect to the second request for a change to the RFP language referenced in CSC’s April 21, 2015 proposal cover letter (to RFP Section 5.9.1 Data Confidentiality) during the question and answer period a bidder proposed deleting all of the standard language for this section and replacing it with:

5.9.1 DATA CONFIDENTIALITY

All financial, statistical, personnel, customer and/or technical data supplied by the State to the Contractor are confidential (State Confidential Information). The Contractor must secure all data from manipulation, sabotage, theft, or breach of confidentiality. The Contractor is prohibited from releasing any financial, statistical, personnel, customer, and/or technical data supplied by the State that is deemed confidential. Any use, sale, or offering of this data in any form by the Contractor, or any individual or entity in the Contractor’s charge

or employ, will be considered a violation of this Contract and may result in Contract termination and the Contractor's suspension or debarment from State contracting. In addition, such conduct may be reported to the State Attorney General for possible criminal prosecution. The Contractor shall assume liability associated with any grossly negligent material breach of confidentiality. Contractor shall ensure that its staff assigned to this Contract have executed Contractor's confidentiality and non-disclosure agreements. If Contractor has not secured the criminal background history of any staff assigned to the contract, the State reserves the right to obtain, or require the Contractor to obtain, criminal history background checks from the New Jersey State Police for all Contractor and project staff (to protect the State of New Jersey from losses resulting from Contractor employee theft, fraud or dishonesty). If the State exercises this right, the results of the background check(s) must be made available to the State for consideration before the employee is assigned to work on the State's project. Prospective employees with positive criminal backgrounds for cyber-crimes will not be approved to work on State Projects. Refer to the National Institute of Standards and Technology (NIST) Special Publication (SP) 800-12, An Introduction to Computer Security: The NIST Handbook, Section 10.1.3, Filling the Position – Screening and Selecting.

[Addendum 7, Part 1, Item 82 – Bidder's proposed alternate language].

After review and consideration, the Bureau rejected the request to delete the standard RFP language.

As required by the RFP specifications, proposals for alternate language must be submitted during the question and answer period. CSC took advantage of that opportunity and submitted questions and exceptions to the RFP specifications for review and consideration by the Bureau. During the question and answer period, the Bureau reviewed and considered alternate language to RFP Section 5.17.1; SSTC Section 4.1.1 and RFP Section 5.9.1 and made the determination that placing a limitation on a contractor's liability for a breach of confidentiality is not in the State's best interest. Any language modifications accepted by the State were granted in Addendum #7. Accordingly, the contract to be awarded "shall consist of this RFP, addenda to this RFP, the Contractor's proposal, any best and final offer and the Division's Notice of Award." (RFP§ 5.1 Precedence of Special Contractual Terms and Conditions.)

While CSC's proposed RFP amendments referenced in April 21, 2015 cover letter are less than the amendments proposed during the question and answer period, the result is virtually the same – limited liability for the contractor for a breach of confidentiality. Permitting an amendment to RFP language after proposals have been received and opened, gives CSC an advantage over other bidders who either submitted proposals which conformed to the specifications or did not submit proposals because of the terms contained in the RFP. Therefore, removal or alteration of the standard language which would now limit CSC's liability cannot be accepted.

Second, as to the Notice of Proposal Rejection issued by the Proposal Review Unit, RFP Section 4.4.1 addresses the necessity of the signatory page.

4.4.1.1 SIGNATORY PAGE

The Bidder shall complete, including the signature of an authorized representative of the Bidder, and submit the Signatory Page accompanying this RFP. If the Bidder is a limited partnership, the Signatory Page must be signed by a general partner. If the Bidder is a

joint venture, the Signatory Page must be signed by a principal of each party to the joint venture. Failure to comply will result in rejection of the proposal.

Note: A Bidder's written signature on the Signatory Page, or entry of a Personal Identification Number (PIN) if using the eBid system, shall not serve as a certifying signature on the forms comprising the NJ STANDARD RFP FORMS document. (See 4.4.1.2)

[RFP §4.4.1.1 SIGNATORY PAGE, *emphasis added.*]

With respect to this solicitation, the requirement for signing the proposal was uniformly conveyed to all bidder through item #2 on the Signatory Page of the RFP stating that "THE BIDDER MUST SIGN THE PROPOSAL." Moreover, as a courtesy to all bidders, the Division provided a *Proposal Checklist* as an accompaniment to the RFP. The checklist included the following:

N.J. Department of the Treasury Division of Purchase and Property PROPOSAL CHECKLIST	
Solicitation Number:	15-X-22135
Solicitation Title:	FISCAL AGENT for DMHAS
<i>This checklist was created as a guide to assist bidders in preparing a complete and responsive proposal. It is only advisory in nature. It is the bidder's responsibility to ensure that all requirements of the RFP have been met.</i>	
FORMS THAT MUST BE SUBMITTED WITH YOUR PROPOSAL:	
☒	RFP Signatory Page with physical signature or PIN (PIN is for eBid submission ONLY)
☒	Completed Price Sheets as instructed in Section 4.4.5 of the RFP
☒	Completed and signed Ownership Disclosure Form*
☒	Completed and signed Disclosure of Investments in Iran Form*
☒	Subcontractor Utilization Form

CSC's letter asserts that its failure to sign the *Signatory Page* is an irregularity that can be waived by the Director. CSC seems to base this position upon the language in RFP Section 1.4.10 Proposal Acceptances and Rejections which states "N.J.A.C. 17:12-2.7(d), the Director's right to waive minor irregularities or omissions in a proposal *and* N.J.A.C. 17:12-2.2, which defines causes for proposal rejection, apply to all proposals." (*emphasis added*). N.J.A.C. 17:12-2.2 specifically states

- (a) In order to be eligible for consideration for award of a contract, the bidder's proposal shall conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:
...
- (3) Be signed by a representative of the bidding entity in accordance with the provisions for such signature as set forth in the RFP
- (b) Any proposal failing to comply with the provisions of (a) above shall be subject to automatic rejection.

[N.J.A.C. 17:12-2.2, *emphasis added.*]

Contrary to CSC's belief, this deficiency is not waivable. 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 Township of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, for determining materiality. "In River Vale, Judge Presser 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." On-Line Games, supra, 279 N.J. Super. at 594, citing River Vale, supra, 127 N.J. at 216.

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.

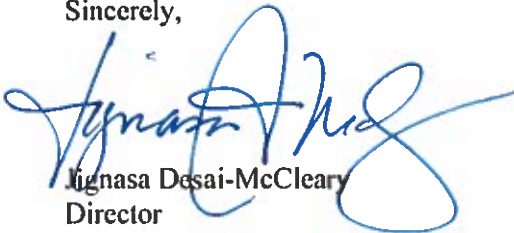
[River Vale, supra, 127 N.J. at 216.]

CSC's failure to sign its proposal is not in dispute and for the reasons set forth herein I must sustain the rejection of CSC's proposal. Looking at CSC's proposal through the lens of the River Vale criteria, I find the failure to sign the *Signatory Page* is material, and therefore non-waivable. Absent the required signature on its proposal, CSC is not bound to the Terms, Conditions and Specification, its proposal or the contract that would result from its proposal, which based upon its cover letter, appears to be CSC's intent in not signing the proposal. This places CSC in a position of advantage over other bidders who submitted fully executed proposals binding them to the mandatory terms and conditions. Therefore, the Proposal Review Unit properly rejected CSC's proposal. As the River Vale Court held, "[i]f 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.

Notwithstanding CSC's interest in competing for this procurement, it would not be in the State's best interests to allow a bidder who did not provide the required completed and fully executed documents to be eligible to participate in the procurement process. Such acceptance would un-level the bidders playing field as the State received responsive proposals in which all necessary documents and information were provided as required. The deficiency at issue cannot be remedied after the proposal submission deadline as acceptance of CSC's proposal under these circumstances would be contrary to the provisions of the governing statute and provide CSC with disclamation options not available to those bidders whose proposals were fully responsive. In light of the findings set forth above, I must deny your request for eligibility to participate in the competition for the subject contract. This is my final agency decision on this matter.

Thank you for your interest in doing business with the State of New Jersey. I invite you to take this opportunity to register your business with **NJ START** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,


Jignasa Desai-McCleary
Director

JD-M: RUD

c: G. Olivera
J. Strype
G. Buddie