



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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December 12, 2019

Via Electronic Mail [Margaret.newman@arup.com] and USPS Regular Mail

Margaret Newman
Principal
Arup USA Inc.
77 water Street,
New York, New York, 10005

Re: I/M/O Bid Solicitation # 19DPP00368
Protest of Notice of Intent to Award, Arup USA, Inc.
T3103 Program Administrator-Resilience Planning Projects-NJDEP

Dear Ms. Newman,

This letter is in response to your protest, on behalf of the Arup USA, Inc. (Arup)), to the Hearing Unit of the Division of Purchase and Property (Division), dated October 30, 2019, protesting the Notice of Intent to Award letter (NOI) issued on October 17, 2019 by the Division's Procurement Bureau (Bureau) for Bid Solicitation #19DPP00368 T3103 Program Administrator-Resilience Planning Projects-NJDEP.

By way of background, on March 28, 2019, the Bureau issued Bid Solicitation #19DPP00368 on behalf of the New Jersey Department of Environmental Protection (NJDEP), Office of Coastal and Land Use Planning (OCLUP) to solicit Quotes from Vendors {Bidders} possessing the experience, expertise and creativity to lead and provide technical assistance for New Jersey Resiliency Planning Projects. Bid Solicitation § 1.1 *Purpose and Intent*. The intent of this Bid Solicitation is to award Master Blanket Purchase Orders (Blanket P.O.s) to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation, are most advantageous to the State, price and other factors considered. *Ibid*. A pool of up to eight (8) prequalified Vendors {Contractors} will then bid on the development of resilience plans for the Resilient NJ program, or other resiliency planning needs of the NJDEP OCLUP. *Ibid*. Through a Mini-Bid Process, each awarded Vendor {Contractor} will be offered the opportunity to review information related to each *Resiliency Planning Project* region and submit a Planning Project Quote for the region of their choice. *Ibid*.

In accordance with the Bid Solicitation Instructions, potential Vendor(s) {Bidder(s)} were permitted to submit questions to the Bureau, using the Division's *NJSTART* eProcurement system by 2:00 pm on April 16, 2019. See, Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*.

On May 23, 2019, Bid Amendment #1 was issued, which included answers to thirty-four (34) questions posed and included the Revised Bid Solicitation entitled "T3103 Revised Bid Solicitation 051019 and T3103 Revised Price Schedule 051019."

On June 11, 2018, the Proposal Review Unit (PRU) opened eleven (11) Quotes, received by the submission deadline of 2:00 pm EST, from the following Vendors {Bidders}:

1. AECOM Technical Services, Inc. (AECOM);
2. Arup USA, Inc. (Arup);
3. Arcadis USA, Inc. (Arcadis);
4. Brownfield Redevelopment Solutions, Inc. (BRS);
5. EDSA, Inc. (EDSA);
6. Dewberry Engineering, Inc. (Dewberry);
7. Jacobs Engineering, Inc. (Jacobs);
8. Kleinfelder, Inc. (Kleinfelder);
9. Louis Berger U.S., Inc. (Louis Berger);
10. Marathon Engineering & Environmental Services, Inc. (Marathon); and
11. Maser Consulting P.A (Maser).

The PRU determined that the eleven (11) Quotes met the administrative requirements, and forwarded the Quotes to the Bureau for a substantive review. (See Recommendation Report, pg. 3.) After conducting an initial Quote review for responsiveness to the requirements of the Bid Solicitation, the Bureau determined that Arup's Quote was non-response for the following reason:

The Quote submitted by ARUP USA, Inc. ("ARUP") was deemed non-responsive for including additional "Standard Terms and Conditions for Consulting Projects" that conflict with the terms and conditions of the Bid Solicitation. Section 1.3.1.1 requires that all exceptions be submitted during the Question and Answer period, and Section 4.1 states that "Vendor {Bidder} proposed terms or conditions that conflict with those containin the Bid Solicitation ... or that diminish the State's rights.... May render a Quote non-responsive." The additional terms and conditions submitted by ARUP conflict with the material terms and conditions as set forth in the Bid Solicitation, and therefore the Quote is non-responsive.

Additionally, ARUP submitted a Source Disclosure Form, which indicates that Services will be performed outside of the United States. This is prohibited by the Standard Terms and conditions Section 3.6 and by N.J.S.A. 52:34-13.2, which states that, in a contract primarily for services, the services must be performed within the United States.

[See Evaluation Committee Report, pg. 3; Recommendation Report, pg. 3.]

On October 17, 2019, a NOI was issued to all Vendors {Bidders}, notifying that it was "the intent of the Director of the Division of Purchase and Property (Division) to make a Master Blanket Purchase Order (Blanket P.O.) award to the following Vendor(s) {Bidder(s)} in accordance with the Quote(s) submitted in response to the above referenced Bid Solicitation:

1. Arcadis U.S., Inc.,
2. Brownfield Redevelopment Solutions, Inc.;
3. Dewberry Engineers Inc.;

4. Kleinfelder, Inc.,
5. Louis Berger U.S., Inc.; and
6. Maser Consulting P.A.

[See October 17, 2019 NOI.]

On October 30, 2019, Arup submitted an email protesting the Bureau's determination that its Quote was non-responsive to the mandatory requirements of the Bid Specification for the following reasons:

1. Standard Terms and Conditions

Our statement attached to the Quote submission on NJSTART was intended to create an opportunity for Arup and NJDEP to discuss the terms and conditions, as Arup has not engaged directly with NJDEP before, and has not submitted a proposal through NJSTART before, hence our request for a discussion. If the discussion of terms and conditions was not possible, our intention was to accept the provided terms and conditions, and we are prepared to do so if our Quote is reconsidered. Section 4.1 of the Bid Solicitation states that any conflict "May render a Quote non-responsive" (emphasis added). As such, we invite NJDEP to reconsider our proposal with the understanding that we will accept the proposed terms and conditions.

2. Source Disclosure Form

Arup's Source Disclosure Form did note that "Services will be performed by the Contractor and/or Subcontractors outside of the United States." Our reasoning for checking this box on the Form is nuanced. The nature of the Solicitation is an on-call contract with several positions listed, many of which were listed as optional. In an effort to demonstrate our comprehensive offer, and the breadth of our team, we chose to include resumes for all positions (including the optional Economics Expert role). At the time of our proposal, we did not have a person located in the United States who fit the requirements of the Economics Expert (specifically, having a master's degree in Economics), despite having several economics "experts" with a bachelor's in economics and master's degrees in engineering, environmental planning, business, finance, etc. We are confident that we can undertake any of the work of an Economics Expert within the United States, if needed. With this qualification, and the acknowledgement that the position was not required according to the Solicitation, we ask that NJDEP reconsider our proposal. Lastly, it is noted that this form was not required to be submitted with our Quote. The Source Disclosure Form was listed as should be submitted with Quote. Thus, had we not submitted the form until after award, we would not have been deemed non-responsive. We are prepared to issue a new Source Disclosure Form that clarifies Arup's intention to complete all work in the United States.

[See Arup's October 30, 2019 Protest Letter, pg. 1-2]

In consideration of the Arup'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. The issues raised by the Arup are sufficiently clear such that a review of the record of this procurement 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 based on the written record. I set forth herein my Final Agency Decision.

On June 11, 2019, Arup submitted its Quote for the Bid Solicitation #19DPP00368. Page 3 of Volume 2 of Arup's Quote included the following paragraph:

We have reviewed the Special Contractual Terms and Conditions Applicable to the Blanket P.O. and State of New Jersey Standard Terms and Conditions included in the Bid Solicitation and find these to be generally acceptable. Should our submission be of interest, we would seek to discuss with you a limited number of items in order to align with industry standards and our insurance policy, including (i) aligning the indemnification obligations with our insurance cover by tying same to negligence and removing the upfront duty to defend (ii) removal of the provision for liquidated damages as it is unsuitable for consultants; and (iii) incorporation of an overall limitation of liability.

In accordance with the Bid Solicitation Section 1.3.1.1 *Exceptions to the State of NJ Standard Terms and Conditions (SSTC)*, "Questions regarding the State of New Jersey Standard Terms and Conditions (SSTC) and exceptions to mandatory requirements **must¹ be posed during this electronic question and answer period** and shall contain the Vendor's {Bidder's} suggested changes and the reason(s) for the suggested changes." (Emphasis added).

On May 23, 2019, the Bureau issued Bid Amendment #1, which contained answers to thirty-four (34) questions received by 2:00 pm on April 16, 2019, as required by the Bid Solicitation. Only one those questions posed related to exceptions to any of the SSTCs.

33	Section 9.0 NJ Standard Terms and Conditions	<p>Will the State allow Vendors (Bidders) to take exception to any of the Standard Terms and Conditions?</p> <p>As stated in Bid Solicitation Section 1.3.1.1, <i>Exceptions to the State of NJ Standard Terms and Conditions (SSTC)</i>: "Questions regarding the SSTC and proposed exceptions to mandatory requirements, including the Special and Standard Terms and Conditions in Sections 5 and 9 of this Bid Solicitation must be posed during this Electronic Question and Answer period and shall contain the Vendor's {Bidder's} suggested changes and the reason(s) for the suggested changes." Additionally, as stated in Section 4.1, General: "Quotes including Vendor {Bidder} proposed terms and conditions may be accepted, but Vendor {Bidder} proposed terms or conditions that conflict with those contained in the Bid Solicitation, as defined in Section 2.0 of this Bid Solicitation, or that diminish the State's rights under any Blanket P.O. resulting from the Bid Solicitation, may render a Quote non-responsive."</p>
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¹ **Must** – Denotes that which is a mandatory requirement. Bid Solicitation Section 2.2 *General Definitions*.

There were no other questions or requests for exceptions to mandatory requirements of the SSTC as permitted by Bid Solicitation Section 1.3.1.1.

Arup's intent in including the paragraph in its Quote and its argument that the "statement attached to the Quote submission on NJSTART was intended to create an opportunity for Arup and NJDEP to discuss the terms and conditions" is not the determiner of responsiveness. In Meadowbrook Carting Co. v. Borough of Island Heights, the court espoused a two-part test for determining if a change is material:

[F]irst, whether the effect of a waiver [of the Bid Solicitation's terms] would be to deprive the [contracting party] of its assurance that the contract will be ... performed ... according to its specified requirements, and second, whether ... 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 standards of competition.

[138 N.J. 307, 315 (1994).]

Here, it is clear that by allowing Arup to delete the paragraph suggesting SSTC modifications from its proposal post bid opening would place Arup into a position of advantage over other bidders who did not have the opportunity to include SSTC modifications with their Quote in the hope that the State would accept them. Bid Solicitation Section 1.3.1.1 was clear that all "exceptions to mandatory requirements must be posed during this electronic question and answer period," and allowing Arup to withdraw its statement at this stage of the procurement will create an un-level playing field for all bidders. "Although broad, the grant of discretion to the Director to administer the public bidding process is not limitless. . . . the Division may not award a contract to a bidder whose proposal deviates materially from the RFP's requirements." Barrick v. State, 218 N.J. 247, 258-259 (2014). "Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract. Thus, requirements that are material to an RFP are non-waivable; the winning bidder's proposal must comply with all material specifications." Id. at 259. As stated above, the requirements of Bid Solicitation Section 1.3.1.1 are mandatory, and therefore cannot be waived as minor irregularities or omissions.

As such, Arup's reference to Bid Solicitation Section 4.1 *General* is also not persuasive. Bid Solicitation Section 4.1 is inapplicable to the current situation, as Bid Solicitation Section 1.3.1.1 is a mandatory requirement of this procurement. In I/M/O Protest of Award of On-Line Games Production and Operation Svs. Contract, Bid No. 95-X-20175, the court held that a post-opening commitment to supply an essential missing element for a bid is not a clarification but rather is an "impermissible supplementation ... and flies in the face of our public bidding scheme." 279 N.J. Super. 566 (App. Div. 1995). Allowing Arup to withdraw its statement from its Quote at this time constitutes an impermissible supplementation.

"The Vendor {Bidder} assumes sole responsibility for the complete effort required in submitting a Quote in response to this Bid Solicitation. No special consideration will be given after Quotes are opened because of a Vendor's {Bidder's} failure to be knowledgeable as to all of the requirements of this Bid Solicitation." Bid Solicitation Section 1.4.2. *Vendor {Bidder} Responsibility*. Arup had the opportunity to request SSTC modifications during the Electronic Question and Answer Period, as required by Section 1.4.1.1. However, it failed to do so.

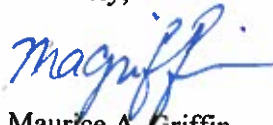
Next, Arup argues that the Source Disclosure Form submitted with its Quote for the Economics Expert was not mandatory and should not have rendered its Quote non-responsive. (See Arup's October 30, 2019 Protest Letter, pg. 2). Because Arup's Quote is non-responsive due to the failure to comply with

the mandatory requirements of Bid Solicitation Section 1.3.1.1 *Exceptions to the State of NJ Standard Terms and Conditions (SSTC)*, as discussed above, Arup's protest point with respect to the Source Disclosure Form need not be addressed in further detail.

This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put on preparing and submitting the Quote. However, in light of the findings set forth above, I have no choice but to sustain Bureau's Notice of Intent to Award. This is my final agency decision on this matter.

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, the State of New Jersey's eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RD

c: A. McMullen
L. Spildener