



State of New Jersey

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May 4, 2020

Via Electronic Mail Only sougata.roy@rutgers.edu

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Re: I/M/O Bid Solicitation #20DPP00473 Rutgers, the State University of New Jersey
Protest of Notice of Cancellation
Bid Solicitation Title: T2505 - Supplemental Consulting Services – Department of Transportation
(NJDOT) Infrastructure Research

Dear Dr. Roy,

This letter is in response to your correspondence of March 16, 2020, on behalf of Rutgers, the State University of New Jersey (Rutgers), to the Division of Purchase and Property's (Division) Hearing Unit. By way of that letter, Rutgers protests the Notice of Cancellation for Bid Solicitation No. 20DPP00473 / T2505 – Supplemental Consulting Services – Department of Transportation (NJDOT) Infrastructure Research (Bid Solicitation) issued by the Division's Procurement Bureau (Bureau) on March 6, 2020.

By way of background, on October 18, 2019, the Bureau issued the Bid Solicitation on behalf of the Department of Transportation, Bureau of Research, to solicit Quotes to engage a Vendor {Contractor} to perform infrastructure related research studies at varying degrees of complexity for the Bureau of Research. Bid Solicitation Section 1.1 *Purpose and Intent*. The intent of this Bid Solicitation was to award a Master Blanket Purchase Order (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 January 7, 2020, the Division's Proposal Review Unit opened one (1) Quote submitted by Rutgers through the State's **NJSTART** eProcurement system and received by the submission deadline of 2:00 p.m. eastern time.

In conducting its review and evaluation of the Quote submitted by Rutgers, the Bureau found the following instances of conflict between the requirements of the Bid Solicitation and Rutgers' submitted Quote:

Section	Requirement	Rutgers' Response
Section 4.4.5.2 State-Supplied Price Sheet Instructions	One price must be submitted to apply for all three (3) years of the Blanket P.O. term.	Had submitted three (3) separate Price Sheets in addition to the three (3) for Subcontractors Arora and Associates (Arora) and Bridge Intelligence, LLC (BI) each. In the Vendor's {Bidder's} Quote, had demonstrated the possibility of utilizing and combining personnel from all three (3) agencies with varying prices. Rutgers had explained that "upon receipt of each Project Request from the SCM, [Rutgers personnel] will identify the most appropriate Research Team based on the project need."
Section 9.0 State of New Jersey Standard Terms and Conditions (NJSSTC)	Vendors {Bidders} shall adhere to the NJSSTC unless specifically instructed otherwise.	In the Vendor's {Bidder's} Quote, a letter detailing further negotiation and potential removal of Sections 4.1 (A) and 4.1 (C) of the NJSSTC for indemnification was provided.

[See Recommendation Report, pg. 1-2.]

Based on above findings, the Bureau concluded that Rutgers' Quote was non-responsive and recommended that the Bid Solicitation to be canceled as Rutgers was the only Vendor {Bidder}. Id. at 2.

On March 6, 2020, the Bureau issued a Notice of Cancellation of the Bid Solicitation, advising that:

[b]ased upon review of the submitted Quote from Rutgers, The State University of New Jersey (Rutgers) for Bid Solicitation 20DPP00473, it was deemed non-responsive due to issues with the following Bid Solicitation Sections:

- Section 4.4.4.2 State-Supplied Price Sheet; and
- Section 9.0 State of New Jersey Standard Terms and Conditions (NJSSTC).

Based upon the above, the Director of the Division of Purchase and Property (Director), in consideration of the public interest, has determined that the procurement will be cancelled.

[See March 6, 2020 Notice of Cancellation.]

On March 16, 2020, Rutgers submitted a letter to the Division's Hearing Unit, protesting the Division's decision to cancel the Bid Solicitation. See Protest Letter, pg. 1. In that letter, Rutgers expresses its disagreement with the Bureau's determination that the submitted Quote was non-responsive for the reasons cited in the cancellation letter and Recommendation Report. Id. More specifically, Rutgers disagreed with the Bureau's determination that the Price Sheets it submitted were non-compliant with Bid Solicitation Section 4.4.5.2 and that its Quote was non-responsive due to "expressing desire for further negotiation and potential removal of Section 4.1 (A) and 4.1 (c) of the NJSSTC related to indemnification." Id.

In consideration of Rutgers' protest, I have reviewed the record of this procurement, including the Bid Solicitation, Rutgers' Quote and protest, the relevant statutes, regulations, and case law. The issues raised in Rutgers' protest are sufficiently clear such that review of the written record 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. I set forth herein the Division's Final Agency Decision.

First, Rutgers protests the Bureau's determination that its Quote was non-responsive because it submitted multiple price sheets. Specifically, Rutgers states:

[W]e submitted price sheets for the applicable labor rate titles as identified in Section 3.8 of the bid solicitation. The quoted labor rates are all inclusive hourly rates. Since our team consists of Rutgers (prime) and two subcontractors, including one small business enterprise, we submitted three price sheets, one each for each entity. It may be noted that Rutgers, a non-profit educational institution has a different accounting system than the for-profit industry partners. Providing three price sheets for the three members of the team was a good faith effort of responding to the solicitation, keeping the best interest of the public and the state of New Jersey in consideration. Moreover, we submitted one price sheet each for each year of the Blanket P.O., a total of three for each organization of the team, to cater for escalation. Since the instruction asked to hold the quoted prices firm throughout the issuance of the Blanket P.O., we recognized that adjustment of labor rates for future escalation during the execution of the Blanket P.O. would not be possible. From the commentary in the Recommendation Report, however, it appears that DPP required a single composite price sheet for the entire team and for all three years. This expectation was not clear from the verbiage in Section 4.4.5.2, even after repeated careful reading.

[See March 16, 2020 Protest Letter, pg. 1.]

With respect to the submission of pricing, Bid Solicitation Section 4.4.5.2 *State-Supplied Price Sheet* Instructions required:

The Vendor {Bidder} shall submit pricing for all eight (8) of the required Labor Rate Titles Price Lines as identified in Section 3.8 of this Bid Solicitation for the term of the Blanket P.O. for all three (3) years. The required price cells have been highlighted to assist in the proper completion of the State-Supplied Price Sheet. Failure to submit all price lines may result in the Quote being considered non-responsive. Each Vendor {Bidder} is required to hold its prices firm through issuance of Blanket P.O.

The Vendor {Bidder} must submit pricing for the Labor Rate Titles provided in the State-Supplied Price Sheet; changes, modifications, or additions to Labor Rate Titles shall not be permitted. Rates must be All-Inclusive Hourly Rates as that term is defined in Section 2.2 of this Bid Solicitation.

In the event that a Vendor {Bidder} using *NJSTART* to submit a Quote uploads a State-Supplied Price Sheet and completes the "Items" Tab in *NJSTART* (instead of entering a Unit Cost of \$1.00 as instructed), the State-Supplied Price Sheet will govern.

[Bid Solicitation Section 4.4.5.2 *State-Supplied Price Sheet Instructions*.]

Additionally, the following Price Sheet was provided to Vendors {Bidders} through **NJSTART** along with other Bid Solicitation documents:

Price Sheet - T2505 Bid Solicitation 20DPP00473 Supplemental Consulting Services: Department of Transportation (NJDOT) Infrastructure Research			
Vendor {Bidder} Name:			
Price Line Number	Labor Rate Title	Unit	All-Inclusive Hourly Rate for Each Year
1	Chief Engineer - Section 3.8 A of Bid Solicitation	Hourly Rate	\$ -
2	Project Manager/ Supervising Engineer - Section 3.8 B of Bid Solicitation	Hourly Rate	\$ -
3	Project Engineer - Section 3.8 C of Bid Solicitation	Hourly Rate	\$ -
4	Principal Engineer - Section 3.8 D of Bid Solicitation	Hourly Rate	\$ -
5	Senior Engineer - Section 3.8 E of Bid Solicitation	Hourly Rate	\$ -
6	Assistant Engineer - Section 3.8 F of Bid Solicitation	Hourly Rate	\$ -
7	Engineer Technician - Section 3.8 G of Bid Solicitation	Hourly Rate	\$ -
8	Clerk Typist - Section 3.8 H of Bid Solicitation	Hourly Rate	\$ -
Please refer to Bid Solicitation Section 2.2 for the definition of "All-Inclusive Hourly Rate" and Section 4.4.5 (State-Supplied Price Sheet) for additional information regarding this Price Sheet.			

As shown above, and, as described in Bid Solicitation Section 4.4.5.2, Vendors {Bidders} were to submit an All-Inclusive Hourly Rate¹ for Each Year for the eight (8) Labor Titles identified. The Bureau intended that Vendors {Bidders} would submit a single All-Inclusive rate representing a flat fee for all years of the Blanket P.O., and that the All-Inclusive rate would be a blended rate inclusive of work to be performed by the Vendor {Contractor} and any proposed subcontractors. Accordingly, upon seeing that Rutgers submitted three (3) separate Price Sheets for itself, three (3) for its subcontractor Arora and Associates (Arora); and three (3) price sheets for its subcontractor Bridge Intelligence, LLC (BI), the Bureau concluded that the submitted Quote did not conform to the requirements of the Bid Solicitation and determined that the Quote non-responsive.

In further support of its protest, Rutgers further asserts that:

According to Section 6.7.4 Evaluation of the Quotes, and Section 6.8 Negotiation and Best and Final Offer (BAFO), the quoted rates may be subjected to negotiations by DPP to “maximize the State’s ability to obtain the best value based on the mandatory requirements, evaluation criteria, and cost.” This implies that the quote can be revised based on DPP feedback and through negotiation, and the price sheet submitted with the quote is not final. We, therefore, would like to have the opportunity to

¹ Bid Solicitation Section 2.2 *General Definitions* defined All-Inclusive Hourly Rate as “an hourly rate comprised of all direct and indirect costs including, but not limited to: labor costs, overhead, fee or profit, clerical support, travel expenses, per diem, safety equipment, materials, supplies, managerial support and all documents, forms, and reproductions thereof. This rate also includes portal-to-portal expenses as well as per diem expenses such as food.”

revise the quote based on DPP's requirement of one composite price sheet for all three years of Blanket P.O., which was not clear to us.

However, what Rutgers proposes is not a negotiation as contemplated by the Division's governing statutes, regulations and the Bid Solicitation. Negotiations cannot be used as a mechanism to make a Quote responsive to the requirements of the Bid Solicitation. Rather, what Rutgers' proposes is changing its Quote submission from six submitted price sheets to one price sheet representing the All-Inclusive rate would be a blended rate inclusive of work to be performed by the Vendor {Contractor} and any proposed subcontractors, as sought by the Bureau. Permitting Rutgers to revise its Quote and submit a correct pricing information after the Quote submission deadline would result in an impermissible supplementation of Rutgers' bid submission, which the Division cannot allow as doing so would be contrary to the Court's holding in In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995), the Appellate Division held that "[i]n 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."

Second, as noted above, with its Quote Rutgers included a letter entitled "Terms and Conditions Exceptions Letter". The letter states in the relevant part:

Upon preliminary review of the State of New Jersey Standard Terms and Conditions document, Rutgers has identified at least two articles that will require further negotiation and potential removal at the time of award. These are Item 4.1(A) and 4.1(C).

Rutgers is also reserving the right to perform a more detailed review of the award's terms and conditions if the Sponsor identifies our Institution as an Awardee.

In reviewing the submitted Quote, when the Bureau noted that Rutgers took exceptions to the State's Standard Terms and Conditions, specifically as terms regarding indemnification and that it reserved there the right to "perform a more detailed review" of the State' Standard Terms and Conditions, the Bureau determined that the Quote submitted by Rutgers was non-responsive.

In the protest Rutgers states as follows:

We disagree with the rationale for finding Rutgers' quote as non-responsive because of expressing desire for further negotiation and potential removal of Sections 4.1 (A) and 4.1 (C) of the NJSSTC related to indemnification. As may be appreciated, Rutgers is also a New Jersey State entity, and would like to protect the State's interest by limiting blanket indemnification provisions. Rutgers have entered into similar negotiations with NJDOT and other federal, state, government and semi-government agencies on similar contracts to protect the State's interest. Rutgers would not have any reservation in accepting similar terms previously agreed with NJDOT. Also, note that Rutgers did not decline the terms of NJSSTC, but have requested an opportunity to discuss the terms related to indemnification. This should not be construed as non-responsive.

[See March 16, 2020 Protest Letter, pg. 2.]

Bid Solicitation Section 1.3.1.1 *Exceptions to the State of NJ Standard Terms and Conditions (SSTC)* was clear “Questions regarding the State of New Jersey Standard Terms and Conditions (SSTC) and exceptions to mandatory requirements 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.” (Emphasis added). Additionally, as shown in the screenshot below, the Bureau’s sample Questions and Answers alerted potential Vendors {Bidders} to the requirement that exceptions to the State of New Jersey Standard Terms and Conditions must be posed during the electronic question and answer period.

Question #	Created Date	User Created	Question Subject	Question	Answer	Show All on Web	Show Original Vendor Only	Delete All
1	10/09/2019	Brenda Tran	PDF Documents	When trying to open a Portable Document Format (PDF) I am receiving an error message and am unable to access the PDF. How should I proceed?	It is recommended that users utilize Internet Explorer or Microsoft Edge to view PDF documents. Certain PDF forms cannot be opened in the Chrome or Firefox built in PDF viewers that are enabled by default. If using Chrome or Firefox it is recommended that the file is downloaded instead by clicking the download button in the upper right-hand corner of the browser after an error message is received. An alternative option is to disable the built in PDF viewers in Chrome or Firefox.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2	10/09/2019	Brenda Tran	Quote Submission	Should I check that I have properly completed and attached all of the required documents with my submitted Quote?	Yes. Prior to the Quote Opening Deadline, a Vendor (Bidder) should review the documents comprising the submitted Quote to ensure that all of the required documents have been completed and attached. Oftentimes a Quote is deemed non-responsive because a Vendor (Bidder) fails to attach a required form or attaches a blank form. To review a submitted a Quote a Vendor (Bidder) should log into NJSTART and review each document attached to the Quote submission. Instructions on how to review a submitted Quote can be found in the Quick Reference Guide entitled How to Review a Submitted Quote which is available on the NJSTART Vendor Support Page under Vendor Reference Guides.	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3	10/09/2019	Brenda Tran	Exceptions	Will the State allow Vendors to take exception to any of the Standard Terms and Conditions?	As stated in Bid Solicitation Section 1.3.1.1, Exceptions to the State of NJ Standard Terms and Conditions (SSTC): "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."	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

The review of the record reveals that no questions or requests for exceptions to mandatory requirements of the SSTC as required by Bid Solicitation Section 1.3.1.1 were submitted during the Q&A.

The State of New Jersey’s Standard Terms and Conditions are included in all Bid Solicitations to protect the State’s interests and to ensure uniformity and consistency in the State’s contracting terms. That being said, the State will review a potential Vendor’s {Bidder’s} alternate terms and/or requests to modify or remove terms when those questions are presented during the electronic question and answer period. Unless specifically identified in the Bid Solicitation, the State does not negotiate terms and conditions with a Vendor after the Quote opening date as doing so would unlevel the playing field giving an advantage to the Vendor {Bidder} who submitted a Quote intending to the negotiate terms after the Quote opening, over those potential Vendors {Bidders} who did not submit a Quote because the Bid Solicitation did not permit the negotiation of terms and conditions after the Quote opening.

Had Rutgers raised questions, concerns or proposed modifications to the State’s Standard Terms and Conditions during the electronic question and answer period, the State would have been in a position to review alternate language, make any necessary modification or advise the bidding community that certain terms could be negotiated with the intended awardee. In doing so, the State would have maintained a level playing field.

The New Jersey Courts have long recognized that the purpose of the public bidding process is to “secure for the public the benefits of unfettered competition.” Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the “public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good.” Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997). The objective of New Jersey’s statutory procurement scheme is “to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.” Barrick v. State of New Jersey,

218 N.J. 247, 258 (2014) (citing, Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)). Consistent with this purpose, the New Jersey procurement law provides that “any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do.” N.J.S.A. 52:34-12(a).

Here, the Bureau recommended, and I concurred, to cancel the Bid Solicitation because the review of the only Quote submitted revealed that it was non-responsive based upon the incorrect submission of pricing information and the exceptions to the State’s Standard Terms and Conditions proposed with the Quote.

Thank you for your interest in doing business with the State of New Jersey; however, based upon the foregoing, I find no reason to disturb the Bureau’s recommendation that the subject Bid Solicitation be cancelled. Accordingly, I sustain March 6, 2020 letter that cancelled the subject Bid Solicitation. This is my final agency decision on this matter.

Sincerely,



Maurice A. Griffin
Acting Director

MAG:RD

c: B. Tran
L. Spildener
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