



State of New Jersey

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April 22, 2020

Via Electronic Mail Only ed.taffet@wageworks.com

Edward D. Taffet, Vice President, Legal Affairs
WageWorks Inc.
1100 Park Place, 4th Floor
San Mateo, California 94403

Re: I/M/O Bid Solicitation #19DPP00325 WageWorks Inc.
Protest of Notice of Intent to Award
T2010 - Administrative Services for Flex Spending

Dear Mr. Taffet,

This letter is in response to your email on behalf of WageWorks Inc. (WageWorks) to the Hearing Unit of the Division of Purchase and Property (Division), dated January 28, 2020. In that letter, WageWorks protests the Notice of Intent to Award letter (NOI) issued on January 13, 2020, by the Division's Procurement Bureau (Bureau) for Bid Solicitation #19DPP00325 T2010 - Administrative Services for Flex Spending (Bid Solicitation).

By way of background, on January 18, 2019, the Bureau issued the Bid Solicitation on behalf of the State of New Jersey, Department of the Treasury, Division of Pensions and Benefits (DPB), to solicit Quotes to administer two (2) Flexible Spending Account (FSA) plans under the State's Section 125 Tax Savings Program. See Bid Solicitation Section 1.1 *Purpose and Intent*. The intent of the Bid Solicitation was to award a Master Blanket Purchase Order (Blanket P.O.) to that responsible Vendor {Bidder} whose Quote, conforming to the Bid Solicitation, is most advantageous to the State, price and other factors considered. 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 February 11, 2019. See Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*. On February 22, 2019, the Bureau posted Bid Amendment #1, which extended the Quote Submission Due Date to April 11, 2019. On March 14, 2019, the Bureau posted Bid Amendment #2, which extended the Quote Submission Due Date to April 18, 2019. On March 20, 2019, the Bureau posted Bid Amendment #3, which extended the Quote Submission Due Date to May 17, 2019. On April 16, 2019, the Bureau posted Bid Amendment #4, which included answers to one hundred thirty two (132) questions, included Revised Bid Solicitation entitled "T2010 Revised Bid Solicitation 041119" and Attachment 1 – File Layouts. On April 23, 2019, the Bureau posted Bid Amendment #5, which extended the Quote Submission Due Date to May 24, 2019, included answers to an additional seven (7) questions, and included a Revised Bid Solicitation entitled "T2010 Revised Bid Solicitation 0426119".

On May 24, 2019, the Proposal Review Unit opened five (5) Quotes received by the submission deadline of 2:00 pm EST, from the following Vendors {Bidders}:

1. CBIZ Benefits & Insurance Services, Inc. (CBIZ)
2. Horizon Healthcare Services, Inc. (Horizon)
3. PayFlex Systems USA, Inc. (PayFlex)
4. Total Administrative Services Corporation (TASC)
5. WageWorks, Inc. (WageWorks)

[See Recommendation Report, pg. 3, Evaluation Report pg. 5.]

After conducting a preliminary review of the Quotes received, the Proposal Review Unit forwarded the Quotes to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*.

On December 24, 2019, the Bureau completed the Recommendation Report which recommended a Blanket P.O. award to Horizon. In part, the Recommendation Report stated that:

The Evaluation Committee (Committee) has completed its evaluation of the responsive Quotes received and determined that Horizon satisfied all the requirements of the Bid Solicitation and represents the most advantageous offers (sic) to the State, price and other factors considered.”

[Recommendation Report, pg. 1.]

With respect to the Quote submitted by WageWorks, the Bureau’s Recommendation Report stated that:

The Bureau found that the Quote submitted by WageWorks was non-responsive based on a material deviation from the requirements of the Bid Solicitation.

WageWorks stated that "if the need for such electronic discovery, litigation holds, discovery searches, and expert testimonies is through no fault of WageWorks and requires extensive time and effort, there may be additional fees, which would be mutually agreed upon in advance by both parties" (page 28 of its Quote, WageWorks VOLUME 2 TECHNICAL FINAL). The State cannot agree to pay the Vendor {Contractor} fees for services other than those provided by the Vendor {Contractor} and included in the all-inclusive Section 125 administrative fee as per Section 4.4.5.2 of this Bid Solicitation. The material deviation to the mandatory requirement resulted in the Vendor's {Bidder's} Quote to be deemed non-responsive.

[See Recommendation Report, pg. 4.]

Accordingly, the Bureau issued the NOI advising all Vendors {Bidders} that it was the State’s intent to award the Blanket P.O. to Horizon.

On January 28, 2020, WageWorks submitted a protest to the Division's Hearing Unit. By way of summary, in the protest WageWorks' stated that (1) it followed the instructions and completed the Price Sheet as required by the Bid Solicitation; (2) WageWorks did not require the State to agree to pay any other fees for services within the Scope of Work, and therefore, there is no material deviation from requirements of the Bid Solicitation. See WageWorks' January 28, 2020 letter, pg. 5. Additionally, in the protest, WageWorks requests an in-person presentation.

First, with respect to WageWorks' request for an in-person presentation, I note that pursuant to N.J.A.C. 17:12-3.3(e), "[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director." Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). In consideration of WageWorks' protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes submitted, the Evaluation Committee report, the Bureau's Recommendation Report, and the relevant statutes, regulations, and case law. The issue(s) raised in WageWorks' protest were 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 submitted by WageWorks' on the written record. I set forth herein my Final Agency Decision.

Turning to WageWorks substantive protest, as noted above, this Bid Solicitation sought a Vendor {Contractor} to administer the State's two Flexible Spending Accounts under the State's Section 125 Tax Savings Program. Bid Solicitation Section 1.1 *Purpose and Intent*. More specifically, Bid Solicitation Section 3.1 *General Requirements* identified the administrative services to be performed by the Vendor {Contractor} stating:

The Vendor {Contractor} shall handle the following administrative services:

- A. Processing Enrollments: including providing announcement, enrollment and training materials (see Bid Solicitation Section 3.2.1);
- B. Payment Card Services (see Bid Solicitation Section 3.2.2);
- C. Other Required Services: Terminations and election changes (see Bid Solicitation Section 3.2.3);
- D. Member Correspondence (see Bid Solicitation Section 3.2.3);
- E. Claims Processing Services (see Bid Solicitation Section 3.2.4);
- F. Account Maintenance (see Bid Solicitation Section 3.2.5);
- G. File Exchange (see Bid Solicitation Section 3.2.6);
- H. End of Year Services (see Bid Solicitation Section 3.2.7);
- I. Reports (see Bid Solicitation Section 3.2.8);
- J. Interfaces (see Bid Solicitation Section 3.2.9); and
- K. Document Management (see Bid Solicitation Section 3.2.10).

With respect to Document Management, Bid Solicitation Section 3.2.10 noted the following:

The Vendor {Contractor} may perform the following tasks:

- A. Scan Document – image a document and identify document type;
- B. Retrieve Document – for viewing on screen;
- C. Annotate Document – with signature or other information;
- D. Browse Documents – view documents;

- E. Document Report – list of documents available;
- F. Print Documents – to printer;
- G. Send Documents – via email or facsimile;
- H. Track Document Version – if the document is updated, all versions will be kept; and
- I. Manage Archive and Retention Schedule – determine how and when documents are archived or become unnecessary.

Describe the types of documents to be scanned, the minimum acceptable scanning resolution, where they will be stored and whether they need to be available immediately for retrieval.

Describe how documents will be captured and retrieved and if it will be done centrally or at multiple locations.

Describe whether documents are delivered for scanning, possibly at a later time, or if a customer will be present during the process and requires the original documents to be returned once scanned.

Confirm that any document management process must be able to be certified by the State Records Committee (SRC). Additional information can be found at: <http://www.nj.gov/treasury/revenue/rms/index.shtml>

NOTE: SRC review and approval must be required for document management components in the Bid Solicitation. For more information, refer to Circular Letter 10-02-OMB and the Imaging Certification Process website:
<http://www.nj.gov/treasury/revenue/rms/imgcertificationprocess.shtml>

Moreover, encompassed within the scope of work for this Bid Solicitation was the requirement that the Vendor {Contractor} have a security plan. In part, Bid Solicitation Section 3.4.1 *Security Plan* required that:

The Vendor {Contractor} shall disclose to the State a description of their roles and responsibilities related to electronic discovery, litigation holds, discovery searches, and expert testimonies. The Vendor {Contractor} shall disclose its (sic) process for responding to subpoenas, service of process, and other legal requests.

As to the submission requirements imposed on each Vendor {Bidder}, Bid Solicitation Section 4.4.5.2 *State-Supplied Price Sheet Instructions*, required that Vendors {Bidders}, “enter an amount for each price line based on the All-Inclusive Administrative Fee for Each Participating Employee per Month, years one (1) through three (3), or the Quote {Proposal} may be considered non-responsive. Each Vendor {Bidder} is required to hold its prices firm through issuance of Blanket P.O.”

With its Quote, WageWorks submitted the following Price Sheet:

Price Schedule Bid Solicitation #19DPP00325 - Administrative Services for Section 125 Flexible Spending Accounts		
Vendor {Bidder} Name:	<i>WageWorks, Inc.</i>	
Instructions:	Refer to Bid Solicitation Section 4.4.5 for Vendor {Bidder} instructions. The Vendor {Bidder} shall provide pricing in the yellow highlighted cells.	
Task Description	Unit of Measurement	Cost per Individual Participating Employee per Month
Year 1 - All-Inclusive Section 125 Administrative Fee as specified in Bid Solicitation Sections 3.1 - 3.10.	Each	\$3.35
Year 2 - All-Inclusive Section 125 Administrative Fee as specified in Bid Solicitation Sections 3.1 - 3.10.	Each	\$3.35
Year 3 - All-Inclusive Section 125 Administrative Fee as specified in Bid Solicitation Sections 3.1 - 3.10.	Each	\$3.35

No other notations or comments were included on the Price Sheet. On July 18, 2019, the Bureau requested a Best and Final Offer (BAFO) from all Vendors {Bidders}. See Evaluation Committee Report, pg. 14. WageWorks submitted the following BAFO response:

BAFO Price Schedule Bid Solicitation #19DPP00325 - Administrative Services for Section 125 Flexible Spending Accounts		
Vendor {Bidder} Name:	<i>WageWorks, Inc.</i>	
Instructions:	Refer to Bid Solicitation Section 4.4.5 for Vendor {Bidder} instructions. The Vendor {Bidder} shall provide pricing in the yellow highlighted cells.	
Task Description	Unit of Measurement	Cost per Individual Participating Employee per Month
Year 1 - All-Inclusive Section 125 Administrative Fee as specified in Bid Solicitation Sections 3.1 - 3.10.	Each	\$3.00
Year 2 - All-Inclusive Section 125 Administrative Fee as specified in Bid Solicitation Sections 3.1 - 3.10.	Each	\$3.00
Year 3 - All-Inclusive Section 125 Administrative Fee as specified in Bid Solicitation Sections 3.1 - 3.10.	Each	\$3.00

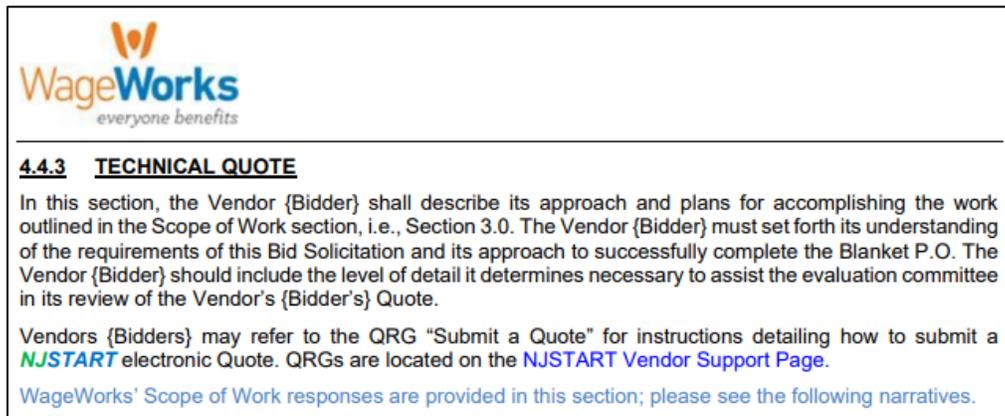
Again, no other notations or comments were included on the Price Sheet.

Nothing in the Bureau’s record of review indicates that the Price Sheet submitted by WageWorks did not conform to the requirements of the Bid Solicitation Section 4.4.5.2 *State-Supplied Price Sheet Instructions*. The sole issue is whether WageWorks’ statement in its technical proposal results in a material pricing deviation.

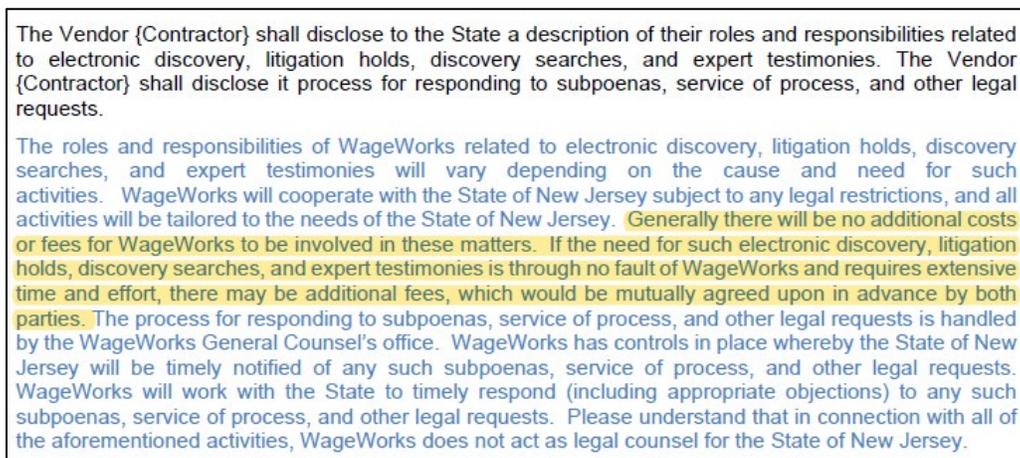
In order to ensure that Vendor {Contractor} would have a plans in place as required, Bid Solicitation Section 4.4.3.3.4 (C) (8) *Contingency Plan* required that Vendor {Bidder} “provide its draft plan to accomplish all work required by this Blanket P.O.” The Contingency Plan shall include: (A) Disaster Recovery Plan; (B) Backup Plan; and, (C) Security Plan. With respect to the draft Security Plan, the Bid Solicitation required:

The Vendor {Contractor} shall disclose to the State a description of their roles and responsibilities related to electronic discovery, litigation holds, discovery searches, and expert testimonies. The Vendor {Contractor} shall disclose its process for responding to subpoenas, service of process, and other legal requests.¹

In its Technical Quote WageWorks' provided a response to each section of Scope of Work, noting the following:



Specifically, in response to Bid Solicitation Section 3.4.1 *Security Plan* WageWorks stated in part:



[WageWorks Quote, Volume 2, Technical Quote, p. 28, emphasis added.]

Based on the statement highlighted above, the Bureau determined that WageWorks' Quote was non-responsive to the requirements of the Bid Solicitation. The Bureau noted that the "State cannot agree to pay the Vendor {Contractor} fees for services other than those provided by the Vendor {Contractor} and included in the all-inclusive Section 125 administrative fee as per Section 4.4.5.2 of this Bid Solicitation.

¹ Despite the fact that Bid Solicitation Section 4.4.3.3.4 (C) (8) *Contingency Plan* used the term Vendor {Contractor} rather than Vendor {Bidder}, Section 4 of the Bid Solicitation is entitled "Quote Preparation and Submission" and identifies those requirements of the Vendor {Bidder} in preparing and submitting it Quotes. I note that the introductory sentence to Bid Solicitation Section 4.4.3.3.4 appropriately stated "Vendor {Bidder}":

The material deviation to the mandatory requirement resulted in the Vendor's {Bidder's} Quote to be deemed non-responsive.”² See, Bureau’s Recommendation Report, p. 4. The Bureau’s review and analysis of WageWorks response reveals that there was a deviation from the requirements of the Bid Solicitation. WageWorks disputes that this response was a material deviation.

In order for WageWorks’ Quote to be considered responsive, WageWorks response to the Bid Solicitation Section 3.4.1 would have to be a minor irregularity. Minor irregularities can be waived pursuant to the authority vested in N.J.A.C. 17:12-2.7(d) and Bid Solicitation Section 6.1 *Right to Waive*. It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Sternin, 25 N.J. 317, 324 (1957). 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 Twp. of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). “In River Vale, Judge Pressler 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.” In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), citing River Vale, supra, 127 N.J. at 216. The River Vale court set forth a two-part test for determining whether a deviation is material:

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.]

In, In re Jasper Seating, 406 N.J. Super. 213, 225-26, the Appellate Court concluded that a Bidder's price quotation was materially defective and thus unresponsive. In that case,

the RFP contained two express and material provisions regarding pricing. Addendum No. 1 amended Section 3.20.2 as follows: ‘[T]he price list submitted must remain firm for the first 18 months of the contract.’ Addendum No. 2 amended section 4.4.7.4 as follows: ‘[T]he price list submitted must not contain any sticker increases.’ Interpreting this language by its plain meaning, the Division explicitly informed bidders that there must be no ambiguity in bids concerning pricing for the life of the contract. Hence, price lists submitted could contain no sticker increases.

[Id. at 224.]

The Appellate Court evaluated the Bidder’s proposal under the materiality test and concluded that "a deviation in [the] plaintiff's bids due to its inclusion of price escalation stickers" Id. at 225. The plaintiff argued that the deviation allegedly caused by the price stickers displayed on its catalog should have been waived. However, the Acting Director of the Division of Purchase and Property disagreed, and determined that the plaintiff's bid was non-conforming. Id. The Appellate Division upheld that finding and concluded

² There were no questions asked regarding this requirement of the Bid Solicitation during the Question and Answer Period.

that a waiver of such a deviation would fail the materiality test. Id. Applying the River Vale test, the Appellate Division held that

First, a waiver would deprive the State of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements... [Because] [t]he RFP specified that the pricing was to remain firm for the life of the contract. Second, a 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.” [A]llowing Jasper to choose one of the two interpretations of its pricing, one with the price increase and one without, after all of the bids are opened, would give it an unfair advantage over the other bidders.

[Id. at 225-226.]

In, In re Motor Vehicle Comm'n Surcharge Sys. Accounting & Billing Servs., 2018 N.J. Super. Unpub. LEXIS 285, *7, 2018 WL 766856, the indented awardee, MSB, included a lengthy footnote on its pricing sheet, which stated:

Price does not include a surcharge partial payment processing fee per payment processed and electronic payment (ACH and credit card) convenience fee *which is paid by constituent* at time payment is tendered. Both the installment payment fee and convenience fee *can be negotiated with the State and are necessary components to maintain the pricing* shown in cell C7[.]

[Emphasis added.]

The Appellate Division concurred with the challenger to the intended award stating that “MSB's original pricing submission materially deviated from the requirements of this RFP [because] pricing sheet failed to specify that printing and postage costs were to be absorbed by MSB within its contingency fee compensation, and that MSB was not expecting to be paid for those extra costs, either by the motorists remitting the surcharges or by the State.” Id. at *26. Additionally, the Appellate Division held that it “was clearly a material deviation from the RFP’s requirement for bids to set forth the full price to be charged by the contract recipient. Undoubtedly, in declaring on the pricing sheet that the transactional costs were subject to future “negotiations” with the State and are “necessary” components to the pricing, MSB was looking to be paid more for its services than only the respective 4.35% and 10.0% contingent fee percentages reflected on the spreadsheet. Id. at *26-27.

The record reveals that, unlike in In re Jasper Seating and In re Motor Vehicle Comm'n Surcharge Sys. Accounting & Billing Servs., WageWorks’ Price Sheet and BAFO did not include any notes or additional information on the offered pricing. WageWorks indicated on the Price Sheet submitted with its Quote, that All-Inclusive Section 125 Administrative Fee as specified in Bid Solicitation Section 3.1-3.10 is a flat fee throughout Years 1-3. The only discrepancy in WageWorks’ Quote is between the submitted Price Sheet, the subsequently submitted BAFO, and WageWorks’ statement in Section 3.4.1 that “[i]f the need for such electronic discovery, litigation holds, discovery searches, and expert testimonies is through no fault of WageWorks and requires extensive time and effort, **there may be additional fees, which would be mutually agreed upon in advance by both parties.**” (Emphasis added.)

In its January 28, 2020 protest letter, WageWorks stated that it “entered an amount for each price line based on the All-Inclusive Administrative Fee for Each Participating Employee per Month, for years one through three. Based on the instructions, WageWorks was not requested (or permitted) to (i) modify this form to reflect any costs other than Administrative Fees or (ii) include costs for services outside the Scope of Work.” (See January 28, 2020 Protest Letter, pg. 2-3). Additionally, throughout its protest letter, WageWorks states that:

Based on WageWorks’ response, it described its roles and responsibilities and disclosed to the State there will be no additional costs or fees for WageWorks to be involved in these types of services (“Legal Services”). In an effort to be complete and thorough, WageWorks further indicated if the need for such Legal Services is required through no fault of WageWorks and requires extensive time and effort (by WageWorks), there may be additional fees, which would be mutually agreed upon in advance by both parties. Without explicitly stating it, these Legal Services, **if required through no fault of WageWorks**, are clearly outside the Scope of Work. As such, the fees quoted on the Price Sheet reflected **all** fees for services that fall within the Scope of Work, and there is no material deviation from requirements of the Bid Solicitation.

...

The cost of all Legal Services to be performed within the Scope of Work are included in the all-inclusive Administration Fee for each participating employee per month – exactly as required by the Bid Solicitation.

[Id. at 3. Emphasis in the original.]

At the same time WageWorks explains in its protest letter that “[i]f the need for Legal Services were caused through no fault of WageWorks (**i.e. through the fault of the State of New Jersey**), it would clearly be outside the Scope of Work and should not be included in the Price Sheet. Under these circumstances (Legal Service falling outside the Scope of Work) WageWorks indicated there may be additional fees, which would need to first be agreed to in advance by both parties.” Id. at 4. Emphasis added.

This statement, combined with the WageWorks’ response to Bid Solicitation Section 3.4.1 in its Quote, suggests that WageWorks’ interprets the requirements of Section 3.4.1 to mean that only the discovery that is required through the fault of WageWorks is within the Scope of Work of the Bid Solicitation. This interpretation of the Bid Solicitation Section 3.4.1 is incorrect. Section 3.4.1 states that “[t]he Vendor {Contractor} shall disclose to the State a description of their roles and responsibilities **related to electronic discovery, litigation holds, discovery searches, and expert testimonies**. The Vendor {Contractor} shall disclose its process for responding to subpoenas, service of process, and other legal requests.” Emphasis added. Therefore, Section 3.4.1 is intended to cover any and all discovery, related to the subject matter of the Bid Specification that the State may need WageWorks to assist with during the course of the contract, regardless of why the need for the electronic discovery, litigation holds, discovery searches, and expert testimonies arose. Accordingly, WageWorks’, in submitting its Quote pricing, should have contemplated and submitted its Quote pricing accounting for any scenario wherein it may be called upon to assist the State with electronic discovery, litigation holds, discovery searches, and expert testimony, regardless of fault.

“Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract.” Barrick v. State, 218 N.J. 247, 259 (2014). Because the requirements of Bid Solicitation Section 3.4.1 are equally applicable to all Vendors {Bidders} who submitted Quotes in

response to this Bid Specification, WageWorks' statement contained within its technical proposal results in a material deviation from the requirements of Section 3.4.1, because, applying the River Vale materiality test, it deprives the State of assurance that WageWorks will perform the contract according to its specified requirements, specifically, when and if the need for discovery arises. Next, waiving WageWorks' Section 3.4.1 language would adversely affect competitive bidding by placing WageWorks in a position of advantage over other bidders, who did not limit their response to Section 3.4.1 as applicable to discovery.

Pursuant to Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*, WageWorks had an opportunity to clarify any questions it had regarding Section 3.4.1. The review of the record reveals that no questions regarding Section 3.4.1 were submitted to the State.

In light of the findings set forth above, I sustain the Bureau's Notice of Intent to Award. This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put forth in preparing and submitting the Quote. 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: G. Griffith
L. Spildener
M. Tagliaferri