



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

PHILIP D. MURPHY
Governor

ELIZABETH MAHER MUOIO
State Treasurer

SHEILA Y. OLIVER
Lt. Governor

MAURICE A. GRIFFIN
Acting Director

August 6, 2020

Via Email Only MECA@stevenslee.com

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

RE: IMO Bid Solicitation 19DPP00343 Sandata Technologies, LLC
Final Agency Decision - Protest of Notice of Intent to Award
T3099 Electronic Visit Verification Management System (EVMMS)

Dear Ms. Cannon,

This Final Agency Decision is in response to your correspondence of June 8, 2020, to the Division of Purchase and Property's ("Division") Hearing Unit on behalf of Sandata Technologies, LLC ("Sandata"). In that letter, Sandata protests the Division's Procurement Bureau's ("Bureau") May 14, 2020, Notice of Intent to Award ("NOI") which advised all Vendors {Bidders} that the State intended to make a Master Blanket Purchase Order ("Blanket P.O." or "Contract") award to HHAeXchange.

BACKGROUND

By way of background, in 2012, the Government Accountability Office reported that 40% of all fraud convictions initiated by a group of Medicaid fraud units were for Home Health Care Services ("HHCS"). Bid Solicitation Section 1.2 *Background*. A key factor that makes home health care so susceptible to fraud is the lack of oversight and connectivity. *Ibid*. As a result, the Centers for Medicare/Medicaid ("CMS") mandated that states begin utilizing an Electronic Visit Verification Management System ("EVMMS") for Personal Care Services ("PCS") by January 1, 2020 and for HHCS by January 1, 2023. On December 19, 2019, CMS granted the State of Jersey an extension of time to implement the EVMMS system through January 1, 2021.¹ Capitalized terms used in this final agency decision and not defined herein will have the meanings set forth in the Bid Solicitation, Section 2.3 Blanket P.O. Specific Definitions/Acronyms, unless the context suggests otherwise.

¹ In granting that extension, CMS advised as follows "[p]lease be advised that the Cures Act provision on good faith effort exemptions does not provide CMS with authority to delay the FMAP reductions for more than one year. Therefore, if the state is not fully compliant by January 1, 2021, FMAP reductions will be applied beginning in the first quarter of 2021 and every quarter thereafter until the state achieves compliance."

The EVVMS will be a software platform where Medicaid Payers, Managed Care Organizations (“MCOs”), and their contracted network of Health Care Providers communicate. *Ibid.* The purpose of the EVVMS is to verify home health care visits to ensure patients are not neglected and to reduce fraudulently documented home visits. *Ibid.* Health Care Providers can record visits using the Beneficiary’s home phone, a Forward Operating Base (“FOB”) device, or a Global Positioning System (“GPS”) mobile application. *Ibid.* EVVMS provides real-time visibility into visit confirmation and Health Care Provider compliance, enhances care coordination, streamlines the billing process, and provides an audit trail of all communication between the Medicaid Payer, MCOs, and Health Care Providers. *Ibid.*

On January 14, 2019 the Bureau issued Bid Solicitation #19DPP00343 - T3099 Electronic Visit Verification Management System (“Bid Solicitation”) on behalf of the Department of Human Services (“DHS”), Division of Medical Assistance and Health Services (“DMAHS”). Bid Solicitation Section 1.1 *Purpose and Intent.* The purpose of the Bid Solicitation was to solicit Quotes from qualified Vendors {Bidders} to provide a centralized web-based EVVMS for Personal Care Services and Home Health Care Services to prevent inappropriate billing/payment, safeguard against fraud, improve program oversight, and enhance quality of services. *Ibid.* The Bid Solicitation noted that many healthcare providers have already implemented their own EVVMS; and therefore, the State sought a Vendor {Bidder} to develop a vendor hosted application to serve as the State’s EVVMS, with the additional capacity to act as a “data aggregator” to combine EVVMS data from multiple EVVMS platforms.

Potential Vendors {Bidders} were permitted to submit questions regarding the Bid Solicitation and the State of New Jersey Standard Terms and Conditions through February 8, 2019. The Division received 162 questions from potential Vendors {Bidders}. On May 24, 2019 the Bureau posted answers to the questions received and issued a revised Bid Solicitation. On June 20, 2019, the Division’s Proposal Review Unit opened eleven Quotes received in response to the Bid Solicitation. Quotes were received from the following Vendors {Bidders}:

1. Conduent State and Local Solutions
2. Ernst & Young LLP
3. First Data Government Solutions
4. HealthStar LLC
5. HHAeXchange
6. MediSked LLC
7. Optum Government Solutions (“Optum”)
8. Prime Care Technologies
9. Public Consulting Group Inc. (“PCG”)
10. Sandata Technologies (“Sandata”)
11. SinqTechnologies

After conducting its initial review of the Quotes for compliance with the mandatory requirements for Quote submission, the Division’s Proposal Review Unit issued a Notice of Proposal Rejection to SinqTechnologies.²

The remaining Quotes were forwarded to the Bureau and the Evaluation Committee for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria.* It is the State’s intent to award one Contract to the responsible Vendor {Bidder} whose Quote, conforming to the

² SinqTechnologies’ Quote was rejected for failing to submit the *Ownership Disclosure Form* or pricing information with its Quote. On June 25, 2019, SinqTechnologies submitted a protest to the Division. On June 27, 2019 the Division’s Hearing Unit issued a final agency decision upholding the Notice of Proposal Rejection.

Bid Solicitation is most advantageous to the State, price and other factors considered. *Ibid.* Bid Solicitation Section 1.1 *Purpose and Intent*.

The record of this procurement reveals that Sandata's Quote was reviewed, evaluated and scored by the Evaluation Committee and that the determination that the submitted Quote was non-responsive was made on April 6, 2020. The Evaluation Committee also deemed the Quote submitted by First Data Government Solutions to be non-responsive to the requirements of the Bid Solicitation because First Data took exception certain terms and condition of the Bid Solicitation and proposed alternative language.

On May 5, 2020, the Evaluation Committee completed its report which summarized the review and evaluation of the Quotes received in accordance with the criteria identified in Bid Solicitation Section 6.7 *Evaluation Criteria*. On May 7, 2020, consistent with the recommendation of the Evaluation Committee, the Bureau completed its Recommendation Report which recommended a Contract award to HHAeXchange. On May 14, 2020 the Bureau issued the NOI advising that it was the Division's intent to award a Contract to HHAeXchange.³

With respect to the Quote submitted by Sandata, the Evaluation Committee Report and the Recommendation Report both state, "Sandata was deemed non-responsive because [it] included language that the Bureau determined to be material deviations from the terms and requirements of the Bid Solicitation." *See* Evaluation Committee Report p. 5; Recommendation Report p, 2. After the issuance of the NOI, Sandata made a document and information request to the Bureau. In response to the documents Sandata received, it raised additional questions to the Bureau on May 18, 2020. On May 21, 2020, the Bureau responded to Sandata's questions.

On June 8, 2020, Sandata submitted a protest to the Division's Hearing Unit. By way of summary, in the protest Sandata alleges that (1) the pricing evaluation model utilized by the Bureau to review the Vendors {Bidders} Quote pricing was a departure from the pricing evaluation identified in the Bid Solicitation and resulted in an improper evaluation of the submitted Quote pricing; and, (2) the Bureau erroneously rejected Sandata's Quote as non-responsive, while ignoring the material deviations contained in other Quotes.

Additionally, Sandata requests the opportunity for an in-person presentation as permitted by N.J.A.C. 17:12-3.3(b)(1)(iii). With respect to Sandata's request for an in-person presentation to challenge the intended Contract award, 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). I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the Evaluation Committee Report, the Bureau's Recommendation Report, the relevant statutes, regulations, case law, and the protest submitted by Sandata. The issues raised in Sandata's protest were sufficiently clear such that a review of the record of this

³ On May 21, 2020, Sandata requested a five day extension of time to file a protest. In support of the request, Sandata noted that there was a delay in it receiving the voluminous records comprising the record of this matter. The Division acknowledged that because of constraints while working from home, there was a short delay in responding to Sandata's several requests for documents and information and therefore, a short extension to the protest period was appropriate. However, in reviewing Sandata's request, it became apparent that the Bureau had inadvertently not sent the Notice of Intent to Award to SinqTechnologies. The Division's governing regulations mandate that Notice of Intent to Award be issued to all participating bidders. N.J.A.C. 17:12-2.7(h). Accordingly, the Bureau was required to issue an NOI to SinqTechnologies and extended the protest period through June 8, 2020.

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 Sandata on the written record, as such an in-person hearing is not warranted. I set forth herein the Division's Final Agency Decision.

DISCUSSION

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). Based upon my review of the record of this procurement, I find that the pricing evaluation model employed by the Bureau was a fair comparison of all Quotes received and was consistent with the methodology identified in the Bid Solicitation. Additionally, I concur with the Bureau's determination that the Quote submitted by Sandata was non-responsive to the requirements of the Bid Solicitation.

A. The Pricing Evaluation Model Utilized by the Bureau Consistently Compared the Quote Pricing

Sandata alleges that pricing evaluation utilized by the Bureau incorrectly compared the Quote pricing submitted by the Vendors, noting that it was not a fair comparison of Quote pricing because the consumption model utilized "disproportionately understate[d] one element of each vendor's proposal." See Sandata protest, p. 8. More specifically, Sandata alleges:

Vendors price their proposals in different ways, with the fixed versus variable costs changing from proposal to proposal, but if the proposals are to be evaluated over time, each element must be evaluated using the same time value or the impact will be to disproportionately state the value of the three pricing elements of the proposal. Here, the State's model used the full value of the one-time implementation fee, the total five year cost of the monthly hosting fee and a purported five year value of the transaction fee based on slightly less than one and one-half months' worth of transactions.

[*Ibid.*]

Sandata contends that the Bid Solicitation sought pricing:

Premised on a tiered pricing model and then evaluated those quotations on an entirely different basis using a total volume number. This evaluation model also did not utilize the appropriate volume figures in proportion to the other price components. The result of this flawed methodology is a distortion of the actual cost and bidder ranking, and a skewing of the analysis to one component of the pricing matrix with the clear and fiscally

imprudent result of directing an award to a bidder whose proposal does not nearly reflect the best value to the State.

[Sandata protest, pgs 2-3.]

With respect to the submission of Quote pricing, the Bid Solicitation instructed Vendors {Bidders} as follows:

4.4.5.2 STATE-SUPPLIED PRICE SHEET INSTRUCTIONS

The Vendor {Bidder} must bid on all line items. Pricing shall be proposed as follows:

1. An implementation cost must be quoted for price line 00001.
2. A monthly hosting fee must be given for price line 00002 for each year of the 5 year term of this Blanket P.O.
3. Tiered pricing must be provided for transaction fees for price lines 0003 – 00013 for each year of the 5 year term of this Blanket P.O.

The Bureau's responses to questions posed by potential Vendors {Bidders} defined a "transaction" as "recording both the start and end times of a visit" and indicated that there were approximately 721,000 transactions per month with a total of 8,649,181 claims/transaction for fiscal year 2018 (July 1, 2017 – June 30, 2018).⁴

As to the evaluation of the Quote pricing, Bid Solicitation Section 6.7 *Evaluation Criteria* stated in pertinent part as follows:

6.7 EVALUATION CRITERIA

The following evaluation criteria categories, not necessarily listed in order of significance, will be used to evaluate Quotes received in response to this Bid Solicitation. The evaluation criteria categories may be used to develop more detailed evaluation criteria to be used in the evaluation process.

....

6.7.2 VENDOR'S {BIDDER'S} STATE-SUPPLIED PRICE SHEET

The Bureau will utilize a weighted consumption/market basket model to evaluate pricing. The pricing model will be date-stamped and entered into the record before Quote opening.

[*Emphasis added.*]

In order to evaluate the pricing details submitted by the Vendors {Bidders}, as required by Bid Solicitation Section 6.7.2 and N.J.A.C. 17:12-2.7(b), on December 18, 2019, the Bureau time and date-stamped the evaluation criteria. That evaluation criteria, shown in the screen shot below, identified the

⁴ See Bid Amendment #5 dated May 24, 2019, Question and Answer #s: 3, 21, 40, 115, 140 and 141.

specific consumption model to be used in evaluating the Quote pricing submitted by the Vendors {Bidders}.⁵

Bid Solicitation Section - Price Sheet/Schedule																
Refer to Bid Solicitation Section 3.0 (Scope of Work) for task requirements and deliverables																
19DPP00343 - 13099 Electronic Visit Verification Department of Human Services - DHS																
Vendor (Bidder) Name:										Date:						
Line #	Description	Unit	Weight	Price Year												
7	00001 Implementation Costs Year 1	EACH	1	\$ 500,000.00												
11	00002 Monthly Hosting Fee including Customer Service	Monthly		Year 1	Year 2	Year 3	Year 4	Year 5								
				\$ 4,000.00	\$ 5,100.00	\$ 4,200.00	\$ 4,300.00	\$ 4,400.00								
		Subtotal	1	\$252,000.00												
14	Price Per Transaction Fee	Unit		Price Year 1	Price Year 2	Price Year 3	Price Year 4	Price Year 5	Sum of Prices	Transactions	Value	Weight for line	Subtotal			
15	00003 1 - 100,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	50,000.00	\$ 250,000.00	0%	\$ -			
16	00004 100,001 - 200,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	150,000.00	\$ 750,000.00	0%	\$ -			
17	00005 200,001 - 300,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	250,000.00	\$ 1,250,000.00	0%	\$ -			
18	00006 300,001 - 400,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	350,000.00	\$ 1,750,000.00	0%	\$ -			
19	00007 400,001 - 500,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	450,000.00	\$ 2,250,000.00	0%	\$ -			
20	00008 500,001 - 600,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	550,000.00	\$ 2,750,000.00	0%	\$ -			
21	00009 600,001 - 700,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	650,000.00	\$ 3,250,000.00	0%	\$ -			
22	00010 700,001 - 800,000 Transactions	EACH	0%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	750,000.00	\$ 3,750,000.00	0%	\$ -			
23	00011 800,001 - 900,000 Transactions	EACH	10%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	850,000.00	\$ 4,250,000.00	10%	\$ 425,000.00			
24	00012 900,001 - 1,000,000 Transactions	EACH	10%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	950,000.00	\$ 4,750,000.00	10%	\$ 475,000.00			
25	00013 1,000,001 + Transactions	EACH	80%	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 1.00	\$ 5.00	1,100,000.00	\$ 5,500,000.00	80%	\$ 4,400,000.00			
26			100%	Subtotal					\$ 5,300,000.00							
27				Grand Total					\$ 6,052,000.00							

Consistent with that model, the Evaluation Committee Report noted that:

The consumption model calculated and evaluated Quotes based on adding the total costs to be incurred throughout the lifetime of the Blanket P.O. for each Vendor {Bidder}. This was done by adding costs for Line 1 (Implementation) with Line 2 (Monthly Hosting, multiplied by twelve) as well as three of the Line Items between Line 3 and Line 13 to represent cost for transactions run through the EVVMS system. For evaluation purposes in the Consumption Model Price Sheet, Line 13 was used to represent 80% of the transaction volume while Line 12 and Line 11 were each used to represent 10% of the transaction volume.

[Evaluation Committee Report, p. 27.]

The pricing evaluation used considered the year one implementation costs (price line 1), the total five-year monthly hosting fee (sum of price line 2 x 12 months) and the price per transaction, which was based the anticipated volume of transactions (price lines 11, 12 and 13). With respect to the price per transaction, price line 13, which represented a transaction volume of over 1,000,001 transactions annually, was afforded the highest weight, 80% of the transactional costs, as DHS' historical transaction volume indicated that billing would mostly likely occur at that rate. Price lines 11 and 12 were afforded a lower respective weight, 10% each in the consumption model as billing was likely to occur based upon these transaction volumes only during the transition from the current system of billing to the new EVVS system.

First, all Vendors {Bidders} were on notice that the Bureau would use a consumption model to evaluate Quote pricing. See Bid Solicitation Section 6.7.2. Second, all Vendors {Bidders} had the information available regarding the estimated monthly and annual transactions. See Bid Amendment #5. While Sandata may disagree with the evaluation model utilized by the Bureau, that fact does not render the model incorrect as argued. The purpose of the consumption model or market basket is to provide a uniform way to estimate the costs of a Contract for evaluation purposes, not to predict the actual costs of the Contract over time. As with any pricing evaluation using a consumption model or market basket, the pricing submitted is vulnerable to manipulation based upon the methodology selected. To avoid any potential for manipulation post pricing submission, as required by the Division's governing regulations, the pricing evaluation methodology was created prior to the Quote opening deadline to ensure that all pricing submitted would be evaluated based upon the identical, pre-defined criteria.

⁵ Subtotal = SUM(P:15-P25); Grand Total = G26+E12+E8

I note that, even if a different evaluation methodology had been used, the process employed ensures that there can be no argument that the methodology was employed after bid submission to manipulate the data and skew the respective position of the Vendors {Bidders}. Further, all Vendors {Bidders} had the same information upon which to create their Quote pricing, and all submitted Quote pricing was evaluated based upon the same standards. Contrary to Sandata's belief, the fact that the consumption model may have underestimated the actual Contract costs provides no basis to amend the methodology or cancel and re-procure the subject Contract as proposed. Sandata Protest p. 32. *See In re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 561 (App. Div. 2018) (stating "Express Scripts' argument that the State may have underestimated the costs the State will pay for PBM services based on flaws in its trend assumptions requires substituting its judgment for the Division's and provides no basis for a challenge to the award."). *See also Commercial Cleaning Corp. v. Sullivan*, 47 N.J. 539, 549 (1966) (stating "courts should not and cannot substitute their discretion for that of the Director"). The process employed here was consistent with New Jersey's statutory procurement scheme "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." *Barrick*, 218 N.J. at 258.

Based on my review of the record of this procurement, there was no error in the evaluation methodology employed, which would require that this Bid Solicitation be cancelled and re-bid.

B. The Bureau Properly Deemed Sandata's Quote as Non-responsive to the Requirements of the Bid Solicitation

Sandata states that its submitted Quote fully complied with the requirements of the Bid Solicitation and that the Bureau improperly deemed its Quote non-responsive. Further, Sandata alleges the Bureau accepted the Quotes of other Vendors {Bidders} whose submitted Quotes contained similar language as that contained in Sandata's Quote, and yet those other Vendors {Bidders} Quotes were accepted as responsive.

With respect to the Quote submitted by Sandata, the Evaluation Committee Report and the Recommendation Report both state, "Sandata was deemed non-responsive because [it] included language that the Bureau determined to be material deviations from the terms and requirements of the Bid Solicitation." *See* Evaluation Committee Report p. 5; Recommendation Report p. 2. After the issuance of the NOI, Sandata made a document and information request to the Bureau. Of note here, on May 18, 2020, Sandata raised the following questions to the Bureau:

1. On RR Page 2 - "Sandata was deemed non-responsive because they included language that the Bureau determined to be material deviations from the terms and requirements of the Bid Solicitation."
 - a. Can you provide (or direct us to) the specific language within our proposal that was deemed non-responsive by the Bureau?
 - b. On what date was the determination was made that Sandata's response was non-responsive?
2. On RR Pages 2-3 - Each of the Six voting Committee members could assign a maximum weighted score of 1,000 technical points to the Vendor's Quote. Per Amendment 5, Question 155 (copied below for reference), what were the weights and amount of points for the technical scoring and pricing scoring?
 - a. Amendment 5, Question 155: DMAHS mentions in the evaluation section that each area will be scored and then multiplied by a weight. Can the state provide bidders with the weights and the

- amount of points given to each section for use while developing proposals?
- b. No, this information is confidential until Notice of Intent to Award is issued.
3. RR Page 12 - Pricing Analysis “the Committee requested BAFO⁶ responses from the nine (9) responsive Vendors.
 - a. Was Sandata one of the responsive vendors as we received and responded to the BAFO request in August 2019?
 4. RR Page 12 - Price Proposal Evaluation Methodology
 - a. Can you clarify the exact pricing calculation, including the transaction volumes used?
 - b. Is the state using only Year 1 costs or all five years?
 5. RR Page 13 - The Vendor with the most points after HHAeX was Sandata, with 4,600 points.
 - a. Can you please provide Sandata’s detailed scoring sheets as aligned with the format in technical score table at the top of page 3 of the RR.

[Sandata, May 18, 2020, email from J. Richardson]

On May 21, 2020, the Bureau responded to Sandata’s questions. By way of summary, the Bureau concluded that Sandata’s Quote was non-responsive to the requirements of the Bid Solicitation because on its submitted price sheet Sandata indicated that there would be additional cost if the number of providers exceeded 900. Additionally, the Bureau concluded that Sandata’s proposed implementation period did not conform to the requirements of the Bid Solicitation.

1. Sandata’s pricing notes rendered the Quote non-responsive.

Sandata’s submitted Quote price sheet and BAFO price sheet included the following notes:

Sandata Pricing Notes	
Implementation	
Implementation Costs Year 1 include all system set up and configuration activities for PCS and Home Health Services, data exchange as described in the proposal, webinar and learning management system to support training.	
Fees assume no more than 900 Providers will require a Sandata EVV system with the Sandata Order Manager module. Should actual counts exceed 900 providers, additional fees will apply.	
Fees assumes no more than 6 payers (DHS/DMMA, 5 MCOS) will require Sandata EVV Jurisdictional View and Sandata Order Manager modules. Should the actual number of MCOS change, additional fees will apply.	
Fees assume five Sandata Business Intelligence User Licenses for DHS. Additional BI Licenses are available for an additional fee.	
Per DHS response to Question Fees assume four (4) months of implementation resources (Award in September, expected launch of January 1, 2020). Sandata will use the change order process if the implementation extends beyond the four month period.	
Monthly Hosting Fee	
Monthly Hosting Fee includes standard software updates, Order Manager usage, and Customer Service as outlined in the proposal.	
Fees assume no more than 1% of EVV members will need Fixed Visit Devices (FVVs) for visit verification; if additional FVVs are required, additional fees will apply.	
Transaction Fee	
Per DHS response to Question 4.4.5.2, a transaction is defined as recording both the start and end times of a visit, and will apply to transactions captured in the Sandata EVV and Sandata Aggregator systems.	

⁶ “Best and Final Offer or BAFO - Pricing timely submitted by a Vendor {Bidder} upon invitation by the Bureau after Quote opening, with or without prior discussion or negotiation.” See Bid Solicitation Section 2.2.1 *Standard Definitions*

Prior to the Evaluation Committee completing its report, the Bureau concluded that the multiple notes set forth on Sandata’s submitted price sheet rendered the Quote non-responsive because they made the prices provided other than firm fixed prices. In response to Sandata’s request, the Bureau stated:

Please find attached the Sandata T3099 initial price sheet and BAFO Price Sheet submitted by Sandata. These spreadsheets contain language that the Division determined to be a material deviation from the Bid Solicitation because *Sandata included numerous additional terms and conditions on its price sheet under the heading “Sandata Pricing Notes”.* Specifically, *Sandata stated that its pricing was based on 900 providers, and indicated that if the number of providers exceeds 900, “additional fees will apply.”* This contradicts the Bid Solicitation, as amended by Amendment 5, which states, in response to questions 3, 9, 17, 31, 41, 51, 100, 122, and 123, that there are “approximately 900 providers.” Sandata specifically indicated it would charge more if the number of providers exceeded 900. This response unfairly limits the number of providers to exactly 900, which is a material deviation from the Amended Bid Solicitation. *The deviation specifically implicates pricing, and results in variable, non-reliable pricing in response to the State’s needs. The Bid Solicitation calls for “firm fixed” pricing, so Sandata’s Quote was deemed non-responsive.*

[Bureau’s May 21, 2020 letter, *emphasis added.*]

In response to questions posed during the electronic Question and Answer Period, the Bureau advised all potential Vendors {Bidders} there were approximately 900 Health Care providers. Specifically,

#	Bid Solicitation Section Reference	Question (Bolded) and Answer
3	General	Please provide the following data for the EVVMS program: List of EVV services, Number and name of MCO’s, Total number of Provider Agencies, Total EVV Members, Average Visits per member per month (if available)⁷

⁷ Bid Solicitation Section 2.3 *Blanket P.O. – Specific Definitions/Acronyms* defines the following:
Managed Care Organization (MCO) – An entity that has, or is seeking to qualify for, a comprehensive risk contract that is:

- A. A Federally Qualified Health Maintenance Organization (HMO) that meets the advance directive requirements of 42 CFR 489 subpart I; or
- B. Any public or private entity that meets the advance directive requirements and is determined to also meet the following conditions:
 - 1. Makes the services it provides to its Medicaid beneficiaries as accessible (in terms of timeliness, amount, duration, and scope) as those services are to other Medicaid recipients within the area served by the entity; and
 - 2. Meets the solvency standards of 42 CFR 438.116.

Direct Care Provider (Home Health Aid) – Is an individual employed by a health care provider that administers health care services to beneficiaries.

Health Care Providers – A business entity or a licensed individual that provides health care services to individuals, families or communities.

		<p>The State of New Jersey contracts with five (5) MCO's as follows:</p> <ul style="list-style-type: none"> • Aetna Better Health • Amerigroup • Horizon NJ Health • United Healthcare • Wellcare <p><i>There are approximately 900 provider agencies, 50,000 EVV beneficiaries and 721,000 visits per month.</i></p>
90	3.6	<p>On pages 19-20, Section 3.6, how many health care provider agencies will be participating in the EVVMS?</p> <p>Refer to question #3.</p>

[*Emphasis added.*]

Nowhere in the Bid Solicitation or in the Bid Amendment #5, were potential Vendors {Bidders} made to believe that pricing was based on the number of providers. Rather, as Sandata acknowledges in its protest, that the Bid Solicitation and the price sheet required that Vendors {Bidders} submit tiered pricing based upon transaction volume.

Sandata's attempt to reserve for itself the ability to amend its pricing is contrary to the Appellate Division's decision in *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527 (App. Div. 2018). In *In Re Request for Proposals #17DPP00144*, the subject Bid Solicitation stated:

During the term of the Blanket P.O. {Contract}, the State shall have the right to make any change to any Plan, including, without limitation, changes in Deductibles, Copayments, Plan maximums, and similar variables.

In the event of such a change, the parties shall meet to discuss the change and discuss the needed Change Orders {Contract Amendments} to the Blanket P.O. {Contract}. For any such Change Order {Contract Amendment}, there shall be no change in the Administrative Fee when the Vendor {Contractor} need only make changes in its Claim administration and other related systems, such as changes in Deductible, Copayment, Plan maximum or similar variable. Similarly, there shall be no change in the Administrative Fee for a change in Plan that requires a change to the open enrollment period, a special open or limited enrollment period, additional communications with Network Providers or reissuance of an Identification Card to some or all Members.

If more substantial changes are made to a Plan or Plans, such that the Vendor {Contractor} must make more substantial changes to its systems, or undertake more work than set forth in the prior paragraph, the parties shall engage in negotiations for a change to the Administrative Fee for a period of 30 calendar days. If no agreement is reached at the conclusion of the negotiations period, the change in the Plan Design will be treated

as a change in law and addressed pursuant to section 5.5 of the Standard Terms and Conditions.

[*Id.* at 538.]

In *In Re Request for Proposals #17DPP00144*, the intended awarded submitted a Quote which included the following statement:

[Bidder] accepts all terms and conditions of this bid with the following additional language:

- Section 5.18 – Agree, as it applies to changes that impact administrative fees as outlined in this provision, provided that Vendor reserves the right to modify Financial Contracted Terms based on changes by the State in formulary or any carve out of services set forth in the Agreement, including but not limited to Specialty Pharmacy services.

[*Id.* at 548.]

There, in reviewing the submitted Quote statement, the Division concluded that the reservation of rights noted above did not result in a material deviation from the requirements of the Bid Solicitation. *Id.* at 551-53. The Division believed that the statement should not be afforded any weight as the matter had been addressed during the question and answer period and through the order of precedence contained within the Bid Solicitation which specified that the terms and conditions of the Bid Solicitation, as amended by Bid Amendment would prevail over the intended awardee submitted Quote. *Ibid.* The Appellate Division disagreed; the court stated:

it does not matter whether a bidder's deviation from a pricing term actually affected the bidding: “[o]mission of a cost item can be material even if it is unlikely that it could have affected the relative positions of the bidders, because it necessarily undermines the common standard of competition.”

[*Id.* at 568 (quoting *In the Matter of Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 601-602 (App. Div. 1995)*).]

Further, the Appellate Division held:

Optum’s reservation of the right to change its pricing in response to Plan Design changes both deprived the State of the assurance the Contract would be entered into and performed according to the specified requirements of Section 3.7.1A and Standard Term 5.4A, and adversely affected competitive bidding by allowing Optum to bid with a pricing privilege not provided to other bidders.

....

Optum’s additional language also provided it a clear competitive advantage over the other potential bidders by permitting it to offer price terms while reserving the right to change them in the event of anticipated

Plan Design changes to the Formulary or any reduction in the scope of work, including but not limited to Specialty Pharmacy services.

[*Id.* at 565-567.]

Sandata attempts to distinguish *In re Request for Proposals #17DPP00144* in its protest. Sandata protest, pgs. 23-25. Sandata argues its “pricing note is decidedly different than the pricing exception at issue in” *In re Request for Proposals #17DPP00144*. *Id.* at 24. Sandata asserts

[its] note, like HHA’s and Optum’s quotes in this process, simply confirms that it will avail itself of the change order process, charge as extra work, or request a legally appropriate equitable adjustment if the estimates upon which it bid prove wrong. Therefore, Sandata’s pricing notation does not place it in a different position than other bidders, or provide it with an advantage that all other bidders did not have. Its bid is fully conforming.

[*Id.* at 25.]

Contrary to Sandata’s statement in its protest, the notes contained on the submitted price sheet, do not indicate that Sandata would seek to avail itself of the change order process or that it would request a legally appropriate equitable adjustment if the estimates upon which it bid are proved wrong. Rather, similar to the intended awardee’s statement in *In re Request for Proposals #17DPP00144*, Sandata reserved for itself the ability to unilaterally increase the Contract pricing stating “Fees assume no more than 900 providers will require a Sandata EVV System with the Sandata Order Manager module. Should actual counts exceed 900 providers, additional fees will apply.” *Emphasis added.*

Further, with respect to the Quotes submitted by HHAeXchange and Optum, contrary to Sandata’s statement, neither Quote contains a similar reservation to increase unilaterally the Contract price based upon an increase in the number of providers. The Quote submitted by Optum contained the following statement “There are approximately 900 provider agencies, 50,000 EVV beneficiaries and 721,000 visits per month. A total of 8,649,181 claims (transactions) in FY18.” *See* Optum Quote – Volume 3 p. 2. Optum merely re-stated the Bureau’s answer to the Question #3 of Bid Amendment #5. A review of the Quote submitted by the intended awardee HHAeXchange did not reveal any similar statement either re-stating the approximate number of provider agencies or reserving the right to increase costs if there was a change in the number of provider agencies.

Additionally, it is unclear how Sandata would seek to amend the Contract price for provider agencies. As Sandata acknowledges in its protest, pricing was required based on the volume of transactions, not based on the number of provider agencies. Presumably, if the number of provider agencies increases the number of transactions will also increase, thereby increasing the payments to the Vendor {Contractor}. Alternatively, an increase in the number of provider agencies may not affect the total number of transactions if the number of people receiving PCS and HHCS remains the same.

Moreover, while not specifically addressed in the Bureau’s May 21, 2020 letter, I find that Sandata’s Quote could also have been deemed non-responsive for the following statements:

- Fees assume five Sandata Business Intelligence User Licenses for DHS. Additional BI Licenses are available for an additional fee.
- Fees assume no more than 1% of EVV members will need Fixed Visit Devices (FVVs) for visit verification; if additional FVVs are required, additional fees will apply.

The same reasoning discussed above would apply to these statements. Similar to the Appellate Division's holding in *In re Request for Proposals #17DPP00144*, Sandata reserved for itself the ability to increase unilaterally the Contract pricing.

Based upon the foregoing, I find no reason to disturb the Bureau's determination that Sandata's Quote was non-responsive to the requirements of the Bid Solicitation.

2. Sandata's implementation plan was responsive to the requirement of the Bid Solicitation

With respect to the Implementation Plan, Bid Solicitation Section 3.21 *Technology Project Plan* stated:

- A. The Vendor {Contractor} shall submit a draft technology project plan with its quote, detailing its approach and methodology to accomplishing the requirements outlined in section 4.4.3.3.3.A – 4.4.3.3.3.D. *The implementation process in section 4.4.3.3.3.C should last no longer than six (6) months. The plan should include assumptions, risks, procedures and a time line for implementing the system. See Section 4.4.3.3.3 for further information.*
- B. The Vendor {Contractor} shall submit a final plan within ten (10) business days after Blanket P.O. award. The plan shall be approved by the SCM and must be updated by the Vendor {Contractor} throughout the duration of this Blanket P.O.

[Emphasis added.]

With the Quote, Vendors {Bidders} were required to submit a draft Technology Project Plan which addressed the following items:

The Vendor {Bidder} shall provide its draft plan with its Quote to accomplish all work required by this Blanket P.O. The Project Plan should include:

....

- C. *The Implementation Plan: The Vendor {Bidder} should describe its plans for EVVMS roll-out including EVVMS Pilot Testing and full deployment; and*

....

The plan should demonstrate to the Evaluation Committee that the Vendor {Bidder} understands the scope of work required for a successful implementation of the EVVMS, its operations and maintenance and support. The Vendor {Contractor} shall submit a final plan within ten (10) business days after Blanket P.O. award. See Section 3.21 for further information.

[Bid Solicitation Section 4.4.3.3.3 Technology Project Plan, emphasis added.]

Further, as to the anticipated Contract award date, Bid Amendment #5 stated as follows:

#	Bid Solicitation Section Reference	Question (Bolded) and Answer
22	General	<p>What is the expected award date? What is the expected go-live date?</p> <p>The expected award date is approximately September 2019. Section 1.2 of the RFP specifies that EVVMS go-live dates are by January 1, 2020 for PCS, and EVVMS by January 1, 2023 for HHCS.</p>

The Bid Solicitation alerted the potential Vendors {Bidders} that CMS mandated that New Jersey begin utilizing an Electronic Visit Verification Management System for Personal Care Services by January 1, 2020. *See Bid Solicitation Section 1.2 Background.*⁸

With its Quote, Sandata submitted a draft Implementation Plan. *See Sandata Quote, p. 460 – 465.* In the draft Implementation Plan, Sandata stated in part the following:

1.0 Approvals

1.1 IMPLEMENTATION PLAN CHANGE PROCEDURES

This Implementation Plan is considered a living document maintained by the Sandata implementation project manager. All changes to this document will be reviewed and approved according to the document approval and change process, as defined in section 4.0. The Sandata implementation project manager will be responsible for updating the Implementation Plan accordingly.

1.2 IMPLEMENTATION PLAN ACCEPTANCE

The following representatives will be responsible for reviewing and accepting this Implementation Plan, and all subsequent revisions to it. The signatures for this document will be collected and tracked via the external signature tracking sheet associated with this document.

⁸ On December 19, 2019, after all Vendors {Bidders} submitted Quotes, CMS granted New Jersey an extension through January 1, 2021 to implement the Electronic Visit Verification Management System.

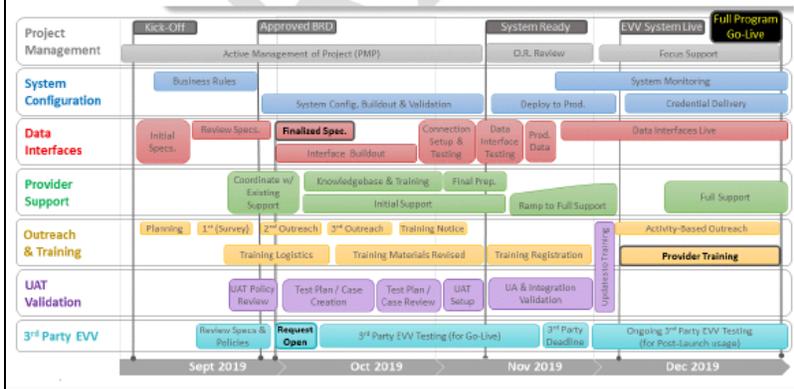
2.0 EVVMS Project Plan

The Implementation Plan provides detailed plans, processes and procedures for managing and controlling the lifecycle activities of the Electronic Visit Verification (“EVV”) implementation project for the New Jersey Division of Medical Assistance and Health Services (“DMAHS”), henceforth known as the DMAHS EVVMS project.

The anticipated project duration for this implementation is approximately six months from receipt of all properly executed contract documents from DMAHS. This project will be limited to the scope identified and defined as part of the overall project deliverables and is heavily dependent upon provision of adequate DMAHS resources as defined during the initial stages of the implementation.

The Implementation Plan also describes the processes and approaches for managing (i.e. planning, monitoring and controlling) the project. The information in this Implementation Plan provides the basis for communication and understanding among project team members and all other stakeholders, including resources from DMAHS, Sandata, and Sandata’s sub-contractors.

Please note that this Implementation Plan is a living document and will be updated regularly as the project progresses.



Additionally, with respect to the Contract implementation, on the Quote price sheet Sandata included the following statement “Per DHS response to Question Fees (sic) assume four (4) months of implementation resources (Award in September, expected launch of January 1, 2020). Sandata will use the change order process if the implementation extends beyond the four month period.”⁹

After reviewing Sandata’s Quote, the Bureau concluded that the draft Implementation Plan, along with the associated notes contained on the submitted price sheet, rendered Sandata’s Quote non-responsive to the requirements of the Bid Solicitation. In its May 21, 2020, letter the Bureau noted:

Sandata also specified a 4 month implementation period, and indicated that it will use the Change Order process to seek additional compensation if the implementation period exceeds 4 months. This assertion specifically contradicts Section 3.21 of the Bid Solicitation, which indicates that the Vendor {Bidder} shall submit a draft Technology Plan describing, among other items, an implementation plan and schedule which shall last “no more

⁹ A Change Order is defined as “An amendment, alteration or modification of the terms of a Blanket P.O. between the State and the Vendor(s) {Contractor(s)}. A Change Order is not effective until it is signed and approved in writing by the Director or Deputy Director, Division of Purchase and Property.” See Bid Solicitation Section 2.2.1 *Standard Definitions* and Bid Solicitation Section 5.4 *Change Order*

than 6 months.” The Bid Solicitation also specified that this draft plan would be subject to review and approval by the State Contract Manager following the Blanket P.O. award. By prematurely fixing the implementation period, Sandata has bypassed the collaborative process described in Section 3.21 and has eliminated the possibility of negotiation and approval by the Using Agency of an alternate implementation period.

I disagree with the Bureau’s conclusion.

The Bid Solicitation stated that the Implementation Plan should *not exceed* six months. The Bid Solicitation did not mandate that the plan continue for six months. *See* Bid Solicitation Section 3.21(A) *Technology Project Plan*. At the time that Vendors {Bidders} submitted Quotes on June 20, 2019, the anticipated Contract award date was September 2019 and more importantly, the CMS mandated implementation date was January 1, 2020. Sandata’s draft implementation plan spans the available timeframe from the anticipated award date in September through the mandatory implantation date of January 1, 2020 – four months. Sandata’s proposed implementation plan did not exceed six months, and in this respect conformed to the requirements of the Bid Solicitation. While Sandata did indicate, “[a]ll changes to this document will be reviewed and approved according to the document approval and change process, as defined in section 4.0,” nowhere did Sandata indicate that it would seek additional fees for amendments to the Implementation Plan.¹⁰ Unlike the reservation contained in the other Pricing Notes, on this point Sandata has not reserved for itself the ability to increase unilaterally the Contract pricing. Rather, similar to acknowledgements made by other Vendors {Bidders} Sandata has merely restated the Bureau’s response to Question 22 of Bid Amendment #5 and acknowledged the process for Contract amendments.

Based upon the foregoing, the Bureau should have deemed Sandata’s submitted draft Implementation Plan as responsive to this requirements of the Bid Solicitation.

C. Quotes Submitted By Other Vendors {Bidders}

Sandata contends that there was disparate treatment by the Evaluation Committee of the submitted Quotes. Sandata Protest, p. 27. In support of this argument, Sandata refers to the Quotes submitted by its competitors, Medisked, Ernst and Young and PCG, each of which Sandata believes should have been deemed non-responsive to the requirements of the Bid Solicitation, yet were accepted by the Bureau and the Evaluation Committee as compliant and therefore eligible for a Contract award.

To begin, none of these points, even if found meritorious would change the notice of intent to award the contract, as the Bureau issued the notice of intent to award the contract to HHAeXchange. Each, however, is briefly discussed for completeness sake.

1. Medisked

Sandata alleges Medisked’s Quote should have been deemed non-responsive because its project and technology implementation plans were “deficient.” Sandata Protest, p. 28. Sandata asserts “Medisked’s proposal does not demonstrate when and how it intends to complete project implementation milestones as mandated by the RFP” because the Quote states Medisked needed “[a]dditional discovery . . . to provide a schedule with detailed milestones.” *Ibid*. Sandata also argues “Medisked’s technology

¹⁰ Sandata’s Pricing Notes related to the implementation plan are no more offensive than those of its competitor Optum who stated “Additional State requirements, changes to CMS requirements, or changes made to implementation timelines are not included in our price proposal.” *See* Optum Quote, Volume 3, p. 3.

implementation plan is equally deficient for similarly reasons” including the inclusion of “a nine (9) month implementation plan for the project, instead of the six (6) month plan required by the RFP.” *Ibid.*

As to the submission of draft plans, Bid Solicitation Section 4.4.3.3 *Blanket P.O. Schedule and Plans* required the submission of several types of draft plans; however, the details listed in the Bid Solicitation for each draft plan was only requested information. See Bid Solicitation Section 2.2.1 *Standard Definitions* (“Shall – Denotes that which is a mandatory requirement” and “Should – Denotes that which is permissible or recommended, not mandatory.”). A review of Medisked’s submitted Quote reveals that Medisked provided a response in its submitted Quote for each of the required draft plans. The level of detail provided in those draft plans was reviewed and considered by the Evaluation Committee and affected Medisked’s ultimate technical score. Medisked’s average technical score was 530 points, the second lowest score out of all Quotes received. By contrast, the Quote submitted by the intended awardee, HHAeXchange received an average technical score of 858.¹¹

2. Ernst and Young

Sandata alleges that the Quote submitted by Ernst and Young “was materially defective due to its failure to bid price-per-transaction fees on its Price Sheet...and circumvented [the] price-line requirements.” Sandata Protest, p. 29-30. In support of its argument, Sandata relies upon Bid Solicitation Section 4.4.5.3 *State Supplied Price Sheet Instruction* which states:

A review of Ernst and Young’s price sheet reveals that for the Price Per Transaction Fee price lines, Ernst and Young proposed “No Charge.”

Bid Solicitation Section 4.4.5 - Price Sheet/Schedule							
Refer to Bid Solicitation Section 3.0 (Scope of Work) for task requirements and deliverables							
19DPP00343 - T3099 Electronic Visit Verification Department of Human Services - DHS							
Vendor (Bidder) Name: Ernst & Young LLP (EY US)			Date: June 20, 2019				
Line #	Description	Unit	Price Year 1	Price Year 2	Price Year 3	Price Year 4	Price Year 5
00001	Implementation Costs Year 1	EACH	\$ 818,228.00				
00002	Monthly Hosting Fee including Customer Service	Monthly	\$ 110,144.00	\$ 139,561.00	\$ 135,645.00	\$ 137,728.00	\$ 139,811.00
							The Hosting Fee including Customer Service also includes the required Microsoft Dynamics 365 License Fees
	Price Per Transaction Fee	Unit	Price Year 1	Price Year 2	Price Year 3	Price Year 4	Price Year 5
00003	1 - 100,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00004	100,001 - 200,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00005	200,001 - 300,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00006	300,001 - 400,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00007	400,001 - 500,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00008	500,001 - 600,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00009	600,001 - 700,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00010	700,001 - 800,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00011	800,001 - 900,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00012	900,001 - 1,000,000 Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge
00013	1,000,001 + Transactions	EACH	No Charge	No Charge	No Charge	No Charge	No Charge

Contrary to Sandata’s belief, Ernst and Young’s response was permitted by Bid Solicitation Section 4.4.5.3 *Use of “No Bid” Versus “No Charge” on the State Supplied Price Sheet* which stated:

If the Vendor {Bidder} is not submitting a price for an item on a price line, the Vendor {Bidder} must indicate “No Bid” on the State-Supplied Price Sheet accompanying this Bid Solicitation. *If the Vendor {Bidder} will supply an item on a price line free of charge, the Vendor {Bidder} must indicate “No Charge” on the State-Supplied Price Sheet accompanying*

¹¹ Notably, Sandata did not dispute the responsiveness of HHAeXchange’s Quote.

this Bid Solicitation. The use of any other identifier may result in the Vendor's {Bidder's} Quote being deemed non-responsive.

[*Emphasis added.*]

Ernst and Young's use of "No Charge" on its submitted price sheet was permitted by the terms of the Bid Solicitation.

Sandata maintains that Ernst and Young's Quote was an unbalanced bid and therefore should have been rejected by the Bureau noting that "[w]hile unbalanced or zero bids are not prohibited in public bidding, they can be conducive to fraud and to leaving the public entity exposed to exorbitant pricing over the life of a contract." Sandata Protest p. 31 (citing, *Armaniaco v. Borough of Cresskill*, 62 N.J. Super. 476, 480-81 (App. Div. 1960)).

The New Jersey Courts have defined an 'unbalanced bid' as one where a Vendor {Bidder} submits a nominal price for some work and enhanced prices for other work. *Turner Construction Company v. New Jersey Transit Corporation*, 296 N.J. Super. 530, 537 (App. Div. 1997). However, the Courts have also concluded that "reasonable unbalancing is perfectly proper." *Id.* at 538 (citing *Riverland Construction Co. v. Lombardo Contracting Co.*, 154 N.J. Super. 42 (App. Div. 1977)). "[T]he submission of an unbalanced bid standing alone does not invalidate the bid." *Turner*, 296 N.J. Super. at 538 (citing *Frank Stomato v. City of New Brunswick*, 20 N.J. Super. 340, 344 (App. Div. 1952)). In *Turner*, the court held

The submission of a zero bid is similar to that of a nominal penny bid. A nominal bid is not inherently evil or destructive of fair and competitive bidding. Every contractor may apply his own business judgment in the preparation of a public bid, and his willingness to perform one of the items for a nominal amount is but his judgmental decision in an effort to underbid his competitors.

As we stated in *Riverland*

[i]n the absence of a factual showing that such a decision subverts the principles of fair and competitive bidding there is no reason to invalidate the resulting bid. The pejorative connotation of the phrase "unbalanced bid" comes into play only when the nominal bid on one item is unbalanced because of an excessive bid on other items, or because of other elements pointing to fraud, collusion, unfair restriction of competition or other substantial irregularity. Reasonable unbalancing is perfectly proper.

[*Turner*, 296 N.J. Super. at 538 (*internal quotes and citations omitted*).]

In evaluating Quotes received, the Division is not evaluating pricing in terms of a Vendor's {Bidder's} profitability. Rather, the Division evaluates Quotes to ensure that the Contract is awarded to that responsible Vendor {Bidder} whose Quote, conforming to the Bid Solicitation, is most advantageous to the State, price and other factors considered. See Bid Solicitation Section 1.1 *Purpose and Intent*. Ernst and Young is free to exercise its business judgment regarding the price it will charge the State for any portion or price line item identified on the price sheet. As "reasonable unbalancing is perfectly proper," and there is no evidence that Ernst and Young has engaged in fraud, collusion, unfair restriction of competition, or other substantial irregularity – necessary for a finding that a Vendor {Bidder} submitted an unbalanced bid, Bureau deemed Ernst and Young's Quote pricing responsive to the requirements of the Bid

Solicitation as the Bid Solicitation permitted a submission of “No Charge.” See Bid Solicitation Section 4.4.5.3 *Use of “No Bid” Versus “No Charge” on the State Supplied Price Sheet*. I concur with that finding.¹²

3. Public Consulting Group Inc.

Finally, I note that Sandata disputes the price sheet submitted by PCG noting that the pricing is not based on the tiered pricing structure required by Bid Solicitation Section 4.4.5.2(3). In support of its position Sandata states:

PCG, which apparently priced their quote using volume and not tiered pricing as required in the Solicitation, stating on their price sheet, under Assumptions, as follows: “Line 00003 through Line 000013 – The transaction fees in the table are fees per transaction. In order to calculate the monthly price, one would take the monthly transactional volume and multiple it by the per transaction price for the applicable year and transaction range. For example, in Year 2 if the monthly transactional volume equals 721,000 transactions at \$0.16 per transaction, the monthly price would be \$115, 360 (721,000 x \$0.16 = \$115,360).” Thus, PCG’s price proposal indicates that it is not based on tiered pricing as required in the solicitation. PCG’s bid should have been rejected as nonresponsive on that basis.

[See Sandata Protest, pgs 13-14, fn. 5.]

A review of the PCG’s price sheet and the note confirms that the submitted price sheet conformed to the requirements of the Bid Solicitation. The price sheet indicated that the unit price bid for price lines 3 to 13 was “each” or per transaction. PCG’s note explains what the Bureau intended, and what the Vendors {Bidder} understood, that the price submitted on the price line would be multiplied by the number of transactions performed. Nothing in PCG’s note indicates that the price submitted was not a firm fixed price as required. Therefore, the Bureau concluded that the submitted price sheet conformed to the requirements of the Bid Solicitation. I find no reason to disturb that conclusion.

CONCLUSION

Based upon the findings set forth above, I find no reason to disturb the Bureau’s recommendation that a Contract award be made to HHAeXchange. I note that even if I were to accept Sandata’s argument that they consumption model was flawed, a change in the consumption model, if it could be implemented, would not cure those issues in Sandata’s Quote that rendered Sandata non-responsive. Additionally, I note that while I have concluded that Sandata’s Implementation Plan was responsive to the requirements of the Bid Solicitation Section 4.4.3.3.3 *Technology Project Plan*, Sandata’s Quote as a whole was non-responsive to the requirements of the Bid Solicitation due to the pricing note contained on its submitted price sheet.

Accordingly, I sustain the May 14, 2020 Notice of Intent to Award. This is my final agency decision with respect to the protest submitted by Sandata.

¹² As noted above, because of the potential wide variation among Quote pricing, the Bureau employed a consumption model to evaluate the Quote pricing submitted.

Thank you for your company's interest in doing business with the State of New Jersey. I encourage you to log into [NJSTART](#) to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: L. Leonardi
C. Iverson
A. Giaquinto
S. Anderton, Esq.
D. Disler, Esq.