

EXECUTIVE SUMMARY

I/M/O Bid Solicitation #20DPP00553 - T3121 Software Reseller Services
SHI International Corp. Protest of Notice of Intent to Award

Since 2010, the State of New Jersey has utilized a reseller model for purchasing software and related services through a cooperative contract awarded by the Commonwealth of Massachusetts. That cooperative contract expires on June 30, 2021 with no available extensions. To ensure the State Using Agencies and Cooperative Purchasing Program Participants have continued access and the ability to purchase software and related services to meet their operational and statutory mandates, on July 13, 2020, the Department of the Treasury - Division of Purchase and Property issued a Bid Solicitation for the procurement of software and related services. The Division received fifteen Quotes in response to the Bid Solicitation. After completing its evaluation of the submitted Quotes, the Division advised all Bidders of its intent to make contract awards to CDW-Government, LLC; Dell Marketing L.P.; Insight Public Sector, Inc.; Softchoice Corporation; and, York Telecom Corporation, all of whom submitted a Quote that was responsive to all of the terms and conditions of the Bid Solicitation. The Quotes submitted by the remaining ten Bidders were deemed non-responsive to the requirements of the Bid Solicitation rendering each of them ineligible for a contract award. SHI International, Corp. filed a protest challenging the Division's intent to award contracts to CDW-G, Dell, Insight, Softchoice and YorkTel and further protested the Division's determination that SHI's Quote was non-responsive.

The Bureau correctly determined that the Quote submitted by SHI was non-responsive to the requirements of the Bid Solicitation because SHI took exceptions to the mandatory requirements of the Bid Solicitation contrary to governing law. In the protest, SHI claimed that its proposed modifications to the terms and conditions of the Bid Solicitation were simply requests for review; however, many of the proposed modifications included a statement that the modified language was "required" by SHI if it was awarded a contract. Reviewing SHI's proposed terms under the factors set forth by the Court in *Twp. of River Vale v. Longo Constr. Co.*, 127 N.J. Super. 207, 222 (Law Div. 1974), the Director agreed that SHI's Quote contained material deviations from the requirements of the Bid Solicitation. SHI reserved for itself, contrary to the requirements of the Bid Solicitation, the right to mandate the terms and conditions of the Bid Solicitation for its own benefit contrary to the Court's holding in *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 566 (App. Div. 2018).

SHI further alleged that the Quotes submitted by CDW-G, Dell, and Insight should have been deemed non-responsive for failing to include an authorization letter for all of the Software Publishers listed in the Bid Solicitation. Unfortunately, SHI misread the language of the Bid Solicitation. The Bid Solicitation stated that Contractors should have an agreement with the listed Software Publishers; it did not require Bidders to submit an authorization letter for all of the Software Publishers listed in the Bid Solicitation. Rather, Bidders were required to submit pricing for each of the identified Software Publishers. CDW-G, Dell, and Insight all submitted pricing which complied with the requirement of the Bid Solicitation.

SHI next claimed that the ownership statement submitted by CDW-G did not comply with the requirements of the N.J.S.A. 52:25-24.2. CDW-G submitted a statement of ownership on the State provided *Ownership Disclosure Form* and within its narrative Quote. The State recognized there were inconsistencies; therefore, the Bureau sought clarification with CDW-G, as permitted by *In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract*, Bid No. 95-X-20175, 279 N.J. Super. 566 (App. Div. 1995). CDW-G confirmed that the statement of ownership set forth in the narrative Quote correctly reflected the ownership of the bidding entity as required by N.J.S.A. 52:25-24.2.

Finally, SHI alleged that the Quote submitted by YorkTel contained a material deviation from the requirements of the Bid Solicitation because YorkTel did not indicate that it could provide real time reporting. While real time reporting is a requirement for the awarded Contractors, there was no timeframe in the Bid Solicitation within which a Contractor must be able to provide the real time reporting, nor was it a Bidder requirement for submitting a Quote. In its Quote YorkTel set forth a plan for providing real time reporting within 12 months which assured the Bureau that if awarded a contract, YorkTel would be able to comply with the requirements of the Bid Solicitation. As such, there was not a material deviation.



State of New Jersey

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Re: I/M/O Bid Solicitation #20DPP00553 SHI International Corp.
Protest of Notice of Intent to Award
T3121 Software Reseller Services

Dear Ms. Cannon:

This final agency decision is in response to your letter of April 19, 2021, on behalf of SHI International, Corp. (SHI) that was received by the Division of Purchase and Property's (Division) Hearing Unit. In that letter, SHI protests the April 5, 2021, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #20DPP00553 – T3121 Software Reseller Services (Bid Solicitation).

BACKGROUND

Since 2010, the State of New Jersey (State) has utilized a reseller model for purchasing software. In 2015, the State joined a cooperative agreement led by the Commonwealth of Massachusetts. That cooperative agreement expires on June 30, 2021 with no remaining extensions. In lieu of joining the newly awarded Massachusetts cooperative agreement, the State opted to issue its own Bid Solicitation for software reseller services as doing so would be most advantageous to the State.¹ Bid Solicitation § 1.2 *Background*.

On July 13, 2020, the Bureau issued the Bid Solicitation on behalf of the New Jersey Office of Information Technology. Bid Solicitation § 1.1 *Purpose and Intent*. The awarded Contracts will be available for use by the State's Cooperative Purchasing Program Participants.² *Ibid*. The purpose of the Bid Solicitation was to solicit Quotes for software resellers to provide Commercial Off the Shelf Software ("COTS"), including Software as a Service ("SaaS"), Software-Related Services (training, pre-sales assistance, documentation, installation, configuration and Limited Customization), maintenance, support, volume license agreement (VLA) administration, and software packaged with hardware as an appliance.

¹ In reviewing the new Massachusetts cooperative contract, the Division and the New Jersey Office of Information Technology determined that the contract did meet the State's need for software and related services and did not conform with New Jersey's procurement law.

² N.J.A.C. 17:12-1.3.

Ibid. The intent of this Bid Solicitation is to award up to six Master Blanket Purchase Orders (Blanket P.O.s or Contracts) to those responsible Vendors {Bidders} (Bidders) whose Quotes, conforming to the Bid Solicitation are most advantageous to the State, price and other factors considered. *Ibid.* The Bid Solicitation was designated as a partial Small Business Enterprise (SBE) and it was the State's intent to award up to two (2) of the six (6) Contracts to qualifying SBE Bidders. However, if no responsive Quotes offering reasonable pricing from qualifying SBEs was received, the State could award those Contracts reserved for SBEs to any responsive Bidder. *Ibid.*

The Bid Solicitation was structured such that the State's relationship with the Vendors {Contractors} (Contractors) awarded Contracts is limited to the pass through of pricing for a Software Publisher's in-scope software and services and the payment thereon for in-scope goods and services. Bid Solicitation § 1.2 *Background*. The State acknowledges that Contractors will be resellers of a Software Publisher's software and/or services, and that the Software Publisher will be solely responsible for providing the software and/or services and the performance of the software and the services, including warranty and related indemnities. Accordingly, the State expects competitive reseller discounts reflecting the Contractor limited role of quoting and pay-agent services described in this Bid Solicitation. *Ibid.* The State's Method of Operation, as may be amended from time to time, will detail a mini-bid procedure for Using Agencies to follow when soliciting responses from Contractors for in-scope software and services. Conceptually, the mini-bid procedure requires the Using Agency to send all Contractors an email detailing the software and/or services sought and requesting a price for the software and/or services sought. *Ibid.* All Contractors will respond to the mini-bid request with either a price for the software and/or services sought or a "no bid" response. *Ibid.* Each mini-bid will be awarded to the Contractor offering the lowest price to the Using Agency for the requested software and/or services, notwithstanding whether the Contractor is a small business or not. *Ibid.*

In accordance with Bid Solicitation Section 1.3.5 *Optional Pre-Quote Conference*, a pre-Quote conference was held on July 20, 2020. The purpose of the Optional Pre-Quote Conference was to address procedural questions regarding the Bid Solicitation and Bidder Quote Submission Requirements. No substantive questions regarding the Bid Solicitation were accepted or answered during the pre-Quote conference. *Ibid.* Rather, potential Bidders were advised that all questions and/or proposed modifications to the Bid Solicitation and State Standard Terms and Conditions were to be submitted through the **NJSTART** eProcurement System by August 3, 2020 for the Bureau's review. Bid Solicitation 1.3.1 *Electronic Questions and Answer Period*. The Bureau received 114 questions. On October 7, 2021, the Bureau issued Bid Amendment #2 that responded to all of the questions received.

On December 8, 2020, the Division's Proposal Review Unit opened fifteen (15) Quotes, which were received by the submission deadline of 2:00 pm eastern time.³ After conducting an initial review of the Quotes received for the compliance with mandatory Quote submission requirements as set forth in N.J.A.C. 17:12-2.2, the Division's Proposal Review Unit forwarded the Quotes to the Bureau for further review and evaluation.

The Bureau conducted an initial review of the Quotes received to determine whether the Quotes were responsive to the mandatory requirements of the Bid Solicitation. After completing that review, the Bureau concluded that ten (10) of the Quotes, including that submitted by SHI, were non-responsive to

³ Quotes were received from the following fifteen Bidders: Arrosoft Solutions, LLC (Arrosoft); CDW-Government, LLC (CDW-G); Compulink Technologies, Inc. (Compulink); Continental Resources, Inc. (Continental); Dell Marketing L.P. (Dell); EverSec Group Inc. (EverSec); Gold Type Business Machines, Inc. (Gold Type); Insight Public Sector, Inc. (Insight); Lima Charlie Management & Analytics (Lima); Red River, LLC (Red River); SHI International, Corp. (SHI); Softchoice Corporation (Softchoice); World Wide Technology (World Wide); York Telecom Corporation (YorkTel); Zones, Inc. (Zones).

mandatory requirements of the Bid Solicitation. By way of summary, the Evaluation Committee Report noted the following:

- Arrosoft – The Bureau found that the Quote submitted by Arrosoft was non-responsive to the requirements of Bid Solicitation Section 4.4.5.2 which required that the

Vendor {Bidder} shall submit a completed State-Supplied Price Sheet with its Quote. Vendor {Bidder} shall submit a fixed cost-plus (markup) or cost-minus (discount) percentage on each Tier 1 Software Publisher and Tier 2 Software Publisher. Vendor {Bidder} shall also submit a fixed cost-plus (markup) or cost-minus (discount) percentage to be applied to all other Tier 3 Software Publishers.

[Emphasis added.]

Bid Solicitation Section 2.2 *General Definitions* defines “Shall” as “denotes that which is a mandatory requirement.” Arrosoft did not provide the required “fixed cost-plus (markup) or cost minus (discount) percentage” for numerous price lines for the listed Tier 1 and 2 Software Publishers. In response to the Bureau’s clarification letter, Arrosoft stated, “[w]e are bidding only for Commvault and Airgap Solutions. All the blank cells means ‘No Bid’.” Evaluation Committee Report, pgs. 4-5.

- Compulink - The Bureau found that the Quote submitted by Compulink was non-responsive to the requirements of Bid Solicitation Section 4.4.5.2. Compulink did not provide the required “fixed cost-plus (markup) or cost minus (discount) percentage” for Oracle, one of the Tier 1 Software Publishers for which the submission of pricing was required. In response to the Bureau’s clarification letter, Compulink stated, “N/A on our price sheet means no bid.” Evaluation Committee Report, pgs. 5.
- Continental - The Bureau found that the Quote submitted by Continental was non-responsive to the requirements of Bid Solicitation Section 4.4.5.2. Continental did not provide required “fixed cost-plus (markup) or cost minus (discount) percentage” for numerous price lines for the listed Tier 1 and 2 Software Publishers. In response to the Bureau’s clarification letter, Continental stated, “The N/A or blank portions of our price sheet signify “no bid”.” Evaluation Committee Report, pgs. 5-6.
- EverSec – The Quote submitted by EverSec was deemed non-responsive because the Bidder did not submit a technical Quote as required by Bid Solicitation Section 4.4.3, which states: “Vendor {Bidder} shall describe its approach and plans for accomplishing the work outlined in the Scope of Work section.” Evaluation Committee Report, pg. 6.
- Gold Type – The Bureau found that the Quote submitted by Gold Type was non-responsive to the requirements of Bid Solicitation Section 4.4.5.2. Gold Type did not provide required “fixed cost-plus (markup) or cost minus (discount) percentage” for numerous price lines for the listed Tier 1 and 2 Software Publishers. Gold Type instead stated “no bid” for numerous Tier 1 and Tier 2 Software Publishers. Further, the Bureau noted that Gold Type altered the State-Supplied Price Sheet. Evaluation Committee Report, pgs. 6-7.
- Lima – The Bureau found that the Quote submitted by Lima was non-responsive to the requirements of Bid Solicitation because the Bidder submitted an additional restriction regarding

price. Specifically, Lima stated that its Quote was valid for 60 days. Evaluation Committee Report, pg. 7. I note that though it was not specified by the Bureau in the Evaluation Committee Report, the Bid Solicitation required that “all prices quoted shall be firm through issuance of contract or purchase order.” State Standard Terms and Condition Section 6.1.

- Red River - The Bureau found that the Quote submitted by Red River was non-responsive to the requirements of Bid Solicitation Section 4.4.5.2. Red River did not provide required “fixed cost-plus (markup) or cost minus (discount) percentage” for numerous price lines for the listed Tier 1 and 2 Software Publishers. In response to the Bureau’s clarification letter, Red River stated, “In response to bid solicitation 20DPP00553, T3121 Software Reseller Services, any cells left blank on Red River’s submitted price sheet should be interpreted as no bid lines”. Evaluation Committee Report, pgs. 7-8.
- SHI - The Bureau found that the Quote submitted by SHI was non-responsive to the requirements of the Bid Solicitation because SHI submitted exceptions to the terms and conditions in the Bid Solicitation in its Quote. Specifically, SHI submitted over seven (7) pages of exceptions to the Terms and Conditions of the Bid Solicitation. “Such terms are material because they concern fundamental aspects of the Contract such as indemnity and termination. To the extent that the proposed terms do not conflict with the Terms of the Bid Solicitation, they are hereby rejected pursuant to Section 4.1 of the Bid Solicitation. To waive these exceptions would impact the State’s assurance that the Bidder would perform the Contract as required. To waive such conflicts with the Bid Solicitation would be manifestly unfair to those Bidders who chose not to submit a Quote because they disagreed with the terms of the Bid Solicitation. Therefore, SHI’s Quote is non-responsive.” Evaluation Committee Report, pgs. 8-9.
- World Wide - The Bureau found that the Quote submitted by World Wide was non-responsive to the requirements of Bid Solicitation Section 4.4.5.2. Gold Type did not provide required “fixed cost-plus (markup) or cost minus (discount) percentage” for numerous price lines for the listed Tier 1 and 2 Software Publishers. World Wide instead stated “no bid” for numerous Tier 1 and Tier 2 Software Publishers. Further, the Bureau noted that World Wide altered the State-Supplied Price Sheet. Evaluation Committee Report, pgs. 9-10.
- Zones – The Bureau found that the Quote submitted by Zones was non-responsive to the requirements of Bid Solicitation Section 4.4.5.2. Zones did not provide required “fixed cost-plus (markup) or cost minus (discount) percentage” for numerous price lines for the listed Tier 1 and 2 Software Publishers. Zones instead stated “no bid” for several Tier 1 and Tier 2 Software Publishers. Evaluation Committee Report, pg. 10.

The remaining five (5) Quotes that met the mandatory requirement of the Bid Solicitation were forwarded to the Evaluation Committee for further review and evaluation consistent with the requirements of the Bid Solicitation Section 6.7 *Evaluation Criteria*. The Evaluation Committee met on January 29, 2021 and February 5, 2021 to perform the technical and price evaluation of the Quotes submitted by Dell, Insight, CDW-G, Softchoice, and YorkTel.

On March 23, 2021, the Evaluation Committee completed its report, which recommended that Contracts be awarded to Dell; CDW-G; Insight; Softchoice; and, YorkTel. In making the recommendation, The Evaluation Committee noted:

As outlined in Section VI, *Technical Evaluation Summary Narrative*, of this Evaluation Report, the Bureau determined that the five (5) Vendors

{Bidders} demonstrated the required experience and were scored accordingly to the highest qualified Vendor {Bidder} starting at 1 in the Technical Ratings. The Vendors {Bidders} are technically responsive, understood the Bid Solicitation requirements, and are competent in successfully completing the required scope of work. The five (5) Vendors {Bidders} Quotes demonstrated that they accurately and efficiently understood the requirements of the Bid Solicitation and are capable of providing the services required. As a result, the five (5) Vendors {Bidders} satisfied all the requirements of the Bid Solicitation and represents the most advantageous offers to the State, price and other factors considered.

[Evaluation Committee Report, p. 26.]

Thereafter, on March 26, 2021, the Bureau prepared the Recommendation Report, which recommended that Contracts be awarded to Dell; CDW-G; Insight; Softchoice; and, YorkTel. On April 5, 2021 the Bureau issued the NOI advising all Bidders that Contract awards would be made to Dell; CDW-G; Insight; Softchoice; and, YorkTel consistent with the March 26, 2021 Recommendation Report.

On April 19, 2021, SHI wrote to the Division's Hearing Unit protesting the Bureau's determination that its Quote was non-responsive and also protesting that other Quotes were accepted. By way of summary, SHI states that its Quote "should not have been rejected since its proposed clarification of the Standard Terms and Conditions...were simply offered terms, which the State was free to reject, and where were, in any case, not material in the context of this bid." SHI's protest, p. 1. SHI believes that the "State should have sought clarification from SHI as to its withdrawal of the proffered clarifications of the T&Cs..." *Ibid*. Additionally, SHI claims that the Quotes submitted by CDW-G, Dell, Insight, Softchoice and YorkTel should have similarly been deemed non-responsive.⁴

By way of remedy, SHI requests that its Quote be reinstated and that it be awarded a Contract and that the Quotes of CDW-G, Dell, Insight, Softchoice and YorkTel be declared non-responsive. As an alternative, SHI proposes that the Bid Solicitation be cancelled and rebid. SHI also requests the opportunity for an in-person presentation due to the complexity of the issues raised.

With respect to SHI's request for an in-person presentation to challenge the intended 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 and SHI's protest, the Evaluation Committee Report, the Bureau's Recommendation Report, the relevant statutes, regulations, case law. The issues raised in SHI's protest

⁴ With the protest, SHI submitted a letter from its Senior Vice President – Public Sector. That letter discussed SHI's history as a New Jersey based business, its past work with public agencies, and SHI's continued desire to be a Contractor on the new contract. Subsequent to the filing of the protest, the Division's Hearing Unit learned that SHI was contacting State Agencies to advise Agencies that its Quote had not been accepted and that it may no longer be able to provide reseller services under the State's Contract. Additionally, it has come to the Hearing Unit's attention that SHI attempted to influence the protest process by requesting that Agencies call or write to the Department of the Treasury to voice displeasure at the determination that SHI was not among the Bidders listed for a Contract award. I note that no State Agency reached out to the Hearing Unit as requested by the SHI's representative; and therefore, this communication was not considered as a factor in this final agency decision.

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 SHI on the written record, as such an in-person hearing is not warranted.

DISCUSSION

A. The Quote submitted by Softchoice Corporation

First, SHI challenges the intended award of a Contract to Softchoice stating that Quote submitted contained a non-waivable defect. SHI alleges that Softchoice did not provide a reseller authorization letter for several of the Tier 1 and Tier 2 Software Publishers. SHI's protest, p. 4. Additionally, SHI alleges that Softchoice's Quote contained a non-waivable defect in that it also offered out of scope services.

As noted above, the Bureau issued the NOI to all Bidders on April 5, 2021. In response to the NOI, on April 14, 2021, Softchoice wrote to the Bureau requesting modifications the terms and conditions of the Bid Solicitation, specifically Bid Solicitation Section 5.8 *Ownership of Material* and Bid Solicitation Section 5.17.1 *Indemnification* amending SSTC section 4.1.1 Limitation of Liability. The Bureau responded that State could not negotiate those terms. Pointing to Bid Solicitation Section 1.3.1.1, the Bureau reminded Softchoice that "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 Bidder's suggested changes and the reason(s) for the suggested changes." After receiving the Bureau's response that the State could not negotiate the requested terms, on April 26, 2021, Softchoice withdrew its Quote. Therefore, any protest issues raised by SHI, as to the Quote submitted by Softchoice are moot and need not be addressed.

B. The Quotes submitted by CDW-G, Dell and Insight are responsive to the requirements of the Bid Solicitation

SHI alleges that the Bureau should have deemed the Quotes submitted by CDW-G, Dell and Insight as non-responsive to the requirements of the Bid Solicitation claiming that CDW-G, Dell and Insight did not submit reseller authorization letters for all Tier 1 and Tier 2 Software Publishers. SHI further alleges that the Bureau treated these three Bidders differently when reviewing the submitted State-supplied price sheets. The Hearing Unit's review of the Quotes submitted by CDW-G, Dell and Insight confirms the Bureau's determination that the Quotes conformed to the requirements of the Bid Solicitation and that Quotes submitted were reviewed against the requirements of the Bid Solicitation equally and consistently.

1. Software Publisher Certifications

SHI's states that the Quotes submitted by CDW-G, Dell and Insight each contained a material deviation from the requirements of the Bid Solicitation which should have rendered each Quote non-responsive. Specifically, SHI asserts these Bidders failed to furnish the reseller authorization letters for all of the listed Tier 1 and Tier 2 Software Publishers. SHI believes that the Bid Solicitation "directed bidders to either provide evidence of their authorization to resell from the Tier 1 and Tier 2 Software Publishers or explain why they are unable to obtain such authorization." SHI's protest, p. 4. However, SHI has misread the requirements of the Bid Solicitation.

With respect to the Contractor⁵ requirements, Bid Solicitation Section 3.3.5 *Software Publisher Categories* set forth the Tier 1, Tier 2 and Tier 3 Software Publishers.

- Tier 1 Software Publishers – are those Software Publishes with the highest tier of sales volume;
- Tier 2 Software Publishers – are those Software Publishes with a high level of sales volume; and
- Tier 3 Software Publishers – all other Software Publishers not specifically identified in Tier 1 or 2.

Specifically, the Bid Solicitation noted that awarded “Vendors {Contractors} should have a direct Reseller Agreement with the Tier 1 Software Publishers.” Section 3.3.5.2 *Tier 1 Software Publishers*⁶, emphasis added. Bid Solicitation Section 2.2 *General Definitions* defines “Should” as “denotes that which is permissible or recommended, not mandatory.” Accordingly, a Reseller Agreement with all Tier 1 Software Publishers was not required. In fact, the Bid Solicitation contemplated that Contractors might not have Reseller Agreements in place with all Software Publishers at the time of Contract award; and therefore encouraged those awarded Contractors to seek out Reseller Agreements, after award, in order to pass through more competitive rates to Using Agencies during the mini-bid process. Bid Solicitation § 3.3.5 *Tier 1 Software Publishers*. Similarly, the Bid Solicitation noted that awarded “Vendors {Contractors} should have a direct Reseller Agreement with the Tier 2 Software Publishers.” Section 3.3.5.2 *Tier 1 Software Publishers*, emphasis added. It did not mandate such an arrangement.

Turning to the Quote submission for Bidders, Bid Solicitation Section 4.4.3.3.4 *Software Publisher Certification* requested, but not require, that Bidders submit the following information for the identified Tier 1 and Tier 2 Software Publishers:

The Vendor {Bidder} should provide the following information for every Tier 1 and Tier 2 Software Publisher:

- A. A letter from the Software Publisher indicating the certification level (or other terminology), or a screen capture from the Software Publisher’s website, including URL, showing the certification level.
- B. A description of the certification level(s) explaining where its level falls relative to the top certification level for that Software Publisher (for example, is “Gold” the highest level, or does it fall beneath “Platinum”?). If it is a certification for a specific line of products/services as opposed to all of the Software Publisher’s products/services, explain.
- C. The number of current Vendor {Bidder} employees holding individual certifications/competencies issued by the Software Publisher, including the title of the certification/competency and a brief description. Bidders should not include copies of the

⁵ Bid Solicitation Section 2.2 *General Definitions* defines the following: “Vendor {Bidder} – An entity offering a Quote in response to the Division’s Bid Solicitation.” and “Vendor {Contractor} – The Vendor {Bidder} awarded a Blanket P.O. resulting from this Bid Solicitation.”

⁶ “Reseller Agreement – an agreement between the Vendor {Contractor} and a Software Publisher setting forth the terms of the relationship between the parties and granting Vendor {Contractor} the authority to provide the State and its Using Agencies mini-bid responses for Software Publisher’s in-scope software and services. The State is not a party to the Reseller Agreement.” Bid Solicitation Section 2.2 *General Definitions*.

certifications with their bids. For any Software Publishers with separate licensing, pricing, or programs for education/academic customers, identify the number of Vendor {Bidder} employees certified or otherwise qualified to handle academic/education licensing and programs.

- D. If the Bidder is unable to provide evidence of certification from a Software Publisher, explain.

[Emphasis added.]

Additionally, the Bureau's response to Question #10 on Bid Amendment #2 reminded potential Bidders that they were "not required to have a relationship with all software publishers prior to submitting its Quote, however, the State Supplied Price Sheet must be completed."

In responding to the Bid Solicitation, Dell, CDW-G and Insight each provided a response to the information requested, not required, in Bid Solicitation Section 4.4.3.3.4 *Software Publisher Certification* and completed the State-Supplied price sheet as required, such that the Evaluation Committee was satisfied that the companies could perform the scope of work required by the Bid Solicitation.

In its Quote, Dell provided a letter of authorization and/or a table indicating the certification level for many of the Tier 1 and Tier 2 Software Publishers. With respect to those Tier 1 and Tier 2 Software Publishers for which it did not have a current relationship, Dell stated:

Dell partners with some of the most powerful software publishers in the world to provide a wide array of software solutions and services in order to help our customers fulfill their IT needs and goals. These partnerships are the backbone of our decades of success as one of the largest software resellers in the industry. In order to best serve New Jersey's software needs, Dell will conduct good faith negotiations with any publisher named in Tier 1 and 2 in order to secure a reseller agreement that is mutually acceptable to both parties. Additionally, Dell will attempt to onboard any Tier 3 publisher at the customers' request.

[Dell's Quote, p. 34.]

In reviewing the Quote submitted by Dell, the Evaluation Committee concluded that this response satisfied the requirements of Bid Solicitation Section 4.4.3.3.4 *Software Publisher Certification*. Based upon the Hearing Unit's independent review of the Quote submitted by Dell, I have no reason to dispute this conclusion.

With respect to the Quote submitted by CDW-G, the company included a letter of authorization and table indicating the certification level for many of the Tier 1 and Tier 2 Software Publishers. With respect to those Software Publishers for which CDW-G does not have a current relationship, it noted "[i]f CDW-G does not hold a direct reseller agreement with a publisher, we are able to resell through a qualified distributor." While SHI questions CDW-G's ability to work with a distributor, nothing in Bid Solicitation precludes an awarded Contractor from doing so. In reviewing the Quote submitted by CDW-G, the Evaluation Committee concluded that this response satisfied the requirements of Bid Solicitation Section 4.4.3.3.4 *Software Publisher Certification*. Based upon the Hearing Unit's independent review of the Quote submitted by CDW-G, I have no reason to dispute this conclusion.

Turning now to the Quote submitted by Insight, the company submitted a letter of authorization for many of the Tier 1 and Tier 2 Software Publishers. With respect to those Software Publishers for which Insight does not have a current relationship, it noted “[f]or the remaining Tier 1 and Tier 2 publishers, Insight does not have a direct relationship with the publisher; however, in most cases we are able to procure the publisher’s software solutions through one of our many distribution partners.” Again, nothing in Bid Solicitation precludes an awarded Contractor from working with a distribution partner to perform the work required. Here, in reviewing the Quote submitted by Insight, the Evaluation Committee concluded that this response satisfied the requirements of Bid Solicitation Section 4.4.3.3.4 *Software Publisher Certification*. Based upon the Hearing Unit’s independent review of the Quote submitted by Insight, I have no reason to dispute this conclusion.

I concur with the Evaluation Committee’s determination that the Quotes submitted by Dell, CDW-G and Insight did not contain a material deviation from terms and conditions of the Bid Solicitation.⁷ Contrary to SHI’s assertion and belief, the Bid Solicitation did not require that Bidders/Contractors have a relationship with all Tier 1 and Tier 2 Software Publishers and did not require that the Bidders submit a reseller authorization letter for all of the listed Tier 1 and Tier 2 Software Publishers. The Bid Solicitation only requested that Bidders provide information regarding those Software Publishers with whom they already have a business relationship and encouraged Contractors, after award, to seek relationships with other Software Publishers.

2. State-Supplied Price Sheet

Turning now to the State-Supplied price sheets submitted by Dell, CDW-G and Insight, I agree with the Evaluation Committee’s determination that the submitted State-Supplied price sheets complied with requirements of the Bid Solicitation.

In the protest, SHI alleges that in evaluating the Quotes, the Evaluation Committee treated similarly situated Bidders differently which lead to inconsistent results. SHI mistakenly believes that if the Bureau accepted the Quotes of Dell, CDW-G and Insight as responsive, despite the fact that the companies did not submit letters of authorization for all Tier 1 and Tier 2 Software Publishers; and therefore, it should have also accepted the Quotes submitted by those Arrosoft, Compulink, Continental, Gold Type, Red River, World Wide, and Zones who indicated “No Bid” on the State-Supplied price sheet for the Tier 1 and Tier 2 Software Publishers. SHI’s interpretation of the terms and conditions of the Bid Solicitation is in erroneous.

As discussed in point B(1) above, Bidders were not required to submit a reseller authorization letter for all Tier 1 and Tier 2 Software Publishers. Bid Solicitation Section 4.4.3.3.4 *Software Publisher Certification*. However, Bidders were required to submit a cost-plus (markup) or cost-minus (discount) percentage on the State-Supplied price sheet for each Tier 1 Software Publisher and Tier 2 Software Publisher. Bid Solicitation Section 4.4.5.2 *State-Supplied Price Sheet Instructions* states in pertinent part:

Vendor {Bidder} shall submit a completed State-Supplied Price Sheet with its Quote. Vendor {Bidder} shall submit a fixed cost-plus (markup) or cost-minus (discount) percentage on each Tier 1 Software Publisher and Tier 2 Software Publisher. Vendor {Bidder} shall also submit a fixed cost-plus (markup) or cost-minus (discount) percentage to be applied to all

⁷ Had the Quotes submitted by Dell, CDW-G and Insight been deemed non-responsive for failing to provide a letter of authorization for all Tier 1 and Tier 2 Software Publishers as suggested by SHI, SHI’s Quote would have similarly been non-responsive, as SHI also only submitted letters of authorization for some, but not all, of the Tier 1 and Tier 2 Software Publishers.

other Tier 3 Software Publishers. Vendors {Bidders} may Quote no markup or discount (i.e. Reseller Cost pass through) by inserting “0.00%”.

...

Cost-plus percentages are “not to exceed” percentages, and cost-minus percentages may be increased. That is, more favorable pricing may be offered during the life of the [Contract].

[Emphasis added.]

In preparing their respective Quote pricing, Arrosoft, Compulink, Continental, Gold Type, Red River, World Wide, and Zones did not submit a cost-plus (markup) or cost-minus (discount) percentage for each Tier 1 Software Publisher and Tier 2 Software Publisher. Rather, each of them submitted a “no bid” to at least one, and in some circumstances many, of the Tier 1 and Tier 2 Software Publishers. Because these Bidders did not complete the State-Supplied price sheet as required, the Bureau deemed the submitted Quotes non-responsive to the mandatory requirements of the Bid Solicitation.⁸ Dell, CDW-G and Insight on the other hand fully completed the State-Supplied price sheet, listing a cost-plus (markup) or cost-minus (discount) percentage for each Tier 1 Software Publisher and Tier 2 Software Publisher as required by Bid Solicitation § 4.4.5.2 *State-Supplied Price Sheet Instructions*.

Accordingly, the Bureau’s review of the Quotes with respect to Bid Solicitation Section 4.4.5.2 *State-Supplied Price Sheet Instructions* as not inconsistent with its review of the Quote with respect to Bid Solicitation Section 4.4.3.3.4 *Software Publisher Certification* as each required the submission of different information, requiring a different analysis. As noted above, I concur with the Evaluation Committee’s determination that the Quotes submitted by Dell, CDW-G and Insight did not contain a material deviation from terms and conditions of the Bid Solicitation. Further, the Hearing Unit’s review for the Quotes submitted by all Bidder’s confirms that there was no disparate treatment among similarly situated Bidders. All Quotes submitted were reviewed equally against the requirements of the Bid Solicitation.

C. The Quote submitted by CDW-G Was Responsive to the Bid Solicitation

SHI alleges that the Quote submitted by CDW-G was non-responsive to the requirements of the Bid Solicitation. SHI claims that (1) CDW-G submitted a defective *Ownership Disclosure Form*; and, (2) CDW-G’s Quote included a material exception to the pricing terms. The Hearing Unit’s review of the CDW-G’s Quote confirms the Bureau’s determination that CDW-G’s Quote conformed to the requirements of the Bid Solicitation.

1. CDW-G’s Ownership Disclosure conformed to the requirements of the statute

With respect to ownership, the New Jersey Legislature, in implementing N.J.S.A. 52:25-24.2, mandated that a Bidder must supply its ownership information, prior to or with its Quote, to be eligible to enter into a Contract with the State. N.J.S.A. 52:25-24.2 states, in pertinent part:

No corporations, partnership, or limited liability company shall be awarded any [Blanket P.O] nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State,

⁸ Neither Arrosoft, Compulink, Continental, Gold Type, Red River, World Wide, nor Zones has disputed the Bureau’s determination that their submitted Quotes were non-responsive.

or any county, municipality or school district, or any subsidiary agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation, said partnership, or said limited liability company there is submitted a statement setting for the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, and member exceeding the 10 percent ownership criteria established in this act, has been listed.

To comply with this section, a bidder with any direct or indirect parent entity which is publicly traded may submit the name and address of each publicly traded entity and the name and address of each person that holds a 10 percent or greater beneficial interest in the publicly traded entity as of the last annual filing with the federal Securities and Exchange Commission or the foreign equivalent, and, if there is any person that holds a 10 percent or greater beneficial interest, also shall submit links to the websites containing the last annual filings with the federal Securities and Exchange Commission or the foreign equivalent and the relevant page numbers of the filings that contain the information on each person that holds a 10 percent or greater beneficial interest.

[Emphasis added.]

In order to make this process of certifying easier, the Division provides to the bidding community the *Ownership Disclosure Form* to be completed in order for Bidder to comply with the statutory requirement. Bid Solicitation Section § 4.4.1.6 *Ownership Disclosure Form*. The subject Bid Solicitation required that Bidders submit a completed *Ownership Disclosure Form* with the Quote. Specifically, Bid Solicitation Section § 4.4.1.6 *Ownership Disclosure Form* stated in pertinent part “[p]ursuant to N.J.S.A. 52:25-24.2, in the event the Vendor {Bidder} is a corporation, partnership or limited liability company, the Vendor {Bidder} must complete an Ownership Disclosure Form.”

As noted by SHI in the protest, and as shown in the screen shot below, with the Quote CDW-G included an *Ownership Disclosure Form* that indicated that there were no 10% or greater owners of the bidding entity.

	STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY DIVISION OF PURCHASE AND PROPERTY 33 WEST STATE STREET, P.O. BOX 230 TRENTON, NEW JERSEY 08625-0230		
OWNERSHIP DISCLOSURE FORM			
BID SOLICITATION #:	20DPP00553	VENDOR (BIDDER):	CDW Government LLC
ALL PARTIES ENTERING INTO A CONTRACT WITH THE STATE ARE REQUIRED TO PROVIDE THE INFORMATION REQUESTED PURSUANT TO <u>N.J.S.A. 52:25-24.2</u> . PLEASE NOTE THAT IF THE VENDOR/BIDDER IS A NON-PROFIT ENTITY, THIS FORM IS NOT REQUIRED.			
<u>PART 1</u>			
Are there any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor (Bidder)?		YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>

However, as shown in the screen shot below, within the body of the Quote, CDW-G stated that the bidding entity was a wholly owned subsidiary of CDW LLC.

Date Company was Established: CDW LLC (CDW) was founded in 1984 as a home-based business and is now a leading direct marketer of multi-brand information technology products, services and solutions in the United States. CDW Government LLC (CDW•G), a subsidiary of CDW, was established in 1998 to focus on the government and education markets.

Location Where the Vendor is Incorporated: CDW•G is incorporated in the State of Illinois.

Ownership Structure: CDW Government LLC is the wholly-owned subsidiary of CDW LLC. Our customer base is quite diverse, ranging from state and local government, federal, healthcare, K-12 and higher education.

[CDW-G Quote p. 87.]

Noting this discrepancy between two parts of CDW-G's submitted Quote, on February 1, 2021, the Bureau wrote to CDW-G asking it to clarify the discrepancy between the *Ownership Disclosure Form* and the statement within the body of its Quote. Specifically, the Bureau's letter inquired:

The Ownership Disclosure Form submitted with your Quote indicated that CDW Government LLC does not have any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor {Bidder}. However, on pages 37 and 38 of your Quote, you indicated that CDW Government LLC is the wholly-owned subsidiary of CDW LLC. Please clarify whether the Ownership Disclosure Form is correct or your Quote is correct, and if the Quote is correct, please submit the name and address of each person or entity that holds a 10 percent or greater beneficial interest in CDW LLC.

On February 4, 2021, CDW-G responded indicating that it was the statement within the body of its Quote that contained the correct information. With the response, as shown on the screen shot below, CDW-G submitted an *Ownership Disclosure Form* that set forth and confirmed the ownership information that was contained within the body of its Quote.

	STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY DIVISION OF PURCHASE AND PROPERTY 33 WEST STATE STREET, P.O. BOX 230 TRENTON, NEW JERSEY 08625-0230				
OWNERSHIP DISCLOSURE FORM					
BID SOLICITATION #:	20DPP00553	VENDOR (BIDDER):	CDW Government LLC		
ALL PARTIES ENTERING INTO A CONTRACT WITH THE STATE ARE REQUIRED TO PROVIDE THE INFORMATION REQUESTED PURSUANT TO N.J.S.A. 52:25-24.2. PLEASE NOTE THAT IF THE VENDOR/BIDDER IS A NON-PROFIT ENTITY, THIS FORM IS NOT REQUIRED.					
PART 1					
Are there any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor (Bidder)?		YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>		
If you answered, "YES" above, you must disclose the following: (a) the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class; (b) all individual partners in the partnership who own a 10 percent or greater interest therein; or, (c) all members in the limited liability company who own a 10 percent or greater interest therein.					
NAME	CDW LLC				
ADDRESS 1	230 N. Milwaukee Ave				
ADDRESS 2					
CITY	Vernon Hills	STATE	IL	ZIP	60061

The Bureau's clarification request and the response provided by CDW-G is consistent with the Appellate Division'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 (App. Div. 1995). There, the Appellate Division held that "in 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." *Id.* at 597. In responding to the Bureau's clarification request, CDW-G did not provide any new or different information that already included within four corners of its submitted Quote; rather, it clarified which statement was correct.

The disclosure response made by CDW-G here is different to that made by HFL Sport Science (HFL) in *In the Matter of Protest of Scheduled Award of Term Contract T2813 RFP 12-X-22361 Laboratory Testing Service, Equine Drug Testing*, Lexis 1698, at *25 (App. Div. July 10, 2013). In *Equine*, HFL submitted an *Ownership Disclosure Form* with its Quote that indicated that there were no individuals, corporations or partnerships having a 10% or greater interest in the company. *Id.* at *2. However, its narrative Quote included a more involved ownership structure than set forth on the *Ownership Disclosure Form*. Because of the ambiguity between the submitted *Ownership Disclosure Form* and the narrative Quote, the Division sought clarification from HFL. However, HFL's response to the clarification revealed a more detailed ownership structure than previously set forth. The response supplemented the original information contained within the narrative Quote, which is not permissible. Therefore, the Division found, and the Appellate Division affirmed, that the initial ownership statement provided by HFL did not conform to the requirements of the law and the additional information provided by HFL was an impermissible supplementation. *Id.* at 6, 18-19.

The New Jersey Courts have consistently held that strict compliance with the ownership disclosure requirements of N.J.S.A. 52:25-24.2 is necessary. As such, a Quote is properly rejected where it contains inaccurate ownership information. See, *Impac, Inc. v. City of Paterson*, 178 N.J. Super. 195, 200-01 (App. Div. 1981); *Muirfield Const. Co., Inc. v. Essex County Imp. Authority*, 336 N.J. Super. 126 (App. Div. 2000). Here, there was no new or different information included in CDW-G's response. CDW-G explained that it was the ownership statement made within the body of the Quote that was correct. The fact that CDW-G responded to the clarification by submitting an updated *Ownership Disclosure Form* does not change the fact that it clarified an ambiguity contained within its submitted Quote. Had CDW-G provided additional or different information than what was included in its Quote, then such a response would have been contrary to the Appellate Division's holding in *On-Line Games* and *Equine* as would have been an

impermissible supplementation, change or correction. Based upon the CDW's response to the clarification letter, it was clear that CDW-G had submitted a complete statement of its ownership as required by N.J.S.A. 52:25-24.2.

Based upon the relevant case law, with respect to the factors set forth by the court in *Twp. of River Vale v. Longo Constr. Co.*, discussed infra., for determining materiality, I find that CDW-G's Quote does not contain a material deviation. 127 N.J. Super. 207, 216 (Law Div. 1974). First, the State is assured "that the contract will be entered in to performed and guaranteed according to its specified requirements" because CDW-G fully disclosed all 10% or greater owners, such that the State is aware of the real parties in interest, can identify conflicts of interest, and has the information necessary to assess the capability, financial stability and moral integrity of the company. *C&H Industrial Services, Inc. v. City of Vineland*, 2014 N.J. Super Unpub. Lexis 1187, at *14-15 (App. Div. May 23, 2014); citing, *George Harms Constr. Co. v. Lincoln Park*, 161 N.J. Super. 367, 372 (Law Div. 1978). Second, because CDW-G provided the full disclosure in its narrative Quote, it has not been placed in a "position of advantage over other bidders who might have bid on the project had they known they could avoid timely filing of the disclosure statement or that it would be waived." *C&H*, supra, Lexis 1187 at *16; citing, *Muirfield Const. Co., Inc. v. Essex County Imp. Authority*, 336 N.J. Super. 126, 136-37 (App. Div. 2000).

Accordingly, I find that Bureau correctly determined that CDW-G's ownership statement complied with the requirements of the statute; and therefore, there was no material deviation.

2. CDW-G's Quote Did Not Contain A Material Exception To The Pricing Terms

SHI alleges that CDW-G's Quote contained an exception to the pricing terms required in the Bid Solicitation. SHI argues that CDW-G took an exception to the provisions of Reseller Cost as defined by the Bid Solicitation and that CDW-G did not agree to maintain a firm fixed price for the duration of the Contract. SHI argues that this material deviation deprives the State of any assurance that the Contract will be performed as required and therefore, CDW-G's Quote should have been deemed non-responsive.

As noted above, Bid Solicitation Section 4.4.5.2 *State Supplied – Price Sheet Instructions* stated:

Vendor {Bidder} shall submit a completed State-Supplied Price Sheet with its Quote. Vendor {Bidder} shall submit a fixed cost-plus (markup) or cost-minus (discount) percentage on each Tier 1 Software Publisher and Tier 2 Software Publisher. Vendor {Bidder} shall also submit a fixed cost-plus (markup) or cost-minus (discount) percentage to be applied to all other Tier 3 Software Publishers. Vendors {Bidders} may Quote no markup or discount (i.e. Reseller Cost pass through) by inserting "0.00%". Vendor {Bidder} shall provide a rate percentage in two columns – one column with the proposed rate for COTS, SaaS, maintenance and support, and Appliances and a second column for Software-Related Services. The rates inserted in either column may be any combination of a markup rate, discount rate, or pass through.

The cost-plus or minus percentage shall be applied to what the Vendor {Bidder} pays to the Software Publisher at the time of purchase, that is, the Reseller Cost. For example, the Vendor {Bidder} is invoiced \$1000, which is the Reseller Cost. Vendor {Bidder} Quoted a 2% markup on this Software Publisher so the cost to the Using Agency would be 102% of \$1000, or \$1020. The cost-plus percentages bid shall NOT increase over the life of the [Contract].

Using the above example, a markdown of 2% would result in a cost to the Using Agency of 98% of \$1000, or \$980. The cost-minus percentages bid shall NOT decrease over the life of the Contract.

Cost-plus percentages are “not to exceed” percentages, and cost-minus percentages may be increased. That is, more favorable pricing may be offered during the life of the [Contract].

The markup or markdown bid per Software Publisher will also apply to appliances, maintenance, subscriptions, SaaS agreements, and software-related Services provided under the [Contract].

Additionally, Bid Solicitation Section 2.3 *Blanket P.O. Specific Definitions/Acronyms* defined Reseller Cost as “the price that the Vendor {Contractor} pays the Software Publisher to purchase software and/or services on behalf of the Using Agency. Reseller Cost does not include any administrative or other mark-up costs.”

With its State-Supplied Price Sheet, in response to Bid Solicitation Section 4.4.5.2, CDW-G stated:

Due to the dynamic and evolving landscape of software products, CDW-G is pleased to offer a not to exceed cost plus structure where the markup % will remain fixed for the duration of the contract when cost is available for the product.

Cost is defined as the standard acquisition cost associated with the inventory of product, but also including the management costs with procuring and distributing the inventory.

[CDW-G Quote, p. 60.]

In response to the protest, the Bureau advises that in reviewing and evaluating CDW-G’s Quote it determined that CDW-G’s Quote pricing conformed to the requirements of the Bid Solicitation and that there is no conflict between CDW-G’s use of the terms “Reseller Cost” and “cost” in its Quote. In fact, the Bureau advises that CDW-G’s definition of cost conforms with the Bid Solicitation. As noted above, “Reseller Cost” is the amount that the Software Publisher charges the Contractor/Reseller for a piece of Software. The markup or discount is the Contractor’s/Reseller’s overhead or administrative fee. Cost, as used by CDW-G, is the total cost to the State to purchase the Software from the Reseller. Broken down for clarity:

<i>State’s formula of cost</i>	Total cost to the State	=	Reseller Cost	+	Markup or Discount
<i>State’s definitions</i>			The price that the Reseller pays to the Software Publisher		Reseller Administrative Costs
<i>CDW-G’s Definition</i>	Cost	is defined as	The standard acquisition cost associated with the inventory of product	but also	Including the management costs with procuring and distributing the inventory

Further, CDW-G's statement that it "is pleased to offer a not to exceed cost plus structure" complied with the requirements of the Bid Solicitation. As accounted for in the Bid Solicitation, the Reseller Cost, the price the Reseller pays to the Software Publisher, will fluctuate over time. Additionally, a Reseller's administrative costs for procuring and distributing Software may fluctuate over time. The Bid Solicitation required, and CDW-G submitted, a markup for all Tier 1, 2 and 3 Software Publishers. The markup submitted on the State-Supplied price sheet is a not to exceed markup; the Contractor, during a mini-bid, may always offer better pricing to the State. Bid Solicitation Section 3.4 *Reseller Quoting* and Bid Solicitation Section 4.4.5.2 *State Supplied Price Sheet Instructions*. Nothing in CDW-G's submitted Quote or the pricing contradicts this process.

Reviewing CDW-G's Quote with the requirements of the Bid Solicitation as it relates to pricing, I agree with the Bureau's analysis and determination; CDW-G did not take an exception to the terms and conditions of the Bid Solicitation and there is no deviation.

D. Quote Submitted By YorkTel is responsive to the requirements of the Bid Solicitation

SHI alleges that the Quote submitted by YorkTel contains material deviation from the requirements of the Bid Solicitation. Specifically, SHI alleges that YorkTel's Quote demonstrates that it cannot comply with the reporting requirements of the Bid Solicitation that are imposed on a Contractor.

Bid Solicitation Section 3.2.3.2 *Online Reports* requires that a Contractor awarded a Contract "shall be able to provide online, real time, reporting capabilities using a website established for the State. These reports may include Back Order or Current Order Status reports. In addition, the system shall enable the Using Agency to create custom reports on contract utilization and spend." Importantly, there was no timeframe identified in the Bid Solicitation within which a Contractor awarded a Contract must be able to provide the online reporting capability.

In creating and submitting a Quote, Bid Solicitation Section 4.4.3 *Technical Quote*, required the following:

the Vendor {Bidder} shall describe its approach and plans for accomplishing the work outlined in the Scope of Work section, i.e., Section 3.0. The Vendor {Bidder} must set forth its understanding of the requirements of this Bid Solicitation and its approach to successfully complete the [Contract] The Vendor {Bidder} should include the level of detail it determines necessary to assist the evaluation committee in its review of the Vendor's {Bidder's} Quote.

[Emphasis added.]

Accordingly, YorkTel, in describing its approach and plans for accomplishing the work outlined in the Section 3.2.3.2 *Online Reports* stated:

While we may be able to provide a near real time reporting, real-time online reporting capabilities is not something we are able provide, at least not immediately. YorkTel has the ERP systems and in-house development expertise to develop online reporting tools of the type envisaged. While not opposed to developing the capability – the requirement and value are understood- at time of submission the effort, cost and timeframe in which the envisaged real time capability can be delivered is unknown.

Most likely YorkTel would take a phased approach, first developing a rudimentary online reporting capability to show Back Order or Current Order Status report (estimate 3-6 months). Custom reporting capabilities of the type envisaged might be delivered in a second phase within 6-12 months to show contract utilization and spend with Data Fields: Purchasing Entity Name, Invoice Number, Invoice Date, Product/Service Description, Unit of Measure, Unit Price, Quantity, Line Total Purchase Amount, Publisher, Part Number, Licensing Program name and Number, License (Yes/No), Maintenance/Support (Yes/No), Media (Yes/No), Services (Yes/ No), Appliance (Yes/No), SaaS (Yes/No), Order Date, Delivery Date, Client PO Number, Client Contact Name, Client Contact Email. Facility to export of currently available reports for download or email in PDF or Excel format could likely be delivered concurrently in each phase

The license information data acquired and retained by YorkTel for reporting purposes shall be stored as sortable, non-proprietary data fields so the license information can be transferred to the State upon reasonable request. YorkTel will work with the State and Using Agencies, or their designees, to ensure that the license information data can be successfully transferred in a usable format.

In reviewing YorkTel's Quote response, the Evaluation Committee recognized that YorkTel is a newcomer to the field, and its Quote was "clear and forthright in this regard."⁹ While YorkTel's technical score reflects their lack of specific experience as a software reseller, YorkTel's commitment to entering the industry is demonstrated by other new contracts it has secured." Evaluation Committee Report, p. 24. With respect to real time reporting, the Committee noted that:

The Committee had minor concerns about real time reporting, the development of online reporting is estimated to take 3 to 6 months and custom reporting capabilities could take 6 to 12 months (YorkTel Quote, pdf page 13). While this is a deviation from the requirements of the Bid Solicitation, the Committee recommends that this deviation be waived by the [Procurement] Bureau. The waiver of this deviation from the requirements of the Bid Solicitation does not impact the State's assurance that the Contract will be performed as specified, since the required details can be added during contract kick off, and are not critical for the State's oversight and monitoring of purchases. Also, the waiver of this deviation does not provide an unfair advantage to the Vendor {Bidder} since the required reporting will be accomplished following kickoff. However, the Committee determined YorkTel's noncompliance to be immaterial administrative detail that can be adjusted post award. The degree of reporting that YorkTel can provide at award is sufficient for short-term launch of the [Contract] These details assist the State Contract Manager in categorizing spend detail and aid in the oversight of contract administration. The State's ability to manage the contract is not immediately negatively impacted by the lack of these details at the time of award.

⁹ YorkTel is the only company which identifies and has been certified as a Small Business Enterprise and/or Minority-Owned Business.

While the Evaluation Committee believed that YorkTel's Quote contained a deviation from Bid Solicitation Section 3.2.3.2 *Online Reports*, I disagree. The Bid Solicitation requirement for real time reporting is placed upon those Contractors awarded Contracts, not those Bidders who have submitted Quote. Importantly, the Bid Solicitation did not include a definition, criteria for "real time" reporting, or a timeframe within which a Contractor must have real time reporting in place after contract award. As noted above, YorkTel stated that it can currently provide "near real time reporting", which the Evaluation Committee determined was sufficient to meet the needs of the State Contract Manager in categorizing spend detail and in the oversight of contract administration. In its Quote, YorkTel laid out a plan for providing the State with the real time reporting discussed in Bid Solicitation Section 3.2.3.2 *Online Reports*. YorkTel's statement that it would work toward providing real time reporting within 12 months further assured the Committee that if awarded a Contract, YorkTel would be able to comply with the requirements outlined in Bid Solicitation Section 3.0. That plan conformed to the requirements of the Bid Solicitation; and therefore there was no deviation.

However, even assuming *arguendo* that there was a deviation from the requirement of Bid Solicitation as noted in the Evaluation Committee Report, reviewing the YorkTel's Quote response to Bid Solicitation Section 3.2.3.2 *Online Reports* with respect to the *River Vale* factors, I conclude that any deviation that may exist is minor, and therefore can be waived as permitted N.J.A.C. 17:12-2.7(d) which states "[t]he Director may waive minor irregularities or omissions in a proposal." Specifically, in the Quote, YorkTel acknowledged the requirement for real time reporting and set forth a plan for achieving the requirement; therefore, the State is assured "that the contract will be entered in to performed and guaranteed according to its specified requirements." Further, YorkTel was not placed in a position of advantage over other Bidders who might not have had real time reporting capabilities at the time of Quote submission. The Bid Solicitation was clear that the real time reporting requirement was placed a Contractor awarded a Contract, the Bid Solicitation did not require that a Bidder have real time reporting capabilities at the time of Quote submission, that the Bidder demonstrate the capability with the Quote; nor was there a timeframe for this required listed in the requirements. As noted above, the Bid Solicitation required that the Bidder describing its approach and plans for accomplishing the work outlined in the Section 3.0. YorkTel did just that. Therefore, any potential deviation here is minor and can be waived in accordance with Bid Solicitation Section 6.1 *Right to Waive* and N.J.A.C. 17:12-2.7(d).

Accordingly, I do not dispute the Evaluation Committee's determination that YorkTel's Quote conformed to the requirements of the Bid Solicitation.¹⁰

E. SHI's Proposed Modifications To The Terms And Conditions Rendered The Quote Non-Responsive

Turning now to the SHI's statement that the modifications to the terms and conditions of the Bid Solicitation which were included in its Quote were simply proposed modifications which the State was free to reject, I disagree. SHI's proposed modifications to the terms and conditions of the Bid Solicitation directly conflicted with the language of the Bid Solicitation rendering the Quote non-responsive.

¹⁰ Based on the Hearing Unit's review of SHI's Quote, it is unclear whether or not SHI's response complies with the requirements of Bid Solicitation Section 3.2.3.2. SHI indicates that they can provide periodic reporting to clients via email. However, SHI does not explicitly mention that it has a website that is established for the State, nor does SHI clearly indicate that the State of New Jersey would have the ability to access reports, in real time, in an online setting or that SHI would work towards this requirement as an awarded Contractor.

Bid Solicitation Section 4.1 *General* states in relevant part:

A Vendor {Bidder} may submit additional terms as part of its Quote. 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 [Contract] resulting from the Bid Solicitation, may render a Quote non-responsive. It is incumbent upon the Vendor {Bidder} to identify and remove its conflicting proposed terms and conditions prior to Quote submission. Where additional terms are submitted they may be accepted, rejected, or negotiated, in whole or in part, at the State’s sole discretion where the terms do not conflict with material terms of the Bid Solicitation or do not diminish the State’s rights under the [Contract] resulting from the Bid Solicitation.

In the event that a Vendor {Bidder} intends to propose terms and conditions that conflict with the Bid Solicitation, those Vendor {Bidder} proposed terms and conditions shall only be considered if submitted and agreed to pursuant to the electronic question and answer procedure set forth in Section 1.3.1 of this Bid Solicitation. Vendors {Bidders} shall not submit exceptions in the Quote or on the “Terms and Conditions” Tab through [NJSTART](#).

[Emphasis added.]

While the Bid Solicitation did permit a Bidder to submit additional terms, the Bid Solicitation cautioned Bidders that the acceptance, rejection or negotiation of the those additional terms, if the proposed terms do not conflict with the terms and conditions of the Bid Solicitation, was at the sole discretion of the State. Importantly, if a Bidder desired to propose terms that conflicted with the terms and conditions of the Bid Solicitation, the Bidder was required to submit the proposed language during the Question and Answer period. Bid Solicitation 1.3.1 *Electronic Questions and Answer Period*.

As noted above, during the Question and Answer period, the Bureau received and answered 114 questions. SHI submitted twelve (12) questions, none of which were related to modifications to the terms and conditions of the Bid Solicitation identified within SHI’s Quote. In its Quote, SHI included a section entitled “Clarification To Terms” which included the following modifications to the terms and conditions of the Bid Solicitation:

- Bid Solicitation §5.8 *Ownership of Material*
- Bid Solicitation §5.17.1 *Indemnification - Subsection 4.1.1 Limitation of Liability*
- Bid Solicitation §5.17.3 *Accessibility Compliance*
- Bid Solicitation §6.3 *State’s Right to Inspect Vendor {Bidder} Facilities*
- State of New Jersey Standard Terms and Conditions §3.1 *Compliance – Codes*
- State of New Jersey Standard Terms and Conditions §3.7 *Buy American*
- State of New Jersey Standard Terms and Conditions §4.1 *Indemnification*
- State of New Jersey Standard Terms and Conditions §5.7 *Termination of Contract*
- State of New Jersey Standard Terms and Conditions §5.11 *Performance Guarantee of Contractor*
- State of New Jersey Standard Terms and Conditions §5.12 *Delivery Requirements*
- State of New Jersey Standard Terms and Conditions §6.1 *Price Fluctuation During Contract*

- State of New Jersey Standard Terms and Conditions §6.6 *Availability of Funds*

The only items of additional language included in the “Clarification To Terms,” addressing items not contemplated by the Bid Solicitation, were the following sections:

- Warranty
- Force Majeure

After reviewing “Clarification To Terms” contained within SHI’s Quote, the Bureau determined that the Quote submitted by SHI was non-responsive to the requirements of the Bid Solicitation. The Bureau noted:

SHI International (SHI): SHI submitted exceptions to the terms and conditions in the Bid Solicitation in its Quote. Specifically, SHI submitted over seven (7) pages of exceptions to the Terms and Conditions of the Bid Solicitation, in a section of its Quote entitled “Clarifications to Terms.” In this section of its Quote, SHI states: “If Contractor is a potential candidate for award, Contractor looks forward to negotiating various terms and other conditions of business if awarded.” Following this statement are numerous recitations of various Bid Solicitation Terms accompanied by SHI’s requested changes. The Bid Solicitation Sections that SHI requests changes to include Section 5.8 Ownership, Section 5.17.1 Indemnification, Section 6.3 States’ Right to Inspect, and Section 5.7 of the State Standard Terms and Conditions Termination. Section 4.1 of the Bid Solicitation states that in the event a Vendor {Bidder} submits terms that conflict with the terms of the Bid Solicitation, such terms may render the Quote non-responsive. Here, SHI’s exceptions clearly conflict with Section 5.8, Section 5.17.1, Section 5.17.3, Section 9.6.3, Section 9.3.1, Section 9.3.7, Section 9.4.1, Section 9.5.7, Section 9.5.11, Section 9.5.12, Section 9.6, and Section 9.6.6 of the Bid Solicitation. Such terms are material because they concern fundamental aspects of the [Contract] such as indemnity and termination. To the extent that the proposed terms do not conflict with the Terms of the Bid Solicitation, they are hereby rejected pursuant to Section 4.1 of the Bid Solicitation. To waive these exceptions would impact the State’s assurance that the Vendor {Bidder} would perform the [Contract] as required. To waive such conflicts with the Bid Solicitation would be manifestly unfair to those Vendors {Bidders} who chose not to submit a Quote because they disagreed with the terms of the Bid Solicitation. Therefore, SHI’s Quote is non-responsive.

In the protest, SHI claims that the Bid Solicitation permitted Bidders to submit additional terms and that its request modify various sections of the Bid Solicitation and the State’s Standard Terms and Conditions was permitted as an “additional term.” SHI further states that the proposed modifications were not material and were terms that should apply to the Software Publishers, not the resellers; and therefore, SHI believes the Division should have simply waived or rejected SHI’s modified language. In support of its position, SHI states that proposed modifications to the terms and conditions “was a request to review the clarifications, nothing more, which the State was fee to reject.” SHI protest p. 27.

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). Although the Division has broad discretion to select among qualified and responsive Bidders in public contracting matters, the discretion afforded to the Director, “is not limitless.” See, *In re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 559 (App Div. 2018); *Barrick v. State*, 218 N.J. 247, 258-259 (2014). 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.” *Ibid*, citing *Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop.*, 99 N.J. 244, 256 (1985)). For that reason, the Division’s governing regulations mandate stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State’s bidding process. Notably, “a proposal that is not...responsive to the material requirements of the [Bid] shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.” N.J.A.C. 17:12-2.7(c). 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).

The question before me is whether the SHI’s proposed modifications and the notation that its Quote was subject to negotiation, were material deviations rendering the Quote non-responsive or if the proposed language could have been waived. To be deemed non-responsive, SHI’s Quote would have had to materially deviate from the requirements of the Bid Solicitation such that the State would have no assurances that the Contract would be performed consistent with the requirements of the Bid Solicitation. In determining whether a material deviation exists, 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). “If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *Twp. of River Vale v. Longo Constr. Co.*, 127 N.J. Super. 207, 222 (Law Div. 1974). 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 Award of On-Line Games Prod. And Operation Servs. Contract*, 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.]

Essentially, the materiality test “is nothing more than an enunciation of what has always been the only relevant matter in a bid conformity inquiry: whether waiver of the deviation would thwart the aims of the public bidding laws.” *In Re Motor Vehicle Comm’n Surcharge Sys. Accounting & Billing Servs.* 2018 N.J. Super. Unpub. LEXIS 285*21, 2108 WL 766856, citing *On-Line Games*, 279 N.J. Super at 596. In *In Re Motor Vehicle*, the court observed that:

In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to

whether or not it was purposely left that way. Public bidding laws were adopted to secure for the taxpayers the benefits of competition and to promote the honesty and integrity of the bidders and the system. These laws must be construed as nearly as possible with sole reference to the public good.

[*In Re Motor Vehicle*, supra 2018 N.J. Super. Unpub. LEXIS 285 *21, citing *Township of Hillside v. Sternin*, 25 N.J. 317, 324 (1957), *On-Line Games*, 279 N.J. Super at 589, *Keyes Martin*, supra, 99 N.J. at 256.]

In the protest, SHI claims that the proposed modifications were not requirements, but rather simply requests for review as the modifications came under the statement of “SHI respectfully requests to review the following clarifications to the original terms of the State’s request.” SHI protest, p. 26-27. SHI further claims that the State was “free to reject” the modifications. SHI protest, p. 26-27. However, along with the statement requesting a review of terms, SHI additionally stated “[i]f Contractor is a potential candidate for award, Contractor looks forward to negotiating various terms and other conditions of business if awarded.” SHI Quote p. 53. It is unclear from the Quote whether the table of fourteen language modifications represented the totality of the request, or if there would be additional requested modifications if SHI had been selected as a Contractor.

Interestingly, while SHI in the protest claims that the language modifications were simply “requests to review”, SHI’s Quote presents a different picture. Several of the language modifications included a statement that SHI “requires this clause in the final agreement if awarded.” See screen shot below.

Page 47, Sec. 5.17.1, Indemnification, Subsection 4.1.1 LIMITATION OF LIABILITY	The Vendor's (Contractor's) liability to the State for actual, direct damages resulting from the Vendor's (Contractor's) performance or non-performance, or in any manner related to this Blanket P.O., for any and all claims, shall be limited in the aggregate to 200% of the total value of this Blanket P.O., except that such limitation of liability shall not apply to the following: a. The Vendor's (Contractor's) obligation to indemnify the State of New Jersey and its employees from and against any claim, demand, loss, damage, or	The Vendor's (Contractor's) liability to the State for actual, direct damages resulting from the Vendor's (Contractor's) related to this Blanket P.O., for any and all <u>third party claims to the extent arising from Contractor's negligence, willful misconduct, or violation of law in fulfilling its obligations herein</u> , shall be limited in the aggregate to <u>200% times (2x) of the total amount of fees actually paid or payable by the state to contractor under this agreement for the year</u>	Contractor will provide for indemnification associated with its negligence, willful misconduct, or violation of law. Contractor will provide copyright protections for items it develops and services it performs. Third party manufactured items, and services performed by third parties, will have coverages offered by such third parties.
 Innovative Solutions. World Class Support. Page 54			
Reference	New Jersey Bid Terms and Conditions	Redline/Exceptions	Comments
	expense relating to bodily injury or the death of any person or damage to real property or tangible personal property, incurred from the work or materials supplied by the Vendor (Contractor) under this Blanket P.O.	<u>previous to the incident which gave cause for such liability value of this Blanket P.O.</u> , except that such limitation of liability shall not apply to the following:	Contractor requires this clause in the final agreement if awarded.

The Hearing Unit's review of SHI's Quote revealed that SHI included a statement that the modified language was required for the following sections: Bid Solicitation §5.17.1 *Indemnification* - Subsection 4.1.1 *Limitation of Liability*; Bid Solicitation §6.3 *State's Right to Inspect Vendor {Bidder} Facilities*; State of New Jersey Standard Terms and Conditions §5.7 *Termination of Contract* State of New Jersey Standard Terms and Conditions §6.1 *Price Fluctuation During Contract*; Warranty; and, Force Majeure.¹¹ For SHI to now claim that these were simply "requests to review" is disingenuous.

Reviewing SHI's proposed terms under the *River Vale* factors, I find that SHI's proposed language modifications were material deviations from the requirements of the Bid Solicitation. First, SHI proposed 12 language modifications, and indicated that it was "look[ing] forward to negotiating various terms and other condition of business if awarded." Any one of the proposed language modifications, or SHI's opening statement alone, prevents the State from being assured that the contract will be entered in to performed and guaranteed according to its specified requirements. *River Vale*, supra, 127 N.J. at 216. Further, SHI indicated that at least four of the language modifications were required making it clear that the State would be contracting with SHI under the terms and conditions not set forth in the Bid Solicitation. SHI argues that the Bureau should have sought to a clarification from it regarding the proposed terms.

Second, if the State accepted SHI's language modifications, SHI would be in a position of advantage over other Bidders who did not bid because they could not agree with the mandatory requirements of the Bid Solicitation or correctly believed that they could not submitted alternative required language with the submitted Quote. *Ibid*. SHI did avail itself of the Question and Answer period submitting 12 questions for review.¹² After reviewing all of the questions submitted, the Bureau did make some modifications to the terms and conditions of the Bid Solicitation in response to the questions received from SHI and other potential Bidders. In fact, during the Q&A process, the Bureau received several questions regarding the *Ownership of Material, Limitation of Liability, Accessibility Compliance, Compliance – Codes, Indemnification, Termination of Contract, Performance Guarantee of Contractor, Delivery Requirements, Price Fluctuation During Contract* and, *Availability of Funds* – many of the provisions which SHI sought to amend through its Quote submission. Some proposed modifications were accepted and incorporated into the revised Bid Solicitation which was posted on *NJSTART*, which was then made available to all potential Bidders prior to the Quote opening date. This ensured that all Bidders were all a level playing field, aware of the terms and conditions of the Bid Solicitation and the resulting Contract awards when submitting Quotes and pricing. This process ensured that no one Bidder is put in a position of advantage, to the detriment of another, by being able to submit more favorable terms at a later date. Because the requirements of Bid Solicitation are equally applicable to all Bidders who submitted Quotes in response to this Bid Specification, "[r]equiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract." *Barrick*, supra, 218 N.J. at 259. However, contrary to the clear requirements of the Bid Solicitation, SHI did not submit any of its proposed modifications to the terms and conditions of the Bid Solicitation to the Bureau for review during the Question and Answer period. SHI reserved for itself, contrary to the requirements of the Bid Solicitation, the right to negotiate or mandate the terms and conditions of the Bid Solicitation for its own benefit, leaving it with "the option, after all bids are opened, to decline the contract." *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 566 (App. Div. 2018).

¹¹ Of these sections, only the Warranty and Force Majeure language could be added as additional terms.

¹² SHI's questions related to the following: adding a definition for 'manage service offerings;' making the State's contract open for interstate cooperative purchasing; engaging small businesses; evaluation criteria; pricing; permitting a second round of Q&A; permitting Contractors to sell their own software and/or provide maintenance of their own software; and value added software reseller services.

However, Bid Solicitation Section 6.4 instructs “clarifications cannot correct any deficiencies or material omissions, or revise or modify a Quote.” See, *In Re Motor Vehicle*, supra 2018 N.J. Super. Unpub. LEXIS 285 *29. Unlike the “discrepancy” discussed above in CDW-G’s ownership statement, there is no discrepancy in SHI’s submitted Quote. Rather, the proposed language modifications directly conflicted with the terms and conditions of the Bid Solicitation, such that SHI’s Quote materially deviated from the requirements of the Bid Solicitation rendering the Quote non-responsive.¹³ “The conditions and specifications of . . . [a] bid must apply equally to all prospective bidders; the individual bidder cannot decide to follow or to ignore these conditions” *In Re Motor Vehicle*, supra 2018 N.J. Super. Unpub. LEXIS 285 *28, citing, *Hall Constr. Co. v. N.J. Sports & Exposition Auth.*, 295 N.J. Super. 629, 635 (App. Div. 1996).

As the Supreme Court explained over sixty years ago, “[e]very element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders... If this were not the rule, the mandate for equality among bidders would be illusory and the advantages of competition would be lost.

[*In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 568, 575 (App. Div. 2018), citing, *Hillside v. Sternin*, 25 N.J. 317, 322-23 (1957).]

Because SHI’s Quote contained a material deviation from the requirements of the Bid Solicitation, I concur with the Bureau’s determination that SHI’s Quote was non-responsive.

¹³ SHI claims that the State failed to notify it that its Quote was non-responsive which prevented SHI from submitting a protest prior the Bureau requesting Best and Final Offers (BAFO) or prior to the issuance of the NOI. The Bureau was not required to advise SHI that its Quote was non-responsive prior to BAFO or NOI. Per *N.J.A.C. 17:12-3.1* et seq. protests may be filed as follows:

1. A timely filed written challenge to a term, condition, or requirement of a specification contained within an advertised RFP;
2. A timely filed written challenge related to the rejection of a proposal for failure to comply with any of the prerequisites set forth in *N.J.A.C. 17:12-2.2*;
3. A timely filed written challenge to a notice of intent to award issued by the Director; or
4. A timely filed written challenge to the Director's cancellation of an RFP after the opening of proposals.

A protest of the Bureau’s determination that a Quote was non-responsive occurs after the issuance of the notice of intent award. *N.J.A.C. 17:12-3.3*. This process ensures that the evaluation of Quote received proceeds without any administrative confusion, favoritism, corruption, or the appearance that one bidder may have received an advantage over any other bidder.

CONCLUSION

Based upon the foregoing, I find no reason to disturb the Bureau's recommendation that Contracts be awarded to CDW-G, Dell, Insight and YorkTel. Accordingly, I sustain the April 5, 2021, Notice of Intent to Award. This is my final agency decision.

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. Please monitor the Division's [NJSTART](#) website for future bidding opportunities for these services.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: L. Leonardi
C. Iversen
A. Morales
CDW-Government, LLC
Dell Marketing L.P.
Insight Public Sector, Inc.
York Telecom Corporation