



State of New Jersey

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April 8, 2021

Via Electronic Mail allen.melton@ey.com

Allen Melton, Partner
Ernst & Young, LLP
200 Plaza Drive
Secaucus, NJ 07094

Re: I/M/O Request for Quotation RFQ1465267S Ernst & Young, LLP
Protest of Notice of Intent to Award
G4018 Integrity Oversight Monitoring: Program and Performance Monitoring, Financial Monitoring
and Grant Management and Anti-Fraud Monitoring for COVID-19 Recovery Funds and Programs

Dear Mr. Melton:

This final agency decision is in response to your letter of March 24, 2021, on behalf of Ernst & Young, LLP (Ernst & Young) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that letter, Ernst & Young protests the March 18, 2021, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Request for Quotation RFQ1465267S – G4018 Integrity Oversight Monitoring: Program and Performance Monitoring, Financial Monitoring and Grant Management and Anti-Fraud Monitoring for COVID-19 Recovery Funds and Programs (Request for Quotes or RFQ).

By way of background, on March 9, 2020, Governor Murphy issued Executive Order 103 declaring both a Public Health Emergency and State of Emergency in light of the dangers of the Coronavirus disease 2019 (COVID-19). RFQ § 1.2 *Background*. On March 13, 2020, the President of the United States declared a national emergency and determined that the COVID-19 pandemic was of sufficient severity and magnitude to warrant a nation-wide emergency declaration under Section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121-5207, (Stafford Act) and that declaration was extended to the State of New Jersey on March 25, 2020 pursuant to Section 401 of the Stafford Act. *Ibid*. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, (CARES Act) was enacted to provide economic stimulus in response to the global pandemic caused by COVID-19. *Ibid*. The CARES Act, among other things, was enacted to assist State, Local and Tribal governments in navigating the impact of the COVID-19 outbreak and to cover necessary expenditures related to the public health emergency incurred between March 1, 2020 and December 30, 2020. *Ibid*.

On July 17, 2020, Governor Murphy signed Executive Order 166 (EO 166), which, among other things, established the COVID-19 Compliance and Oversight Task Force (Taskforce) and the Governor's Disaster Recovery Office (GDRO). *Ibid*. The purpose of the Taskforce is to advise Using Agencies that receive or administer COVID-19 Recovery Funds regarding compliance with federal and State law and

how to mitigate the risks of waste, fraud, and abuse. *Ibid.* Pursuant to EO 166, the Taskforce issued guidelines regarding the appointment and responsibilities of COVID-19 Oversight Integrity Monitors (Integrity Monitors). *Ibid.* Using Agencies may retain and appoint Integrity Monitors to oversee the disbursement of COVID-19 Recovery Funds and the administration of a COVID-19 Recovery Program. Integrity Monitors are intended to serve as an important part of the State’s accountability infrastructure while working with Using Agencies in developing measures to prevent, detect, and remediate inefficiency and malfeasance in the expenditure of COVID-19 Recovery Funds. *Ibid.* EO 166 requires Using Agencies to identify an Accountability Officer to serve as central point of contact for tracking COVID-19 funds within each agency or authority and is responsible for working with and serving as a direct point of contact for the GDRO and the Taskforce. *Ibid.*

On October 21, 2020, the Department of the Treasury (hereinafter “State”) issued the Request for Quotes to solicit Quotes from qualified firms to provide Program and Process Management Monitoring, Financial Auditing and Grant Management and Integrity Monitoring/Anti-Fraud support services for the disbursement of COVID-19 Recovery Funds. RFQ § 1.1 *Purpose and Intent.* The intent of the Request for Quotes is to award Contracts to those responsible Bidders whose Quotes, conforming to this Request for Quotes are most advantageous to the State, price and other factors considered in the following three areas of expertise: (1) Program and Process Management Monitoring; (2) Financial Auditing and Grant Management; and (3) Integrity Monitoring/Anti-fraud service.¹ *Ibid.* The creation of a pool of qualified Integrity Monitors will support monitoring and oversight and ensure that Using Agencies administer COVID-19 Recovery Funds in compliance with program, financial, and administrative requirements set forth in the federal-state grant agreement, the State-Recovery Program Participant sub-grant agreement, and applicable federal and state laws, regulations, and guidelines.

On December 18, 2020, the State received 15 Quotes in response to the Request for Quotes.² After conducting an initial review of the Quotes received, the State determined that five (5) of the submitted Quotes were not responsive to the requirements of the Request for Quotes; and therefore, those five Quotes were not further evaluated.³ The remaining ten (10) Quotes were then forwarded to the Evaluation Committee for review and evaluation consistent with the requirements of the Request for Quotes Section 6.7 *Evaluation Criteria.*

¹ This final agency decision uses the State’s statutory and/or regulatory terminology as used in the Request for Quotes, rather than the terminology employed by the State of New Jersey’s *NJSTART* eProcurement system. For ease of reference, the following is a table which references the *NJSTART* term and the statutory/regulatory term.

<i>NJSTART</i> Term	Statutory / Regulatory
Bid Solicitation	Request For Proposal
Bid Amendment	Addendum
Change Order	Contract Amendment
Master Blanket Purchase Order	Contract
Offer and Acceptance Page	Signatory Page
Quote	Proposal
Vendor {Bidder}	Bidder
Vendor {Contractor}	Contractor

² Quotes were received from the following firms: Acumen, LLC (Acumen); BDO USA, LLP (BDO); CohnReznick, LLP (CohnReznick); Cotton & Company, LLP (Cotton); Crowe LLP (Crowe); Deloitte & Touche LLP (Deloitte); Ernst & Young (EY); Grant Thornton Public Sector, LLC (Grant Thornton); Guidehouse Inc. (Guidehouse); KPMG LLP (KPMG); The North Highland Company (North Highland); Premier Group Services, Inc. (Premier); Regis & Associates, P.C. (Regis); Rumph and Associates, P.C. (Rumph); and Vander Weele Group, LLC (Vander Weele).

³ The Quotes submitted by Acumen, Ernst & Young, Guidehouse, KPMG, and Premier were determined to be non-responsive to the requirements of the Request for Quotes.

On March 12, 2021, the Evaluation Committee issued its report which recommended that Contracts be awarded to BDO; CohnReznick; Cotton; Crowe; Deloitte; Grant Thornton; North Highland; Regis; Rumph; and Vander Weele. Evaluation Committee Report, P. 27. On that date, the Bureau also completed a Recommendation Report, which recommended that Contracts be awarded to BDO; CohnReznick; Cotton; Crowe; Deloitte; Grant Thornton; North Highland; Regis; Rumph; and Vander Weele as the Bidders' contracts represent the most advantageous offer to the State price, and other factors considered. Recommendation Report, p. 1.

On March 18, 2021, the Bureau issued the NOI, indicating that it was the State's intent to make Contract awards consistent with the Bureau's recommendation in the March 12, 2021 Recommendation Report.

On March 24, 2021, Ernst & Young submitted a protest to the Division's Hearing Unit challenging the State's determination that its submitted Quote was non-responsive to the requirements of the Request for Quotes. By way of summary, Ernst & Young states many of the firms submitting Quotes in response to the Request for Quotes are, like it, public accounting firms subject to "professional standards related to auditor independence, conflicts, ethics, and other matters...To comply with professional standard, public accounting forms cannot perform consulting services if doing so would impair their independence with respect to their audit clients." Ernst & Young protest, p. 1. Therefore, the firms cannot now agree to "perform consulting services if doing so would impair their independence with respect to their [other] audit clients." Ernst & Young protest, p. 1. Ernst & Young alleges that the State, in proposing to award Contracts to other similarly situated public accounting firms, failed to ensure a level playing field, because it has treated similarly situated entities differently. Ernst & Young protest, p. 1. Ernst & Young states that this un-level playing field is further demonstrated by the fact that the State found that the Quote submitted by Premier was non-responsive to the requirements of the Request for Quotes because Premier failed to submit the State of New Jersey Security Due Diligence Third-Party Information Security Questionnaire required by Request for Quotes Section 4.2.9 *Overview of Security Plan and Standards*, but determined that the Quote submitted by Deloitte was responsive and Deloitte is eligible for a Contract award despite the fact that Deloitte similarly did not submit the State of New Jersey Security Due Diligence Third-Party Information Security Questionnaire. Ernst & Young protest, p. 3.

In consideration of Ernst & Young's protest, I have reviewed the record of this procurement, including, the Request for Quotes, the Quotes received and Ernst & Young's protest, the relevant statutes, regulations, and case law. This review of the record 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.

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).

First, Ernst & Young alleges that the State, in reviewing the Quotes received, treated similarly situated Bidders disparately. As noted above, Ernst & Young alleges that all Bidders who are public accounting firms are unable to comply with the requirements of the Request for Quote which asks that the Contractors provide litigation support services applicable to the nature of the Contract. See, RFQ §.2 *Litigation Services*. Specifically, Request for Quotes Section 3.2 *Litigation Services* required that awarded Contractors

...shall, at its own cost, fully cooperate with the State and provide all documentation and/or working papers necessary to represent and defend the State and any of its political sub-divisions at its own cost, in any matter before any federal, state or local regulatory agency if any agency files a proceeding against the State or any of its political sub-divisions resulting from the implementation of the contractor(s) recommendations.

Litigation Services shall include a full range of litigation support services applicable to the nature of the Contract, including without limitation, expert witness testimony, strategy development, document discovery, deposition assistance, arbitration consulting, computation of damages, and preparation of trial exhibits.

Potential Bidders were permitted to submit questions regarding the Request for Quotes by October 28, 2020. Sixty-two questions were received, only one question related to the requirements of Request for Quotes Section 3.2. Specifically, the potential Bidder enquiring “regarding litigation services, will you require legal services or support?” On December 7, 2020 the State amended the requirements of Request for Quotes Section 3.2 to include the following clarifying language:

Litigation Services shall include a full range of litigation support services applicable to the nature of the Contract, including without limitation, expert witness testimony, strategy development, document discovery, deposition assistance, arbitration consulting, computation of damages, and preparation of trial exhibits.

No other questions were received from any potential Bidder regarding this requirement of the Request for Quotes, nor did any potential Bidder request that this language be modified to comply with either American Institute of Certified Public Accountants (AICPA) or Public Company Accounting Oversight Board (PCAOB) professional standards.⁴

In its submitted Quote, Ernst & Young included the following language:

We accept the State’s Standard Contract Terms and Conditions. If EY is selected for contract award, to supplement those terms, EY would request incorporation of a limitation of liability provision consistent with our recent engagement with NJ Treasury titled “State of New Jersey Action Plan for Coronavirus Relief Fund” that was executed in July 2020. Through leveraging the limitation of liability terms previously agreed

⁴ The State did receive a question from a potential Bidder requesting that the indemnification language of Section 4.1 of the State’s Standard Terms and Conditions be modified so as not to impair an auditor’s independence under the AICPA standards. While the State did not accept the proposed modified language, the State noted that requested indemnification language was covered under the common law.

upon, EY is positioned to expeditiously finalize engagement terms upon contract award.

As a firm within a highly regulated industry, there are certain restrictions EY must adhere to as part of providing services. To the extent EY is required by applicable law or subpoena to produce information or make available personnel as witnesses in connection with future litigation matters against the State of New Jersey, EY will comply with such requirements. However, EY cannot accept an advance commitment that EY will provide information and make available personnel upon request of the State of New Jersey in connection with potential future litigation matters. EY shall have the right to decline acceptance of support that State of New Jersey may request and in cases where EY agrees to provide requested support, EY cannot provide any assurance that information or testimony EY provides will either support or contradict a particular position that State of New Jersey wants to maintain in the litigation. If EY's participation in the litigation is challenged on the basis of an alleged conflict of interest or alleged violation of independence requirements, the State of New Jersey will promptly notify EY, and EY may engage our own legal counsel to contest any such challenge.

[Ernst & Young Quote, p. 97, emphasis added.]

As noted above, the purpose of the Request for Quotes was to obtain Contractors to provide Program and Process Management Monitoring, Financial Auditing and Grant Management and Integrity Monitoring/Anti-Fraud support services for the disbursement of COVID-19 Recovery Funds. RFQ § 1.1 *Purpose and Intent*. The requirements for each were set forth in Request for Quotes Section 3.1.1 *Specific Tasks by Category*. Should any Using Agency require a Contractor to provide the litigation support services identified in Request for Quotes Section 3.2, such support services would be related to the tasks and deliverables provided to the State under the terms of the Contract. Had Ernst & Young believed that the requirement was unclear, or contrary to its professional standards, it had the opportunity to request that language be clarified or modified during the Question and Answer period, it chose not to do so.

Ernst & Young asserts that the State created an un-level playing field because it determined that the Quotes submitted by other public accounting firms were responsive to the specifications, when those firms are bound by the same professional standards as Ernst and Young. Of the five public accounting firms identified in Ernst & Young's protest letter, none of them raised a concern in their submitted Quotes regarding the inability to agree to the performance of litigation support services required by Request for Quotes. Accordingly each awarded Contractor will be bound by the terms and conditions of the Request for Quotes, including the requirement to provide litigation support services as set forth in Request for Quotes Section 3.2.⁵ Here, it is Ernst & Young who seeks to un-level the playing field by reserving for

⁵ In connection with the protest, the Hearing Unit undertook a review of the Quotes submitted by each of the public accounting firms identified in Ernst & Young's protest. That review revealed that the Quote submitted by Crowe LLP (Crowe) may be non-responsive based upon its response to the Request for Quotes Section 3.2. As noted above, the Request for Quote required that:

The Contractor shall, at its own cost, fully cooperate with the State and provide all documentation and/or working papers necessary to represent and defend the State and any of its political sub-divisions at its own cost, in any matter before any federal, state or local regulatory agency if any agency files a proceeding

itself the right to negotiate the terms and condition of the contract after award. Therefore, the State properly deemed Ernst & Young's Quote non-responsive.

Second, in further support of its allegation that the State created an un-level playing field by treating similarly situated Bidder differently, Ernst & Young state that State accepted a Quote submitted by Deloitte as responsive to the Request for Quotes while deeming the Quote submitted by Premier as non-responsive, when both Bidders failed to include the New Jersey Security Due Diligence Third-Party Information Security Questionnaire (Questionnaire) with their submitted Quotes. Request for Quote Section 4.2.9 *Over of Security Plan and Standards* required that Bidders complete and submit the Questionnaire with their

against the State or any of its political sub-divisions resulting from the implementation of the contractor(s) recommendations.

[RFQ § 3.2 *Litigation Support.*]

In its Quote, Crowe appears to have limited the situations in which it would provide litigation support services to the State. Additionally, Crowe reserved for itself the right to negotiate the fees in the future for the litigation support services. Crowe's attempt to reserve for itself the ability to negotiate its future pricing is contrary to the Appellate Division's decision in *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527 (App. Div. 2018). As such, a review of the Quote submitted by Crowe should be conducted to determine whether the submitted Quote is responsive to the requirements of the Request for Quotes.

Additionally, the Quote submitted by Grant Thornton may also be non-responsive. In its submitted Quote Grant Thornton stated "This proposal is the work of Grant Thornton Public Sector LLC, the U.S. member firm of Grant Thornton International Ltd, and is in all respects subject to negotiation, agreement, and signing of specific contracts." Grant Thornton Quote, p. 88, emphasis added. Potential Bidders were permitted to submit questions regarding the Request for Quotes by October 28, 2020. Sixty-two questions were received. One question was received regarding Request for Quotes Section 5.1. Specifically, the potential Vendor {Bidder} sought a modification to Request for Quote language as noted below in red.

This Contract awarded, and the entire agreement between the parties, as a result of this RFQ shall consist of this RFQ, SSTC, Bid Amendment to this RFQ, the Contractor's Quote, any Best and Final Offer, and the Using Agency's Notice of Award.

In the event of a conflict in the terms and conditions among the documents comprising this Contract, **in each case as modified by any exceptions taken or assumptions offered by the Contractor**, the order of precedence, for purposes of interpretation thereof, listed from highest ranking to lowest ranking, shall be:

- A. Executed Offer and Acceptance Page;
- B. RFQ Section 5, as may be amended by Bid Amendment;
- C. The State of NJ Standard Terms and Conditions (SSTC) accompanying this RFQ;
- D. All remaining sections of the RFQ, as may be amended by Bid Amendment; and
- E. The Contractor's Quote as accepted by the State.

The State rejected this proposed modification stating "the State does not accept this proposed modification. Please see response to Question 38." In response to Question 38, the State noted "There will be no negotiation of terms and conditions after the Question and Answer process is complete, after Notice of Intent to Award is issued or after a final award is made." Similar to the notation by Crowe, contrary to the Appellate Division's decision in *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527 (App. Div. 2018), Grant Thornton attempted to reserve for itself the ability to negotiate the terms and conditions of the Contract. As such, a review of the Quote submitted by Grant Thornton should be conducted to determine whether the submitted Quote is responsive to the requirements of the Request for Quotes.

Quote. The purpose of the Questionnaire is to “to provide the State with an overview of the Bidder’s security and privacy controls to meet the State of New Jersey’s objectives as outlined and documented in the Statewide Information Security Manual and compliance with the State’s security requirements as outlined in Section 3.4.” It is the information requested in the Questionnaire that is needed by the State, whether provided on the form or otherwise provided.

As noted above, Premier failed to include the Questionnaire with its submitted Quote. Further Premier did not describe any of its security and privacy controls within the technical Quote, such the State could make a determination whether Premier’s security and privacy controls meet the State’s objectives as outlined and documents in the Statewide Information Security Manual. Accordingly, the State determined that the Premier’s Quote was not responsive to the requirements of the Request for Quotes. Specifically, the Evaluation Committee Report notes:

The Bureau determined Premier to be non-responsive due to its failure to submit the completed Security Questionnaire, Non-Disclosure Agreement, and Security Overview as required by Section 4.2.9, *Overview of Security Plan and Standards*, of the RFQ. The Security Questionnaire and Security Overview is an important material element of the Quote, and its absence deprives the State of the assurance that the Vendor {Bidder} will perform the Scope of Work in accordance with the terms of the RFQ. Furthermore, without a completed Security Questionnaire or Security Overview, the State is unable to determine whether the Vendor {Bidder} has adequate procedures and practices in place to protect State Confidential Information.

[Evaluation Committee Report, p. 6-7.]

In contrast, while the Quote submitted by Deloitte did not include the Questionnaire, Deloitte did address its security and privacy controls within the text of its technical Quote. The Evaluation Committee Report notes

Deloitte did not submit the Security Questionnaire and Non-Disclosure Agreement (NDA) with their Quote; however, Deloitte did include an overview of their information security program, identifying specific sections that meet the information security requirements as requested by the State. While the Committee would have liked to see the full and completed Security Questionnaire response, the Committee agreed that if awarded, the Security Questionnaire must be submitted and reviewed by the Office of Homeland Security and Preparedness prior to any forthcoming contractual agreement during the mini-bid process pursuant to Section 1.2.1 of the RFQ.

[Evaluation Committee Report, p. 12.]

The Hearing Unit’s independent review of Deloitte’s submitted Quote reveals that on pages 121 – 137 of its submitted Quote, Deloitte provided a narrative response to each of the requirements identified in Request for Quotes Section 3.4 *Security Plan*. While Deloitte did not provide the Questionnaire, the firm provided to each of the security protocols required of any awarded Contractor. Based upon the information provided in the narrative Quote, the State’s Office of Homeland Security and Preparedness determined that Deloitte provided the necessary information and was satisfied Deloitte has the capability to meet the State’s security and privacy objectives as outlined and documents in the Statewide Information Security Manual.

Contrary to Ernst & Young's allegation, these two vendors were not treated differently by the State in reviewing the Quotes received. As noted above, Premier failed to include any mention of its security and privacy controls either through the Questionnaire or within its submitted Quote; therefore, the State had no assurance that the contract could be performed as required by the terms of the Request for Quotes. Deloitte on the other hand, submitted a detailed response to each of the security requirements identified in the Request for Quotes; therefore, despite the fact that Deloitte did not submit Questionnaire, the information needed to make an assessment of Deloitte's security and privacy protocols was included within the submitted Quote; and therefore, the objectives of requiring the submission of the Questionnaire was otherwise met.

Based upon the findings set forth above, I find no reason to disturb the determination that the Quote submitted by Ernst & Yong was non-responsive to the requirements of the Request for Quotes. However, I remand this matter back for further review of the Quotes submitted by Crowe and Grant Thornton. As the Integrity Monitoring engagements from resulting contract will be on an as needed basis, and given the immediate need for these services, awards can be made to those vendors deemed responsive, while it re-evaluates the Quotes submitted by Crowe and Grant Thornton by upon the above findings. This is my final agency decision with respect to the protest submitted by Ernst & Young.

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: J. Pastuzyn
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L. Spildener
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Grant Thornton Public Sector, LLC
Crowe LLC