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October 17, 2017

Denis Serkin, Esq.
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70 Grand Avenue
River Edge, NJ 07661

RE: IMO RFP# 18DPP00166
Protest of Notice of Intent to Award
T3086 – Project Management Services for the RREM and LMI Homeowners Rebuilding
Programs: DCA

Dear Mr. Serkin:

This letter is in response to your correspondence of October 6, 2017, to the Division of Purchase and Property's (hereinafter "Division") Hearing Unit on behalf of APTIM Environmental & Infrastructure, Inc.¹ (hereinafter "APTIM"). In that letter APTIM protests the Division's Procurement Bureau's (hereinafter "Bureau") September 29, 2017, Notice of Intent to Award (hereinafter "NOI") a contract to Innovative Emergency Management, Inc. (hereinafter "IEM") for Bid Solicitation {Request for Proposal} #18DPP00166: T3086 – Project Management Services for the RREM and LMI Homeowners Rebuilding Programs: DCA (hereinafter "RFP"). In the protest, APTIM asserts that "[b]ased on its [P]roposal, IEM cannot deliver the services it proposed in the time frame required, with the people identified or for the price quoted." APTIM protest, p. 2. APTIM requests that the Division disqualify IEM based upon the alleged deficiencies and misrepresentations contained in IEM's Quote {Proposal} (hereinafter "Proposal"), and that APTIM be awarded the contract.

BACKGROUND

By way of background, on October 27, 2012, Governor Chris Christie signed Executive Order 104 declaring a State of Emergency in New Jersey due to the impact of Superstorm Sandy on the citizens of the State which resulted in significant property damage. RFP § 1.2 *Background*. On October 30, 2012, former President Barack Obama declared New Jersey a major disaster area which qualified the State for Federal disaster assistance funds. *Ibid.* New Jersey designated the Department of Community Affairs (hereinafter "DCA") as the lead agency for use of the State's Community Development Block Grant Disaster Recovery funds (hereinafter "CDBG"). As the lead agency, DCA was tasked with formulating and implementing the

¹ APTIM is formerly known as CB&I Government Solutions, Inc. and is a vendor on the State's current RREM Program Contract (G-8046), for services similar to that sought by this Bid Solicitation {Request for Proposal} RFP, which is presently due to expire on May 23, 2018.

State's Action Plan. DCA continues to implement the recovery phase of the State's Action Plan; and therefore, there exists a continued need for project management services. Ibid.

Accordingly, on August 21, 2017, the Bureau issued the subject RFP on behalf of DCA. The purpose of the RFP was to solicit Proposals to engage a Vendor {Contractor} (hereinafter "Contractor") with experience providing project management services for government-funded individual assistance programs. The awarded Contractor will provide project management services for the State's Reconstruction, Rehabilitation, Elevation and Mitigation (RREM) and Low-to-Moderate Income (LMI) Homeowners Rebuilding Programs.² RFP § 1.1 *Purpose and Intent*. It is the intent of the Division to award one Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter "Contract") to that responsible Vendor {Bidder} (hereinafter "Bidder") whose Proposal, conforming to the RFP, is most advantageous to the State, price and other factors considered. Ibid.

On September 20, 2017, the Division's Proposal Review Unit opened four (4) Proposals received by the submission deadline. One Proposal received was deemed administratively non-responsive due to the Bidder's failure to submit a Price Sheet/Schedule as required by the RFP § 4.4.5 *Price Schedule/Sheet*. The Proposals received from APTIM, IEM and Gilbane Building Company (Gilbane) were forwarded to the Bureau for review to determine compliance with the requirements of the RFP.

In conducting its initial review of the Proposal received from APTIM, the Bureau determined that the alternative staffing plan proposed and the pricing assumptions set forth in the Proposal did not conform to the requirements of the RFP. Accordingly, the Bureau requested a clarification from APTIM regarding its alternative staffing plan and the corresponding pricing assumptions. Specifically, the Bureau requested that APTIM withdraw its alternative staffing plan and pricing assumptions or withdraw its Proposal. See, Bureau's September 21, 2017 letter to APTIM. On September 22, 2017, APTIM responded to the Bureau withdrawing the alternative staffing plan and pricing assumptions from its Proposal. See, APTIM's September 22, 2017 letter.

In conducting its initial review of Gilbane's Proposal the Bureau determined that the section of Gilbane's Proposal entitled "Proposal Assumptions, Qualifications and Exclusions," which set forth pricing qualifications, deleted certain RFP terms, and proposed additional terms and conditions, that conflicted with the requirements of the RFP. Accordingly, the Bureau wrote to Gilbane requesting that Gilbane withdraw that section of its Proposal. See, Bureau's September 21, 2017 letter to Gilbane.

RFP § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions*, requires that:

The Vendor {Bidder} shall³ provide a Firm Fixed Unit Cost for each identified Pool on the Price Schedule. Failure to provide all requested unit pricing shall result in the Vendor's {Bidder's} Quote {Proposal} being deemed non-responsive.

The Vendor's {Bidder's} unit pricing shall provide the Firm Fixed Unit Cost for the task of successfully reaching Final Closeout of an Applicant's

² This is a reprourement of similar services provided under the G-8046 – RREM Program term Blanket P.O. {Contract}. RFP § 1.2 *Background*.

³ "Shall or Must [d]enotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a Quote {Proposal} as non-responsive." RFP § 2.2 *General Definitions*.

Project based on the DCA designated Pool status of the Applicant at the time of Project transfer (initiation) to the Vendor {Contractor}.

[*Emphasis added.*]

Accordingly, in its clarification letter to Gilbane, the Bureau also requested that Gilbane confirm that its “Revised Price Schedule, found in Volume III, [of its Proposal], provide[s] firm-fixed pricing and meets all requirements specified by the Bid Solicitation.” *Ibid.* In its response to the Bureau, Gilbane agreed to withdraw the section of its Proposal entitled “Proposal Assumptions, Qualifications and Exclusions.” See, Gilbane’s September 22, 2017 letter. However, with respect to firm-fixed pricing, Gilbane stated:

Given our agreement to withdraw the “Proposal Assumptions, Qualifications and Exclusions” and due to the lack of clarity and resulting ambiguities in the RFP statement of work, Gilbane lacks the clarity necessary to confirm that its Revised Price Schedule, found in Volume III, provides firm fixed pricing and meets all requirements as specified by the Bid Solicitation {RFP}.”

[*Ibid.*]

Because Gilbane would not confirm that its submitted Proposal pricing represented firm fixed pricing, the Bureau deemed Gilbane’s proposal non-responsive for failure to conform to the mandatory requirement of the RFP that Bidder submit a firm fixed cost.

The Bureau forwarded the two (2) responsive Proposals, submitted by APTIM and IEM to the Evaluation Committee (hereinafter “Committee”) for review. The Committee was responsible for performing a technical review of those Proposals using the criteria set forth in RFP § 6.7.1 *Technical Evaluation Criteria* as follows:

6.7.1 EVALUATION CRITERIA

Each criterion will be scored and each score multiplied by a predetermined weight to develop the Technical Evaluation Score.

- A. **Personnel**: The qualifications and experience of the Vendor’s {Bidder’s} management, supervisory, and key personnel assigned to the Blanket P.O. {Contract}, including the candidates recommended for each of the positions/roles required;
- B. **Experience of firm**: The Vendor’s {Bidder’s} documented experience in successfully completing Blanket P.O. {Contracts} of a similar size and scope in relation to the work required by this Bid Solicitation {RFP}; and
- C. **Ability of firm to complete the Scope of Work based on its Technical Quote {Proposal}**: The Vendor’s {Bidder’s} demonstration in the Quote {Proposal} that the Vendor {Bidder} understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the Blanket P.O. {Contract}.

The technical scores were based upon an independent review of the Proposals by each Committee member and the results of deliberations conducted by the Committee. Price was not a consideration in the technical evaluation and each Proposal was scored by the Committee without knowledge of each Bidders' pricing. Once technical scoring was completed, pricing was revealed and then considered as part of the Committee's final recommendation.

Committee's Review of APTIM's Proposal

With respect to APTIM's Proposal the Committee concluded that for Criteria A, APTIM's Proposal included detailed information which demonstrated that its key personnel have experience performing related contracts. Evaluation Committee Report (hereinafter "Committee Report"), p. 13. For example, APTIM's proposed Program Manager possesses more than 30 years of related housing and infrastructure program management experience. Ibid. The proposed Deputy Program Manager possesses over 26 years of experience in civil and residential construction and disaster recovery, including CDBG related experience for Hurricane Katrina, Hurricane Ike, and Superstorm Sandy. Ibid. In addition, APTIM's Proposal included a chart detailing the years of experience and program related responsibilities of 63 members of its team. Ibid. Based upon the information submitted, the Committee determined that the key personnel identified by APTIM had the necessary education, qualification, and experience to successfully perform the tasks required by the RFP.

As to Criteria B, APTIM provided detailed information regarding six (6) similar CDBG related contracts, State of New Jersey (Superstorm Sandy); Louisiana (Hurricane Katrina); Galveston County, Texas (Hurricane Ike); and multiple contracts for New York City (Superstorm Sandy). Committee Report, p. 14. APTIM included a detailed project description, contract value, and project dates for each of the related contracts. Ibid. With this information, the Committee concluded that APTIM had demonstrated that it had successfully completed contracts of a similar size and scope in relation to the work required by this RFP.

For Criteria C, APTIM's technical quote addressed the requirements of each section of the RFP's Scope of Work in detail. Ibid. The Committee found that APTIM's proposed schedule was detailed and indicative of APTIM's understanding of the tasks and deliverables required by the RFP. Ibid. APTIM's Proposal demonstrated its proposed approach to the completion of the Project Management Components and Core Services. Ibid. APTIM's approach to the management of Applicant Interaction was comprehensive and showed an understanding of the importance of this aspect of the Contractor's responsibilities. Ibid. The Committee found APTIM's technical quote met the requirements of the RFP and presented an approach that would permit successful performance of the technical requirements of the Contract if awarded.

Committee's Review of IEM's Proposal

With respect to the Proposal submitted by IEM, the Committee concluded for Criteria A that IEM's Proposal provided resumes for the 14 key personnel identified by IEM to be assigned to the Contract resulting from this Bid Solicitation along with four (4) representative non-key staff members for "CM Pod Leads". Committee Report, p. 15. The resumes set forth relevant experience, including CDBG related experience similar to that sought by the subject RFP. Ibid. IEM's proposed Program Executive, possesses ten (10) years of related experience, including experience serving as the Program Director for Hurricane Katrina related projects and the Executive Director for Superstorm Sandy related projects. Ibid. Additionally, IEM's proposed Program Manager has nearly ten (10) years of CDBG related experience, including the management of New York City's Superstorm Sandy related redevelopments. Ibid. Based upon the information provided, the Committee determined that the personnel identified by IEM had the education, qualification, and experience to successfully perform the tasks required by the RFP.

As to Criteria B, IEM provided a detailed description of ten (10) CDBG related projects that IEM, its executives, and its subcontractors have been awarded in recent years. Ibid. Of the listed projects, IEM served as the prime vendor on three (3) of the listed projects, including the NY Rising Housing Recovery Program and the Restore Louisiana Housing Recovery Program. Ibid. The Committee determined that IEM's experience with the NY Rising Housing Recovery Program Management contract was impressive. Ibid. IEM served as program manager for the State of New York's \$1 billion recovery program funded by CDBG. Ibid. The Committee also noted that IEM was recently awarded the Restore Louisiana Housing Recovery Program Management contract, which provides similar CDBG related services to the thousands of homes that were severely damaged during the 2016 floods. Ibid. Louisiana received a \$1.7 billion CDBG allocation, for which IEM has been leading the program management services team implementing the housing recovery effort. Ibid. With this information, the Committee concluded that IEM demonstrated that it has successfully completed contracts of a similar size and scope in relation to the work required by this RFP.

Finally, with respect to Criteria C, the Committee found that IEM's technical Proposal addressed its plan to transition the current Contract and startup services if it is awarded the Contract. Committee Report, p. 16. IEM's Proposal stressed the importance of an empathetic approach to Applicant relations. Ibid. IEM's proposed Contract schedule was detailed and indicative of IEM's understanding of the tasks and deliverables required by this RFP and the firm's plan to successfully address the requirements. Ibid. The Committee found IEM's technical Proposal met the requirements of the RFP and presented an approach that would permit successful performance of the technical requirements of the Contract if awarded.

Committee Recommendation

Based upon the review, evaluation and scoring of the Proposals submitted by APTIM and IEM, the Committee concluded that both Bidders submitted competitive Proposals that met the mandatory requirements of the RFP, and that each Bidder successfully conveyed its ability to complete the Scope of Work as required by the RFP. Committee Report, p. 18. After reviewing and scoring the technical Proposals, the Committee was provided with the Proposal pricing from each Bidder. Ibid. IEM's total Proposal cost is \$25,286,000, while APTIM's total Proposal cost is \$34,885,970. Ibid. IEM's total Proposal costs represents a 27.52% cost savings over APTIM's total Proposal cost. Ibid. Therefore, based upon its technical Proposal, which met all requirements of the Bid Solicitation, and its pricing, the Committee recommended an award to IEM.

On September 29, 2017 the Bureau issued a NOI indicating that it was the Division's intent to award a Contract to IEM for the subject solicitation. On October 6, 2017 APTIM submitted its protest.

DISCUSSION

In its protest, APTIM alleges the following: (A) IEM's Proposal was not "true and accurate" as IEM proposed project staff that are not available to work on this Contract; (B) IEM made material false representations to the Division in its Proposal; (C) IEM's Proposal failed to meet mandatory requirements of the RFP; (D) IEM submitted an unbalanced bid; (E) IEM exaggerated its capabilities and/or reinterpreted certain non-mandatory requirements of the RFP; and, (F) the Division failed to properly weigh its evaluation criteria.

APTIM requests that the Contract award be stayed pending the Division's review of its protest, and any associated appeals, should its protest be denied. APTIM Protest, p. 18. APTIM further requests that the NOI indicating the Division's intent to award a Contract to IEM be rescinded, that IEM's Proposal be

“thrown out” and that the Contract be awarded to APTIM. Ibid. Finally, APTIM requests an in-person presentation with respect to the issues raised in its protest. APTIM Protest, p. 1.

On October 11, 2017, IEM submitted a response to APTIM’s protest.

First, with respect to APTIM’s request that the Contract award to IEM be stayed pending the outcome of its protest, I note that the Division’s governing regulations state in pertinent part:

the Division shall not award the contract in question until a final decision is rendered by the Director on the merits of the protest. The Director may award the contract, notwithstanding the receipt of a protest pursuant to the above provisions, if the failure to award the contract will result in substantial cost to the State or if public exigency so requires. In such event, the Director shall notify all interested parties.

[N.J.A.C. 17:12-3.3(c).]

Given the timeframe within which APTIM’s protest is being reviewed and the issuance of this final agency decision, there is no resulting substantial cost to the State or public exigency which would warrant award of this contract prior to my decision on APTIM’s protest. As such, there was no Contract award while APTIM’s protest was pending before me.

Second, as to APTIM’s request for an in-person presentation to challenge the intended contract award, I note that pursuant to N.J.A.C. 17:12-3.3(d)(1), “[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director.” Further, “[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing.” N.J.A.C. 17:12-3.3(d). In consideration of APTIM’s protest, I have reviewed the record of this procurement, including the RFP, the Proposals submitted, the Committee Report, the Bureau’s Recommendation Report, and the relevant statutes, regulations, and case law. The issues raised in APTIM’s protest are 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 APTIM on the written record. APTIM’s request for an in-person presentation is therefore denied. I set forth herein my final agency decision.

A. IEM accurately represented the qualifications and availability of its proposed project staff

APTIM alleges that despite the fact that IEM certified to the Division that it had submitted a true and accurate proposal, it did not; and therefore, its Proposal should be disqualified.⁴

1. Management Supervisory and Key Personnel

APTIM alleges that IEM has proposed two key employees, Jon Mabry as Program Executive and Joan Harmer as Invoicing and Reporting Manager who are contractually committed to the Louisiana Restoration Program, and therefore neither is available to work in New Jersey if IEM is awarded the

⁴ Though not required by the RFP, with its Proposal, IEM included a cover letter from its Director of Operations dated September 20, 2017, stating “[a]s IEM’s Director of Operations, I certify that the information submitted in and with this offer is true and accurate. I am authorized to submit this response on behalf of IEM.”

Contract.⁵ Additionally, APTIM asserts that IEM's proposed Program Manager – Sean Almonte, currently works for the New York City Department of Housing Preservation and Development, not IEM contrary to IEM's Proposal. Further, APTIM asserts that 50% of the managers "assigned" to this Contract do not currently work for IEM. APTIM protest, p. 7.

With respect to the identification of management, supervisory and other key personnel RFP § 4.4.4 *Organizational Support and Experience* states:

The Vendor {Bidder} should⁶ include information relating to its organization, personnel, and experience, including, but not limited to, references, together with contact names and telephone numbers, evidencing the Vendor's {Bidder's} qualifications, and capabilities to perform the services required by this Bid Solicitation {RFP}.

The Vendor {Bidder} should include the level of detail it determines necessary to assist the evaluation committee in its review of Vendor's {Bidder's} Quote {Proposal}.

[Emphasis added.]

Further, the RFP requests that the Bidder provide:

- A. Blanket P.O. {Contract} - Specific Chart. The Vendor {Bidder} should include a Blanket P.O. {Contract} organization chart, with names showing management, supervisory and other key personnel (including Subcontractor management, supervisory, or other key personnel) to be assigned to the Blanket P.O. {Contract}. The chart should include the labor category and title of each such individual; and
- B. Chart for Entire Firm. The Vendor {Bidder} should include an organization chart showing the Vendor's {Bidder's} entire organizational structure. This chart should show the relationship of the individuals assigned to the Blanket P.O. {Contract} to the Vendor's {Bidder's} overall organizational structure.

[RFP § 4.4.4.2 Organization Charts, emphasis added.]

⁵ APTIM asserts that there was litigation between Louisiana and IEM regarding IEM's proposal and that IEM assured Louisiana that Mabry and Harmer would be fully committed to project. In support of this statement, APTIM provided a March 24, 2017 article from Business Report (www.businessreport.com). APTIM protest, Exhibit S. That article however does not support APTIM's protest statement that Mr. Mabry and Ms. Harmer are contractually committed to the Louisiana Restoration Program. Rather, the article discusses problems with Louisiana's solicitation that cause the state to re-bid the subject contract. While IEM, was mentioned in the article as the intended awardee for the Louisiana Restoration Program, neither Mabry nor Harmer were mentioned in the article.

⁶ "Should – [d]enotes that which is permissible or recommended, not mandatory." RFP §2.2 *General Definitions*.

The RFP additionally requests that the Bidder include resumes for management, supervisory and key personnel to be assigned to the Contract, noting that:

Resumes should emphasize relevant qualifications and experience of these individuals in successfully completing Blanket P.O.s {Contracts} of a similar size and scope to those required by this Bid Solicitation {RFP}. Resumes should include the following:

- A. The individual's previous experience in completing each similar Blanket P.O. {Contract};
- B. Beginning and ending dates for each similar Blanket P.O. {Contract};
- C. A description of the Blanket P.O. {Contract} demonstrating how the individual's work on the completed Blanket P.O. {Contract} relates to the individual's ability to contribute to successfully providing the services required by this Bid Solicitation {RFP}; and
- D. With respect to each similar Blanket P.O. {Contract}, the name and address of each reference together with a person to contact for a reference check and a telephone number.

[RFP § 4.4.4.3 Resumes, emphasis added.]

In its Proposal, in response to RFP §4.4.4, IEM included the following Organizational Chart

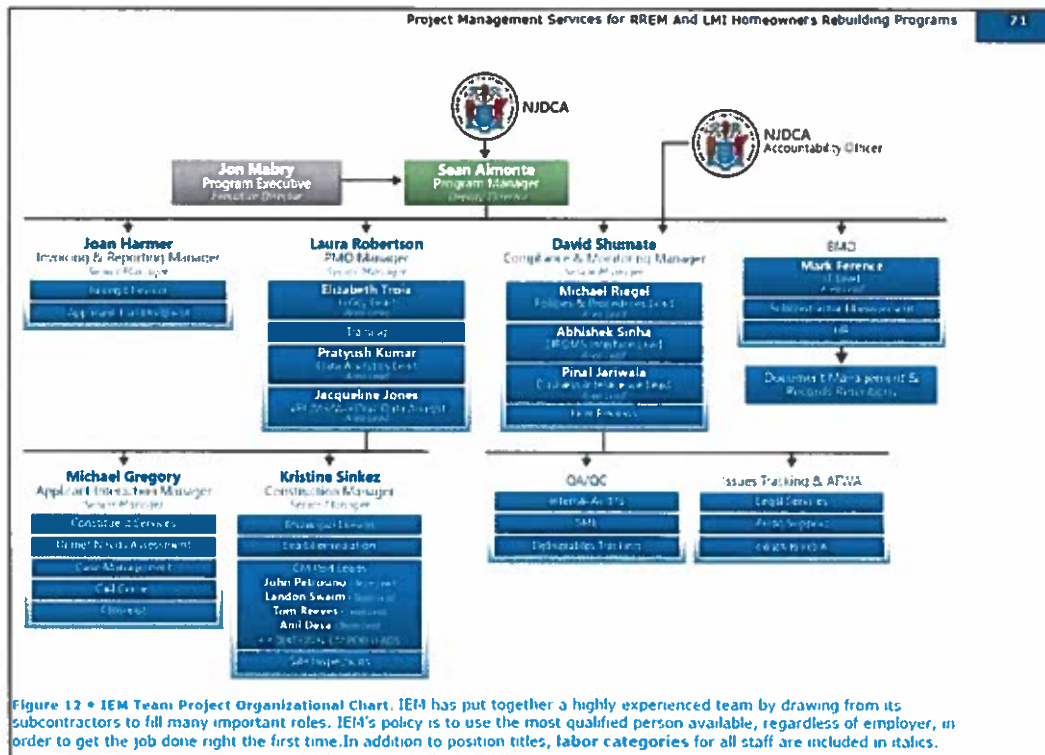


Figure 12 • IEM Team Project Organizational Chart. IEM has put together a highly experienced team by drawing from its subcontractors to fill many important roles. IEM's policy is to use the most qualified person available, regardless of employer, in order to get the job done right the first time. In addition to position titles, labor categories for all staff are included in italics.

Further with respect to Key Personnel, IEM's Proposal states:

3.4 RESUMES

Key Personnel

Resumes for all management, supervisory, and key personnel to be assigned to the Blanket P.O. are provided on the following pages. Our key personnel are listed below.

- Jon Mabry, Program Executive
- Sean Almonte, Program Manager
- Joan Harmer, Invoicing & Reporting Manager
- Lara Robertson, PMO Manager
- David Shumate, Compliance & Monitoring Manager
- Michael Gregory, Applicant Interaction Manager
- Kristine Sinkez, Construction Manager
- Elizabeth Troia, Policy Lead

Jon Mabry is listed as the Program Executive and IEM's Proposal notes that he "has the responsibility of ensuring that DCA has the right program operational team serving the needs of New Jersey homeowners." IEM Proposal, p. 68. Contrary to APTIM's assertion, Mr. Mabry will not have the day-to-day responsibility for project oversight. Rather, that responsibility will be borne by Mr. Almonte, the Program Manager. See, IEM Proposal, p. 51; IEM protest response, p. 7. With respect to the Mr. Almonte's duties as Program Manager, IEM states "[o]ur Program Manager Sean Almonte will have the overall responsibility for contract performance and will be the key point of contract for [the] SCM and DCA." IEM Proposal, p. 68. I note that the RFP does not require that the position to be filled by Mr. Mabry, Program Executive, be located in New Jersey and APTIM has provided no evidence that Mr. Mabry's duties for New Jersey and Louisiana will have an impact either program.

Joan Harmer is listed as the Invoicing and Reporting Manager and IEM's Proposal indicates that she will be responsible for receipt review and applicant fund requests. IEM Proposal, p. 71. In its response to the protest, IEM notes that the Proposal does not represent that Ms. Harmer would be based in New Jersey. IEM protest response, p. 8. Rather, Ms. Harmer, will supervise the invoicing and reporting team and while she will not be located full-time at the New Jersey field office, she will be available to be on-site on an "as needed" basis, while also providing services on the Louisiana project. Ibid. I note that the RFP does not require that the position to be filled by Ms. Hamer, Invoicing and Reporting Manager, be located in New Jersey and similarly, APTIM has not provided any evidence that Ms. Harmer's duties for New Jersey and Louisiana will have an impact either program.

With respect to the remaining resumes submitted by IEM for the proposed management, supervisory and key personnel to be the assigned to the Contract, IEM's Proposal reveals that of the 18 listed employees, three (3) are current IEM employees and seven (7) are employed by IEM's listed subcontractors. As to the management, supervisory and key personnel who are not current IEM employees, IEM advises that "each person not currently employed by IEM has signed a commitment with IEM, and is available to being work immediately." IEM protest response, p. 9. This would include Mr. Almonte as Program Manager.

However, even if IEM did not have a commitment from these individuals, it is not until Contract award, during the Contract mobilization that the Contractor is required to have all of its staffing in place. See, RFP § 4.4.3.3.2 *Mobilization Plan*. In the event that any proposed management, supervisory and key

personnel identified in the Proposal is unable to work on the Contract, the RFP permits IEM to substitute staff during the Mobilization phase as needed to comply with the RFP requirements.

RFP § 5.6 *Substitution of Staff*

If it becomes necessary for the Vendor {Contractor} to substitute any management, supervisory or key personnel, the Vendor {Contractor} shall identify the substitute personnel and the work to be performed. The Vendor {Contractor} must provide detailed justification documenting the necessity for the substitution. Resumes must be submitted evidencing that the individual(s) proposed as substitute(s) have qualifications and experience equal to or better than the individual(s) originally proposed or currently assigned.

The Vendor {Contractor} shall forward a request to substitute staff to the State Contract Manager for consideration and approval. No substitute personnel are authorized to begin work until the Vendor {Contractor} has received written approval to proceed from the State Contract Manager.

Any proposed change in personnel, must be approved by the State Contract Manager and IEM will be required to demonstrate that proposed substitute employees “have qualifications and experience equal to or better than the individual(s) originally proposed or currently assigned.” RFP § 5.6 *Substitution of Staff*, *emphasis added*.

While it was not required to do so, IEM’s Proposal included details regarding its proposed management, supervisory and key personnel. The qualifications and experience of the proposed personnel were considered by the Committee with respect to the requirements of the RFP. The Committee determined that IEM’s Proposal demonstrated that IEM could provide staff that have the education, qualifications, and experience necessary to successfully perform the tasks required by the RFP. The Hearing Unit’s review of the individual resumes included with IEM’s Proposal for the key personnel, confirms that IEM has presented a level of staffing with the education, qualifications, and experience to successfully perform the tasks required by the RFP. Each of the resumes reveals that the key personnel proposed has meaningful experience related to the position identified. Moreover, as discussed above, the RFP requires that if any key personnel become unavailable, IEM must provide personnel with “qualifications and experience equal to or better than the individual(s) originally proposed or currently assigned.” RFP § 5.6 *Substitution of Staff*. I find that given the wealth of relevant experience presented for these key staff members and the requirements of RFP § 5.6 *Substitution of Staff*, IEM’s Proposal provided information which demonstrated its ability to select and hire individuals with the education, qualifications, and experience to successfully perform the tasks required by the RFP such that its Proposal met the requirements of Criteria A.

2. Backup Staff

APTIM states that none of IEM’s seven (7) proposed backup staff are available to work on the State’s Contract if necessary. With its protest, APTIM provided Affidavits from two of IEM’s proposed backup staff – John Lewis and Jason Mabile, both of whom are current APTIM employees based in Louisiana. Both men aver that they (1) are currently employed by APTIM; (2) have never been employed or affiliated with IEM; or, (3) have never been contacted by IEM or agreed to serve as backup staff. Of the remaining five (5) proposed backup staff, APTIM asserts that none of them is currently employed by IEM.

With respect to backup staff, RFP § 4.4.4.4 *Backup Staff*,

The Vendor {Bidder} should include a list of backup staff that may be called upon to assist or replace primary individuals assigned. Backup staff must be clearly identified as backup staff.

In the event the Vendor {Bidder} must hire management, supervisory and/or key personnel if awarded the Blanket P.O. {Contract}, the Vendor {Bidder} should include, as part of its recruitment plan, a plan to secure backup staff in the event personnel initially recruited need assistance or need to be replaced during the Blanket P.O. {Contract} term.

In its Proposal, with respect to backup staff, IEM stated:

3.5 BACKUP STAFF

In addition to our regular staff, the IEM Team stands ready to provide additional backup staff should the need arise. IEM's dedicated staff of recruiters maintains a list of qualified individuals from which additional backup staff can be drawn should the need arise, as part of its overall recruitment plan. Table 5 below provides a list of representative potential backup staff and a brief statement of their qualifications.

The RFP did not require that proposed backup staff be immediately available. Rather, the Bidder was required to submit a recruitment plan with its Proposal. See, RFP § 4.4.3.3.2(D) *Mobilization Plan*. Here, IEM has proposed to use the individuals listed above with specific experience identified. As there is no evidence that the personnel proposed by IEM will not be available and given that the requirements of RFP § 5.6 *Substitution of Staff*, the State is assured that any substituted personnel will have the same or better qualifications and experience as those individuals identified in IEM's proposal. *IEM's Proposal does not represent that the "backup staff" are current employees.* Rather, the Proposal made clear that identified persons were representative of the qualified individuals from which its recruiters could draw upon if needed. IEM Proposal, p. 107; IEM response to protest, p. 10.

B. IEM did not make material false representations to the Division in its Proposal

APTIM alleges that IEM materially misrepresented its qualifications in its Proposal; and therefore, the Director should debar IEM from participating in the Contract pursuant to N.J.A.C. 17:2-6.3 which states in pertinent part:

(a) In the public interest, the Director shall debar a person for any of the following causes:

...

(12) Any other cause affecting responsibility as a State contractor of such serious and compelling nature as may be determined by purchase and property to warrant debarment, including but not limited to, making a material false representation in a bid, even if such conduct has not been or may not be prosecuted as violations of such laws or contracts.

In support of this claim, APTIM alleges that IEM misrepresented its staffing. As discussed in Point A above, IEM did not make any misrepresentation regarding its proposed staffing. Therefore, debarment⁷ is not appropriate on this point.

In addition, APTIM alleges that IEM failed to disclose prior litigation in the State of New York wherein IEM was accused of failing to pay hourly workers overtime as required by the Fair Labor Standards Act. 29 U.S.C. 201 et seq., and that this failure to disclose this prior litigation violates the requirements of the RFP.

With respect to the noted litigation, an alleged violation of the Fair Labor Standards Act, I note that RFP § 4.4.2.2 *Disclosure of Investigations and Other Actions Involving Bidder Form*, requests that

The Vendor {Bidder} should submit the Disclosure of Investigations and Other Actions Involving Bidder Form, with its Quote {Proposal}, to provide a detailed description of any investigation, litigation, including administrative complaints or other administrative proceedings, involving any public sector clients during the past five (5) years, including the nature and status of the investigation, and, for any litigation, the caption of the action, a brief description of the action, the date of inception, current status, and, if applicable, disposition. If a Vendor {Bidder} does not submit the form with the Quote {Proposal}, the Vendor {Bidder} must comply within seven (7) business days of the State's request or the State may deem the Quote {Proposal} non-responsive.

[*Emphasis added.*]

The Division's *Disclosure of Investigations and Actions Involving Bidder Form* specifically directs Bidders to respond to the following questions:

1. Has any person or entity listed on this form or its attachments ever been arrested, charged, indicted, or convicted in a criminal or disorderly persons matter by the State of New Jersey (or political subdivision thereof), or by any other state or the U.S. Government?
2. Has any person or entity listed on this form or its attachments ever been suspended, debarred or otherwise declared ineligible by any government agency from bidding or contracting to provide services, labor, materials or supplies?
3. Are there currently any pending criminal matters or debarment proceedings in which the firm and/or its officers and/or managers are involved?
4. Has any person or entity listed on this form or its attachments been denied any license, permit or similar authorization required to engage in the work applied for herein, or has any such license, permit or similar authorization been revoked by any agency of federal, state or local government?

⁷ Debarment requires the initiation of an affirmative action against a vendor and the making of specific findings resulting in the exclusion of the vendor from Division contracting. N.J.A.C. 17:12-6.2; N.J.A.C. 17:12-6.5. The more appropriate analysis here is whether the alleged conduct would require disqualification of IEM's proposal.

The *Disclosure of Investigations and Actions Involving Bidder Form*, though not a statutorily required form, was developed by the Division to solicit the type of information regarding litigation involving a Bidder that is significant in evaluating a Bidder's ability to complete the contract according the specifications, and it is limited to criminal or disorderly persons' matters, debarments and license denials which have occurred within the past 5 years. A civil complaint, between non-governmental entities, involving allegations of a violation of the Fair Labor Standards Act, would not require IEM to provide an affirmative response to any of the questions on the *Disclosure of Investigations and Actions Involving Bidder Form*. This is not the type of action that the *Disclosure of Investigations and Actions Involving Bidder Form* contemplates.

The facts alleged by APTIM are not cause for the Division to disqualify IEM's Proposal nor do they prohibit IEM from participating in this Contract as APTIM has not set forth any evidence which would support its claim that IEM has made a material false representation in its Proposal.

C. IEM's Proposed Mobilization Plan and Operational Plan met the requirements of the RFP

In its protest, APTIM asserts that IEM failed to submit a Mobilization Plan as required by the RFP. Specifically, APTIM contends that the RFP required that the commencement of the Mobilization Plan be triggered by the issuance of the Bureau's NOI letter, rather than the notice of Contract award. APTIM protest, p. 9. In addition, APTIM alleges that IEM failed to include an Operational Plan in its Proposal and failed to demonstrate proficiency with WorlTrac as required by the RFP. APTIM protest, pp. 10-11. Therefore, APTIM states that the Division should reject IEM's proposal as non-responsive for failing to meet a mandatory material requirement of the RFP. Ibid.

1. IEM's Mobilization Plan conforms to the requirements of the RFP

APTIM's interpretation of the RFP requirement regarding the Mobilization Plan is in error. RFP § 4.4.3.3.2 *Mobilization Plan* states in pertinent part:

It is essential that the State have quick use of the functionality this Blanket P.O. {Contract} is to provide. Therefore, each Vendor {Bidder} shall include as part of its Quote {Proposal} a mobilization plan, beginning with the date of notification of Blanket P.O. {Contract} award and lasting no longer than 30 calendar days.

[*Emphasis added.*]

APTIM has interpreted the RFP clause "date of the notification of Blanket P.O. {Contract} award" to mean the Bureau's September 29, 2017, NOI letter. The NOI letter does not serve as the Contract award, but rather advises all Bidders of the Division's intent to award a Contract to a specific Bidder. The NOI letter triggers the protest period whereby those with standing can challenge the NOI. APTIM did just that in protesting the award to IEM. It is not until the conclusion of the protest period and the resolution of any protests received,⁸ that the Contract is awarded via a notice of contract award. It is the Contract award - the State's counter-signing of the Offer and Acceptance Page - that triggers the requirement for the commencement of the Mobilization Plan.

⁸ As indicated above, the Director can also exercise discretion in certain circumstance to award the contract prior to the resolution of protests.

In its Proposal, IEM stated:

The IEM Team assumes, for the purpose of our mobilization plan timetable, that project activities commence with the execution of the Blanket P.O. award. To model our mobilization plan, we assumed that award execution would occur on or about October 12, 2017, and the mobilization period will end on November 11, 2017, 30 calendar days later.

[IEM Proposal, p. 60.]

IEM's statement that it will commence mobilization at award execution (regardless of its assumed timeframe for the award date) conforms to the RFP.

2. IEM submitted an Operational Plan with its Proposal

APTIM contends that IEM failed to submit an Operational Plan as part of its Mobilization Plan alleging that it was required by the RFP. APTIM protest, p. 10. APTIM states that IEM's Proposal statement "[t]he IEM Team will meet the requirements of the Operational Plan by leveraging member experience with doing similar types of work for other states and municipalities" does not comply with the RFP requirement for the submission of an Operational Plan. *Ibid*, *citing*, IEM Proposal, p. 59. Again, APTIM's interpretation of the relevant RFP term is erroneous.

RFP § 4.4.3.3.2 *Mobilization Plan* states in pertinent part:

...

Such mobilization plan should include the following elements:

- A. A detailed plan demonstrating how the Vendor {Bidder} will meet the requirements of the Operational Plan specified by Bid Solicitation {RFP} Section 3.2.1.

...

The mobilization plan will serve as the first draft of the Operational Plan required pursuant to Section 3.2.1 of this Bid Solicitation {RFP}.

[*Emphasis added.*]

IEM was not required to include the Operational Plan with its Mobilization Plan. Rather, the RFP only requested that Bidders provide the information. A Bidder's failure to include a detailed plan does not result in the Proposal being non-responsive, as the submission of the Operational Plan was not a mandatory requirement for submission.

Nevertheless, IEM's Proposal did address its Operational Plan stating:

Operational Plan

IEM has developed a draft Operational Plan that will be updated and modified based on the outcomes of the project kick-off meeting. We will finalize this plan after communication with the [State Contract Manager] SCM and DCA, to ensure consistency with state objectives and requirements. The IEM Team will deliver the final plan to DCA within 30 days of Blanket P.O. award.

Currently, our Operational Plan is composed of our Mobilization/Staffing Plan, Contingency Plan, Proposed Schedule and Budget, and Section 3 Hiring Plan. Each component will be critical to the successful implementation of the Program. Our Operational Plan outlines how we will implement and complete the tasks described in the Bid Solicitation, and will incorporate our Program Policies and Operating Procedures upon completion of these deliverables. Our Mobilization Plan includes our key proposed staff, proposed staffing levels, and staff locations and availability during the mobilization period.

[IEM Proposal, p. 23.]

Contrary to APTIM's assertion, IEM's did address the Operational plan within its Proposal. Further in accordance with RFP § 4.4.3.3.2 *Mobilization Plan*, submission of the Mobilization Plan itself satisfies the RFP request that a Bidder submit a draft Operational Plan with its Proposal.

3. IEM can demonstrate proficiency with WorlTrac after the Contract award

While APTIM acknowledges that proficiency with WorlTrac is a Contractor and not a Bidder requirement, it states that IEM cannot demonstrate proficiency with WorlTrac. APTIM states:

In response to this mandatory requirement, and as evidence of this required proficiency, IEM emphatically states that the "IEM Team CTAs and CM Pod Leads are proficient in the software ... include[ing] WorlTrac" and that "[c]urrent IEM employees include former Worley employees who are familiar with the product. However, there is not a single former Worley employee included anywhere in this proposal; thus, there is no substantive basis for this assertion anywhere in [IEM's Proposal].

[APTIM protest, p. 11.]

RFP § 3.2 *Blanket P.O. {Contract} Startup* states in part:

The Vendor {Contractor} shall be responsible for startup operations, staffing, and logistics to ensure that it is operational 30 calendar days from the date of Blanket P.O. {Contract} award.

...

The Vendor {Contractor} shall, at a minimum:

...

D. Perform SIROMS training as provided by DCA within 30 calendar days of Blanket P.O. {Contract} award. This system must be utilized by the Vendor {Contractor} for all Program-related information management. In addition to SIROMS, the Vendor {Contractor} must be proficient with the following software and online tools: Xactimate – Property Estimation (Software and/or Online Tool) and WorlTrac – Property/Claim Assessment (Software and/or Online Tool); Provide Program initiation/ instruction for employees and subcontractor(s), if

applicable;

With respect to software proficiency as sought by the RFP, in its Proposal IEM stated:

Proficient in Software/Web- and Cloud-Based Systems. IEM Team CTAs and CM Pod Leads are proficient in the software, web, and cloud-based systems necessary to execute the Program. This includes WorlTrac and Xactimate. Both systems are tools for property assessment and claims adjusting. WorlTrac is a proprietary software of Worley Catastrophe Services, LLC. Current IEM employees include former Worley employees who are thoroughly familiar with this product. Xactimate has become the industry standard after its successful adaptation to the world of disaster recovery in Mississippi in 2010. Members of the IEM Team were among the first to apply this insurance-industry software package in the realm of disaster recovery, the first to design parameters for its implementation, and the first to work with HUD to gain acceptance of this methodology.

[IEM Proposal, p. 20.]

IEM's Proposal further identified an employee, Jacqueline Jones, IEM's - SIROMS/WorlTrac Data Analyst and indicated that Ms. Jones is "[h]ighly trained in several programs, including WorlTrac, SQL, Adobe and Microsoft Office." IEM Proposal, p. 92.

As APTIM points out, the requirement for proficiency with WorlTrac is a Contractor and not Bidder requirement. Therefore, regardless of whether or not IEM identified an employee in its Proposal staff list who is proficient in WorlTrac, is of no consequence. IEM need only demonstrate proficiency with WorlTrac within thirty days of the Contract award. Therefore, IEM's Proposal conforms to the RFP.

E. IEM did not submit an unbalanced bid

APTIM asserts that IEM submitted an unbalanced bid and therefore, IEM's Proposal should be disqualified. APTIM claims that IEM submitted a price Proposal that was artificially low which puts the success of the program at risk. APTIM protest, p. 11. APTIM contends that the Division should have focused on the pricing discrepancy between Pools 1A and 1B rather than on the consistency in pricing for Pools 1C, 2, 3, and 4. APTIM protest, p. 12, Exhibit 7, p. 1 - Division's Pricing Review. Further, APTIM states:

The very descriptions of Pool 1A and 1B, which group the most labor-intensive cases comprised of the remaining most adversely impacted homeowners which will be in the Program the longest amount of time, mandate a close review of the pricing assigned to these pools. To successfully complete and close a Pool 1A or 1B project, the Program manager also needs to complete the inspection milestones required of Pools 2, 3 and 4. Based on the sheer scope, Pools 2, 3 and 4 projects will be completed well before Pool 1A or 1B. In essence, IEM frontloaded the bid by market pricing Pools 1C, 2, 3 and 4, and underbidding the more difficult Pools 1A and 1B - that will take longer to complete. Based on their performance in Louisiana on the Louisiana ReLa Project, and New York on the New York Rising Project, it is more than conceivable that IEM will not be around to complete Pools 1A and 1B, and those

individuals who have had the most complex cases will be left without resolution.

[APTIM protest, p. 12.]

Finally, on this point APTIM notes that the Division's "refusal to disclose IEM's and Gilbane's unit price information significantly compromised APTIM's preparation of this protest." APTIM protest, p. 11. In response to documents requests, the Division released to all Bidders the total Proposal cost for all Proposals received. The Division did not release the unit price information for any of the Proposals, as the release of these details could compromise the Division's ability to re-procure the services sought in this RFP if necessary. See, N.J.S.A. 47:1A-1.1 stating, "A government record shall not include the following information which is deemed to be confidential for the purposes of P.L.1963, c.73 (C.47:1A-1 et seq.) as amended and supplemented...information which, if disclosed, would give an advantage to competitors or bidders."

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

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

As we stated in Riverland

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

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

In response to the protest, IEM notes that APTIM misunderstands IEM's business model, stating:

As any bidder likely would have done, IEM's approach has identified that this program will involve material start-up costs that will be recovered through the unit pricing in the contract. To match the timing of the cash outlay, IEM priced the fixed price units accordingly. In other words, to

better match cash resources with cash uses, the price of the units expected to be delivered earlier in the program (i.e., Pools 3 and 4) necessarily took program level start-up costs into consideration. To the extent IEM's unit prices for the more difficult and protracted cases (Pools 1A and 1B) are lower than APTIM's, that is not a reason to deem IEM's bid unbalanced or non-responsive.

[IEM protest response, p. 15.]

IEM, like all other Bidders exercised its business judgment to create a pricing structure to fit its business needs. Further, I note that IEM's proposal pricing was consistent with the Division's Independent Cost Estimate prepared in connection with the pricing review for this solicitation. The Independent Cost Estimate total pricing is in accord with IEM's proposed pricing.⁹

Absent any evidence of collusion or fraudulent conduct, as is the case here, IEM is free to exercise its business judgment in creating Proposal pricing that fits its business needs. Because IEM did not submit an unbalanced bid, its Proposal will not be disqualified.

F. IEM has not exaggerated its capabilities and/or reinterpreted certain non-mandatory requirements of the RFP

APTIM asserts that IEM exaggerated its qualifications with respect to many non-mandatory requirements of the RFP such that its Proposal should be deemed non-responsive. Specifically, APTIM calls attention to the following items for which it believes that IEM exaggerated its abilities or presented misleading information to the Division:¹⁰

First, APTIM asserts that IEM's *Offer and Acceptance* form indicates that the company is not a Minority-Owned Business or a Women-Owned Business; however, within the context of the Proposal, IEM states that it is a Women-Owned Business. APTIM protest, p. 14. Additionally, APTIM, referring to a privately maintained website (www.mwbe.com) states that IEM is not registered as a Women or Minority owned business; and therefore claims that IEM's Proposal statement that it is a Women-Owned Business is disingenuous. I note that this solicitation was not a Small Business, Minority-Owned Business or a Women-Owned Business set aside with respect to the Bidder/prime contractor; therefore the fact of whether IEM is a Women-Owned Business or not, does not affect the responsiveness of its Proposal.¹¹ With its Proposal however, IEM included its New Jersey State Certification demonstrating that it is registered as a Women-Owned Business. APTIM protest, Exhibit A, p. 11. In addition, a review of the State's databases reveals that IEM is in fact registered with the Department of the Treasury's Division of Revenue and Enterprise Services as a Women-Owned Business.

⁹ APTIM was provided a copy of the Independent Cost Estimate which showed the Division's total pricing estimates along with vendor total pricing submitted for the services being procured by this RFP.

¹⁰ On this protest point, APTIM again raises concerns regarding IEM's Mobilization Plan and IEM's listed backup staff. Those allegations have been fully addressed above, and therefore will not be discussed again under this Point.

¹¹ This RFP did have a set-aside component for subcontractors. See, RFP § 4.4.1.5 *Small Business Subcontracting Set-Aside Blanket P.O. {Contracts}*.

Category: Certification: Women Owned Business Enterprise
Description: This Certification status is updated daily. If you have questions regarding Women Business eligibility, please see the following link:
Approved
Notes
APPROVED DATE 2016-01-22, EXPIRATION DATE 2019-01-21, VERIFICATION DUE DATE 2017-01-21

With respect to this item, IEM's Proposal is not misleading.

Second, APTIM alleges that IEM's proposed staffing is inadequate compared to the requirements of RFP § 3.4(P). RFP § 3.4 *Construction Management* states in part that the "Vendor {Contractor} shall, at a minimum... [e]nsure that no Project Manager handles more than 20 Applicant Projects concurrently, unless otherwise approved in writing by the SCM." APTIM asserts that the "Pod Model" proposed by IEM will not support the estimate 2200 applicant projects. In its Proposal, IEM states that:

Drawing on our recent experiences in the states of New York and Louisiana, IEM will adapt its successful "Pod" management model, shown in Figure 1, for implementation on RREM and the LMI Homeowner Rebuilding Programs. A Construction Management (CM) Pod Lead will manage 10 [Construction Technical Advisor] CTAs. The CTA is the homeowner's program representative, acting in the capacity of construction manager. Each homeowner will be assigned a CTA, with no single CTA managing more than 20 active construction projects at a time. Each group of 11 individuals (one CM Pod Lead and 10 CTAs) constitutes one Construction Pod. IEM will deploy these Construction Pods geographically in order to best assist homeowners. Our construction management structure provides for a distribution of homeowner projects across small, highly accountable teams. This management concept allows us scale (sic) our staffing levels easily across geographies and to both ramp up and ramp down operations efficiently.

[IEM Proposal, pp. 16-17, *emphasis added*.]

IEM's Pod staffing model conforms to the requirement of the RFP and IEM will be required to ensure that no CTA is managing more than 20 Applicant Projects, unless otherwise approved by the State Contract Manager. Based upon the number of Applicant Projects in progress at the time of contract award, IEM may be required to adjust its staffing levels during the Mobilization period, and may be required to do so during the Contract term as may be necessary to meet the Contract needs. See, RFP §4.4.3.3.2 *Mobilization Plan*. With respect to this item, IEM's Proposal is not disingenuous and conforms to the RFP.

Third, APTIM states that IEM "will need to hire, train and onboard a minimum of 121 individuals...but IEM has not indicated how they are going to identify 121 individuals with the knowledge, skill and experience of this Program and all of its complexity in less than 30 days." APTIM protest, p. 14. In its Proposal, IEM states that its "dedicated staff of recruiters maintains a list of qualified individuals from which additional backup staff can be drawn should the need arise, as part of its overall recruitment plan." IEM Proposal, p. 107. IEM further details its recruitment and staffing plan in within the Mobilization Plan stating,

Recruitment and Staffing Plans. Central to the startup process is the prompt establishment of a hiring infrastructure to staff key startup

operations and long-term project initiatives. The IEM Team staffing strategy combines a cadre of experienced professionals (many of whom have local background and experience) to serve in management roles with a local and regional hiring strategy to fill staff positions. We will build a diverse workplace that reflects the applicant population that the RREM and LMI Homeowners Rebuilding Programs serve.

Though IEM and our current teaming partners will have the core and key staff members in place and ready to serve DCA at project kick-off, additional local hiring to fill out the staff roster will be necessary, particularly to fully staff the CTA roles at the level these programs require. It is our intention to make offers to experienced Program staff from the predecessor contracts in order to maintain institutional knowledge and minimize transition learning curves.

At project kick-off, we will present the state with a customized HUD Section 3 Hiring Plan. Our plan will be based on best practices gleaned from our previous experience in designing approved plans in Mississippi, Texas, New York, and Louisiana.

Our Section 3 Plan makes the most of our ties to neighborhood and community organizations to disseminate employment opportunity notices to potential hires. The strategy includes posting to local newspapers and local and popular online job sites, in addition to sending employment opportunity information to local colleges, trade schools, and universities. Finally, to complement the recruiting campaign, we capitalize on social media forums to publicize job openings. IEM effectively initiated this process with our housing program management work for the States of New York in 2014 and Louisiana in 2017. We have applied lessons learned from both of these previous efforts to provide a quality hiring strategy to New Jersey.

[APTIM Proposal, pp. 62-63.]

As part of Contract mobilization, IEM will be required recruit the staff necessary to perform the services required by this RFP. IEM has acknowledged the same and has set forth a plan in its Proposal to accomplish this task. With respect to this item, IEM's Proposal conforms to the RFP.

Fourth, APTIM states that IEM does not have an office space in New Jersey; therefore,

in addition to gearing up to assume management of the RREM and LMI Homeowners Rebuilding Program, IEM will have to lease space, conduct a build-out of this space, move its employees into the space, and set up its call center. In its timetable, IEM contemplates these tasks starting on the proposed October 12, 2017 contract execution date and running well into the mobilization period. Additionally, IEM concedes that for the beginning of its tenure, the nerve center of its operations will be in Morrisville, NC, roughly 500 miles away from its proposed New Jersey location. Thus, at a time when it should be gearing up to provide seamless service under the program IEM will also be juggling the administrative

hassle of establishing a presence in New Jersey while also conducting the decision-making portions of its duties from 500 miles away.

[APTIM protest, p.15.]

In its Proposal, IEM acknowledges the requirement to have an office in New Jersey noting:

A contingent lease agreement has already been made to ensure that this location will be up and running well before the mobilization period ends at 30 days after P.O. award. After the mobilization period has ended (30 days after award), the responsible office will become the New Jersey office. This facility will have the following address:

IEM
Building A, Monmouth Park Corp Center
2 Crescent Place
Oceanport, NJ 07757

[IEM Proposal, p. 70.]

In its response to the protest, IEM affirms that it has leased spaced in Monmouth County. IEM protest response, p. 18. With respect to this item, IEM's Proposal conforms to the RFP.

Fifth, APTIM notes that in its Proposal, IEM stated “[o]ur team of seasoned professionals will begin coordination with the State and its previous vendor within 24 hours of award notification in order to jump-start the transition plan so that start-up operations are complete within the 30-day start-up period.” APTIM protest, p. 15, citing, IEM Proposal, p. 9. As previously noted, Contract award means the State's counter-signing of the Offer and Acceptance Page, not the Bureau's Notification of Intent to Award letter. Moreover, I note that there is no requirement in the RFP that the awarded Contractor contact the current Contractor within 24-hours of the Contract Award. Rather, the RFP requires that “[t]he Vendor {Contractor} shall, at a minimum...Coordinate with the State for the transfer of all relevant files, data, and information that may be held by the preceding Vendor {Contractor} and/or the State within five (5) business days of the award of the Blanket P.O. {Contract}.” RFP § 3.2(B) *Blanket P.O. {Contract} Startup*. Therefore, IEM has not violated a term of its Proposal or this RFP.

Finally, APTIM contends that IEM has overstated the qualifications of subcontractors noting that “IEM states that CORE Construction Services, LLC (CORE) was recently the top-performing housing contractor in the Louisiana Shelter at Home program.” APTIM alleges that these statements are nothing more than conjecture and cannot serve as a reason for the Division to reject or disqualify a bidder. APTIM has not provided any document or other evidence to support this claim. Further, whether or not CORE is the top performing housing contractor in the Louisiana program has little or nothing to do with the RFP requirements that IEM must, and has proposed, to meet.

G. The Division properly weighed the evaluation criteria

APTIM alleges that the Division failed to properly weight the criteria used to evaluate the Proposals received, including price. APTIM states that in evaluating the proposals, the Committee should have considered, assessed and weighted the price, technical criteria and other factors in order to make a recommendation to the Director. APTIM asserts that the failure to assign a weight to price, resulted in an arbitrary evaluation of APTIM's superior technical qualifications against IEM's lower prices. APTIM's protest, p. 17. In support of its position, APTIM refers to a report issued by the Office of the State

Comptroller (hereinafter “OSC”) in 2010 entitled “Best Practices for Awarding Service Contracts”¹² wherein the OSC stated:

A government unit’s award of a contract for services is oftentimes determined by judging what proposal best meets the government unit’s overall needs, where price is just one of many factors. In a situation where quality of service is important, a single-minded focus on price may well be unwarranted. Thus, selection of a vendor through competitive proposals can involve many considerations besides price, such as “technical capability, management capability, prior experience, and past performance.” 41 U.S.C. § 253a(c)(1)(A); see FAR 15.204-5(b); N.J.S.A. 18A:18A-4.4(b); N.J.S.A. 40A:11-4.4(b); N.J.A.C. 5:34-4.2.

When a government unit procures services through such competitive proposals, however, subjectivity and favoritism are more likely to enter the evaluative process than when price is the sole factor used. Thus, in procuring services, selection and application of criteria used to evaluate competing proposals takes on special significance. In order to promote genuine competition when price is not the sole factor for award, and to promote transparency and accountability in the evaluation of competing proposals, a government unit should: (1) use predetermined, merit-based evaluative criteria to measure the proposals; (2) disclose those criteria in the solicitation materials; and (3) consider whether some criteria are more important than others, which may require assigning different weights to each criterion, with the percentage assigned to each preferably made known to vendors before submission of the proposals.

[APTIM protest, p. 16, citing, OSC’s Best Practices, p. 7, *emphasis added*.]

Recognizing that due to the absence of rigid procurement procedures, historically, public procurement had served as an avenue for unscrupulous public officials to steer contract awards, the OSC developed six principals to guide procurement officials in soliciting and awarding services contracts. OSC Best Practices, p. 1. Those principals are as follows:

- (1) The pool of contractors solicited should be as expansive as possible;
- (2) Statements of work should be drafted in clear and unambiguous terms;
- (3) Proposals should be judged on the basis of predetermined, merit-based evaluative criteria, made known to vendors before proposals are submitted;
- (4) The evaluative criteria should be judged by a qualified evaluation committee;
- (5) The evaluation process should be explainable to evaluators and competing vendors, and capable of withstanding scrutiny under a protest challenge; and
- (6) The scoring process and award recommendations should be well-documented and retained.

[OSC Best Practices, pp. 1-2, *emphasis added*.]

¹² Available at, http://www.nj.gov/comptroller/news/docs/service_contracts_report.pdf.

It is important to note that OSC's Best Practices are recommendations, not mandates. That being said, consistent with OSC's Best Practices, the Bureau created the evaluation criteria for this procurement, which are as follows:

6.7 EVALUATION CRITERIA

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

6.7.1 TECHNICAL EVALUATION CRITERIA

Each criterion will be scored and each score multiplied by a predetermined weight to develop the Technical Evaluation Score.

- A. Personnel: The qualifications and experience of the Vendor's {Bidder's} management, supervisory, and key personnel assigned to the Blanket P.O. {Contract}, including the candidates recommended for each of the positions/roles required;
- B. Experience of firm: The Vendor's {Bidder's} documented experience in successfully completing Blanket P.O. {Contracts} of a similar size and scope in relation to the work required by this Bid Solicitation {RFP}; and
- C. Ability of firm to complete the Scope of Work based on its Technical Quote {Proposal}: The Vendor's {Bidder's} demonstration in the Quote {Proposal} that the Vendor {Bidder} understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the Blanket P.O. {Contract}.

6.7.2 VENDOR'S {BIDDER'S} PRICE SCHEDULE

For evaluation purposes, Vendors {Bidders} will be ranked from lowest to highest according to the total Quote {Proposal} price located on the Price Sheet/Schedule accompanying this Bid Solicitation {RFP}.

In accordance with the Division's governing regulations, N.J.A.C. 17:12-2.7(b), each of the evaluation criteria was assigned a weight prior to the Proposal opening date: Criteria A – 20%; Criteria B – 30%; Criteria C – 50%. See, APTIM protest Exhibit L, p. 41.

In accordance with Section 6.7.4 of the RFP, the Committee considered "price, technical criteria and other factors", to determine which proposal "conforming to this Bid Solicitation {RFP}, is most advantageous to the State, price and other factors considered." The Committee first considered the technical capabilities of the bidders. Consistent with OSC's recommendations, the evaluation criteria and the weighting reflect those "merit-based evaluative criteria" which are of the utmost importance in considering whether a Bidder's technical proposal demonstrates its ability to perform the services sought. Had the

Bureau and the Committee included price in this evaluation it would be possible for the Committee to skew the scoring rather than focus on the technical merits of the Proposals submitted.

Here, the Committee conducted its review and evaluation of the technical Proposals received from APTIM and IEM using the “merit based evaluative criteria.” That evaluation resulted in a total point score (out of a possible 5000 points) for APTIM of 3990 points and IEM of 3500 points. APTIM received a 79.8% of the total possible points and IEM 70.0% of the total possible points for their respective its technical Proposals. For all three criteria considered, both Bidders received scores in the “very good” range. Committee Report, pp. 13-16. Overall, the Committee concluded that both Bidder’s “submitted competitive quotes that met all mandatory requirements and successfully conveyed the ability of each respective firm to complete the Scope of Work as required by the Bid Solicitation.” Id. at 18.

Only after the Committee had scored the technical proposals received, was pricing released the Committee and considered in the Committee’s overall recommendation for a Contract award. IEM’s total Proposal price is \$25,286,000; 27.52% lower than APTIM’s total Proposal price of \$34,885,970. Ibid. Because the scoring of the technical Proposals was close, and because of the significant cost savings to the taxpayers of the State, the Committee recommended that at Contract be awarded to IEM. Ibid.

The procedure utilized here to review and evaluate the Proposals received using “merit based evaluative criteria”, fully conforms with the OSC’s recommendations.

H. APTIM has not satisfied the factors necessary for the granting of a stay

A stay is an extraordinary remedy and a party who seeks a stay must satisfy a particularly heavy burden [to] demonstrate by clear and convincing evidence that the party is entitled to the relief sought. Zoning Bd. v. Service Elec. Cable Television, 198 N.J. Super. 370, 279 (App. Div. 1985); Gauman v. Velez, 421 N.J. Super. 239, 247-48 (App. Div. 2011) (internal citations omitted); see also, McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007) (stating that plaintiff must prove each of the Crowe factors and establish each by clear and convincing evidence). In exercising discretion to grant a request for stay, an agency must be guided by certain fundamental principles:

- (1) A preliminary injunction should not issue except when necessary to prevent irreparable harm...
- (2) Temporary relief should be withheld when the legal right underlying plaintiff’s claim is unsettled...
- (3) Preliminary injunction should not issue where all material facts are controverted. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits...
- (4) The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying the relief...

[Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982).]

In its request for stay, APTIM did not address the individual Crowe factors but did request a stay should its protest be denied noting that the “substantial interests of the State are at greater risk if the contract award proceeds.” APTIM protest, p. 18. For the sake of completeness, I will address each of the Crowe factors here.

1. APTIM will not suffer an irreparable harm if the stay of the Contract award is denied.

APTIM will not suffer irreparable harm if the stay of the Contract award is denied. APTIM submitted a protest, as it was permitted to do, and the Division has substantively ruled on the basis of the protest. When considering a stay, “harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages.” Crowe, supra, 90 N.J. at 132-33. While monetary damages are never available for the failure to award a public contract, not every request for stay that concerns a public contract award is granted. Ibid, see, e.g., In re Challenge of Contract Award Solicitation No. 13-X-22694 Lottery Growth Mgmt. Servs., 436 N.J. Super. 350, 358 (App. Div. 2014) (denying stay of award of contract). This is one of the pillars underlying the public bidding law.

Even “in some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant.” Waste Management of New Jersey, Inc. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). The Division does not find that APTIM will suffer irreparable injury. The public interest however is greatly affected as the award of this contract will bring about necessary services for those citizens of the State who are still enduring the effects of Hurricane Sandy. The subject RFP has restructured Contract pricing from an hourly rate to a firm fixed price. The Contractor will be paid upon achieving milestones, which will incentivize the Contractor to complete Applicant Projects. The subject RFP also includes additional requirements, adds timeframes to the Scope of Work to facilitate the successful completion of the Program’s goals and provides for broader oversight necessary to comply with federal guidelines. Delay in the award of the new Contract will be detrimental to those citizens who are still seeking services in order to re-build following the devastation of Hurricane Sandy.

However, even if APTIM would suffer irreparable harm, a finding of irreparable harm alone is not sufficient to permit the court to grant injunctive relief as the movant has the burden to establish all of the Crowe factors.

2. APTIM has the legal right to request a stay of the Contract award.

The Division acknowledges that it is well settled that a Bidder claiming to be entitled to an award of a Contract has standing to challenge the award of a Contract to another. M.A. Stephen Construc. Co., Inc. v. Borough of Rumson, 125 N.J. Super. 67, 74 (App. Div. 1973).

3. APTIM has not demonstrated a reasonable probability of ultimate success on the merits.

APTIM has not established a reasonable probability of success on the merits. 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 statutes governing public procurement provide that when the State advertises a contract and accepts bids, “award shall be made . . . to that responsible bidder whose, bid conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered.” N.J.S.A. 52:34-12(a)(g). The language of this statute evidences a grant of broad discretion to the [Division’s] Director to make determinations in public contracting matters.” Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 548 (1966). Furthermore, in reviewing a contract award, a court will not “substitute [its] discretion for that of the Director” or interfere with the exercise of that discretion, absent a finding of “bad faith, corruption, fraud or gross abuse of discretion.” Commercial Cleaning Corp., supra, 47 N.J. at 549. Similarly, APTIM’s judgment should not be substituted for the Committee’s judgment in evaluating IEM’s proposal.

As set forth above in response to substantive protest points above, APTIM has not shown a reasonable likelihood of ultimate success merits of its challenge to the award of the contract to IEM.

4. The balance of the relative hardship weighs in favor of denying the request for a stay.

Lastly, APTIM has not established that the balance of equities weighs in favor of granting of a stay. APTIM has not set forth any evidence that the balance of the relative hardship weighs in its favor. However, the public will benefit from the award of this Contract in that the subject RFP was structured to provide the State with the assistance and expertise necessary to successfully complete the rebuild from Superstorm Sandy. Currently, the State pays the Vendor on a per hour basis for work performed. This has resulted in a payment of approximately \$150,000,000 from the prior Contract's inception, almost five years ago, to date. Under the new Contract to be awarded in response to this RFP, a new pricing structure will be implemented. As previously noted, Bidders were required to submit a firm fixed price. The successful Contractor will be paid upon achieving milestones for each Applicant Project and then at the completion of each Applicant Project. This new pricing structure will incentivize the Contractor to successfully complete Applicant Projects as quickly as possible. The subject RFP also includes additional requirements, adds timeframes to the Scope of Work which are necessary in order to facilitate the successful completion of the Program's goals and shifts project work from DCA to the Contractor. For example, the Contractor will be required to contact or "touch" ever Applicant Project every thirty days to ensure that all Applicant Projects are receiving the services as needed. This service is currently being provided by DCA. Additionally, the subject RFP provides broader oversight necessary in order to comply with federal guidelines, in addition to allowing the State the necessary tools to monitor the Program's progress.

APTIM has not established that the balance of the hardship weighs in its favor, that it will suffer irreparable harm or that the subject matter of the suit will be destroyed if the stay is not granted. Moreover, the Court in Waste Mgmt. of New Jersey, Inc. v. Morris County Mun. Util. Auth., recognized "the important role the public interest plays when implicated, as here, and have held that courts, in the exercise of their equitable powers, may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." 433 N.J. Super. 445, 454 (App. Div. 2013). The State's and the public's interest in moving forward with the awarding of this contract, outweighs any of APTIM's legally cognizable interests. APTIM will not lose anything to which it is entitled if the stay request is denied. Conversely, the public will suffer hardship and high expenses if the procurement process does not continue.

CONCLUSION

In light of the findings set forth above, I sustain the Bureau's NOI and deny APTIM's request for a stay. This is my final agency decision with respect to the protest submitted by APTIM.

Thank you for registering your company with [NJSTART](http://www.njstart.gov) at www.njstart.gov, the State of New Jersey's new eProcurement system. I look forward to your company's continuing interest in doing business with the State of New Jersey.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: P. Torcicollo
R. Regan
K. Anderson-Thomas
P. Michaels
A. Davis