



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR

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June 25, 2024

Via Electronic Mail Only to fturner@mccarter.com

Franklin C. Turner
McCarter & English, LLP
1301 K Street, NW
Suite 1000 West
Washington, DC 20005

Re: I/M/O Bid Solicitation #21DPP00639 Comcast Cable Communications Management, LLC
Protest of Notice of Intent to Award
T1776 – Data Communications Network Services

Dear Mr. Turner:

This final agency decision is in response to your letter delivered via electronic mail on behalf of Comcast Cable Communications Management, LLC (“Comcast”) received by the Division of Purchase and Property’s (Division) Hearing Unit on May 2, 2024 (Protest). In that letter, Comcast protests the Procurement Bureau’s (Bureau) April 19, 2024, Notice of Intent to Award letter (NOI) issued for Bid Solicitation #21DPP00639 – Data Communications Network Services (Bid Solicitation).

By way of background, on January 26, 2022, the Bureau issued the Bid Solicitation on behalf of the State of New Jersey, Office of Information Technology (NJOIT). The purpose of the Bid Solicitation was to solicit Quotes for Data Communications Network Services that will provide basic data network connectivity, as well as associated support services. Bid Solicitation Sec. 1.1, *Purpose and Intent*. Bid Solicitation Section 1.2, *Background*, cautioned Bidders that this Bid Solicitation addressed the State’s current requirements.

NJOIT is responsible for the technology infrastructure used by the Executive Branch of New Jersey State Government. The services covered by this contract will be used as the infrastructure for the State of New Jersey’s Garden State Network (GSN), which enables data communications between different State sites, and allows for Using Agencies to reliably and securely connect to the internet. Currently, the vast majority of State sites are connected to the GSN via ethernet services.

In accordance with Bid Solicitation Section 1.3.5, *Optional Pre-Quote Conference*, an optional Pre-Quote Conference was held on February 8, 2022, providing all potential Bidders with an overview of the Bid Solicitation and Quote submission procedures and requirements. Representatives from six (6) potential bidding entities attended (AT&T, Carousel, DNS, Hunter Carrier, Crown Castle, and Verizon).

In accordance with Bid Solicitation Section 1.3.1, *Electronic Question and Answer Period*, an electronic portal enabling the Bureau to receive questions electronically was available to all potential Bidders until 2:00 P.M. Eastern Time on February 25, 2022. Eight (8) Bid Amendments were issued for this Bid Solicitation, which provided revisions to the Bid Solicitation and responses to questions received from potential Bidders.

Bid Amendment #	Date Issued	Contents
Bid Amendment 1	2/14/2022	Pre-Quote Conference Attendees List
Bid Amendment 2	3/31/2022	Quote Submission due date extended from 6/10/2022 to 9/2/2022
Bid Amendment 3	7/26/2022	Quote Submission due date extended from 9/2/2022 to 11/4/2022
Bid Amendment 4	10/17/2022	Quote Submission due date extended from 11/4/2022 to 1/13/2023
Bid Amendment 5	12/28/2022	Quote Submission due date extended from 1/13/2023 to 4/20/2023
Bid Amendment 6	4/6/2023	Quote Submission due date extended from 4/20/2023 to 5/31/2023; Answers to first round of electronic Bidder questions posted to NJSTART; Revised Bid Solicitation posted to NJSTART; 2 nd Q&A period opened until 4/27/2023
Bid Amendment 7	5/18/2023	Quote Submission due date extended from 5/31/2023 to 6/21/2023
Bid Amendment 8	6/1/2023	Answers to 2 nd round of electronic Bidder questions posted to NJSTART

On June 21, 2023, the Division's Proposal Review Unit opened eleven (11) Quotes. The eleven (11) Quotes were deemed administratively complete by the Proposal Review Unit and released to the Bureau for further review and evaluation.

The Bureau determined that the Quotes submitted by Brightspeed of New Jersey, Inc. (Brightspeed), Cablevision Lightpath, Inc. (Lightpath), MetTel, Granite Telecommunications LLC (Granite), Comcast Communications Management LLC (Comcast), Data Network Solutions (DNS), and Crown Castle Fiber LLC (Crown Castle), were either fully or partially non-responsive due to non-compliance with several mandatory elements of the Bid Solicitation. Recommendation Report at pgs. 3-5. The Bureau found that the following Quotes met, and complied with, the mandatory requirements for at least one award-eligible section of the Bid Solicitation to be released to the Evaluation Committee:

1. AT&T
2. Carousel Industries of North America (Carousel)
3. DNS
4. Hunter Carrier Services LLC Hunter Carrier)
5. Crown Castle
6. Verizon Business Network Services LLC (Verizon)

These six (6) Quotes were released to the Evaluation Committee in accordance with Bid Solicitation Section 6.5, *Quote Evaluation Committee*. The Committee was composed of three (3) voting members from NJOIT, one (1) voting member from the Bureau, and four (4) non-voting members from the Bureau (1), NJOIT (1), and the New Jersey Judiciary (2). Evaluation Committee at p. 7-8. The Committee was responsible for performing the technical evaluation of the responsive Quotes received based upon the evaluation criteria set forth in Bid Solicitation Section 6.7, *Evaluation Criteria*, which stated in part:

- A. Personnel: The qualifications and experience of the Vendor's

{Bidder's} management, supervisory, and key personnel assigned to the Blanket P.O., 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. of a similar size and scope in relation to the work required by this Bid Solicitation; and
- C. Ability of firm to complete the Scope of Work based on its Technical Quote: The Vendor's {Bidder's} demonstration in the Quote 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.

Prior to the public advertisement of the Bid Solicitation, in January 2021, representatives from NJOIT and the Bureau assigned relative weights for the three (3) Evaluation Criteria. The assigned weights are as indicated on the timestamped score sheet shown below:

T1776 - Data Communication Networking Services

Vendor {Bidder} for DS-1 and DS-3 Services shall provide the following requested sample prices. Vendor {Bidder} shall provide its pricing in the table format provided below as if new service. The Total 3-Year Cost = 36 months x Monthly Recurring Charge (MRC) + Non-Recurring Charge (NRC). Vendor {Bidder} shall populate MRC and NRC columns.

The Vendor {Bidder} must also attach a thorough description of the proposed rate structure that includes a price list that clearly identifies all pricing components, including one-time charges, surcharges and mileage charges (if applicable) as per Service Description requirements listed in Section 3.4.1.1

Additionally, the Vendor {Bidder} is invited to propose discounts to their standard pricing for the following options; bulk orders, service quantity commitments, and Provisioning/Maintenance/Performance abilities that are superior to the State requirements provided in Section 3.3.6. The Vendor {Bidder} must include a description of these discounts along with the pricing.

Configuration 1: Section 3.4.1 Private Line Data Services- DS1 & DS3

DS-1
 Location A - Location B – 10 miles

Monthly Recurring Cost (MRC)	Non-Recurring Charge (NRC)	Total
		\$ -

Configuration 2: Section 3.4.1 Private Line Data Services- DS1 & DS3

DS-3
 Location A - Location B – 20 miles

Monthly Recurring Cost (MRC)	Non-Recurring Charge (NRC)	Total
		\$ -

Private Line Total Cost	\$ -	
Configuration 1 Weight		50%
Configuration 2 Weight		50%
Private Line Total Weighted Cost	\$ -	

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The Committee members each conducted an independent analysis of each of the six (6) remaining Quotes. Then, on December 5, 2023, the Committee met to review and consider the Quotes as a group. The four (4) voting members assigned individual technical scores (1-10) for each of the three (3) Evaluation Criteria for each Quote based upon their independent analysis and Committee discussions. Evaluation Committee Report at pgs. 8-9. Assigned scores were multiplied by the criterion weight to produce a weighted score for each criterion.

Bidder	Total Criterion A (Max 400)	Total Criterion B (Max 1200)	Total Criterion C (Max 2400)	Total Technical Score (Max 4000)	Average Technical Score (Max 1000)	Ranking
Verizon	360	1,170	2,100	3,630	908	1
AT&T	320	1,110	1,980	3,410	853	2
Crown Castle	310	870	1,560	2,740	686	3
DNS	280	630	1,440	2,350	588	4
Carousel	260	870	1,140	2,270	568	5
Hunter Carrier	120	270	540	930	233	6

In accordance with Bid Solicitation Section 6.8, *Negotiation and Best and Final Offer (BAFO)*, the Bureau requested a BAFO from Verizon, Carousel, DNS, Crown Castle, and AT&T on December 29, 2023, with responses due by January 10, 2024.¹ The Bidders provided BAFO responses as shown on pages 25 through 30 in the Evaluation Committee Report.

Having completed its evaluation of the Quotes received in response to the Bid Solicitation, on April 19, 2024, the Bureau issued the NOI advising all Bidders that it was the State’s intent to award a Contract to AT&T, Carousel, Crown Castle, DNS, and Verizon.

On May 2, 2024, prior to the close of the protest period, Comcast submitted a Protest challenging the Division’s determination that the Quote submitted by Comcast was non-responsive.

Although Comcast requested an in-person presentation as permitted by N.J.A.C. 17:12-3.3(e), it should be noted that “[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director.” Further, “[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing.” N.J.A.C. 17:12-3.3(d). I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the Evaluation Committee Report, the Bureau’s Recommendation Report, the relevant statutes, regulations, case law, and the protest submitted by Comcast. The issues raised in the protest were sufficiently clear such that a review of the record of this procurement has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest submitted by Comcast on the written record, as such an in-person hearing is not warranted. I set forth herein the Division’s Final Agency Decision.

DISCUSSION

The New Jersey Courts have long recognized that the purpose of the public bidding process is to “secure for the public the benefits of unfettered competition.” Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the “public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good.” Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997). The objective of New Jersey’s statutory procurement scheme is “to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.” Barrick v. State of New Jersey,

¹ Based on the Evaluation Committee’s review, Hunter Carrier’s Quote was deemed not to be in the competitive range as outlined in the Recommendation Report and received no further consideration.

218 N.J. 247, 258 (2014) (citing Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)).

When evaluating Quotes received, the Division is charged with ensuring that the Contract is awarded to that responsible Bidder whose Quote, conforming to the Bid Solicitation, is most advantageous to the State, price and other factors considered. Bid Solicitation Section 1.1 *Purpose and Intent*. A responsive Quote is a Quote that is deemed by the Division and/or evaluation committee to have adequately addressed all material provisions of a Bid Solicitation's terms and conditions, specifications, and other requirements. N.J.A.C. 17:12-1.3. A Quote that is not compliant or responsive to the material requirements of the Bid Solicitation shall not be eligible for further consideration for award of a Contract and the bidder offering said Quote shall receive notice of the rejection of its Quote. N.J.A.C. 17:12-2.7(c).

It is firmly established in New Jersey that material deviations may not be waived. Twp. of Hillside v. Sternin, 25 N.J. 317, 324 (1957). In Meadowbrook Carting Co., *supra*, 138 N.J. at 315, the New Jersey Supreme Court adopted the test set forth by the court in Twp. of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). "In River Vale, the court declared that after identifying the existence of a deviation, the issue is whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity." In re Protest of Award of On-Line Games Prod. and Operation Servs. Contract, 279 N.J. Super. 566, 594 (App. Div. 1995), citing River Vale, *supra*, 127 N.J. Super. at 216. The River Vale court set forth a two-part test for determining whether a deviation is material:

First, whether the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[River Vale, *supra*, 127 N.J. Super. at 216.]

"If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all." On-Line Games, *supra*, 279 N.J. Super. at 595 (citing River Vale, *supra*, 127 N.J. Super. at 222).

Here Comcast's Quote / response to the RFP was captioned "T1776 Data Communications Network Service RFP Comcast Response" and included the following language:

No statement or any terms and conditions included in this Proposal (including, for the avoidance of doubt, all documents submitted in connection therewith) or the RFP shall be considered binding unless and until the same have been incorporated into a bilateral, definitive agreement executed by both parties. Comcast, as part of the post bid submission process, would be amenable to negotiating limited modifications to the Enterprise Services Master Services Agreement appended to the attached Proposal, to address additional items (if any) that your organization feels are critical to its consideration and use of the Comcast solution.

[Comcast Quote p. 2.]

This language clearly and expressly conflicts with the representations made in the Offer and Acceptance form, which states:

By submitting a Quote the Bidder certifies and confirms that:

1. It has read, understand, and agrees to all terms conditions and specifications set forth in the Bid Solicitation and the State of New Jersey Standard Terms and Conditions and agrees to furnish the goods, products, and/ or services in compliance with those terms

On the one hand Comcast signs and submits the Offer and Acceptance with its Quote while at the same time includes language in the Quote disavowing the very same terms, conditions and specifications.

Although the State has broad discretion to select among qualified and responsive Bidders in public contracting matters, the discretion afforded to the Director, “is not limitless.” See, *In re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 559 (App Div. 2018). “In line with the policy goal of thwarting favoritism, improvidence, extravagance, and corruption, the Division may not award a contract to a bidder whose proposal deviates materially from the [RFQ’s] requirements.” *Ibid.*, quoting, *Barrick v. State*, 218 N.J. 247, 258-59 (2014)). For that reason, the Division’s governing regulations mandate stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State’s bidding process. Notably, “a proposal that is not...responsive to the material requirements of the [RFQ] shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.” N.J.A.C. 17:12-2.7(c).

Here, Bid Solicitation Section 4.1 General stated as follows:

A Vendor {Bidder} may submit additional terms as part of its Quote. Quotes including Vendor {Bidder} proposed terms and conditions may be accepted, but Vendor {Bidder} proposed terms or conditions that conflict with those contained in the Bid Solicitation, as defined in Section 2.0 of this Bid Solicitation, or that diminish the State’s rights under any Blanket P.O. resulting from the Bid Solicitation, may render a Quote non-responsive. It is incumbent upon the Vendor {Bidder} to identify and remove its conflicting proposed terms and conditions prior to Quote submission. Where additional terms are submitted they may be accepted, rejected, or negotiated, in whole or in part, at the State’s sole discretion where the terms do not conflict with material terms of the Bid Solicitation or do not diminish the State’s rights under the Blanket P.O. resulting from the Bid Solicitation.

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

Potential Bidders were permitted to submit questions regarding the terms and conditions of the Request for Quotes by October 28, 2020. Four hundred two (402) questions were received. One question was received regarding the ability to modify the Bid Solicitation’s requirements (in bold), and the State responded clearly that any requests for potentially conflicting terms must be submitted during the electronic question and answer period, and that no additional negotiations would be permitted once Quotes were opened.

Vendor {Bidder} has read and understands, however, Vendor {Bidder} would require the opportunity to fully negotiate these terms to incorporate any additional non-conflicting Vendor {Bidder} terms into the Agreement. Except where Vendor {Bidder} has already stated an exception, to the extent there are any conflicts between the final negotiated Agreement and any additional terms provided by Vendor {Bidder}, the fully negotiated Agreement shall govern.

As stated in Bid Solicitation Section 1.3.1.1, Exceptions to the State of NJ Standard Terms and Conditions (SSTC): “Questions regarding the SSTC and proposed exceptions to mandatory requirements, including the Special and Standard Terms and Conditions in Sections 5 and 9 of this Bid Solicitation must be posed during this Electronic Question and Answer period and shall contain the Vendor’s {Bidder’s} suggested changes and the reason(s) for the suggested changes.” Additionally, as stated in Section 4.1, General: “Quotes including Vendor {Bidder} proposed terms and conditions may be accepted, but Vendor {Bidder} proposed terms or conditions that conflict with those contained in the Bid Solicitation, as defined in Section 2.0 of this Bid Solicitation, or that diminish the State’s rights under any Blanket P.O. resulting from the Bid Solicitation, may render a Quote non-responsive.”

There will not be any post-Quote opening negotiations or discussions regarding the Blanket P.O. terms beyond those outlined in Bid Solicitation Section 6.8, Negotiation and Best and Final Offer (BAFO).

[Bid Amendment #6, Question and Answer #293, April 6, 2023.]

As part of the Bid process the Division conducted an Optional Pre-Quote Conference pursuant to Bid Solicitation Section 1.3.5. The purpose and intent of the Pre-Quote Conference is set forth in that section:

The purpose of the Optional Pre-Quote Conference is to address procedural questions only regarding the Bid Solicitation and Vendor {Bidder} Quote Submission Requirements. No substantive questions regarding the Bid Solicitation Scope of Work will be accepted or answered during the Pre-Quote Conference. In the event that questions are posed by Vendors {Bidders}, answers to such questions will be issued by Bid Amendment. Any Bid Amendment to this Bid Solicitation will become part of this Bid Solicitation and part of any Blanket P.O. awarded as a result of this Bid Solicitation.

As part of this Pre-Quote Conference, and because the Division has been presented with this issue multiple times in the past, the following information is specifically included in the standard Pre-Quote Conference presentation:

- ▶ Do NOT include language such as this:
 - ▶ Vendor accepts all terms and conditions of this Bid Solicitation with the following additional language: Section X - Agree, as it applies to changes that impact administrative fees as outlined in this provision, provided that Vendor reserves the right to modify Contracted Terms based on changes by the State.
 - ▶ Vendor reserves the right to charge additional fees for services that require extensive time and effort.
 - ▶ This Quote is a nonbinding expression of interest only and is not intended to create a binding commitment on either party unless and until a definitive agreement has been executed between the parties.
 - ▶ This Quote may include statements regarding plans for future products and services, or future versions of existing products and services. Any such statements are provided solely for your general information and are not part of this Quote unless specifically stated in writing in this Quote.

[Pre-Quote Conference – Slide Deck page #8]

The Division expressly advises and warns Bidders not to include language that reserves to the Bidder the future right, as here, to enter into a more definitive agreement. The Division includes this language knowing how the courts have addressed this issue in the past and to help Bidder's avoid repeating the same mistakes.

Despite the above and the clear language in the Bid Solicitation, and the State's Standard Terms and Conditions, Comcast included the statement on its cover page to its Quote. In addition, the Quote contains the following language in the section captioned, "Appendix 1 - Clarifications and Understandings";

RFP; All Pages; All Sections.	Notwithstanding anything to the contrary contained in the RFP or Comcast's proposal, Comcast's submission of its proposal shall in no event constitute Comcast's implied or actual acceptance of any term(s), conditions, obligations and/or requirements set forth in the RFP (including technical requirements), and, in no way represents a legally binding offer or contractual agreement between Comcast and the State. Binding obligations shall be as set forth in an agreement to be negotiated and executed by both Comcast and the State.
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[Comcast Quote - Appendix 1 - Clarifications and Understandings.]

Notwithstanding Comcast's Protest argument that the offending language in the cover letter is not part of its Quote (which argument the Division rejects), Comcast expressly states, as to the "RFP All Pages, All Sections", that its proposal "shall in no event constitute Comcast's implied or actual acceptance of any term(s), conditions obligations and or requirements set forth in the RFP..." Such a clear contradiction with the affirmative representation in the Offer and Acceptance form deprives the Division of its assurance, identified in River Vale, "that the contract will be entered into, performed and guaranteed according to its specified requirements."

CONCLUSION

Based upon the foregoing, I find no reason to disturb the Bureau's recommendation that the Contract be awarded as outlined in the Recommendation Report. Accordingly, I sustain the April 19, 2024, Notice of Intent to Award. This is my final agency decision.

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

This is the Division's final agency decision. Pursuant to N.J.A.C. 17:12-3.1, this determination is appealable to the Appellate Division of the Superior Court in accordance with the New Jersey Court Rules (R. 2:4-1) which provide a party 45 days to appeal this final agency decision.

Sincerely,



Cory K. Kestner
Chief Hearing Officer

c: M. Dunn
J. Pastuzyn