



## 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 amy.rowe@lightpathfiber.com*

Amy Rowe, Director of Legal Operations & ESG  
Cablevision Lightpath LLC  
1111 Stewart Avenue  
Bethpage, NY 11714

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

Dear Ms. Rowe:

This final agency decision is in response to your letter dated May 1, 2024, provided by electronic mail on behalf of Cablevision Lightpath LLC (Lightpath) and received by the Division of Purchase and Property's (Division) Hearing Unit on May 2, 2024 (Protest). In that letter, Cablevision 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 <sup>nd</sup> 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 <sup>nd</sup> 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 Services (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:

9NOV '21 2:37PM

| 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<br>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<br>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  |                            | \$ -  |

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<br>Criterion A<br>(Max 400) | Total<br>Criterion B<br>(Max 1200) | Total<br>Criterion C<br>(Max 2400) | Total Technical<br>Score<br>(Max 4000) | Average<br>Technical Score<br>(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.<sup>1</sup> 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 1, 2024, prior to the close of the protest period, Lightpath submitted the Protest claiming that its “main concern is that we were not given the opportunity to provide clarification specific to the Subcontractor Utilization Plan. We believe that our proposal met or exceeded all the stated requirements and evaluation criteria outlined in the solicitation documents.” Protest Letter pg. 1. By way of remedy, Lightpath asks to submit its Subcontractor Utilization Plan, attached to its protest, for consideration, and that the State find Lightpath responsive and eligible for evaluation and award.

Although Lightpath did not request 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 Lightpath. 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 Lightpath 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

<sup>1</sup> Based on the Procurement Bureau’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.

Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997). The objective of New Jersey's statutory procurement scheme is "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Barrick v. State of New Jersey, 218 N.J. 247, 258 (2014) (citing Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)). Consistent with this purpose, the New Jersey procurement law provides that "any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do." N.J.S.A. 52:34-12(a).

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 complaint 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).

When evaluating a Quote received, if a deviation is found, the question is whether the deviation is material. 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., 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, 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).

As noted above, in conducting the initial review of Lightpath's Quote, the Bureau determined Lightpath to be non-responsive because Lightpath did not submit a Subcontractor Utilization Plan, despite indicating that subcontractors would be utilized during implementation. Specifically, Lightpath stated that it

makes limited use of subcontractors during the implementation of its services. The work [the subcontractors] engage in is usually limited to cabling. These subcontractors are often selected based on availability during the service implementation, therefore, the information may not be available during the pre-sales process. The assigned Lightpath service

delivery project manager will notify the named contract as soon as the information is available. Lightpath will comply with the requirements of this subsection following award.”

[Recommendation Report, pg. 3.]

With respect to the Lightpath’s failure to provide a completed Subcontractor Utilization Form, in the protest Lightpath requests that

Upon reviewing the notice of non-award, our main concern is that we were not given the opportunity to provide clarification specific to the Subcontractor Utilization Plan. We believe that our proposal met or exceeded all the stated requirements and evaluation criteria outlined in the solicitation documents.

We respectfully request your allowance to submit our Subcontractor Utilization Plan (attached hereto) for consideration as part of our protest and reconsider the position of a non-award. Lightpath has been serving the public sector for over 20 years and is committed to delivering exceptional value and service to the State of New Jersey.

[Lightpath Protest, p. 1.]

The question to be resolved here is whether Lightpath’s failure to provide the Subcontractor Utilization Form was a material deviation which could not be waived, resulting in the Quote being non-responsive.

A Bidder’s use of a subcontractor is governed by Bid Solicitation Section 4.4.1.3, *Subcontractor Utilization Plan*, which states in pertinent part that

Vendors {Bidders} intending to use a Subcontractor **shall** submit a Subcontractor Utilization Plan form. . . .

For a Quote that does NOT include the use of any Subcontractors, by signing the Bid Solicitation Offer and Acceptance Page, the Vendor {Bidder} is automatically certifying that in the event the award is granted to the Vendor’s {Bidder’s} firm and the Vendor {Bidder} later determines at any time during the term of the Blanket P.O. to engage Subcontractors to provide certain goods and/or services, pursuant to Section 5.8 of the SSTC, the Vendor {Bidder} shall submit a Subcontractor Utilization Plan form for approval to the Division in advance of any such engagement of Subcontractors.

[Emphasis added.]

Lightpath did not submit the Subcontractor Utilization Plan form with its Quote. However, its Quote stated clearly on Page 108, under the Bid Solicitation Section 4.4.1.3, *Subcontractor Utilization Form* header, that

Lightpath makes limited use of subcontractors during the implementation of its services. The work they engage in is usually limited to cabling. These subcontractors are often selected based on availability during the service

implementation, therefore, the information may not be available during the pre-sales process. The assigned Lightpath service delivery project manager will notify the named contract as soon as the information is available. Lightpath will comply with the requirements of this subsection following award.

The Division's administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal **shall**<sup>2</sup> conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

- 4. Contain **all** RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), emphasis added.]

The Bid Solicitation makes clear that certain requirements are mandatory and not subject to discretion. Specifically the Bid Solicitation Section 2.2, *General Definitions*, states:

**Must** – Denotes that which is a mandatory requirement.

**Shall** – Denotes that which is a mandatory requirement.

This mandatory language is found in Bid Solicitation Section 4.4.1.3, *Subcontractor Utilization Plan*, which states in pertinent part that "Vendors {Bidders} intending to use a Subcontractor **shall** submit a Subcontractor Utilization Plan form. . . ." [Emphasis added.] The clear language in Bid Solicitation Section 4.4.1.3 requiring submission of the Subcontractor Utilization Form if a Bidder intends to use subcontractors, along with the Glossary definition explaining the mandatory nature of "shall" and "must" requirements, makes clear that the Subcontractor Utilization Form was a required component Lightpath's Quote based on the Bid Solicitation. Therefore, the Bureau correctly determined that the Quote submitted by Lightpath was non-responsive, and therefore, was not eligible for evaluation and an award.

Looking at Lightpath's request to submit its Subcontractor Utilization Form after Quotes have been opened, whether the form was intentionally or mistakenly not included, the Bid Solicitation required Bidders to seek any proposed changes to the Bid Solicitation's requirements during the electronic question and answer period. That did not occur in this procurement. Lightpath's proposed modification to the terms of the Bid Solicitation removes the assurance that the Contract will be performed in accordance with the terms and conditions set forth in the Bid Solicitation. Additionally, allowing Lightpath to provide revised information after Quote opening during a protest, would place it in a position of advantage over other Bidders who submitted conforming Quotes. Applying the court's analysis set forth in River Vale, Lightpath's proposed term renders the Quote non-responsive.

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<sup>2</sup> "Shall – Denotes that which is a mandatory requirement." Bid Solicitation Section 9, *Glossary*.

### **CONCLUSION**

Based upon the foregoing, I find no reason to disturb the Bureau's recommended Contract awards. 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