



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 glenn.gradel@crowncastle.com

Glenn Gradel
Crown Castle Fiber LLC
201 Old Country Road
Suite 125
Melville, NY 11747

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

Dear Mr. Gradel:

This final agency decision is in response to your electronic mail on behalf of Crown Castle Fiber LLC (Crown Castle) received by the Division of Purchase and Property's (Division) Hearing Unit on May 2, 2024 (Protest). In that letter, Crown Castle 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 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:

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 – 20 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	\$ -

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, Crown Castle submitted the Protest claiming that Crown Castle submitted a three (3) percent escalation fee in its Quote by mistake in its submitted Attachment A. By way of remedy, Crown Castle asks that the State accept a revised Attachment A with the offending language removed.

Although Crown Castle 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 Crown Castle. 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 Crown Castle 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, 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). .

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.

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(e).

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, 127 N.J. Super. at 222).

As noted above, in conducting the initial review of Crown Castle's Quote, the Bureau determined that the "Additional Terms" of a three (3) percent escalation fee submitted by Crown Castle with respect to "Dark Fiber", as shown in the screenshot below, conflicted with the requirements of the Bid Solicitation rendering the Quote non-responsive.

Crown Castle Taxes, fees and surcharges:		ATTACHMENT A	
Pass Through Item	Nature of Charge (Tax, Surcharge, Fee, or Other)	Applicability of Charge	Rate*
FCC Universal Service Fund (also known as Universal Surcharge)	Surcharge	This is a federal rate and changes quarterly. The rate charged at the time of service will be adjusted to reflect whatever rate is currently in effect by the Federal Communications Commission. This fee would be assessed on all interstate connections (not dark fiber).	25.0% of Interstate and International Charges (Rate is determined quarterly by FCC)
Federal Regulatory Recovery Fee (also known as Federal Wireline or "Regulatory Cost Recovery Fee")	Surcharge	This fee would be assessed on all interstate connections (not dark fiber). This is a federal charge that is assessed on the same type of services as in Line 1.	430% of charges (Rate is set by FCC and is adjusted annually)
Federal Telecom Relay Service (also known as "Regulatory Cost Recovery Fee")	Surcharge	This fee would be assessed on all interstate and intrastate connections (not dark fiber). The purpose of the charge is to provide funding for the Federal Telecommunications Relay Services and Related Customer Premises Equipment for Persons with Disabilities.	1.778% on interstate services; 653% on intrastate services (Rate is set by FCC and is adjusted annually)
Public Utility Commission Surcharge (also known as "Other State Fees")	Surcharge	This charge is assessed on all services within New Jersey.	23% of charges
NJ State Sales Tax (also known as "State Sales Tax")	Tax	This charge is assessed on dark and all services in New Jersey.	6.625% of charges
Other State Taxes and Surcharges (also known as "Other State Fees, Other Taxes, State Gross Receipts/Excise or State Sales Taxes")	Taxes and Surcharges	In the instance that circuits cross state lines outside of NJ, then the relevant state charges will be applied as required.	As determined by various states' Department of Revenue or Regulatory Agencies
CPI	Fee	Dark Fiber and Datacenter Collocation products: On January 1 of each year, the MRCs shall be escalated by three percent (3%). In addition, in the event that amounts charged to Crown Castle under any Underlying Rights are increased or Crown Castle's costs or expenses are increased due to any Underlying Rights, Crown Castle shall have the right to charge Licensee for its pro rata share of such increases, which shall be added to the MRCs to be paid by Licensee for the applicable Product Term.	3%

*For the avoidance of doubt, the taxes, surcharges and fees herein are estimated and based upon rates as of May 1, 2023, and are subject to change during the length of the contract.

[See Crown Castle Quote, Attachment A.]

The Evaluation Committee Report noted that the Bureau concluded,

The Bureau determined Crown Castle to be non-responsive for Dark Fiber and Datacenter Colocation products and services because Crown Castle submitted additional terms that conflict with the State's Terms and Conditions. On page 1, column 1, and row 7 entitled "CPI," of Crown Castle's 4.4.5 T1776 Crown Castle_State of NJ_Taxes PDF document, attached with its Quote, Crown Castle stated that, "Dark Fiber and Datacenter Colocation products: On January 1 of each year, the MRCs shall be escalated by three percent (3%). In addition, in the event that amounts charged to Crown Castle under any Underlying Rights are increased or Crown Castle's costs or expenses are increased due to any Underlying Rights, Crown Castle shall have the right to charge Licensee for its pro rata share of such increases, which shall be added to the MRCs to be paid by Licensee for the applicable Product Term." Pursuant to Bid Solicitation Section 4.1, General, "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...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." It should be noted that no questions pertaining to price increases and/or escalation fees were received by the Bureau during both Electronic Question and Answer opportunities. Pursuant to Section 6.1 of the State Standard Terms and Conditions, "Unless otherwise agreed to in writing by the State, all prices quoted shall be firm through the issuance of contractor purchase order and shall not be subject to increase during the period of the contract." The language submitted by Crown Castle in regards to Dark Fiber and Datacenter Colocation products conflicts with the State's Terms and Conditions Section 6.1 as the Bidder submitted an additional, yearly 3% escalation fee constituting a price increase to Dark Fiber and Datacenter Colocation services. However, Crown Castle could still be considered for award for the other sections it provided pricing for."

[See Evaluation Committee Report, pgs. 6-7.]

With respect to the specific terms listed in Crown Castle's Attachment A chart, in the protest Crown Castle requests that

requesting that the State of NJ allow Crown Castle to remove CPI language from Attachment A which should not be included in our bid response.

Crown Castle submitted CPI charges in Attachment A for our bid submission by mistake. Crown Castle does not charge a 3% escalation for Dark Fiber to our Government and Education Customers and the CPI line item should have been removed from Attachment A. We are kindly requesting that Crown Castle be allowed to submit a revised Attachment A, or if preferred by State of NJ, an amendment to Attachment A removing the CPI line item.

[Crown Castle Protest, p. 1.]

The question to be resolved here is whether the additional term proposed by Crown Castle was a material deviation which could not be waived, resulting in the Quote being non-responsive.

Looking at Crown Castle's request to include a three (3) percent escalation fee to its pricing, whether added intentionally or mistakenly, 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. Crown Castle's proposed modification removes the assurance that the Contract will be performed in accordance with the terms and conditions set forth in the Bid Solicitation. Additionally, allowing Crown Castle to propose alternate terms in its Quote, and to similarly remove the offending term 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, Crown Castle's proposed term renders the Quote non-responsive.

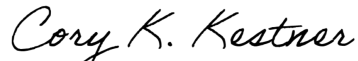
CONCLUSION

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