



State of New Jersey

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

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August 9, 2024

Via Electronic Mail Only steve.greenberg@wellsky.com

Stephen Greenberg, Senior Vice President
WellSky Human & Social Services Corporation
11300 Switzer Road
Overland Park, KS 66210

Re: I/M/O Bid Solicitation 23DPP00818 WellSky Human & Social Services Corporation
Protest of Notice of Intent to Award and Rejection of WellSky proposal
T3053 DoAS Care/Case Management System (C/CMS)

Dear Mr. Greenberg:

This final agency decision is in response to your letter of July 11, 2024, submitted on behalf of WellSky Human & Social Services Corporation ("WellSky") which was received by the Division of Purchase and Property's ("Division") Hearing Unit. In that letter, WellSky protests the July 2, 2024, Notice of Intent to Award ("NOI") issued by the Division's Procurement Bureau ("Bureau") for Bid Solicitation 23DPP00818 – T3053 DoAS Care/Case Management System (C/CMS) ("Bid Solicitation"). The record of this procurement reveals that the Quote submitted by WellSky was deemed non-responsive on the grounds that WellSky submitted terms and conditions that conflicted with the Bid Solicitation as well as the State's Standard Terms and Conditions. Specifically, WellSky submitted an altered Offer and Acceptance Page with their Quote submission which included additional terms and conditions.

By way of background, on May 11, 2023, the Procurement Bureau issued the Bid Solicitation on behalf of the Department of Human Services ("DHS"), Division of Aging Services ("DoAS"). The purpose of the Bid Solicitation was to solicit Quotes to engage a Contractor to provide a cloud-based system that is configurable and/or customizable to meet the State's requirements for the care and case management of individuals, including their federal reporting needs, that are serviced by the DoAS and their partner agencies ("System"). The System is to have the ability to be utilized on an enterprise-wide basis for DoAS, their partner agencies and for other DHS Divisions. Bid Solicitation Sec. 1.1, *Purpose and Intent*. It is the intent of the State to award a Contract to that responsible Bidder whose Quote, conforming to this Bid Solicitation is most advantageous to the State of New Jersey ("State"), price and other factors considered. The State may award any or all price lines.

In accordance with Bid Solicitation Section 2.5, *Optional Pre-Quote Conference*, an Optional Pre-Quote Conference was held on May 22, 2023. Representatives from thirty-three (33) potential vendors attended, although WellSky did not attend this Optional Pre-Quote Conference. In accordance with Bid Solicitation Section 2.1, *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

June 20, 2023. A second Electronic Question and Answer Period was conducted to address questions related to the answers provided to the 352 questions received during the first Electronic Question and Answer Period. The electronic portal was available to all potential Bidders until 2:00pm Eastern Time on November 15, 2023. Four (4) Bid Amendments were issued for this Bid Solicitation, which provided extensions to Quote Submission due date and revisions to the Bid Solicitation and responses to questions received from potential Bidders.

On January 12, 2024, the Division's Proposal Review Unit ("PRU") opened twenty-four (24) Quotes which were received by the submission deadline of 2:00 pm Eastern Time. Quotes were received from the following entities: Arka Information Systems ("Arka"); AssureCare ("Assure"); Brite Systems Inc. ("Brite Systems"); CGI Technologies and Solutions ("CGI"); Comagine Health ("Comagine"); Creative Information Technology Inc. ("Creative Information"); Dimagi, Inc. ("Dimagi"); FEI Com, Inc. d/b/a FEI Systems ("FEI"); Hoover Blanket Inc. ("Hoover"); Kamaletdos LLC ("Kamaletdos"); Masnet Technologies LLC ("Maxnet"); MERP Systems, Inc. ("MERP"); Mon Ami, Inc. ("Mon Ami"); MTX Group Inc. ("MTX"); New Jersey Innovation Institute ("NJII"); Patient Care Intervention Center ("Patient Care"); PruTech Solutions, Inc. ("PruTech"); Ready Computing Commercial Solutions ("Ready Computing"); RTZ Associates Inc. ("RTZ"); Slalom, Inc. ("Slalom"); Son Information Systems ("Son"); VirtualHealth ("VirtualHealth"); Visual Vault, LLC ("VisualVault"); and WellSky Human & Social Services Corporation ("WellSky"). After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirements, the Quotes of MTX and Slalom were rejected for failure to provide an Ownership Disclosure Form as required pursuant to Section 3.13.2 of the Bid Solicitation. Eleven bidders were provided with a formal notice and warning letter from the PRU due to their company's lack of compliance with Business Registration Certificate at the time of Quote opening. The eleven (11) bidders were: Comagine Health; FEI; Hoover Blanket; MERP; Mon Ami; Patient Care; PruTech; Ready Computing; RTZ; VirtualHealth; and VisualVault. The remaining twenty (22) Quotes were released to the Bureau on February 15, 2024, for further review of compliance with mandatory requirements specific to the Bid Solicitation.

On July 1, 2024, the Evaluation Committee issued its report which recommended that a Contract be awarded to Mon Ami. Evaluation Committee Report, P. 26. On July 2, 2024, the Bureau completed a Recommendation Report ("Recommendation Report"), which similarly recommended that a Contract be awarded to Mon Ami as the Bidder's contract represents the most advantageous offer to the State price, and other factors considered. Recommendation Report, p. 1.

On July 2, 2024, the Bureau issued the Notice of Intent ("NOI"), indicating that it was the State's intent to make Contract awards consistent with the Bureau's recommendation in the July 2, 2024, Recommendation Report.

On July 11, 2024, WellSky submitted a protest to the Division's Hearing Unit challenging the State's award of the Contract to Mon Ami and the State's determination that WellSky's submitted Quote was non-responsive to the requirements of the Bid Solicitation ("WellSky Protest"). By way of summary, WellSky challenges both the award to Mon Ami and the rejection of WellSky's proposal.

With respect to the award to Mon Ami, WellSky states:

1. The RFP was not a competitive process due to the removal of all but one competitive bid . . . Because the evaluation process reduced the field of technically viable proposals to one proposal, the Bureau effectively evaluated only one bid, and the process was not fully competitive. The evaluation committee, the Bureau, or the division

should have fully reviewed more vendor proposals to ensure that the process was truly competitive. [WellSky Protest, page 1]

2. The RFP and/or its evaluation process included unreasonable or unfair procedural hurdles that resulted in the removal of over 90% of bidders. According to the Award Recommendation Report, the Bureau received twenty-four (24) Quotes, but ultimately only one Quote completed the full evaluation process. Twenty-two (22) Quotes were deemed non-responsive and ineligible for reward for procedural irregularities and rejected prior to technical review. Many of the rejected Quotes were from established, experienced vendors that each have successfully responded to dozens, if not hundreds, of competitive solicitations without disqualification. [WellSky Protest, page 2]
3. The Evaluation Committee [sic.] abused its discretion by failing to waive minor irregularities to ensure a truly competitive bid. . . The reason for rejection for most of the twenty-two Quotes deemed non-responsive were for reasons that might be considered minor irregularities, (e.g. missing content which absence could be evaluated accordingly) or for inclusion of material that invited negotiation with the State over specific terms. [WellSky Protest, page 2]
4. The State unreasonably disqualified bidders who requested the inclusion of licensing terms despite the allowance of such inclusion in section 5.4.C of the RFP and the State's awareness of vendor concerns raised in the Question-and-Answer portion of the RFP. The RFP sought a "cloud-based system (Base Product) that is configurable and/or customizable to meet the State's requirements for . . . care and case management." Many peer states use proprietary COTS cloud solutions that are provided, configured, and deployed by vendors that responded to this RFP. As required by the RFP, vendors, including WellSky, attempted to use the question period prior to submission to effect reasonable changes to the terms and conditions of the RFP to protect their intellectual property . . . The Bureau's responses to the vendors' questions on these issues, without exception, was to reject suggested changes to the RFP's terms. As a last resort, several vendors included minor caveats or conditions or included their commercial license agreements . . . These inclusions were deemed non-responsive. Based on all of the questions and objections posed by vendors, the terms and conditions as written were not aligned with industry standards and, even though the State knew full well that leading SaaS vendors had issues, the State did not change terms. Of the twenty-two (22) Quotes deemed non-responsive, ten (10) Quotes or forty-five percent (45%) were rejected at least in part for the inclusion of additional terms, including for the addition of licensing terms. Section 5.4C of the RFP clearly allows for the inclusion of license terms within the order of precedence and should not have resulted in disqualification. In WellSky's case, WellSky included a statement that any agreement would be "consistent with the negotiated in agreement in effect between the parties (June 8, 2022) and the BAA (July 5, 2022)." This reference to an existing agreement that is already in effect with the same agency for the same purposes and includes WellSky's standard license terms (as permitted in Section 5.4 C. of the RFP) ought to have been acceptable and not deemed non-

responsive and, therefore, ineligible for reward. [WellSky Protest, page 3.]

With Respect to the rejection of WellSky's Quote, WellSky states:

1. The State unreasonably disqualified WellSky solely on the basis of inclusion of licensing terms which was permissible under Section 5.C.4 of the RFP and a known issue of concern raised by other bidders during the Question-and-Answer phase of the RFP. As indicated in the Award Recommendation Report, WellSky was disqualified only for the inclusion of licensing terms and for no other failure to comply with the pre-requisites of the RFP. Because WellSky's Quote complied with the prerequisites [sic.] of the RFP in all respects, it should have been evaluated against the awarded vendor's Quote. . . . WellSky's proposed solution, WellSky Human Services, does, in fact, already match the existing functionality of the existing commercial COTS product used by DoAS (WellSky Aging & Disability) and is currently in use by other State Units on Aging. . . . WellSky's technical proposal could be expected to meet or exceed the technical scores of Mon Ami. Because WellSky's Quote was unfairly deemed non responsive . . . it was not reviewed or fairly evaluated against Mon Ami's Quote. Had WellSky's quote been evaluated and scored, it almost certainly would have been included in the Competitive Range and advanced to the Pricing Analysis phase, where, if only compared [to] Mon Ami's Quote, it would have been ranked first. [WellSky Protest, page 4.]

In the protest, WellSky claims that the evaluation process "reduced the field of technically viable proposals to one", and that the evaluation process was not fully competitive. WellSky argues that the evaluation process included "unreasonable or unfair procedural hurdles". WellSky further states that most of the twenty two (22) Quotes were deemed non-responsive for "reasons that might be considered minor irregularities . . . or for inclusion of material that invited negotiation with the State over specific terms" and that those could have been waived in accordance with the Director's right to waive minor irregularities pursuant to N.J.A.C. 17:12-2.7(d). Finally, WellSky argues that it was unreasonable to disqualify bidders who requested the inclusion of licensing terms because it was permitted in Section 5.4.C of the Bid Solicitation, that the State was aware of vendor concerns as they were raised in the electronic Question and Answer period, and lastly that for WellSky, their inclusion of the statement that "any agreement would be "consistent with the negotiated agreement in effect between the parties. . ." referencing a current agreement in place "with the same agency for the same purposes and includes WellSky's standard license terms . . . ought to have been acceptable and not deemed non-responsive and, therefore, ineligible for award". WellSky does not request the opportunity for an in-person presentation as permitted by N.J.A.C. 17:12-3.3(b)(1)(iii).

Although WellSky did not request an in-person presentation to challenge the intended Contract award, pursuant to N.J.A.C. 17:12-3.3(e), "[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, but not limited to, 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 WellSky. The issues raised in WellSky's 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 WellSky on the written record, as such an in-person hearing is not warranted.

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).

In point one of their protest, WellSky argued that the RFP was not a competitive process because it “reduced the field of technically viable proposals to one proposal” (WellSky Protest page 1). In point two of their protest, WellSky argued that the “evaluation process included unreasonable or unfair procedural hurdles that resulted in the removal of over 90% of bidders” (WellSky Protest page 2). The chart below reflecting the reasons for non-compliance based on the Recommendation Report, shows that each bidder was found non-responsive for different reasons. The fact that a large number of bidders were found to be non-compliant in and of itself, is not enough to prove that the “evaluation process was unreasonable or unfair” as WellSky asserts. A closer look at each bidder and the reasons they were found non-responsive demonstrates that the determination of non-responsive was due to each bidder’s individual Quote submission and individual failure to adhere to the clear instructions in the Bid Solicitation as set forth in the chart below.

Company	Bid Solicitation Section	Reason
Arka	3.7 – Joint Venture	Arka submitted a joint venture form indicating that Apex Solutions would be the other entity. Apex Solutions did not submit any forms as required.
	3.19 – Additional Plans	Arka failed to submit a draft Status Report or a draft Requirements Traceability Matrix as was required in Section 3.19.
Kamaletdos	3.19 – Additional Plans	Kamaletdos failed to include a draft plan for any of the 12 Additional Plans required by Section 3.19.
Maxnet	3.19 – Additional Plans	Maxnet failed to provide a draft Training Plan as required by Section 3.19
	3.27 – Oral Presentation	Maxnet failed to submit Oral Presentation materials as required by Section 3.27

RTZ	Section 3.27 – Oral Presentation	RTZ failed to provide oral presentation materials as required by Section 3.27.
AssureCare	6.18, 6.19, 6.20(b) - Security	For each Section, AssureCare failed to state how they would implement security controls as required by each Section.
Comagine	3.13.8.1 – Small Business and/or Disabled Business Set Aside	Comagine failed to respond to a request for information as to Comagine’s good faith efforts to obtain Small Business and/or Disabled Veterans for subcontracting services.
MERP	4.1 - Overview of Scope of Work	Pursuant to Section 4.1, approximately 4000 users were expected to use the system. MERP provided pricing for 400 users, instead of pricing for the required 4000 users.
Patient Care	Section 3.13.12 – State of NJ Security Due Diligence Third-Party Information Security Questionnaire	Patient Care failed to complete some sections of the Questionnaire and other sections lacked detail.
Son	Section 3.13.12 – State of NJ Security Due Diligence Third-Party Information Security Questionnaire	Son’s quite was deemed incomplete because many of the referenced policies were not provided for review and other responses were cut off and/or lacked detail.
VisualVault	Section 4.3.14 – Turnover Plan	Pursuant to Section 4.3.14, at the end of the contract, the hardware must become property of the State and the Contractor must deliver all hardware to the State. VisualVault stated that they would turn over all hardware if there was “an NDA in place”, however they refused to ship any hardware and said the “transfer responsibility requirement [of Section 4.3.14] was not applicable”.
Hoover Blanket	Section 3.19 – Additional Plans Section 3.11 – Bidder Additional Terms Submitted with the Quote	Hoover Blanket failed to provide a draft of the Communication Management Plan with their Quote as required under the Section. Hoover Blanket submitted a Software Maintenance & Support Agreement which requires the State agree to an annual subscription plus additional fees.

Brite Systems	Section 3.11 – Bidder Additional Terms Submitted with the Quote	Brite Systems included the following language with their Quote submission: “Any deviation that constitutes a change in time, scope, or funds by 10% must be resolved by an amendment to the contract . . .”
CGI	Section 3.11 – Bidder Additional Terms Submitted with the Quote	CGI added to their Offer and Acceptance page that “Contractor’s acceptance and signing of this page is conditional upon the Contractor’s ability to negotiate key terms with the State in the event of a Contract award . . . If the State and Contractor are unable to agree on mutually satisfactory terms, the Contractor will not be contractually obliged to provide any goods, products, or services to the State nor be subject to penalties of any nature or kind.”
Creative Information	Section 3.11 – Bidder Additional Terms Submitted with the Quote	Creative Information submitted a copy of their End User Licensing Agreement with their Quote.
Dimagi	Section 3.11 – Bidder Additional Terms Submitted with the Quote	Dimagi including additional terms and conditions for third-party vendors with their Quote.
FEI	Section 3.11 – Bidder Additional Terms Submitted with the Quote	FEI included language that “Unanticipated tasks . . . will result in unanticipated costs. More information regarding unanticipated tasks will be found in the executed contract.”
PruTech	Section 3.11 – Bidder Additional Terms Submitted with the Quote	PruTech included language with its Quote submission that license costs (if applicable) are not included in estimates and that provisional of licenses will be provided by NJDoAS.
Ready Computing	Section 3.11 – Bidder Additional Terms Submitted with the Quote	With their Quote submission, Ready Computing stated that the fixed pricing fees would only be incurred in the first service year but that a license would be an ongoing annual cost. Additionally, any services outside the scope of the Implementation or Sustainment service would be \$180/hour.

VirtualHealth	Section 3.11 – Bidder Additional Terms Submitted with the Quote	With their quote, VirtualHealth submitted “Appendix F – Sample VH license and Service Agreement_Tepmplate_Updated_2023”, and a document titled “VirtualHealth NJDHS Terms and Conditions Issues List”. Both of these documents contain additional terms and conditions to the State of New Jersey Standard Terms and Conditions.
WellSky	Section 3.11 – Bidder Additional Terms Submitted with the Quote	On their Offer and Acceptance Form, WellSky inserted the highlighted language in section 1. Section 1 states “1. [Bidder] has read, understands and agrees to all terms, conditions, and specifications set forth in the Bid Solicitation and State of New Jersey Standard Terms and Conditions consistent with the negotiated agreement in effect between the parties (June 8, 2022) and the BAA (July 5, 2022) and agrees to furnish the goods, products, and/or services in compliance with those terms”.

Nine (9) of the twenty four (24) bidders were found to be non-responsive due to the addition of material terms that conflicted with Bid Solicitation Section 3.11.¹ Each of these nine (9) bidders added different language so while all were found non-responsive for not adhering to the same Bid Solicitation section (3.11), there was no other common thread among them as each added different language, and in some cases entire documents to their Quote. Four (4) different bidders failed to include plans required under Bid Solicitation Section 3.19, *Additional Plans*, while the remaining non-responsive bidders generally failed to satisfy the submission of some other required document. This review shows that the majority of the bidders satisfied the majority of the requirements, but failed to meet a mandatory requirement in a unique way, and there was nothing “not competitive” about the structure of the Bid Solicitation’s requirements. In the end, two bidders were considered by the Evaluation Committee, and the award was only made after the Evaluation Committee conducted a full, scored evaluation of the two responsive Quotes.

The addition of terms by a bidder is specifically addressed in Section 3.11 of the Bid Solicitation, *Bidder Additional Terms Submitted with the Quote*. That Section of the Bid Solicitation reads:

¹ While Hoover Blanket added additional material terms in violation of Section 3.11, they also failed to provide a draft Communication Management Plan with their Quote, as required by Section 3.19. Therefore, Hoover Blanket would have been deemed non-responsive for this omission regardless of their addition of material terms in violation of Section 3.11.

3.11 BIDDER ADDITIONAL TERMS SUBMITTED WITH THE QUOTE

A Bidder may submit additional terms as part of its Quote. Additional terms are Bidder-proposed terms or conditions that do not conflict with the scope of work required in this Bid Solicitation, the terms and conditions of this Bid Solicitation, or the State of New Jersey Standard Terms and Conditions. Bidder proposed terms or conditions that conflict with those contained in the State of New Jersey Standard Terms and Conditions will render a Quote non-responsive. It is incumbent upon the Bidder to identify and remove its conflicting proposed terms and conditions prior to [Quote](#) submission.

Quotes including Bidder proposed additional terms [may](#) be accepted, rejected, or negotiated, in whole or in part, at the State's sole discretion.

If Bidder intends to propose terms and conditions that conflict with the State of New Jersey Standard Terms and Conditions, [those Bidder](#) proposed terms and conditions shall only be considered if submitted and agreed to pursuant to the electronic question and answer procedure. Bidders shall not submit exceptions or modifications as part of 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 Bid Solicitation by June 20, 2023. Three hundred fifty-two (352) questions were received. A second electronic question and answer period was provided to address revisions made following the first electronic question and answer period, with questions due by November 15, 2023. During the second question and answer period, an additional forty-nine (49) questions were received. WellSky submitted no questions in the first electronic Question and Answer period. WellSky submitted one "question" during the second electronic Question and Answer period, with the following answer provided:

353	New Jersey State Standard Terms and Conditions (SSTC)	<p>Q: Relating to exceptions to the State's standard terms and conditions, [BLANK] and the State have an existing, negotiated contract in effect today, and [BLANK] proposes using that contract as the terms and conditions governing the relationship if [BLANK] would be selected as Vendor of Choice. For specific exceptions to that agreement that the state would want to pursue, [BLANK] would be happy to discuss those requested changes.</p> <p>A: This is not a question, and cannot be answered as posed. Further, there will not be any post-Quote opening negotiations or discussions regarding the Contract terms beyond those outlined in Bid Solicitation Section 8.11, <i>Negotiation</i>, and Section 8.12, <i>Best and Final Offer (BAFO)</i>. As stated in Bid Solicitation Section 3.11, <i>Bidder Additional Terms Submitted with the Quote</i>, additional terms submitted by a Bidder that conflict with the SSTCs or Bid Solicitation could render a Bidder's Quote non-responsive.</p>
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In its response, the State did not agree to WellSky's proposed language.² Nonetheless, WellSky ultimately inserted language consistent with their "question" into their modified Offer and Acceptance form. In their answer, the State said that "there will not be any post-Quote opening negotiations or discussions regarding the contract terms" outside of those in Bid Solicitation Sections 8.11 *Negotiation* and 8.12 *Best and Final Offer (BAFO)*. Further, the State clearly reminded WellSky that any terms and conditions submitted that conflicted with the "SSTCs or Bid Solicitation could render a Bidder's Quote non-responsive." Here, the State determined that the Quote submitted by WellSky contained a material deviation from the requirements of the Bid Solicitation rendering the Quote non-responsive.

The question before me is whether the additional language WellSky included in their Offer and Acceptance form modified the terms and conditions of its Quote, and whether it was a material deviation rendering the Quote non-responsive or if the modified term could have been waived. To be deemed non-responsive, WellSky's Quote would have had to materially deviate from the requirements of the Bid

² WellSky's modified Offer and Acceptance page referenced "the negotiated agreement in effect between the parties (June 8, 2022) and the BAA (July 5, 2022)." This appears to be a reference to WellSky's "Business Associate Agreement" between WellSky and DHS, currently operating under 25-WAIVE-82948 09-25-DHS Supplement #1 expires 6/30/25, originally designated as 23-WAIVE-34466 43-23-DHS, expired 6/30/23. A review of this authorized waiver contract shows that, although it was procured using a permitted contracting method, it was not procured as an advertised Bid Solicitation regarding the full-breadth of subject matter involved in the current Bid Solicitation. As such, assuming the terms could be accepted, any negotiated terms in the "Business Associate Agreement" would not have considered the full scope of work and terms and conditions here, and as such would have to be rejected under New Jersey's procurement laws as discussed in this Final Agency Decision.

Solicitation such that the State would have no assurances that the Contract would be performed consistent with the requirements of the Bid Solicitation. In determining whether a material deviation exists, it is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Sternin, 25 N.J. 317, 324 (1957).

In Meadowbrook Carting, *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, Judge Pressler 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. 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. 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.” River Vale, *supra*, 127 N.J. Super. at 222.

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).

Bid Solicitation Section 3.11, *Bidder Additional Terms Submitted with the Quote*, stated as follows:

A Bidder may submit additional terms as part of its Quote. Additional terms are Bidder-proposed terms or conditions that do not conflict with the scope of work required in this Bid Solicitation, the terms and conditions of this Bid Solicitation, or the State of New Jersey Standard Terms and Conditions. Bidder proposed terms or conditions that conflict with those contained in the State of New Jersey Standard Terms and Conditions will render a Quote non-responsive. It is incumbent upon the Bidder to identify and remove its conflicting proposed terms and conditions prior to Quote submission.

Quotes including Bidder proposed additional terms may be accepted, rejected, or negotiated, in whole or in part, at the State’s sole discretion.

If Bidder intends to propose terms and conditions that conflict with the State of New Jersey Standard Terms and Conditions, those Bidder proposed terms and conditions shall only be considered if submitted and agreed to pursuant to the electronic question and answer procedure. Bidders shall not submit exceptions or modifications as part of the Quote or on the “Terms and Conditions” Tab through [NJSTART](#).

In the protest, WellSky claims that “The State unreasonably disqualified bidders who requested the inclusion of licensing terms despite the allowance of such inclusion in Section 5.4.C of the RFP and the state’s awareness of vendor concerns raised in the Question-and Answer portion of the RFP.” Additionally, it states that their inclusion on the Offer and Acceptance form of “a statement that any agreement would be “consistent with the negotiated agreement in effect between the parties (June 8, 2022 and the BAA (July 5, 2022))” . . . ought to have been acceptable and not deemed non-responsive and, therefore ineligible for award” since the reference was to “an existing agreement with the same agency for the same purposes and includes WellSky’s standard license terms (as permitted in Section 5.4.C of the RFP)”.

Bid Solicitation Section 5.4(C), *Contractor Intellectual Property; Commercial off the Shelf Software (COTS) and Customized Software*, states that a

Contractor retains ownership of all Contractor Intellectual Property, and any modifications thereto and derivatives thereof, that the Contractor supplies to the State pursuant to the Contract, and grants the State a non-exclusive, royalty-free license to use Contractor Intellectual Property delivered to the State for the purposes contemplated by the Contract for the duration of the Contract including all extensions. In the event Contractor provides its standard license agreement terms with its Quote, such terms and conditions must comply with *Bid Solicitation Section 1.4 – Order of Precedence of Contractual Terms*.

[Emphasis in original.]

Bid Solicitation Section 1.4, *Order of Precedence of Contractual Terms*, states in pertinent part that any conflicts are resolved based on the established order of precedence. While there is a contract currently in place for the services being reprocured under 23DPP00818, as noted in Footnote 2, this Bid Solicitation and ensuing contract stands on its own and has no relationship to the prior contract. Based on the order of precedence listed, there is no contemplation that other, prior, documents included by reference would be made part of this agreement. The idea of including a portion of an expiring document by reference is well out of the norm and would place WellSky in a superior position to other bidders through incumbency bias with respect to revisions to the State Standard Terms and Conditions that other bidders were unable to negotiate in this Bid Solicitation which is in direct conflict with the ruling of River Vale.

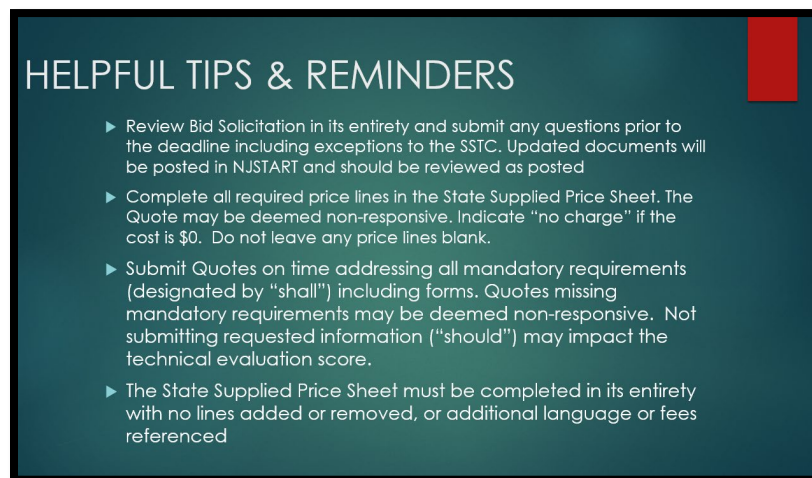
Similarly, rules of interpretation would require that all terms contained in all of the documents establishing the new contract be read consistently, and in a complementary manner avoiding conflicts. This means the plain language found in Bid Solicitation Sections 1.4 (*Order of Precedence of Contractual Terms*), 2.1 (*Electronic Question and Answer Period*), (3.11 (*Bidder Additional Terms Submitted with the Quote*), and Section 5.4 (*Contractor Intellectual Property; Commercial off the Shelf Software (COTS) and Customized Software*) would permit the submission of additional terms, while requiring potentially conflicting terms to be submitted during the electronic question and answer period for a final determination, and any conflicting terms submitted with a Quote would require a bidder to be found non-responsive unless the term was deemed by the Bureau to be non-material.

Despite this information being provided in the Bid Solicitation, and after WellSky had been informed that the State did not agree to WellSky's proposed language, WellSky inserted language into their modified Offer and Acceptance form. A *de novo* review of the submitted question and response shows the Bureau's determination was reasonable based on the clear terms of the Bid Solicitation and the response to WellSky's question."

As part of the Bid Solicitation process the Division conducted an Optional Pre-Quote Conference pursuant to Bid Solicitation Section 2.5. As described in that section:

The purpose of the Optional Pre-Quote Conference is to address procedural questions regarding the Bid Solicitation and Bidder Quote Submission Requirements only. No substantive questions regarding the Bid Solicitation Scope of Work will be accepted or answered during the pre-Quote conference. All questions are to be submitted during the Electronic Question and Answer Period.

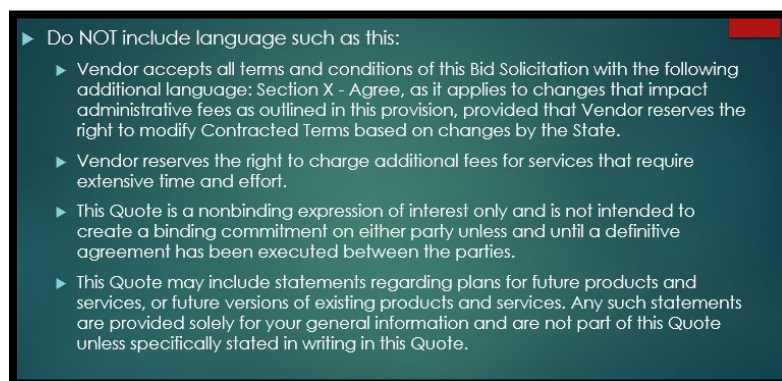
As part of this Pre-Quote Conference, and because the Division has been presented with the issue of Quotes failing to include all required information, as well as the insertion of conflicting terms, multiple times in the past, and the following information is specifically included in the standard Pre-Quote Conference presentation:



HELPFUL TIPS & REMINDERS

- ▶ Review Bid Solicitation in its entirety and submit any questions prior to the deadline including exceptions to the SSTC. Updated documents will be posted in NJSTART and should be reviewed as posted
- ▶ Complete all required price lines in the State Supplied Price Sheet. The Quote may be deemed non-responsive. Indicate "no charge" if the cost is \$0. Do not leave any price lines blank.
- ▶ Submit Quotes on time addressing all mandatory requirements (designated by "shall") including forms. Quotes missing mandatory requirements may be deemed non-responsive. Not submitting requested information ("should") may impact the technical evaluation score.
- ▶ The State Supplied Price Sheet must be completed in its entirety with no lines added or removed, or additional language or fees referenced

[Pre-Quote Conference – Slide Deck page #6]



- ▶ 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.

The Division expressly advises and warns Bidders to include all of the mandatory requirements including forms, and to not include language that reserves to the Bidder the future right, as here, to enter into discussions regarding a certain topic that it agrees or disagrees with in the Bid Solicitation. 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 clear language provided as guidance in the Pre-Quote Conference Slide Deck, included in the Bid Solicitation, and after the proposed changes requested in the electronic question and answer period were rejected, WellSky included language that the State did not agree to based on the State's response to WellSky's Question during the second Question and Answer period. Such a clear contradiction with the express requirements of the Bid Solicitation, whether an explanation or an additional term, 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." Moreover, as shown above, the Bid Solicitation's requirements were competitive because the majority of bidders were able to satisfy the majority of requirements, but then failed to provide some mandatory piece of information or added conflicting terms despite clear guidance on how to complete the bidding process.

WellSky claims that their inclusion of the statement that "any agreement would be 'consistent with the negotiated agreement in effect between the parties. . .'" referencing a current agreement in place "with the same agency for the same purposes and includes WellSky's standard license terms . . . ought to have been acceptable and not deemed non-responsive and, therefore, ineligible for award" are irrelevant. Regardless of past action on a different contract, N.J.S.A. 52:34-12a(g) grants the Division discretion to make an award

with reasonable promptness, after negotiation with bidders where authorized, by written or electronic notice to that responsible bidder whose bid, **conforming to the invitation for bids**, will be most advantageous to the State, price and other factors considered[.]

[Emphasis added.]

Similar language is found in N.J.A.C. 17:12-2.7(c), which states that a

proposal that is not compliant with the provisions of N.J.A.C. 17:12-2.2 or **responsive to the material requirements of the RFP 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.

[Emphasis added.]

The clear statutory and regulatory language makes no exception for inclusion of material requirements or terms from prior contracts. To be eligible for evaluation and eventual award, a bidder must be responsive to the material requirements of the current Bid Solicitation. As noted above, WellSky included language referencing a prior "negotiated agreement" which they proposed to make part of this contract by reference and which conflicted with the express requirements of the Bid Solicitation. Unless the State accepted WellSky's modified terms post-Quote opening, there is no guarantee that the Contract would be performed according the Bid Solicitation's requirements. Moreover, accepting WellSky's insertion of terms from the current contract would be an act of incumbency bias because no other bidder

could offer similar terms as an incumbent. Thus, WellSky was properly removed from consideration for evaluation and award under the Division's statutory and regulatory obligations.

"Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract." Barrick v. State, 218 N.J. 247, 259 (2014). WellSky's language was not an additional term, but rather was a change which directly conflicted with the terms and conditions of the Bid Solicitation. Because the requirements of Bid Solicitation are equally applicable to all Bidders who submitted Quotes, WellSky's language is a material deviation from the requirements of Bid Solicitation because, applying the River Vale materiality test, it deprives the State of assurance that WellSky will perform **this** contract according to its specified requirements. Waiving WellSky's language would adversely affect competitive bidding by placing WellSky in a position of advantage over other bidders, who submitted Quotes without proposed alternate language in conformance with the requirements of the Bid Solicitation. Accordingly, the State correctly determined that the Quote submitted by WellSky was nonresponsive because the language directly conflicted with the terms and conditions of the Bid Solicitation.

Based upon the findings set forth above, I find no reason to disturb the determination that the Quote submitted by WellSky was non-responsive to the requirements of the Bid Solicitation. Accordingly, I sustain the July 2, 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. Please monitor the Division's [NJSTART](#) website for future bidding opportunities for these services.

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
Acting Chief Hearing Officer

CKK:CMD

c: M. Dunn
B. Cegerenko