



State of New Jersey

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

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July 22, 2024

Via Electronic Mail Only to john@oxfordcommunications.com

John Martorana, President
Oxford Communications, Inc.
11 Music Mountain Blvd
Lambertville, NJ 08530

Re: I/M/O Bid Solicitation #23DPP00836 Oxford Communications, Inc.
Protest of Notice of Intent to Award
T3067 – Statewide Advertising and Public Relations Services

Dear Mr. Martorana:

This final agency decision is in response to your letter delivered via electronic mail on behalf of Oxford Communications, Inc. (Oxford) received by the Division of Purchase and Property's (Division) Hearing Unit on June 27, 2024 (Protest). In that letter, Oxford protests the Procurement Bureau's (Bureau) June 13, 2024, Notice of Intent to Award letter (NOI) issued for Bid Solicitation #23DPP00836 – T3067 Statewide Advertising and Public Relations Services (Bid Solicitation).

By way of background, on July 18, 2023, the Bureau issued the Bid Solicitation on behalf of State Agencies. The purpose of the Bid Solicitation was to solicit Quotes for advertising, marketing, public relations, community outreach, and related services for the State of New Jersey (State). 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.

In accordance with Bid Solicitation Section 2.5, *Optional Pre-Quote Conference*, an optional Pre-Quote Conference was held on August 2, 2023, providing all potential Bidders with an overview of the Bid Solicitation and Quote submission procedures and requirements. Representatives from eleven (11) potential bidding entities attended according to the Pre-Quote sign-in sheet.

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 August 9, 2023. Four (4) Bid Amendments were issued for this Bid Solicitation, which provided revisions to the Bid Solicitation and responses to questions received from potential Bidders.

#	DATE	DESCRIPTION
1	09/12/2023	Quote Submission Due Date Extended to October 20, 2023
2	10/12/2023	Quote Submission Due Date Extended to November 17, 2023
3	11/03/2023	Quote Submission Due Date Extended to December 5, 2023
4	11/14/2023	Answers to Questions

On December 5, 2023, the Division's Proposal Review Unit (PRU) opened thirty-nine (39) Quotes. The Quotes submitted by Arise Communications Inc., Purplegator, MMGY Global LLC, were Automatically Rejected by the PRU pursuant to the provisions of N.J.A.C. 17:12-2.2, and no protests were received in response to PRU rejections. The PRU also issued formal notice and a warning letter to five (5) Bidders that they were not in compliance with Business Registration Certificate requirements. The remaining thirty-six (36) Quotes, listed below, were deemed administratively complete by the Proposal Review Unit and released to the Bureau for further review and evaluation.

True North Inc. ("True North")	Oxford Communications ("Oxford")
LAZWORLD.COM INC ("Lazworld")	Dana Communications Inc. ("Dana")
Miles Partnership, LP ("Miles")	Vision Media Marketing Inc. ("VMM")
Integrated Marketing Services Inc. ("IMS")	Positive Solutions, LLC ("PS")
EFK Group, LLC ("EFK")	Success Advertising Inc. ("SA")
AB&C Philadelphia LLC ("AB&C")	Beyond Media Global LLC ("BMG")
Brand Enchanting Media LLC ("BEM")	Magnum Integrated Marketing "MIM")
Kivvit, LLC ("Kivvit")	Spitball LLC ("Spitball")
Birdsall, Voss & Associates, Inc. ("BVA")	Masterpiece Design
Forge Apollo LLC ("FA")	Fuerza Strategy Group ("FSG")
Rockefeller Group Development Corp ("RGD")	The Setroc Group, Inc. ("TSG")
Direct Development	MWW Group LLC ("MWW")
KLR Agency ("KLR")	Impact Consulting Enterprises ("ICE")
EST Marketing ("EST")	Princeton Partners, LLC ("Princeton Partners")
Violet PR ("Violet")	Marketsmith, Inc. ("Marketsmith")
Maple and Monroe	Marketing for Change Co. ("MFC")
Angry Apples Marketing, LLC ("AAM")	JL Media, Inc. ("JL Media")
Targeted Advertising Group Inc. ("TAG")	Tara Dowdell Group LLC ("TDG")

As part of the responsiveness review, the Bureau determined that the Quotes submitted by AB&C, IMS, JL Media, and True North, required a Request for Clarification, in accordance with Bid Solicitation Section 8.4, *Clarification of Quote*, for the Bureau to determine whether or not the Quotes were responsive to mandatory material requirements of the Bid Solicitation as outlined on Pages 4 and 5 in the Recommendation Report. For the reasons more fully explained on those pages in the Recommendation Report, the Bureau determined that each Bidder's clarification response sufficiently addressed the matter in question, and that the Bidders met the requirements of the Bid Solicitation.

The Bureau determined that the Quotes submitted by the Bidders in the following chart were non-responsive due to non-compliance with one or more mandatory elements of the Bid Solicitation. Recommendation Report at pgs. 5-9.

Beyond Media Global LLC ("BMG")	Oxford Communications ("Oxford")
LAZWORLD.COM INC ("Lazworld")	EST Marketing ("EST")
Miles Partnership, LP ("Miles")	Vision Media Marketing Inc. ("VMM")
Kivvit, LLC ("Kivvit")	Magnum Integrated Marketing "MIM")
Princeton Partners, LLC ("Princeton Partners")	MWW Group LLC ("MWW")

Marketsmith, Inc. (“Marketsmith”)	Rockefeller Group Development Corp (“RGD”)
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The Bureau found that the following Quotes met, and complied with, the mandatory requirements of the Bid Solicitation, and remained available to be evaluated and eligible for Contract award:

True North Inc. (“True North”)	Dana Communications Inc. (“Dana”)
Integrated Marketing Services Inc. (“IMS”)	Positive Solutions, LLC (“PS”)
EFK Group, LLC (“EFK”)	Success Advertising Inc. (“SA”)
AB&C Philadelphia LLC (“AB&C”)	Spitball LLC (“Spitball”)
Brand Enchanting Media LLC (“BEM”)	Masterpiece Design
Birdsall, Voss & Associates, Inc. (“BVA”)	Fuerza Strategy Group (“FSG”)
Forge Apollo LLC (“FA”)	The Setroc Group, Inc. (“TSG”)
Direct Development	Impact Consulting Enterprises (“ICE”)
KLR Agency (“KLR”)	Marketing for Change Co. (“MFC”)
Violet PR (“Violet”)	JL Media, Inc. (“JL Media”)
Maple and Monroe	Tara Dowdell Group LLC (“TDG”)
Angry Apples Marketing, LLC (“AAM”)	Targeted Advertising Group Inc. (“TAG”)

Thereafter, the remaining responsive Quotes were reviewed and evaluated in accordance with Bid Solicitation Section 8.9, *Evaluation Criteria*. These twenty-four (24) Quotes were evaluated in accordance with the evaluation criteria set forth in Bid Solicitation Section 8.9.1, *Technical Evaluation Criteria*, which stated in part:

- A. The Bidder's demonstration in the Quote that the Bidder understands and is able to complete the requirements of the Scope of Work as sought;
- B. The qualifications and experience of the Bidder's personnel; and
- C. The Bidder's documented experience in successfully completing contracts of a similar size and scope in relation to the work required by the Bid Solicitation.

The Scoring Legend for the Technical Evaluation of Quotes was: “5 – Excellent”; “4 – Very Good”; “3 – Good”; “2 – Fair”; and “1 – Minimally Responsive”, and each responsive Bidder received a single score between 1-5 based on the above scoring legend and the Bureau’s evaluation of the Quote based on the above Evaluation Criteria. The evaluation methodology and score sheet were finalized and time-stamped prior to the opening of Quotes. Recommendation Report Pg. 10. Following the evaluation and scoring of the responsive Quotes, Bidders BVA, FA, FSG, and Maple and Monroe were found to be outside the Competitive Range, and were ineligible for further consideration.¹ Recommendation Report Pgs. 25-26.

To evaluate pricing pursuant to Bid Solicitation Section 8.9.2, *Price Evaluation*, Bidders were evaluated and ranked from lowest to highest based upon the three (3) year average of the percentages provided for Price Line 1 Media Placement Mark-Up located on Tab 1, with Price Line 1 also evaluated for reasonableness. The pricing submitted for Price Lines 5 through 29 related to hourly rates would be evaluated to confirm all Bidders submitted reasonable hourly rates.

¹ Additionally, Bidders BVA, FA, and FSG were ineligible for award due to the lack of a valid Business Registration Certificate.

In accordance with Bid Solicitation Section 8.12, *Best and Final Offer (BAFO)*, the Bureau requested a BAFO from all responsive Bidders determined to be in the Competitive Range. Ten Bidders provided BAFO responses as shown on pages 25 and 26 in the Recommendation Report. Bidders were thereafter ranked from lowest to highest per Section 8.9.2 as follows:

BIDDER	BAFO – PRICE LINE 1	PRICING RANK
EFK	3%	1
MFC	3.25%	2
TAG	4%	3
ICE	5%	4
KLR	6%	5
TSG	7%	6
Spitball	7%	7
Dana	7%	8
PS	7.67%	9
JL Media	8%	10
SA	8%	11
True North	8%	12
Violet	9%	13
AB&C	10%	14
Direct Development	10%	15
TDG	11.67%	16
IMS	12%	17
Masterpiece Design	14%	18
BEM	15.33%	19
AAM	36.3%	20

The Bureau considered all pricing from the Bidders in the Competitive Range to be reasonable and acceptable, with the exception of AAM's Media Placement Mark-Up percentage of 36.3% for Price Line 1, which was determined to be a significant outlier from the other nineteen (19) Bidders in the Competitive Range. As a result, AAM's pricing was deemed to not be acceptable to the State, and AAM's Quote was removed from further consideration of award.

Having completed its evaluation of the Quotes received in response to the Bid Solicitation, on June 13, 2024, the Bureau issued the NOI advising all Bidders that it was the State's intent to award a Contract to the following Bidders:

Intended Awardee	Intended Awardee
AB&C Philadelphia LLC	Masterpiece Design
Brand Enchanting Media LLC	Positive Solutions, LLC
Dana Communications Inc.	Spitball LLC
EFK Group, LLC	Success Advertising Inc.
Impact Consulting Enterprises	Tara Dowdell Group LLC
Integrated Marketing Services Inc.	Targeted Advertising Group Inc.
JL Media, Inc.	The Setroc Group, Inc.
KLR Agency	True North Inc.
Marketing for Change Co.	Violet PR

On June 28, 2024, prior to the close of the protest period, Oxford submitted a Protest challenging the Division's determination that the Quote submitted by Oxford was non-responsive. Specifically, Oxford claims that its Quote was substantially and materially responsive to Quote's specifications, and that any alleged defect in the Quote was a mere irregularity to be waived by the State. Regardless of its first claim, Oxford argues that it should have been permitted to clarify its response in its Quote similar to the clarifications provided by other Bidders.

Although Oxford has requested an in-person presentation as permitted by N.J.A.C. 17:12-3.3(e), it should be noted that "[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director." Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the Evaluation Committee Report, the Bureau's Recommendation Report, the relevant statutes, regulations, case law, and the protest submitted by Oxford. 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 Oxford 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)).

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

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

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

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

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

Here Oxford’s Price Sheet submitted in response to the Bid Solicitation included the following with respect to Tab 1:

	A	B	C	D	E	F
	Price Schedule					
	Bid Solicitation #23DPP00836					
	T3067 Statewide Advertising and Public Relations Services					
1						
2	Bidder Name:					
3	Refer to Bid Solicitation Section 3.22.1 for Bidder instructions. The Bidder shall provide pricing in the yellow highlighted cells.					
4	Line #	Description	Unit of Measure	Contract Year One (1)	Contract Year Two (2)	Contract Year Three (3)
5	1	Media Placement Mark-Up	Percentage	4% for campaigns under \$1M in net media costs; 3.5% for campaigns >\$1M	4% for campaigns under \$1M in net media costs; 3.5% for campaigns >\$1M	4% for campaigns under \$1M in net media costs; 3.5% for campaigns >\$1M
6	2	Media Placement Mark-Up	Net	Pass Through Line	Pass Through Line	Pass Through Line
7	3	Media Production	Net	Pass Through Line	Pass Through Line	Pass Through Line
8	4	Non-Media Production	Net	Pass Through Line	Pass Through Line	Pass Through Line

[Oxford State-Supplied Price Sheet, TAB 1 Media Placement.]

Additionally, Oxford’s Price Sheet submitted in response to the Bid Solicitation included the following with respect to Tab 2:

	A	B	C	D	E	F
	Price Schedule Bid Solicitation #23DPP00836 T3067 Statewide Advertising and Public Relations Services					
1	Bidder Name:					
2	Refer to Bid Solicitation Section 3.22.2 for Bidder instructions. The Bidder shall provide pricing in the yellow highlighted cells.					
3	Line #	Description	Unit of Measure	Contract Year One (1)	Contract Year Two (2)	Contract Year Three (3)
4	5	President	Hour	\$ 150.00	\$ 150.00	\$ 150.00
5	6	Senior Account Executive	Hour	\$ 150.00	\$ 150.00	\$ 150.00
6	7	Account Executive	Hour	\$ 90.00	\$ 90.00	\$ 90.00
7	8	Advertising Account Manager	Hour	\$ 150.00	\$ 150.00	\$ 150.00
8	9	Public Relations Account Manager	Hour	\$ 150.00	\$ 150.00	\$ 150.00
9	10	Comptroller	Hour	\$ 90.00	\$ 90.00	\$ 90.00
10	11	Media Planner/Buyer	Hour	\$ 150.00	\$ 150.00	\$ 150.00
11	12	Senior Art Director	Hour	\$ 150.00	\$ 150.00	\$ 150.00
12	13	Creative Art Director	Hour	\$ 150.00	\$ 150.00	\$ 150.00
13	14	Creative Copy Director	Hour	\$ 150.00	\$ 150.00	\$ 150.00
14	15	Senior Production Director	Hour	\$ 150.00	\$ 150.00	\$ 150.00
15	16	Production Art Director	Hour	\$ 150.00	\$ 150.00	\$ 150.00
16	17	Production Media Director	Hour	\$ 150.00	\$ 150.00	\$ 150.00
17	18	Production Copy Director	Hour	\$ 150.00	\$ 150.00	\$ 150.00
18	19	Marketing Director	Hour	N/A	N/A	N/A

[Oxford State-Supplied Price Sheet, TAB 2 Hourly Rates.]

The inclusion of a range of percentages in Price Line #1 clearly and expressly conflicts with the language in the Bid Solicitation, as well as the operation of the procurement process. Specifically, Bid Solicitation Section 3.22.1, Tab 1, Media Placement Price Sheet Instructions, states:

The Bidder shall:

- A. Submit a Media Placement Mark-Up Percentage for all three (3) Contract Years of Price Line 1, which comprises the percentage of commission paid to the Contractor for ad placement;
- B. Not complete Price Line 2 which is a pass through line for media placement;
- C. Not complete Price Line 3 which is a pass through line for media production; and
- D. Not complete Price Line 4 which is a pass through line for non-media production.

This language requesting a singular mark-up, and failing to mention or permit a range of percentages, works in tandem with the language in Bid Solicitation Section 8.9.2, Price Evaluation, which informs potential bidders and the public that, with respect to evaluation of Tab 1:

For evaluation purposes, Bidders will be evaluated and ranked from lowest to highest based upon the **three (3) year average of the percentages provided for Price Line 1 Media Placement [sic] Mark-Up** located on Tab 1: Media Placement of the State-Supplied Price Sheet accompanying this Bid Solicitation. Price Line 1 will also be evaluated for reasonableness.

[Emphasis added.]

Additionally, Bidders are advised that they can submit lower pricing as part of the mini-bid process outlined in Bid Solicitation Section 4.2.2, Engagement Response Requirements, which states in Subsection 4.2.2.E.4, the engagement pricing for mini-bids:

Uses the same or lower hourly rates for each labor category as the All-Inclusive Hourly Rates submitted in the Contractor's Quote in response to Bid Solicitation Section 3.22 – State Price Sheet Instructions and the attached State Price Sheet. **The Contractor may submit lower pricing than what was originally proposed, either a lower Media Placement Mark-Up Percentage**, or lower hourly rates. The Contractor shall not submit higher pricing than what was originally proposed. If the Contractor submits lower pricing, that pricing will become the Contractor's new pricing for that specific Mini-Bid only. The Contractor's pricing will automatically revert back to the originally proposed All-Inclusive Hourly Rates for subsequent Mini-Bids; and

[Emphasis added.]

Oxford argues that the Bid Solicitation did not prohibit tiered pricing, and that the State only added this requirement post-opening. Oxford Protest, pg. 4. As shown above, the Bid Solicitation did not discuss tiered pricing, and the language focusing on a singular mark-up percentage fit squarely with the Division's intent to evaluate all Bidders based on an average of the percentages submitted for each year of the Contract. The submission of ranges based on any assumed fact runs contrary to the Bid Solicitation's requirements, and also places Bidders on unequal footing during the evaluation process as there is no assumed volume during the bidding and evaluation process. Finally, as Oxford points out, only four other Bidders submitted ranges on their State-Supplied Price Sheets. This means that thirty-two of the thirty-six Bidders followed the Bid Solicitation's instructions, and Oxford now requests that an exception be made for it despite not following the Bid Solicitation's instructions that were followed by the other Bidders.

Oxford also states that tiered pricing has been permitted in the past. As noted in Bid Solicitation Section 1.2, *Background*, potential Bidders for this Bid Solicitation "should not rely upon or use data or information from the [prior] contract when preparing a response to this Bid Solicitation **as this Bid Solicitation addresses the State's current requirements.**" Emphasis added. Such language is consistent with the statutory and regulatory requirements that the State make its award to "to that responsible bidder whose bid, **conforming to the invitation for bids**, will be most advantageous to the State, price and other factors considered." N.J.S.A. 52:34-12(g) (emphasis added). See also N.J.A.C. 17:12-2.7(c), stating that a Quote must be rejected that is not compliant or responsive to the material requirements of the Bid Solicitation.

Regarding Tab 2 of the State-Supplied Price Sheet, Oxford argues that it did not provide pricing for the relevant price line because “the inclusion of N/A was the logical response to itemized non-mandatory roles that Oxford did not staff at the time of the Proposal.” Pursuant to the instructions in Bid Solicitation Section 3.22.6, *Use of “No Bid” Versus “No Charge” on the State-Supplied Price Sheet*,

All price lines must be filled out in accordance with the instructions above. If the Bidder is not submitting a price for an item on a price line, the Bidder must indicate “No Bid” on the State-Supplied Price Sheet accompanying this Bid Solicitation. If the Bidder will supply an item on a price line free of charge, the Bidder must indicate “No Charge” on the State-Supplied Price Sheet accompanying this Bid Solicitation. **The use of any other identifier may result in the Bidder’s Quote being deemed non-responsive.**

[Emphasis added.]

As noted above, in support of its protest, Oxford states that it indicated “N/A” for the subject price line because it did not intend to offer the service. However, this is not a permitted response based on the clear instructions in the Bid Solicitation.

With respect to the Quote pricing, which after Contract award will set the price that the State will pay the Contractor for performing the services provided, Bid Solicitation Section 3.22, *State-Supplied Price Sheet Instructions*, stated:

The Bidder **must** submit its pricing using the State – Supplied Price Sheet accompanying this Bid Solicitation and located on the “Attachments” Tab. Failure to submit all required information in the manner specified will result in the Quote being deemed non-responsive and ineligible for award.

The State - Supplied Price Sheet consists of two (2) tabs:

- A. Tab 1: Media Placement; and
- B. Tab 2: Hourly Rates.

For Tab 2: Hourly Rates, Bid Solicitation Section 3.22.2, Hourly Rates Price Sheet Instructions, instructs Bidders that:

The Bidder **shall**:

- A. **Submit All-Inclusive Hourly Rates for all three (3) Contract Years of Price Lines 5 through 29 to reflect the cost per hour for all labor titles;**
- B. Equate its firm’s internal staff qualifications to the labor titles included in Tab 2 of the State Price Sheet, as applicable;
- C. Determine the value and placement of personnel based on experience and expertise;
- D. Not alter the State Price Sheet in any way or add additional labor titles; and
- E. Include all project management requirements pursuant to Section 4.0 of the Bid Solicitation in the All-Inclusive Hourly Rate for all labor titles. No additional fees will be paid.

[Emphasis Added.]

Accordingly, inclusion of the words “must” and “shall” in the instructions indicate that the submission of a Quote price for all Price Lines was required. Bid Solicitation Section 3.22.2 dictated that the Price Sheet/Price Lines must be completed in accordance with the instructions of Bid Solicitation Section 3.22, both of which made clear that Bidders shall provide All-Inclusive Hour Rates for all three (3) years for Price Lines 5 through 29.

Use of “N/A” here was not permitted as an awarded Contractor must provide the State with all services identified in the scope of work. Performance of the work required by Section 4 of the Bid Solicitation is mandatory. Accordingly, Bid Solicitation Section 3.22 and Bid Solicitation Section 3.22.2 required that Bidders submit a Quote price for the subject price lines. While a Bidder could propose to provide this work to the State free of charge, it could not decline to perform the work. This Bid Section’s functionality within the Scope of Work is not discretionary, but necessary and incident to the work that the using agency needs completed by a Contractor and Oxford misreads the Bid Solicitation to grant itself discretion to ignore or decline to perform the services required under this portion of the Bid Solicitation. The broad extent of the work to be performed under Bid Solicitation Section 4 further enforces the important nexus of the intent and purpose of this passage to the overall scope of the Bid Solicitation.

Oxford alleges that other Bidders were awarded contracts despite providing ranges. A review of the two Bidders, ICE and Success Advertising, shows a misunderstanding on Oxford’s part about the submitted documents. The State-Supplied Price Sheet submitted by ICE included the phrase “not to exceed 6%” in each contract year. This is consistent however with the terms of the Bid Solicitation Section 4.2.2 that mini-bid mark-ups cannot exceed the mark-up submitted on the State-Supplied Price Sheet, as well as Bid Solicitation Section 8.12, *Best and Final Offer (BAFO)*, that mark-ups not resulting “in more advantageous pricing to the State will not be considered, and the State will evaluate the Bidder’s most advantageous previously submitted pricing.” Similarly, Success Advertising submitted BAFO pricing with a mark-up using tiered pricing. Contrary to Oxford’s allegations, Success Advertising’s Quote contained a responsive State-Supplied Price Sheet, so the non-responsive BAFO submission was rejected leaving Success Advertising able to be evaluated and awarded on the basis of its responsive submission.

Finally, Oxford claims that the State showed favoritism by permitting some Bidders to provide clarifications to “missing or unclear documentation.” In I/M/O Protest of Award of On-Line Games Prod. & Operation Svs. Contract, Bid No. 95-X-20175, the court held that a post-opening commitment to supply an essential missing element for a bid is not a clarification but rather is an “impermissible supplementation ... and flies in the face of our public bidding scheme.” 279 N.J. Super. 566, 598 (App. Div. 1995). In contrast, clarification is permissible. “In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is already there.” Id. at 597. Based on the facts outlined in the Recommendation Report, it’s clear that the Bureau sought permissible clarifications, and the requests and responses were not supplementations.

The Bureau sought clarifications from AB&C and IMS regarding unclear statements on their Subcontractor Utilization Form. This form is required pursuant to Bid Solicitation Section 3.13.8 when a Bidder intends to use one or more subcontractors in its performance of the contract, but permits subcontractors to be added at a later date when a contractor’s use is not intended immediately. Both Bidders responded that they do not initially intend to use subcontractors to perform the Contract, but would forward a written request to add a specific subcontractor as needed and required by Bid Solicitation Section 3.13.8, *Subcontractor Utilization Plan*. The Bureau sought clarifications from JL Media and True North regarding their required ownership disclosures. Pursuant to N.J.S.A. 52:25-24.2, a Bidder must make a disclosure of all individuals or entities owning ten (10) percent or more of the Bidder. Both JL Media and True North duplicated information in Sections 3 and 4 of the Division’s Ownership Disclosure Form. Both Bidders

responded that the information in Sections 3 and 4 was repeated, so the Bureau was in receipt of the complete information required, and no new or additional information was provided. Here however, and notwithstanding Oxford's interest in competing for this procurement, to allow Oxford to provide revised pricing post-Quote opening would result in impermissible supplementation by the addition of new information, because providing a single mark-up rate for Price Line #1 and hourly pricing for all price lines on Tab 2 were mandatory requirements of the Bid Solicitation.

Oxford argues that it should be given consideration based on its experience with the State. It is unfortunate that Oxford will not be awarded a contract as the State benefits from the competition provided by a large pool of vendors, and seeks to provide opportunities to vendors with diverse backgrounds. However, as noted above, the State is legally bound to only make awards "to that responsible bidder whose bid, **conforming to the invitation for bids**, will be most advantageous to the State, price and other factors considered." N.J.S.A. 52:34-12(g) (emphasis added). See also N.J.A.C. 17:12-2.7(c), stating that a Quote must be rejected that is not compliant or responsive to the material requirements of the Bid Solicitation. Thus, to maintain a level and fair playing field with transparency for all Bidders, the State must limit its evaluation and awards to conforming bids, and not make exceptions post-Quote opening for other considerations when a Quote is materially non-conforming.

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).

Potential Bidders were permitted to submit questions regarding the terms and conditions of the Request for Quotes by August 9, 2023. One hundred fifteen (115) questions were received. Several questions were received regarding the ability to submit and modify a Bidder's pricing if there were issues with the Bidder's submission (question in bold), and the State responded clearly that there was no ability to correct pricing issues, and that a Bidder should submit all requested information in the manner required by the Bid Solicitation..

If there are cost concerns related to our pricing sheet, is there an opportunity for a discussion on expected rates?

No, the Bidder must submit pricing pursuant to the instructions in Bid Solicitation Section 3.22, State-Supplied Price Sheet Instructions. Failure to submit all required information in the manner specified will result in the Quote being deemed non-responsive and ineligible for award.


Further, the Bidder must not make changes to the format of the State-Supplied Price Sheet, add/remove Price Lines, or add additional language, assumptions, and/or fees. Such actions may result in the Quote being deemed non-responsive and ineligible for award.

[Bid Amendment #4, Question and Answer #55, November 14, 2023.]

As part of the Bid process the Division conducted an Optional Pre-Quote Conference pursuant to Bid Solicitation Section 2.5. The purpose and intent of the Pre-Quote Conference is set forth in that section:

The purpose of the Optional Pre-Quote Conference is to address procedural questions 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 this issue multiple times in the past, the following information is specifically included in the standard Pre-Quote Conference presentation:



PRICE SHEET PITFALLS

- ▶ Complete all required price lines on the Price Sheet, or Quote may be deemed non-responsive. Indicate "no charge" if the cost is \$0. Do not leave any price lines blank.
- ▶ Do not make formatting changes to the Price Sheet. If the price line requires a dollar amount, don't change it to a percentage, or vice versa. If the price line includes 2 decimal places, don't change the settings to allow 4 decimals.
- ▶ Confirm that you have completed all tabs on the Price Sheet.
- ▶ Do not add additional language, assumptions, or fees on the Price Sheet. Do not add or remove any price lines.
- ▶ Confirm you have completed the proper version of the Price Sheet; it may have been revised via Bid Amendment.

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

The Division expressly advises and warns Bidders to complete all required price lines and to not “add additional language, assumptions, or fees on the Price Sheet.” 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.

Here, Oxford’s failure to include a single, firm fixed mark-up rate for Price Line 1 on Tab 1, as well as a firm-fixed hourly rate for Price Line 19 on Tab 2, is a material deviation from the requirements of the Bid Solicitation. First, the deviation deprives the State from the assurance that the contract will be performed according to the specified requirements because the Bidders cannot be accurately evaluated with contracts awarded based on a ceiling established by a single mark-up rate. Second, accepting Oxford’s mark-up range for Price Line 1 adversely affects competitive bidding because other Bidders submitted pricing that was not reliant on additional assumptions related to volume or similar encouragements to award work to Oxford to achieve lower pricing. Similarly, Oxford reserved to itself the ability to submit pricing for the contemplated min-bids based a sliding scale “ceiling”, while other Bidders would be required to only provide pricing based on its single mark-up rate. Therefore, the Bureau correctly deemed Oxford’s Quote is non-responsive to the requirements of the Bid Solicitation. Therefore, the Bureau correctly deemed Oxford’s Quote is non-responsive to the requirements of the Bid Solicitation.

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 June 13, 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: R. Regan
W. Higgins
M. Maguire
T. Maner