



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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May 20, 2024

Via Electronic Mail at saylor-hilary@aramark.com

Hilary H. Saylor, Assistant General Counsel
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Re: Protest of Bid Solicitation Specifications
Bid Solicitation #24DPP00985 - T1715 Canteen Commissary for the Department of Corrections Through
Distribution and Support Services

Dear Ms. Saylor:

This final agency decision is in response to your letter dated May 15, 2024, regarding Bid Solicitation #24DPP00985 - T1715 Canteen Commissary for the Department of Corrections Through Distribution and Support Services (Bid Solicitation), to the Division of Purchase and Property (Division) on behalf of Union Supply Group, LLC (Union Supply). In that letter which Union Supply identifies as a Specification Challenge (the Specification Challenge), Union Supply challenges certain responses made during the electronic Question and Answer period, which responses can be found in Bid Amendment #3, posted on NJSTART on May 6, 2024, as well as the respective Price Lines. Specifically, Union Supply argues that the bid specifications are vendor specific, and that only the Keefe Group, LLC, can source products to meet the specifications incorporated into the revised Bid Solicitation.

By way of background, the subject Bid Solicitation was issued by the Division's Procurement Bureau (Bureau) on behalf of the New Jersey Department of Corrections (DOC) through Distribution and Support Services (DSS) to solicit quotes for canteen commissary items for the inmate population. Bid Solicitation Section 1.1, *Purpose and Intent*. Bidders' electronic questions were due to the Bureau by April 5, 2024.¹ The Bureau posted Bid Amendment #3, with answers to the questions received from potential Bidders, on May 6, 2024. On May 15, 2024, more than seven (7) business days prior to the Quote Opening Date of May 30, 2024, Union Supply timely submitted its Specification Challenge.²

In this Specification Challenge, Union Supply states that "the 2024 Solicitation still appears to seek items that are produced exclusively for Keefe, and which only Keefe can supply, again rendering this a sole source award." Specification Challenge at p. 1. Union Supply further asserts that "certain bid items are exclusive to the incumbent vendor Keefe, because either: (i) the item is a national brand item but Keefe has the exclusive rights to supply it to

¹ Eleven (11) questions were received from Union Supply.

² To allow for time to respond to the questions submitted during the electronic question and answer period, the Bureau posted Bid Amendments #1 and 2, which postponed the Quote Submission Due Date from the original date of April 23, 2024, at 2:00 pm Eastern Time to May 30, 2024, at 2:00 pm Eastern Time.

correctional facilities pursuant to an exclusive supply agreement with the manufacturer, or (ii) the item, which may or may not be a national brand, is packaged in special prison-safe packaging in custom sizes by either Keefe (in its own re-packaging facilities) or by the manufacturer for Keefe.” Id. at p. 2. Specifically, Union Supply states:

Below is a list of the bid items that only Keefe can supply because minimum package size and/or case counts specified are made exclusively for Keefe:

Individual Price Line Awards				
Price Line Number	Item Description	Package Size and Case Count	Reason for Exclusivity to Incumbent Vendor	Suggested Competitive Package Sizing
49	Hot Pepper Cheese Sticks, Generic Brand, minimum 48 count/3 to 4 oz. sticks per case	Minimum 48 count/3 to 4 oz. sticks per case	<p>This bid item is a unique item made for one vendor that is exclusive to the incumbent vendor.⁶</p> <p>Therefore, no other vendor will have the exact item, ounce range, or case count and there may be no close alternative.</p> <p>The vendor who owns the unique item is the only vendor who can bid this item.</p>	<p>To make this bid competitive we are requesting that the Division expand the case pack range to a minimum of 35 count.</p> <p>Items of this size and count are sold and accepted by other state and federal prisons nationwide.</p>
95	Pouched Lasagna With Beef in Tomato Sauce, Generic Brand, minimum 5 count/6 to 13 oz. pouches per case	Pouched; Minimum 5 count/6 to 13 oz. pouches per case	<p>This bid item is a unique item made for one vendor that is exclusive to the incumbent vendor.⁷</p> <p>Therefore, no other vendor will have the exact item, ounce range, or case count and there may be no close alternative.</p> <p>The vendor who owns the unique item is the only vendor who can bid this item.</p>	<p>To make this bid competitive we are requesting that the Division allow other similar lasagna items (specifically, tray lasagna) with an ounce range of 6oz to 13oz and a minimum case count of 5.</p> <p>Items of this size and count are sold and accepted by other state and federal prisons nationwide.⁸</p>
106	Plain Milk Chocolate Candy Bar, Generic Brand, minimum 36 count /1 to 2 oz. Bars per case	Minimum 12 count/1 to 3.5oz size range	<p>This bid item is a unique item made for one vendor that is exclusive to the incumbent vendor.</p> <p>Therefore, no other vendor will have the exact item, ounce range, or case count and there may be no close alternative.</p> <p>The vendor who owns the unique item is the only vendor who can bid this item.</p>	<p>To make this bid competitive we are requesting that the Division expand the case pack range to a minimum 12 count and the ounce size range to 1oz to 3.5oz.</p> <p>Items of this size and count are sold and accepted by other state and federal prisons nationwide.</p>

128	Pouched Cooked Octopus In Olive Oil, Soybean Oil or Vegetable Oil, Generic Brand, minimum 6 count/3 to 4 oz. pouches per case	Minimum 6 count/3 to 4 oz. pouches per case	<p>This bid item is a unique item made for one vendor that is exclusive to the incumbent vendor.</p> <p>Therefore, no other vendor will have the exact item, ounce range, or case count and there may be no close alternative.</p> <p>The vendor who owns the unique item is the only vendor who can bid this item.</p>	<p>To make this bid competitive we are requesting that the Division allow other similar items with an ounce range of 3oz to 4oz and a minimum case count of 6.</p> <p>Items of this size and count are sold and accepted by other state and federal prisons nationwide.</p>
155	Candy Bar, Milk Chocolate with Almonds, Generic Brand, minimum 40 count/1.75-2.5oz bars per case	Minimum 40 count/1.75-2.5oz bars per case	<p>This bid item is a unique item made for one vendor that is exclusive to the incumbent vendor.</p> <p>Therefore, no other vendor will have the exact item, ounce range, or case count and there may be no close alternative.</p> <p>The vendor who owns the unique item is the only vendor who can bid this item.</p>	<p>To make this bid competitive we are requesting that the Division expand the case pack range to a minimum 12 count and the ounce size range to 1.75oz to 3.5oz.</p> <p>Items of this size and count are sold and accepted by other state and federal prisons nationwide.</p>
144	Tuna Steak in Spicy Sauce, Generic Brand, minimum 12 count/2 to 4oz pouches per case	Minimum 12 count/2 to 4oz pouches per case	<p>This bid item is a unique item made for one vendor that is exclusive to the incumbent vendor.⁹</p> <p>Therefore, no other vendor will have the exact item, ounce range, or case count and there may be no close alternative.</p>	<p>To make this bid competitive we are requesting that the Division allow other similar tuna items with an ounce range of 2oz to 4oz pouches per case.</p> <p>Items of this size and count are sold and accepted by other state and federal prisons nationwide.</p>
			<p>The vendor who owns the unique item is the only vendor who can bid this item.</p>	

Union Supply also notes that none of the price lines referenced above specify “No Substitutes.” Therefore, it is Union Supply’s interpretation that bidders may propose items that do not match the minimum package size or count requirements specified (and may bid the suggested sizes listed in the table above), but which otherwise meet the general description of the desired item.

In the event Union Supply’s interpretation is incorrect, and bidders must match the minimum size and case count requirements for the above-listed items without substitution, Union Supply protests the 2024 Solicitation to the extent the specifications are overly restrictive and result in a sole source award to Keefe, and requests that the 2024 Solicitation be amended to remove the minimum size and case count requirements for the above-listed bid items.

[Specification Challenge at pgs. 3-6.]

It should first be noted that Union Supply requested the same clarification regarding the term “No Substitutes” in its specification challenge filed on December 9, 2022, in 22DPP00767—the predecessor to this supplemental procurement. In the January 23, 2023, Final Agency Decision responding to that challenge, the Hearing Unit responded that:

Union Supply first requests clarification “that where a generic bid item (with no brand name) contains a minimum package size or count requirement and does not specify ‘No substitutes,’ than an alternative pack size or count may be bid.” Bid Solicitation Section 4, Scope of Work, states that the “Contractor must comply with all terms and conditions outlined within this Bid Solicitation.” Pursuant to N.J.A.C. 17:12-2.9(b)(2), the “factors and significant subfactors that establish the requirements of responsiveness shall be set forth in the RFP.” Based upon these requirements, any product bid must meet the size and quantity requirements specified on the given Price Line as they are the “factors and significant subfactors that establish the requirements of responsiveness” in the Bid Solicitation. Permitting any product size or quantity despite having clearly identified specifications would violate these mandates leaving the State without assurances that it would receive the products it requires, and bidders would be subjected to a potentially arbitrary selection process instead of one guided by clear standards.

[Final Agency Decision in response to Union Supply challenge, January 24, 2023, pg. 4.]

The same response is equally applicable here. A contractor must meet the requirements outlined in the Bid Solicitation for the reasons outlined above.

New Jersey procurement law requires that “specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of supplies and services necessary to meet the requirements of the using agency. . . .” N.J.S.A. 52:34-12. This principle is based on the long-recognized “policy behind the competitive bidding statutes, i.e., assurance against favoritism, improvidence, extravagance and corruption in the bidding process.” Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241, 251 (App. Div. 1983) (citing Terminal Construction Co. v. Atlantic City Sewerage Auth., 67 N.J. 403, 410 (1975)). “These policies, in turn, are meant to ensure that all bidders are equally situated in their competition for the public contract.” Palamar, *supra*, 196 N.J. Super. At 251 (citing Hillside Twp. v. Sternin, 25 N.J. 317, 322 (1957)). “The conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition.” *Id.*

It should first be noted that the products for Price Lines 49, 95, 106, and 128 were all included in 22DPP00767, with no revisions made for 24DPP00985 with the exception of a reduced minimum count for Price Lines 106 and 128. Price Lines 144 and 155 were added for the supplemental procurement under 24DPP00985. A review of the price lines at issue here, and the prior bidding results, provides the following analysis with respect to Union Supply’s “exclusivity” argument:

1. Price Line 49: Prior bidding records show that Union Supply was able to provide a responsive product for Price Line 49, but was found non-responsive for Group 2, which included Price Line 49, because the Price Line was included in a “group” that required a bidder to provide a responsive product for all price lines in the group.³ Thus, no change should need to be made because Union Supply has already displayed it can offer a product that satisfies the requirements of the Price Line. Even if Union Supply is no longer a distributor for the product bid last time, no facts have been presented that the requested count or size range is exclusive to Keefe, while the reasonable evidence available to the Hearing Unit actually establishes the opposite to be true. Moreover, there is no reason to disturb the requirements since the reasoning for the established specifications was explained in the response to Question 20 in Bid Amendment 3.
2. Price Line 95: No bidder submitted a product for the Price Line under 22DPP00676. If the product is exclusive to Keefe, then Keefe failed to provide a product where it had a guaranteed contract award under Union Supply’s argument of exclusivity because the Price Line’s specifications were not modified for 24DPP00985. To the extent the packaging requirements are based on safety and security concerns in a correctional facility, as indicated in the response to Question 17 in Bid Amendment 3, the Hearing

³ Union Supply was non-responsive for Price Line 66. Recommendation Report for 22DPP00676, dated October 16, 2023.

Unit will not substitute its judgment regarding safety and security in a correctional facility for that of the Using Agency who issued the requirements for the Price Line.

3. Price Line 106: Similar to Price Line 95, no bidder submitted a product for Price Line 106 under 22DPP00676. In response, the minimum count was reduced from four hundred thirty-two (432) to thirty-six (36) for this procurement. Beyond an unsupported assertion that the requirements of this Price Line favor Keefe, no evidence has been presented to support the claim that the requirements are exclusive to Keefe, and there is no reason to disturb the requirements since the reasoning for the established specifications was explained in the response to Question 21 in Bid Amendment 3.
4. Price Line 128: Similar to Price Line 49, prior bidding records show that another bidder was able to provide a product for Price Line 49, but was found non-responsive for this individual Price Line because it did not satisfy the minimum count requirements under 22DPP00676. As part of this supplemental procurement, the Price Line minimum count was reduced to six (6), so at least two bidders should be able to provide a responsive product. Thus, the requirements for the Price Line are not exclusive to Keefe.

Union Supply also raises the “exclusivity” argument for new Price Lines 144 and 155 in response to its requests to modify the Price Lines being denied in Bid Amendment 3. As stated above, no actual facts have been presented to the Hearing Unit, only an unsupported claim, that the requested specifications are exclusive to Keefe. There are no facts in Union Supply’s specification challenge or available to the Hearing Unit on the record of the procurement to disturb the requirements for this Price Line since the reasoning for the established specifications was explained in the responses to Question 25 and 30 in Bid Amendment 3.

In addition to the exclusivity argument, Union Supply argues that the brands required are national brands exclusive to Keefe. Perhaps this argument remained from a previously filed specification challenge, but Union Supply failed to offer any evidence in support of the argument throughout the remainder of the current Specification Challenge. Further, the argument is irrelevant here since the price lines at issue all request generic brands with no specific brand required. As such, there is no reason to modify any of the price lines based on this point.

With respect to the argument that other states accept differing quantities or sizes of products, that argument is not persuasive. The State of New Jersey and its using agencies are not bound by what other states require to operate. As highlighted above, New Jersey procurement law requires that “specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of supplies and services **necessary to meet the requirements of the using agency. . . .**” N.J.S.A. 52:34-12 (emphasis added). As noted in response to Question 20, and similarly answered in Questions 21 and 25, the requirements developed for

These packaging quantities are necessary based on the State’s ordering patterns established for a specific product based on current ordering trends by the inmate population. Furthermore, the ordering pattern established by the inmate population requires certain minimum count packages so that there is a balance between meeting product demand and not over or under stocking products.

[Bid Amendment 3, dated May 6, 2024, response to Question 20.]

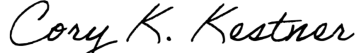
Having considered the Specification Challenge, and following a detailed review of the specific price lines and the Bid Solicitation as a whole, there is no reason to disturb the specifications as currently constructed. Although the State appreciates Union Supply’s efforts to source items to meet the Bid Solicitation specifications, Union Supply’s position that the challenged price lines and respective goods are exclusive to Keefe is not supported by the record. Moreover, the record shows that the specifications have been developed to meet the requirements of the Using Agency while still ensuring “full and free competition” in the procurement process.

In light of the findings set forth above, I sustain the revisions in the Bureau’s Bid Amendment #3 and the most recent version of the Bid Solicitation. However, during this review process a cell malfunction was discovered in the State-Supplied Price Sheet. The error is being corrected, and the revised State-Supplied Price Sheet will be upload to [NJSTART](#) along with Bid Amendment #4 revising the Quote Opening Date to June 4, 2024.

Thank you for your company's interest in doing business with the State of New Jersey and for registering your company with **NJSTART** at www.njstart.gov, the State of New Jersey's new eProcurement system.

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

c: K. Thomas
C. Murphy
H. Billings