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DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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November 2, 2015

Via Electronic [jlipari@marbeliteco.com] and USPS Regular Mail

Joseph Lipari, President
Marbelite Co., Inc.
1913 Atlantic Avenue, P.O. Box 239
Manasquan, New Jersey 08736

Re: Protest of Notice of Intent to Award
RFP# 15-X-23605: Traffic Signals, Poles, Controls, Electrical Equipment, etc.

Dear Mr. Lipari:

This letter is in response to your protest email dated May 21, 2015, to the Division of Purchase and Property (Division) on behalf of Marbelite Co., Inc. (Marbelite). In that protest email, Marbelite protests the May 18, 2015 Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) regarding Solicitation# 15-X-23605. In the protest, Marbelite contends that the product it proposed for line item 00099 conformed to the Request for Proposal (RFP) requirements; therefore, it should have been awarded the contract for this line item. Marbelite requested that the Division review the same.

By way of background, the RFP was issued by the Bureau on behalf of the New Jersey Department of Transportation (DOT) to solicit proposals for Traffic Signals, Poles, Controls, Electrical Equipment, LED Signal Indications and Warning Devices. It is the intent of the Bureau to "award contracts to those responsible bidders whose proposals, conforming to this RFP are most advantageous to the State, price and other factors considered." (RFP § 1.1 *Purpose and Intent.*) This RFP was a re-procurement of those products currently provided under State contract T-1529. (RFP § 1.2 *Background.*)

On December 10, 2014, 11 proposals received by the submission deadline were opened by the Proposal Review Unit. Marbelite submitted a proposal for ten of the 147 items sought in the RFP including line item 00099.[1] After completing its review, the Bureau determined that Marbelite was the lowest responsive bidder as to line items 00086 and 00126.[2] However, with respect to line item 00099, the Bureau indicated that Marbelite's "proposed batteries do not meet NJ Specification No. BME-USPRB-6, dated 5/14/07; section 2-5 page 42 of the RFP which states [that] a set of batteries shall meet

[1] Marbelite submitted a proposal for the following line items: 00086, 00088, 00089, 00090, 00091, 00092, 00099, 00126, 00144, and 00145.

[2] With respect to lines 00088 – 00091, which are to be awarded as a group pursuant to RFP § 4.4.7, and line items 00092, 00144 and 00145, Marbelite was not the low bidder and had not protested the intended award of those line items.

or exceed Military Specification #MIL-B-8565J (Hydrogen Gas Emission)." (Bureau's May 13, 2015 Recommendation Report.)

On May 18, 2015, the Bureau issued its NOI indicating that a contract would be awarded to Marbelite for line items 00086 and 00126. However, with respect to line item 00099 the Bureau indicated that a contract would be awarded to Signal Control Products, Inc. (Signal).[3]

In response to the NOI Marbelite states that it

> wishes to protest the award of Item 0099 to Signal Control Products. We believe that we are the compliant low bidder and should receive the award of this item. The product offered meets the specification in its entirety. In addition, we have provided the identical item in the previous 2 contracts with no complaint from the using agency. Furthermore, the specification for this item has not been changed so as to make us believe that we should have offered a different product. In view of the above and, especially in view of the extremely large price difference we believe that the award needs to be made to us.[4]
>
> [Marbelite's May 21, 2015 protest email.]

In consideration of Marbelite's protest, I have reviewed the record of this procurement, including the RFP, Marbelite's and Signal's proposals, the Bureau's Recommendation Report, and the relevant statutes, regulations, and case law. This review of the record 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 Marbelite.

The RFP requires that "[a]ll material must meet specification requirements and any other specification sketches, drawings and/or manufacturer part numbers referenced in this RFP. Exceptions shall not be permitted." (RFP § 3.4 *General Requirements.*) With respect to the specification for Uninterruptible Power System Replacement Batteries – 6, the RFP requires that "the batteries shall meet or exceed the Military Specification #MIL-B-8565J (Hydrogen Gas Emissions)." (RFP § 3.5.8; *Section H Signal Control Devices*; sub-section 2-5, page 42.)

In preparing a proposal, a "bidder must submit its pricing on the State supplied Price Sheet/Schedule and supply any additional pricing information as directed in the RFP Section 4.4.5." (RFP § 4.4.1.6 *Pricing.*) Section 4.4.5 of the RFP states in pertinent part:

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[3] Three proposals were received for line item 00099. The proposal submitted by the low bidder, Intelligent Traffic Supply (Intelligent), was deemed non-responsive because the "proposed batteries do not meet NJ Specification No. BME-UPSRB-6 dated 5/14/07; section 2-9, page 42 of the RFP, which states the batteries shall consist of six 12 volt DC with 41 A/H capacity or equivalent." Intelligent proposed a battery with a 100A/H capacity in a set of three, which did not conform to the RFP requirements. Marbelite was the second low bidder for line item 00099.

[4] The fact that Marbelite was previously awarded a contract to supply this product in response to similar specifications is not determinative. See generally, In re Protest of Award of N.J. State Contract A7118 for Light Duty Auto. Parts, 422 N.J. Super. 275, 291 (App. Div. 2011) (stating that contractors do not have a continuing right to be a supplier to the State, "no guarantee that they would emerge as the successful bidders in any subsequent round of competitive bids" despite the fact that they had won previous awards).

> [i]n order for the State to make sound business judgments regarding products and prices offered in response to this RFP, the bidder must supply, with its proposal, the information requested on the RFP's pricing lines in sufficient detail as to allow the State to determine the firm, fixed proposal pricing and the precise product or service being offered i.e., with no possible misinterpretation of the price or product/service being offered by the bidder. A bidder's failure to provide, within its proposal, the information deemed by the State to be essential for product identification or price determination will result in rejection of that bidder's proposal.
>
> [RFP § 4.4.5 *Price Schedule/Sheet.*]

Consistent with RFP Section 4.4.5, Marbelite identified the battery proposed by listing the manufacturer and model number on the price sheet.

00099	Commodity Code: 550-88-079499 [MARKERS, PLAQUES AND TRAFFIC CONTROL...] ITEM DESCRIPTION: SIGNAL CONTROL DEVICES REPLACEMENT BATTERIES FOR UNINTERRUPTIBLE POWER SYSTEMS- 850 WATTS AS PER D.O.T. SPEC #BME-UPSRB-6 DATED MAY 14, 2007 APPROX. ANNUAL USAGE 100 UNITS MIN. SHIPMENT ORDER QUANTITY - 25 UNIT REFER TO DELIVERY SCHEDULE A - 4 WEEKS BIDDER TO PROVIDE THE FOLLOWING: MANUFACTURER: Advanced Power Products CATALOG OR MODEL #: AGM1240T As previously supplied EE NUMBER (IF APPLICABLE)	1	EACH	[redacted] 274.00 [redacted]	1274.00

No other information regarding the proposed battery was provided by Marbelite with its proposal. However, the RFP permits the Bureau to request additional information or documentation which may be needed to make a determination regarding a product proposed and states in pertinent part:

> . . . in order to support the State's decision-making process, the State may require a bidder to provide additional information or documentation that has been deemed not to be material to product identification or price determination in which case, the bidder shall, within the time limit set forth in the written request, comply with said request...
>
> [RFP § 4.4.5 *Price Schedule/Sheet.*]

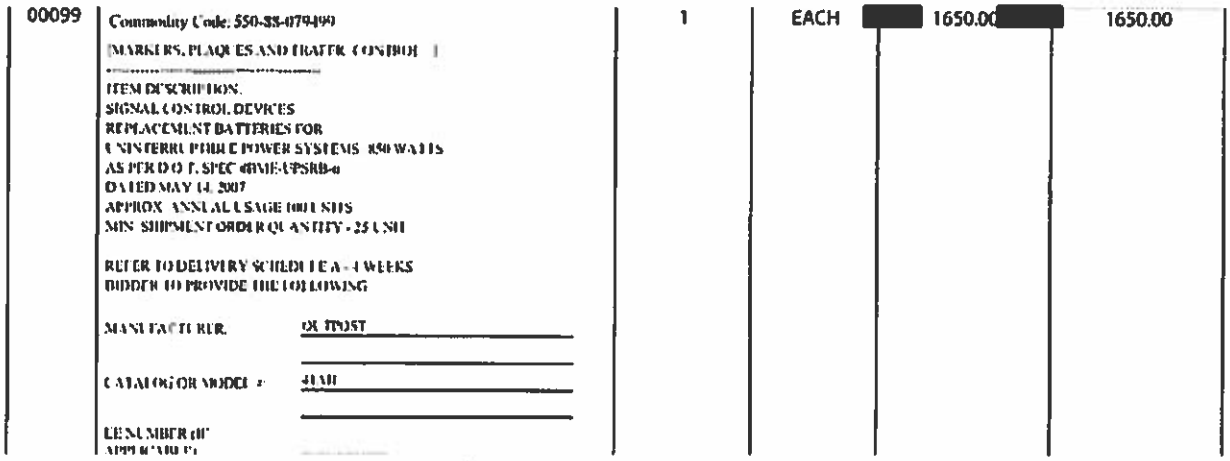
Such a request is consistent with the Appellate Division's reasoning in In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566 (App. Div. 1995), where the court held that:

> [t]he RFP specifically approved of bidders' clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. **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 there. It is the alteration of the original proposal which was interdicted by the RFP.

[Id. at 597 (emphasis added).]

On January 22, 2015, the Bureau wrote to Marbelite requesting the company "submit catalog cuts or submittals providing more information for the following price line items bid by your company: Price Lines 00086, 00088, 00089, 00099, and 000126." The Bureau received Marbelite's response on February 3, 2015. Despite the fact that Marbelite claims that the battery proposed "meets the specification in its entirety," the drawing and data sheet provided for line 00099 in response the Bureau's request do not address the RFP requirement for Hydrogen Gas Emissions. There is nothing contained in Marbelite's proposal or the subsequent clarification which demonstrates that the proposed battery conforms to the RFP requirement for Hydrogen Gas Emissions. Accordingly, the Bureau's determination that Marbelite's proposal for line item 00099 does not conform to the RFP requirements is sustained.

With respect to the proposal submitted by the intended awardee, Signal identified the battery proposed by providing the following information on the price sheet:



In its proposal for this line item, Signal listed the Manufacturer and ampere hour rating, not the catalog or model number as requested on the price sheet and as required by the RFP specifications. (RFP § 4.4.3.2 *Manufacturer's Catalog, Model Numbers and Catalog Cuts.*) No other information regarding the specific battery proposed was included in Signal's proposal. Signal's proposal was therefore non-responsive as it did not provide "the information requested on the RFP's pricing lines in sufficient detail as to allow the State to determine . . . the precise product or service being offered i.e., with no possible misinterpretation of the price or product/service being offered by the bidder." (RFP § 4.4.1.6 *Pricing.*) The Bureau could not seek a clarification from Signal as such a request would result in an impermissible supplementation, correction or alteration of the proposal. On-Line Games, supra, 279 N.J. Super. at 597. Based upon Signal's proposal, there is insufficient information for the Bureau to make a determination whether or not the battery proposed by Signal conforms to the RFP requirements. As such, the NOI for line item 00099 to Signal must be rescinded.

In connection with this protest, a thorough review of all proposals submitted for line item 00099 was conducted by the Division's Hearing Unit. Based upon that review, and as noted above, the Procurement Bureau's finding that Marbelite's proposal is non-responsive is sustained. However, the NOI for line item 00099 to Signal must be rescinded for the reason set forth above. This is my final agency decision with respect to the protest submitted by Marbelite Co., Inc.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your company with NJ START at www.njstart.gov, the State of New Jersey's new eProcurement system. I encourage you to monitor the Division's website for bidding opportunities.

Sincerely,

Jignasa Desai-McCleary
Director

JD-M: RUD

c: D. Reinert
J. Kemery
D. Holt
J. Bolt, Vice President, Signal Control Products