



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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October 28, 2021

Via Electronic Mail AGibbs@cordanths.com

Amanda Gibbs, Sr. Vice President and General Manager, Behavioral Health
Cordant Health Solutions
12015 East 46th Ave., Suite 220
Denver, CO 80239

Re: I/M/O Bid Solicitation #19DPP00411 Technical Resource Management LLC
Protest of Notice of Intent to Award
T2993 – Oral Fluids and Urine Drug Screening – Judiciary and Statewide

Dear Ms. Gibbs:

This final agency decision is in response to your correspondence of October 11, 2021, on behalf of Technical Resource Management, LLC dba Cordant Health Solutions (TRM) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that correspondence, TRM protests the Notice of Intent to Award issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #19DPP00411 T2993 – Oral Fluids and Urine Drug Screening – Judiciary and Statewide (Bid Solicitation).

By way of background, on December 9, 2020, the Bureau issued the Bid Solicitation on behalf of the State of New Jersey and the New Jersey Judiciary to solicit Quotes for laboratory drug-of-abuse testing via oral swab fluid, urine specimens, hair follicles, and sweat patches. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award Master Blanket Purchase Orders (Blanket P.O.s) to those responsible Vendors {Bidders}, whose Quotes, conforming to the Bid Solicitation, are most advantageous to the State, price and other factors considered. Ibid.

An Optional Pre-Quote Teleconference was held on December 22, 2020, in accordance with Bid Solicitation Section 1.3.5 *Optional Pre-Quote Conference*. The following firms attended the optional teleconference:


- TRM
- Redwood Toxicology Laboratory, Inc.
- Premier Biotech
- Access New Jersey
- Forensic Laboratories

In accordance with Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*, potential Vendors {Bidders} were permitted to submit questions to the Bureau, using the Division's **NJSTART**

eProcurement system through 2:00 p.m. on January 5, 2021. *See*, Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*. The Bureau received 83 questions, none of which related to the *Source Disclosure Form* required by Bid Solicitation Section 4.4.2.3 *Source Disclosure*.

On March 30, 2021, the Division’s Proposal Review Unit opened six (6) Quotes received by the submission deadline of 2:00 p.m. eastern time. The Quotes were preliminarily reviewed for compliance with mandatory elements for Quote submission by the Proposal Review Unit. All six Quotes were then forwarded to the Bureau for review and evaluation consistent with the criteria set forth in Bid Solicitation Section 6.7 *Evaluation Criteria*.

In conducting its review and evaluation, the Bureau determined that the TRM Quote included all documentation mandated by the Bid Solicitation; however, TRM was determined to be ineligible for award because the *Source Disclosure Form* indicated that services would be performed “by the Contractor and/or Subcontractors outside of the United States”, in contravention of N.J.S.A. 52:34-13.2.

	<p>SOURCE DISCLOSURE FORM</p> <p>STATE OF NEW JERSEY DEPARTMENT OF THE TREASURY - DIVISION OF PURCHASE AND PROPERTY 33 WEST STATE STREET, P.O. BOX 230 TRENTON, NEW JERSEY 08625-0230</p>																
<p>BID SOLICITATION # AND TITLE: 19DPP00411 - T2993 - Oral Fluids and Urine Drug Screening - Judiciary and Statewide</p>																	
<p>VENDOR/BIDDER NAME: <u>Technical Resource Management, LLC dba Cordant Health Solutions</u></p>																	
<p>The Vendor/Bidder submits this Form in response to a Bid Solicitation issued by the State of New Jersey, Department of the Treasury, Division of Purchase and Property, in accordance with the requirements of N.J.S.A. 52:34-13.2.</p>																	
<p><u>PART 1</u></p>																	
<p><input type="checkbox"/> All services will be performed by the Contractor and Subcontractors <u>in</u> the United States. Skip Part 2.</p>																	
<p><input checked="" type="checkbox"/> Services will be performed by the Contractor and/or Subcontractors <u>outside</u> of the United States. Complete Part 2.</p>																	
<p><u>PART 2</u></p>																	
<p>Where services will be performed outside of the United States, please list every country where services will be performed by the Contractor and all Subcontractors. If any of the services cannot be performed within the United States, the Contractor shall state, with specificity, the reasons why the services cannot be performed in the United States. The Director of the Division of Purchase and Property will review this justification and if deemed sufficient, the Director may seek the Treasurer’s approval.</p>																	
<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="text-align: left;">Name of Contractor / Sub-contractor</th> <th style="text-align: left;">Performance Location by Country</th> <th style="text-align: left;">Description of Service(s) to be Performed Outside of the U.S. *</th> <th style="text-align: left;">Reason Why the Service(s) Cannot be Performed in the U.S. *</th> </tr> </thead> <tbody> <tr> <td style="vertical-align: top;">Pinnacle Data Services</td> <td style="vertical-align: top;">India and US</td> <td style="vertical-align: top;">Billing Data Entry</td> <td style="vertical-align: top;">The laboratory services business is very competitive and toxicology labs are always under pressure to increase services for our clients. Using an agency that allows immediate staffing options and lower costs for certain portions of our billing process allows us to stay competitive.</td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> <tr> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	Name of Contractor / Sub-contractor	Performance Location by Country	Description of Service(s) to be Performed Outside of the U.S. *	Reason Why the Service(s) Cannot be Performed in the U.S. *	Pinnacle Data Services	India and US	Billing Data Entry	The laboratory services business is very competitive and toxicology labs are always under pressure to increase services for our clients. Using an agency that allows immediate staffing options and lower costs for certain portions of our billing process allows us to stay competitive.									
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On August 24, 2021, the Bureau prepared a Recommendation Report, having determined that Redwood Toxicology Laboratory, Inc. (Redwood) and Phamatech, Inc. (Phamatech) submitted Quotes that “met the mandatory requirements of the Bid Solicitation and satisfactorily conveyed [their] ability to complete the Scope of Work as required by the Bid Solicitation at reasonable and acceptable pricing.” *See*, Recommendation Report p. 8. With respect to the Quote submitted by TRM, as stated in the Recommendation Report:

in its Source Disclosure Form, TRM disclosed in Part 1 that “Services will be performed by the Contractor/Subcontractor outside of the United

States.” In Part 2 of the Source Disclosure Form, TRM disclosed that its billing data entry services would be performed in the United States and India by the contractor/subcontractor Pinnacle Data Services. The Bureau found that TRM’s Quote was inconsistent with the requirements of N.J.S.A. 52:34-13.2, which states that “Every State contract primarily for the performance of services shall include provisions which specify that all services performed under the contract or performed under any subcontract awarded under the contract shall be performed within the United States.” Therefore, the Bureau determined that TRM was non-responsive to Source Disclosure requirements. TRM was removed from the evaluation and deemed ineligible for award.

[Recommendation Report p. 4.]

Specifically, Redwood submitted the lowest estimated Total Cost price for Group A, and Phamatech submitted the lowest estimated Total Cost price for Groups B, C, D, and E. Accordingly, on September 27, 2021, the Bureau issued a Notice of Intent to Award (NOI) letter advising all Vendors {Bidders} of those companies who were recommended for a Blanket P.O. award.

On October 11, 2021, TRM submitted its protest to the Division’s Hearing Unit stating that it “understood that approval *could be granted* for the use of a subcontractor that is outside of the United States, as the form sets forth a detailed procedure for granting such approval.” TRM also states that it “can and will perform all services pertaining to this bid within the United States”, explaining that:

In the regular course of business, Cordant does utilize the services of Pinnacle Data Services to perform billing activities outside the United States, thus the Source Disclosure Form was completed accurately and disclosed that some services may be performed outside of the United States. As indicated on our disclosure form, the services performed by this subcontractor occur in both the United States and India. However, Cordant has the ability to perform *all services* related to a contract with the State of New Jersey in the United States. When preparing the Source Disclosure Form, we understood that approval could be granted for the use of a subcontractor that is outside of the United States, as the form sets forth a detailed procedure for granting such approval. We completed this form with the goal of seeking approval for the potential use of this subcontractor, with the assumption that if the approval was denied we would (using the subcontractor or performing the work in-house) perform all applicable services in the United States.

[TRM protest, p. 1, emphasis in original.]

TRM further requested a hearing and an opportunity to provide “all documentation needed to satisfy the State that [TRM] can indeed perform all services within the United States and answer any additional questions.” TRM protest, p. 2. I interpret this as a request for an in-person presentation as permitted by N.J.A.C. 17:12-3.3(b)(1)(iii). 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 the Bid Solicitation, the Quotes received, the Bureau's Recommendation Report, the relevant statutes, regulations, case law, and the protest submitted by TRM. The issues raised in TRM'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 TRM on the written record. As such, an in-person hearing is not warranted.

In 2005, the New Jersey Legislature enacted N.J.S.A. 52:34-13.2, which requires that "[e]very State contract primarily for the performance of services shall include provisions which specify that all services performed under the contract or performed under any subcontract awarded under the contract shall be performed within the United States." N.J.S.A. 52:34-13.2(a).¹

Consistent with the Legislative requirement, the subject Bid Solicitation required that "prior to an award of Blanket P.O., the Vendor {Bidder} is required to submit a completed Source Disclosure Form. The Vendor's {Bidder's} inclusion of the completed Source Disclosure Form with the Quote is requested and advised." Bid Solicitation Section 4.4.2.3 *Source Disclosure*. The Bid Solicitation goes on to state:

Pursuant to N.J.S.A. 52:34-13.2, all Blanket P.O.s primarily for services awarded by the Director shall be performed within the United States, except when the Director certifies in writing a finding that a required service cannot be provided by a Vendor {Contractor} or Subcontractor within the United States and the certification is approved by the State Treasurer. Also refer to Section 3.6 Service Performance Within U.S. of the SSTC.

Pursuant to the statutory requirements, the intended Vendor {Contractor} of a Blanket P.O. primarily for services with the State of New Jersey must disclose the location by country where services under the Blanket P.O., including subcontracted services, will be performed. The Source Disclosure Form accompanies the subject Bid Solicitation. FAILURE TO SUBMIT SOURCING INFORMATION WHEN REQUESTED BY THE STATE SHALL PRECLUDE AWARD OF A BLANKET P.O. TO THE INTENDED VENDOR {BIDDER}.

If any of the services cannot be performed within the United States, the Vendor {Bidder} shall state with specificity the reasons why the services cannot be so performed. The Director shall determine whether sufficient justification has been provided by the Vendor {Bidder} to form the basis of his or her certification that the services cannot be performed in the United States and whether to seek the approval of the Treasurer.

¹ The law only provides for a limited exception to the requirement, stating:

- (b) The provision of subsection a. of this section shall not apply whenever:
- (1) the Director of the Division of Purchase and Property or the Director of the Division of Property Management and Construction, as appropriate, certifies in writing a finding that a service is required by the Executive Branch of the State and that the service cannot be provided by a contractor or subcontractor within the United States and the certification is approved by the State Treasurer.

[N.J.S.A. 52:34-13.2(b)(1), *emphasis added*.]

[Bid Solicitation Section 7.1.2 *Source Disclosure Requirements.*]

To determine whether the requirements of the Bid Solicitation were met and whether the Bureau's review and evaluation of the Quotes submitted was consistent with the requirements of N.J.S.A. 52:34-13.2, the Division's Hearing Unit undertook a review of the legislative history of the statute and the associated case law. A review of the legislative history reveals that in response to "published reports [indicating] that telephone inquiries by welfare and food stamp clients under New Jersey's Families First Program were being handled by operators in Bombay, India, after the contractor moved its operations outside of the United States as a cost cutting measure" the legislature proposed a law requiring that "only citizens or persons authorized to work in the US pursuant to federal law may be employed in performing certain State contracts." See, S494, introduced January 13, 2004. After review, the Senate State Government Committee recommended modifications and amendments to the proposed law, among which were the following:

~~[The Director of the Division of Purchase and Property and the Director of the Division of Property Management and Construction in the Department of the Treasury shall include, in every] a. Every State contract primarily for the performance of services [;] shall include provisions which specify that [only citizens of the United States and persons authorized to work in the United States pursuant to federal law shall be employed in performance of] all services performed under the contract or performed under any subcontract awarded under the contract shall be performed within the United States.~~

Those modifications were incorporated into P.L. 2005, c. 92 as adopted. In signing the bill into law Acting Governor Richard J. Codey stated "[t]oday New Jersey is taking an important step to protect our workers and keep jobs from going overseas... With this bill, we are sending a clear message that if a company wants to take jobs from our hard working families and send them overseas, then it will not do business with the state." See, Governor's press release May, 05 2005; available at <https://repo.njstatelib.org/bitstream/handle/10929.1/21490/ch92gov.pdf>. Unfortunately, there is limited case law which would offer any guidance here.²

In determining the meaning of a statute, we consider first the plain language of the statute. If the language is clear, we interpret the statute consistent with its plain meaning. If the language is not clear, we look to the legislative history to aid in determining the legislative intent of the statute. After all, our goal is to interpret the statute consistent with the intent of the Legislature. Nevertheless, we should strive to avoid statutory interpretations that lead to absurd or unreasonable results.

[*Oberhand v. Director, Div. of Taxation*, 193 N.J. 558, 568 (2008), *internal citations and quotations omitted, emphasis added, see also, State v. Lewis*, 185 N.J. 363, 369 (2005), *stating* ("our goal in construing a statute is to discern and effectuate the Legislature's intent. We start by considering the plain language of the statute. If the language is clear, we interpret the statute consistent with its plain meaning.... whatever be the

² The only New Jersey case referencing N.J.S.A. 52:34-13.2 offers little guidance on how the statute and the legislative intent should be interpreted. See, *In re Bid Solicitation #11-X-21175, Snow Removal & Salting Servs. Statewide*, 2012 N.J. Super. Unpub. LEXIS 2760, 2012 WL 6599794.

rule of construction, it is subordinate to the goal of effectuating the legislative plan as it may be gathered from the enactment when read in the full light of its history, purpose and context.”); *State v. Gill*, 47 N.J. 441, 444 (1966) *stating*, (“in any event, whatever be the rule of construction, it is subordinate to the goal of effectuating the legislative plan as it may be gathered from the enactment when read in the full light of its history, purpose and context. Interpretations which lead to absurd or unreasonable results are of course to be avoided, and so far as the terms of the legislation and proper consideration of the interests of those subject to it will fairly permit, the statutory objective is to be fulfilled”.)]

Reviewing the procurement in light of the law, I first note that the subject Bid Solicitation was primarily for services and therefore the vendors were required to submit a *Source Disclosure Form*. See, Bid Solicitation §§ 1.1 *Purpose and Intent*, 4.4.2.3 *Source Disclosure*. Invoicing is one of the services that the Vendor {Contractor} is required to perform under this Blanket P.O. See, Bid Solicitation § 3.14. The *Source Disclosure Form* submitted by TRM disclosed that “Pinnacle Data Services” would perform “Billing Data Entry” in both India and the United States. TRM offered the following as the reason why the services cannot be performed in the United States:

The laboratory services business is very competitive and toxicology labs are always under pressure to increase services for our clients. Using an agency that allows immediate staffing options and lower costs for certain portions of our billing process allows us to stay competitive.

[TRM Quote, *Source Disclosure Form*]

After conducting its preliminary review of the Quotes, the Bureau concluded that TRM’s Quote was non-responsive and that it was ineligible for a Blanket P.O. award because its submitted *Source Disclosure Form* indicated that billing data entry services would be performed off-shore. The fact that the laboratory testing industry is very competitive does not mean that the services “cannot be provided by a contractor or subcontractor within the United States”. N.J.S.A. 52:34-13.2(b). Indeed, none of the other Vendors {Bidders} indicated their anticipated use of off-shore subcontractors.

Because data entry services can be performed in the United States, albeit possibly at higher cost, the stated justification for performing services off-shore was correctly rejected by the Bureau, and TRM’s Quote was correctly deemed non-responsive.

TRM’s post-NOI statements that it will comply with the Bid Solicitation by performing all services within the United States, cannot now render its Quote responsive. In *Meadowbrook Carting Co. v. Borough of Island Heights*, the court espoused a two-part test for determining whether a specific noncompliance constitutes a substantial and hence nonwaivable irregularity:

[F]irst, whether the effect of a waiver [of the Bid Solicitation’s terms] would be to deprive the [contracting party] of its assurance that the contract will be ... performed ... according to its specified requirements, and second, whether ... 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 standards of competition.

[138 N.J. 307, 315 (1994).]

Here, it is clear that TRM's Quote did not provide assurance that the contract would be performed according to its specified requirements, because on its face, the Quote indicated that billing data entry services would be performed off-shore in contravention of N.J.S.A. 52:34-13.2.

Furthermore, to allow TRM to revise its *Source Disclosure Form* post bid opening would place TRM into a position of advantage over other bidders who did not have the opportunity to provide Quotes using off-shore pricing in the hope that the State would accept them. Bid Solicitation Section 1.3.1.1 was clear that all "exceptions to mandatory requirements must be posed during this electronic question and answer period," and no question on this issue was posed. "Although broad, the grant of discretion to the Director to administer the public bidding process is not limitless. . . . the Division may not award a contract to a bidder whose proposal deviates materially from the RFP's requirements." *Barrick v. State*, 218 N.J. 247, 258-259 (2014). "Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract. Thus, requirements that are material to an RFP are non-waivable; the winning bidder's proposal must comply with all material specifications." *Id.* at 259. As stated above, the requirements of N.J.S.A. 52:34-13.2 and Bid Solicitation Section 4.4.2.3 are mandatory, and therefore cannot be waived as minor irregularities or omissions, nor can they be corrected after the bid opening.

In *I/M/O Protest of Award of On-Line Games Production and 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 (App. Div. 1995). Allowing TRM to withdraw its statement from its Quote at this time constitutes an impermissible change to its submitted Quote.

Accordingly, based upon the foregoing, I sustain the Bureau's Notice of Intent to Award. This is my final agency decision.

This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put on preparing and submitting the Quote. However, in light of the findings set forth above, I have no choice but to sustain the Bureau's Notice of Intent to Award. This is my final agency decision with respect to the protest submitted by TRM.

Thank you for registering your company with [NJSTART](http://www.njstart.gov) at www.njstart.gov, the State of New Jersey's eProcurement system. I look forward to your company's continuing interest in doing business with the State of New Jersey. I encourage you to log into [NJSTART](http://www.njstart.gov) 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.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD/EEL

c: R. Regan
K. Popso
K. Tran