



State of New Jersey

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July 29, 2022

Via Electronic Mail Only kweber@gibbonslaw.com

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Re: I/M/O Bid Solicitation #20DPP00442 Maximus U.S. Services, Inc.
Protest of Notice of Intent to Award
T1392 – Health Benefits Coordinator for NJ FamilyCare Managed Care Programs

Dear Mr. Weber:

This final agency decision is in response to your letter on behalf of Maximus U.S. Services, Inc. (Maximus) received by the Division of Purchase and Property's (Division) Hearing Unit on March 4, 2022 (Protest). In that letter, Maximus protests the Procurement Bureau's (Bureau) February 11, 2022, Notice of Intent to Award letter (NOI) issued for Bid Solicitation #20DPP00442 - Health Benefits Coordinator for NJ FamilyCare Managed Care Programs (Bid Solicitation).

By way of background, on December 3, 2019, the Bureau issued the Bid Solicitation on behalf of the State of New Jersey, Department of Human Services (DHS). The purpose of the Bid Solicitation was to solicit Quotes for a Health Benefits Coordinator (HBC) for NJ FamilyCare Managed Care Programs. Bid Solicitation § 1.1 *Purpose and Intent*.

The HBC has the responsibility to screen and process applications; make determinations of NJ FamilyCare (NJFC) program eligibility; access the Federal Data Services Hub using existing State-provided web services; perform call center operations; assess and collect premiums; provide outreach, marketing and education; and conduct and maintain enrollment of eligible individuals with the State's contracted Managed Care Organizations (MCOs) in accordance with program requirements of the DMAHS. Additionally, the Contractor will provide and operate a system capable of performing tasks required of an Eligibility/Enrollment Processing and Management System (E/EPMS); including a document management system with send/receive access that interfaces with the State's Document and Imaging Management System (DIMS).

Bid Solicitation Section 1.2 *Background*, cautioned Bidders that this Bid Solicitation addressed the State's current requirements, and Bidders should not rely upon or use data from any prior Master Blanket Purchase Order (Blanket P.O. or Contract) or Bid Solicitation in creating its Quote response. "It is the State's intent to award a [Contract] to the responsible Bidder whose Quote, conforming to the Bid

Solicitation, is most advantageous to the State, price and other factors considered.” Bid Solicitation § 1.1 *Purpose and Intent*.

In accordance with Bid Solicitation Section 1.3.4 *Optional Site Visit*, an optional Site Visit was held on January 9, 2020, enabling all potential Bidders to view a demonstration of the State’s Integrated Eligibility System (IES). In accordance with Bid Solicitation Section 1.3.1, *Electronic Question and Answer Period*, an electronic portal enabling the Bureau to receive questions electronically was available to all potential Bidders until January 29, 2020. Nine (9) Bid Amendments were issued for this Bid Solicitation, which provided revisions to the Bid Solicitation and responses to questions received from potential Bidders.

On May 20, 2021, the Division’s Proposal Review Unit opened four (4) Quotes. The four (4) Quotes were deemed administratively complete by the Proposal Review Unit and released to the Bureau for further review and evaluation.

The Bureau determined that the Quote submitted by Kristal Eley LLC was non-responsive due to non-compliance with several mandatory elements of the Bid Solicitation. Evaluation Committee Report at p. 5. The Bureau found that the following Quotes met, and complied with, all the mandatory requirements of the Bid Solicitation:

1. Automated Health Systems (AHS)
2. Conduent State Healthcare LLC (Conduent)
3. Maximus Health Services Inc.

These three (3) Quotes were released to the Evaluation Committee in accordance with Bid Solicitation Section 6.5 *Quote Evaluation Committee*. The Committee was composed of four (4) voting members from the Department of Human Services, Division of Medical Assistance and Health Services, and the Bureau, and one (1) non-voting member from the NJ Office of Homeland Security and Preparedness. *Ibid.* at p. 6. The Committee was responsible for performing the technical evaluation of the responsive Quotes received based upon the evaluation criteria set forth in Bid Solicitation Section 6.7 *Evaluation Criteria* which stated in part:

- A. Personnel: The qualifications and experience of the Vendor’s {Bidder’s} management, supervisory, and key personnel assigned to the Blanket P.O., including the candidates recommended for each of the positions/roles required;
- B. Experience of firm: The Vendor’s {Bidder’s} documented experience in successfully completing Blanket P.O. of a similar size and scope in relation to the work required by this Bid Solicitation; and
- C. Ability of firm to complete the Scope of Work based on its Technical Quote: The Vendor’s {Bidder’s} demonstration in the Quote that the Vendor {Bidder} understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the Blanket P.O.

Prior to the public advertisement of the Bid Solicitation, in October 2019, representatives from DMAHS and the Bureau assigned relative weights for the three (3) Evaluation Criteria. The assigned weights are as indicated on the timestamped score sheet shown below:

QUOTE SCORE SHEET

BID SOLICITATION TITLE: T1392 HEALTH BENEFITS COORINDATOR FOR NJ FAMILYCARE MANAGED CARE PROGRAMS

BID SOLICITATION NO.: 20DPP00442

VENDOR {BIDDER} NAME: _____

DATE SCORED: _____

SCORING LEGEND

9 - 10 **Excellent**
 7 - 8 **Very Good**
 5 - 6 **Good**
 3 - 4 **Fair**
 1 - 2 **Poor**

	EVALUATION CRITERIA	SCORE	WEIGHT	SUBTOTAL
A.	<u>Personnel:</u> The qualifications and experience of the Vendor's {Bidder's} management, supervisory, and key personnel assigned to the Blanket P.O., including the candidates recommended for each of the positions/roles required;		20	
B.	<u>Experience of firm:</u> The Vendor's {Bidder's} documented experience in successfully completing Blanket P.O. of a similar size and scope in relation to the work required by this Bid Solicitation; and		35	
C.	<u>Ability of firm to complete the Scope of Work based on its Technical Quote:</u> The Vendor's {Bidder's} demonstration in the Quote that the Vendor {Bidder} understands the requirements of the Scope of Work and presents an approach that would permit successful performance of the technical requirements of the Blanket P.O.		45	
TOTAL SCORE			100	

NOTE: Each score must be a whole number, decimals and fractions are not permitted.
 SCORE x WEIGHT = SUBTOTAL

EVALUATOR PRINTED NAME: _____

EVALUATOR SIGNATURE: _____

The Committee members each conducted an independent analysis of each of the three (3) remaining Quotes. Then, on October 5 and 14, 2021, the Committee met to review and consider the Quotes as a group. The five (5) voting members assigned individual technical scores (1-10) for each of the three (3) Evaluation Criteria for each Quote based upon their independent analysis and Committee discussions. Evaluation Committee Report at p. 7. Assigned scores were multiplied by the criterion weight to produce a weighted score for each criterion.

Bidder	Total Criterion A (Max 1,000)	Total Criterion B (Max 1,750)	Total Criterion C (Max 2,250)	Total Technical Score (Max 5000)	Ranking
Conduent	840	1505	1680	4025	1
Maximus	660	1400	1280	3340	2
AHS	580	1120	1160	2860	3

In accordance with Bid Solicitation Section 6.8 *Negotiation and Best and Final Offer (BAFO)*, the Bureau requested a BAFO from AHS, Conduent, and Maximus on November 4, 2021. The Bidders provided the BAFO responses as shown below:

Bidder	Original Evaluation Model Pricing	BAFO Evaluation Model Pricing	Percent Change	Cost Ranking
Conduent	\$105,740,311.04	\$ 104,866,010.88	(~1%)	1
Maximus	\$108,952,626.00	\$108,310,671.30	(~1%)	2
AHS	\$197,648,605.76	\$180,248,940.48	(~9%)	3

Having completed its evaluation of the Quotes received in response to the Bid Solicitation, on February 11, 2022, the Bureau issued the NOI advising all Bidders that it was the State's intent to award a Contract to Conduent. On February 18, 2022, Maximus requested an extension to submit a Letter of Protest, which was granted by the Division on that same date.

On March 4, 2022, prior to the close of the extended protest period, Maximus submitted the Protest, including a request for an in-person hearing, challenging the Division's decision to award the Contract to Conduent. By way of summary, Maximus states that Conduent's Quote is non-responsive to the requirements of the Bid Solicitation. Specifically, Maximus alleges that:

1. Conduent's Quote is non-responsive, because Conduent will be making some eligibility determinations in South Carolina and Conduent's proposed key personnel "are not located in New Jersey";
2. The weighted scores were incorrectly calculated and included an evaluator's score that was "plainly arbitrary";
3. The procurement suffered from incumbency bias; and
4. Maximus's Due Process Rights were violated because it did not have "a full and extensive record"

By way of remedy, Maximus states that it should be awarded the Contract, as the second highest-scoring bidder, or in the alternative, the award to Conduent should be overturned and the Bid Solicitation re-issued. Protest, p. 17, 23. Maximus also suggests:

that the [Division] re-score the proposals according to the criteria in the Solicitation, with each evaluator providing, in addition to its raw score, a narrative explanation and analysis, as to the reasons for the respective scores, and that the [Division] issue a new Evaluation Committee Report that includes all its findings of fact (with citations to the record) to support its determination and recommendation as to the most advantageous bid, including but not limited to a substantive comparison of the bids.

[Protest, p. 25.]

Conduent was provided with the opportunity to respond to the issues raised by Maximus in the Protest. On March 18, 2022, Conduent responded to the Protest (Response), stating that it offered the lowest cost solution and highest quality technical Quote, making the Conduent Quote the most advantageous to the State, price and other factors considered. It stood by its Quote submission, which it claimed was fully responsive to the requirements of the Bid Solicitation. In support of its Response, Conduent included a Certification from Carol Trapp, Conduent's proposed Project Director for the Contract to be awarded pursuant to the Bid Solicitation.¹

First, with respect to Maximus' request for an in-person presentation as permitted by 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 Evaluation Committee Report, the Bureau's Recommendation Report, the relevant statutes, regulations,

¹ Conduent copied Maximus on its Response to the Protest; no further submission was received from Maximus.

case law, and the protest submitted by Maximus. 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 Maximus on the written record, as such an in-person hearing is not warranted. I set forth herein the Division's Final Agency Decision.

I. Conduent's Quote Was Responsive to the Requirements of the Bid Solicitation.

A. The Bid Solicitation does not require that eligibility determinations be performed exclusively in New Jersey.

Maximus' first point of protest is that Conduent's Quote should have been rejected because Conduent "made clear in its proposal that eligibility determinations would be made from its South Carolina facility" despite "the Solicitation explicitly requir[ing] that eligibility determinations must be made in a New Jersey location". Protest, p. 1-2.

In support of this argument, Maximus refers to Bid Solicitation Section 3.1.1 *Vendor's {Contractor's} Location*, which states:

The Vendor {Contractor} shall establish an office and operations center to perform all Vendor {Contractor} functions as the Health Benefits Coordinator for NJ FamilyCare. For the convenience of DMAHS staff, the Vendor's {Contractor's} Office, operations and management facilities should be located in New Jersey and within a **ten (10) mile** radius of the present DMAHS facility located at 7 Quakerbridge Plaza, Mercerville, New Jersey 08619, within 45 calendar days from the Blanket P.O effective date as approved by the State Contract Manager (SCM).

[Underlined emphasis added; **Bolded** emphasis in original.]

3.1.3 FURNISHINGS, EQUIPMENT AND SUPPLIES

The Vendor {Contractor} shall provide the following . . .

C. An eligibility system that has inter-connectivity to the State's NJ Worker Portal, which will be provided by the State, that has the ability to process CHIP premium collections, PSP Enrollment, and Managed Care Enrollment.

3.2.1.3 OPERATIONS MANAGER

The Operations Manager shall be present full-time at the Vendor's {Contractor's} primary New Jersey location with 100% dedication to the performance and operations for all functions of the Blanket P.O. . . .

Importantly, Bid Solicitation Section 2.2 *General Definitions* defines the words "must" and "shall" as that "which is a mandatory requirement". In contrast, Bid Solicitation Section 2.2 *General Definitions* defines the words "may" and "should" as that "which is permissible or recommended, not mandatory." Ibid.

Maximus also references Bid Solicitation Section 3.3.2 *Call Center Facility*, wrongly asserting that the Call Center "must" also be located with a ten (10) mile radius of the present DMAHS facility. Rather, Bid Solicitation Section 3.3.2 states:

The Vendor {Contractor} shall establish, operate, and maintain a telephone Call Center with toll-free dedicated telephone lines, and corresponding numbers, for the NJ FamilyCare programs. . . . This facility should be located within a **ten (10) mile** radius of the present DMAHS facility located at 7 Quakerbridge Plaza in Mercerville, New Jersey 08619, as approved by the SCM.

[Bid Solicitation Section 3.3.2 *Call Center Facility*, Underlined emphasis added; **Bolded** emphasis in original.]

Maximus argues that only those two specific functions can be completed out-of-state – transfer of calls and mailing operations. In support of its position, Maximus refers to Bid Solicitation Section 3.3.2 *Call Center Facility*, which states that “[c]alls may be transferred to alternate locations within the continental United States. There are no restrictions placed on the volume of calls transferred” and Bid Solicitation Section 3.4 *Mail Room Operations* which states “[m]ailing operations may be transferred to alternate locations within the continental United States”.

Maximus states that “bidders sought clarification from the Division regarding the difference between the call center activities and operational activities”. Protest, p. 14-15. Maximus references the following question and answer issued as part of Bid Amendment #7 to support this assertion:

#	Bid Solicitation Section Reference	Question (Bolded) and Answer
95	3.3.16 Call Center Reports	<p>A. Are there specific operational requirements that must be reported in the weekly and monthly call center reports?</p> <p>The Call Center Reports report on call centers activities, not the operational aspects of the Blanket P.O.</p> <p>B. How is this report different from 3.6.1.7, Status Reports of Overall Program Performance?</p> <p>Overall Program Performance includes all areas of Blanket P.O. performance such as mail room operations, eligibility, call center activity, missing information received, enrollment, current eligibility status, etc.</p>

[See Bid Amendment #7 at p. 21-22.]

Maximus’ claim that the Division’s response in Bid Addendum #7 made a “clear distinction between operations (such as eligibility) and call center and mailing operations”, contorts the questions and answers to fit its narrative. Protest, p. 15. The questions were clearly related to Bid Solicitation Section 3.3.16, and focused on the content of Call Center Reports. Put another way, the questions were not meant to clarify the allowable locations for any work under the Contract. Nevertheless, Maximus claims that because only call center and mailing operations were expressly mentioned as out-of-state activities, all other aspects of the work must be performed exclusively in the State.

Relatedly, Maximus argues that

[t]he bidders for the Solicitation were clearly not on a level playing field when the Evaluation Committee reviewed responsive bids and the location of key personnel, [and] ignoring the location requirement for making

eligibility decisions . . . surely deprive[d] bidders of a fair evaluation process and . . . hinder[ed] the [Division's] ability to ensure the Solicitation will be performed according to its requirements.

[Protest, p. 17.]

Maximus alleges that, had “bidders [been] allowed to make eligibility determinations out of state, and have key personnel residing out of state and being dedicated (at least in part) to other operations unrelated to the contract at issue”, it would have had the opportunity to propose different personnel and pricing; however, due to Conduent’s alleged material deviation from the terms of the Bid Solicitation, “the Division did not get an ‘apples to apples’ comparison between the bids”. Id. Maximus states that “due to the distance between South Carolina and New Jersey, the Division would lose its ability to do site checks and become intimately familiar with the South Carolina facility’s daily operations.” Id. Furthermore, Maximus argues that the competitive bidding process was hindered because Conduent would enjoy “a significant price advantage because the cost of rent, personnel, etc. is less expensive in South Carolina than it is in New Jersey.” Id.

Conduent’s Quote states that the “Hamilton facility is [the] primary HBC office [which] is supported by four other outreach regional offices [in New Jersey] and [the] Columbia, South Carolina, office” See Conduent Quote at p. 2.2-13. In its Response to the Protest, Conduent states that its Quote does not deviate “from any express requirement of the Specification”, because “Sections 3.1.1 and 3.3.2 of the Solicitation recommend but do not require that operations be located in New Jersey[.]” Response, p. 9. Conduent states that it proposed to conduct primary operations, including eligibility determinations, out of its Hamilton, New Jersey location, and the South Carolina facility is part of its detailed contingency plan (see Bid Solicitation Section 3.16.32). Response, p. 8-9. As noted in Conduent’s Quote at Section 2.2.1 *Vendor’s {Contractor’s} Location*, the South Carolina facility offers “operational redundancy and enhanced business continuity [by providing] additional support for HBC calls and eligibility determinations.” Conduent Quote at p. 2.2-13.

The Hearing Unit’s independent review of the Bid Solicitation reveals that there is no express requirement that all eligibility determinations are to be made solely in the State. It is true that the Contractor is required to establish a New Jersey office capable of handling all functions of the HBC, and it is recommended that such office is located near the present DMHS facility in Mercerville. Bid Solicitation Section 3.1.1 *Vendor’s {Contractor’s} Location*. Critically, however, there is no prohibition against (a) supplemental office(s) located out of State, nor express limitation on the type of work allowed at such site. It is explicitly stated in Conduent’s Quote that the “proposed primary HBC Project operations center is in Hamilton, New Jersey, with other strategically located New Jersey outreach regional offices in New Brunswick, Newark, Paterson, and Westmont.” Conduent Quote, at p. 2.2-13. Conduent’s Quote also states: “Additionally, to provide operational redundancy and enhanced business continuity to our solution, we propose secondary staff located in our office in Columbia, South Carolina, that [will] provide additional support for HBC calls and eligibility determinations.” Id.

Maximus comes to the erroneous conclusion that because certain functions are expressly allowed to be performed out of state, all other aspects of the engagement *must* be performed *solely* in New Jersey. A close reading of Bid Solicitation Section 3.5 *Application and Eligibility Processing*, reveals that there is no location-specific requirement for eligibility determinations.² Maximus’ position is contrary to the plan

² There are two sub-components of the intake/eligibility processing scope of work which, by their nature, cannot be performed out-of-state. Under Bid Solicitation Section 3.5.2.4 *Missing Information*, the Contractor must be able to accept the in-person submission of documents and/or information from Applicants/Beneficiaries. Furthermore, the Contractor must be able “to accommodate local community

language of the Bid Solicitation, and imputes a requirement that is simply not there. It must also be noted that Maximus had an opportunity to ask questions during the Electronic Question and Answer period, and never asked if eligibility determinations must be conducted solely in New Jersey. The questions and answers referenced in Maximus' Protest specifically addressed Bid Solicitation Section 3.3.16 *Call Center Reports*. Despite Maximus' claim that the Division's answer made a "distinction between operations (such as eligibility) and call center and mailing operations" such that the only aspect of the work that can be performed out-of-state is "call transference", this strained reading is not supported by the language of the Bid Solicitation. Protest, p. 14-15.

The Evaluation Committee correctly took note of Conduent's "primary site located in Hamilton, NJ", its New Jersey "regional offices . . . to supplement the education and enrollment efforts of the Call Center in Hamilton, NJ" and the South Carolina location that was meant to provide operational redundancy and enhanced business continuity. The Committee did not mention a prohibition on completing aspects of the scope of work out-of-state, because there was none, a fact unchanged by the answers given in Bid Amendment No. 7 concerning reporting obligations of the ultimate Vendor. Accordingly, the Committee "determined Conduent's technical Quote met or exceeded the requirements of the Bid Solicitation and presented an approach that would permit successful performance of the technical requirements of the [Contract]." Because the Bid Solicitation did not prohibit an out-of-state work location, I find no reason to overturn the Evaluation Committee's determination that Conduent would be performing the work required consistent with the requirements of the Bid Solicitation.

B. Maximus' claims about Conduent's key personnel are misplaced and do not render Conduent's quote non-responsive.

Maximus asserts that several of the key personnel proposed by Conduent, including the proposed Project Director Carol Trapp, "are not located in New Jersey" based on LinkedIn profiles and current position titles. Maximus further questions whether Conduent's key personnel "will be dedicated to this [Contract] 100% as required by Section 3.2.1.3 of the Solicitation", by alleging that Conduent's proposed Operations Manager, Val Merritt, though "based in Hamilton", "manages both operations (*i.e.* New Jersey and South Carolina)." Maximus argues that Conduent's Quote "does not state that certain of its key personnel located outside of New Jersey will relocate." *Id.* at p. 17.

In comparison, Maximus argues that its own bid "is much more clear in explaining the personnel who will be involved if it was awarded the [Contract] and that all of the individuals are located in New Jersey, per the Solicitation's unambiguous requirement." Protest, p. 16. Maximus claims its Quote "specifically confirms that key personnel positions (including the project director, implementation manager, operations director, and call center manager) will be located full-time at the contractor's primary New Jersey location with 100% dedication to the operation." *Id.* at pp. 16-17.

Regarding the proposed Project Director's residence and dedication to this engagement, Conduent's Quote makes clear that Ms. Trapp is, and will remain, "present full-time at Conduent's Hamilton project facility [and] 100% dedicated to the project." Conduent Quote at 2.3-12. As to the identified Operations Manager, Valarie Merritt, Conduent's Response states that she was hired in 1998, and relocated from Texas to New Jersey in 2018 by Conduent's former New Jersey Project Director, Gaynor Ferrell. Conduent asserts that after that time, "Maximus hired Ms. Ferrell, the individual who [had] recruited and relocated Ms. Merritt to New Jersey, in 2020. Ms. Merritt has been 100% dedicated and on site every day, including during the pandemic." Conduent Response at p. 10.

Application/Enrollment intake and processing of Applications (*i.e.*, at churches, schools, community centers, etc.)" Bid Solicitation Section 3.5.2.8 *On-Site Application/Enrollment Procedure*. These functions will be performed at or from the primary Hamilton location and the New Jersey regional offices.

Conduent contends that not only does its proposed staffing conform to the requirements of the Bid Solicitation, but “there is ample cause to conclude that Maximus itself failed to satisfy staffing requirements and could well have been disqualified” based on Maximus’ proposed staffing. Conduent points out that the Evaluation Committee noticed that “[s]ome of [Maximus’] identified staff are currently working on the State Based Exchange project in addition to an engagement in New York. It was not clear in Maximus’ proposal if those staff would be dedicated to the Health Benefits Coordinator project or if these staff would be shared.” *Evaluation Committee Report* at p. 13. Indeed, as noted in the Certification of Carol Trapp, Maximus identified some of the same key employees in both its proposal to the State of New Jersey and in its proposal for a similar contract with the State of Indiana.³

The Evaluation Committee found that “Conduent met or exceeded the staffing requirements” , and “determined that the experience of Conduent’s personnel indicates it could meet the [Contract] requirements.” *Evaluation Committee Report* at p. 10. Having reviewed the Bid Solicitation and Conduent’s Quote, I see nothing that causes me to question that determination, or the scoring of the Evaluation Committee for Criterion A.

II. There Was No Discrepancy In The Scoring Of The Quotes Which Requires That The Quotes Be Rescored Or The Cancellation Of The Procurement.

A. The incorrect calculation of weighted scores does not demand rescoring, cancellation or rescission of award because the Quote ranking was not impacted.

Maximus’ next argument relates to the Evaluation Committee’s calculation of the Overall Technical Scores. Maximus correctly points out that the scoring sheets actually used by the Evaluation Committee stated the incorrect weight for Criterion C. As shown in the timestamped scoresheet above, Criterion A had a relative weight of 20%, Criterion B had a relative weight of 35%, and Criterion C had a relative weight of 45%. The score sheets completed by the Evaluation Committee members incorrectly stated that the relative weight of Criterion C was 40%, such that the relative weights of the three Criteria summed to 95% rather than 100%. To remedy this typographical error, Maximus demands that “the [Division] must, at a minimum, rescore each bid with the correct weighting criteria, and consistent with the Solicitation’s requirements.”

Maximus is correct that there was a typographical error on the scoresheet utilized by the Evaluation Committee. However, the error was applied to all Quotes equally, and as discussed below did not impact the Bidder’s rankings. The erroneous calculation with the Criterion C⁴ weight at 40 is as follows:

³ Conduent further asserts that as of August 2021, Maximus’ website had job postings seeking candidates for several positions that were “contingent upon award” of the New Jersey Health Benefit Coordinator (HBC) contract that is the subject of this Bid Solicitation, including Project Director, Senior Operations Support Manager, and Senior Eligibility Manager. Bidders are required, at the time of the Quote Opening, to have all staff that might be required if awarded the Contract.

⁴ The three (3) Evaluation Criteria labeled as 1, 2, and 3 in these tables are the same as Bid Solicitation Evaluation Criteria A, B, and C, respectively.

Vendor {Bidder}	Criterion Tally (Weighted)						Criterion Total
	Criterion 1		Criterion 2		Criterion 3		
	Weighted	Non-Weighted	Weighted	Non-Weighted	Weighted	Non-Weighted	
Automated Health Systems	580	5.8	1120	6.4	1160	5.8	2860
Conduent	840	8.4	1505	8.6	1680	8.4	4025
Maximus	660	6.6	1400	8	1280	6.4	3340

The corrected calculation with Criterion 3/C's weight at 45% as required by the time-stamped score sheet dated October 8, 2019 at 1:56 pm shown on page 3 above, is as follows:

Vendor {Bidder}	Criterion Tally (Weighted)						Criterion Total
	Criterion 1		Criterion 2		Criterion 3		
	Weighted	Non-Weighted	Weighted	Non-Weighted	Weighted	Non-Weighted	
Automated Health Systems	580	5.8	1120	6.4	1305	5.8	3005
Conduent	840	8.4	1505	8.6	1890	8.4	4235
Maximus	660	6.6	1400	8	1440	6.4	3500

There was an anomaly in the post-scoring calculations of the weighted point totals. Critically, there was no change to the 10-point scoring legend used for each Criterion, which appears correctly at the bottom of the timestamped scoresheet, as well as the scoresheets actually filled out by the Committee members. All scorers used the same 1-10 scale to grade each Bidder in each of the three Criteria, and there is no indication that any of the assigned scores were influenced by the misstated relative weights. Most importantly, even after correcting for the relative weight in Criterion C (40% v 45%), there was no change to the ultimate ranking of the Quotes, with Conduent outscoring Maximus under either scenario.

The assigned relative weights reflect a desire by the State to place the greatest emphasis (45% of total score) on whether the Bidders' Quote demonstrates that the Bidder understands the requirements of the Scope of Work and presented an approach that would permit successful performance, followed by the Bidder's documented experience (35%), and key assigned personnel (20%).

While it is true that the Evaluation Committee Report suffered from a minor error in the calculation of weighted scores, the ranking of the Quotes was not impacted because there was no error in the assignment of raw scores. The inconsequential calculation error is not a cause to set aside or vacate the award to Conduent or require that a new Evaluation Committee be formed for the purpose of rescoring the Quotes.

B. There was not a member of the Evaluation Committee who "assigned scores far outside the range of all other scorers".

Maximus further argues that the evaluation process suffered from another anomaly, due to "inconsistent results" from one Evaluator's "plainly arbitrary" scoring. Protest, p. 18-20. Maximus alleges that:

the Evaluation Committee contained one scorer whose scoring mechanism was inconsistent with the other four scorers, which is made clear from the fact that this scorer was the only member to award a 5 to any bidder

(Maximus) and a 10 to another bidder (Conduent). Again, no other scorer gave a 5 or a 10 to any bidder in any category—but this scorer did both, in the same category. This unexplained score evidences a bias for the incumbent and against Maximus.

[Protest, p. 19-20.]

Questioning the legitimacy of the results, Maximus states that the intended Contract award to Conduent must be vacated, that the allegedly biased member must be removed from the Evaluation Committee, and the Quotes rescored. Id. at p. 20.

With respect to the makeup of the Committee, N.J.S.A. 52:34-10.3(c) states in pertinent part that “[i]n all cases, persons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the project.” The Division’s governing regulations state that “[m]embers of evaluation committees shall conduct evaluations of proposals objectively, impartially, and with propriety.” N.J.A.C. 17:12-2.7(a)(1). With that in mind, “the Director retains the discretion to reject proposed members, remove sitting members and add additional members to an evaluation committee.” Id. The Division should always be aware of the public’s interest in State procurements and possible conflicts of interest, and should take the appropriate actions to insulate the procurement process from those potential conflicts. See generally, Keyes Martin & Co. v. Director, Div. of Purch. & Prop., 99 N.J. 244, 260-64 (1985). Accordingly, the Division ensures that the individuals constituting the Committee have the relevant experience necessary to evaluate the project in accordance with N.J.S.A. 52:34-10.3, and seeks to avoid conflicts of interest in the procurement process.

Here, all members of the Evaluation Committee had the requisite knowledge and experience to conduct an evaluation of the Quotes submitted and none of them had any conflicts of interest which could have affected the public’s confidence in the procurement process. The Evaluation Committee was comprised of members of affected departments and agencies together with representative(s) from the Division possessing a wide variety of skills across multiple disciplines and “the relevant experience necessary to evaluate the [Quotes].” N.J.S.A. 52:34-10.3(c). Several members of the Evaluation Committee have relevant experience with NJ FamilyCare Managed Care Programs and the duties of the HBC, including in connection with the Integrated Eligibility System and the technical requirements thereof. Importantly, none of the Committee members had any “personal, business, or financial interest in the subject matter of the Bid Solicitation”, such that the procurement could be compromised by bias or favoritism. N.J.A.C. 17:12-2.7(a)(1).

Bid Solicitation 6.7.5 states that the Evaluation Committee “considers and assesses price, technical criteria, and other factors during the evaluation process and makes a recommendation to the Director”. Accordingly, the members of the Evaluation Committee reviewed, discussed and provided scoring based on the review of Quotes, including their independent judgment as well as the group discussion. Each committee member approached the process through their own experience and expertise, and reviewed the Quotes through their individual perspective. The group then discussed the Quotes, and each individual had an opportunity to present their observations. The Evaluation Committee members then individually scored each Quote in each of the three (3) Evaluation Criteria on a 1-10 scale.

Maximus made an understandable, though erroneous, assumption when reviewing the redacted score sheets. When the scoring sheets used by the Evaluation Committee were prepared for production, the name of the individual Evaluator was redacted from each score sheet. When the redacted score sheets were then compiled, the order of the Evaluators’ score sheets was not consistent across Bidders. This caused both Maximus and Conduent to assume that the fourth score sheet was from the same Evaluator, whose

scoring was an outlier at both extremes of the point scale. In fact, a review of the unredacted score sheets reveals that it was two different members of the Evaluation Committee that assigned the questioned scores.

The raw scores for Maximus’ and Conduent’s Quotes were as follows⁵:

Conduent			
	Criteria and relative weights:		
	Criterion A – Personnel (20%)	Criterion B - Experience of Firm (35%)	Criterion C - Ability to Complete SOW (45%)
EC Member A ⁶	8	8	9
EC Member B	10	10	9
EC Member C	8	8	7
EC Member D	8	9	9
EC Member E	8	8	8

Maximus			
	Criteria and relative weight:		
	Criterion A – Personnel (20%)	Criterion B - Experience of Firm (35%)	Criterion C - Ability to Complete SOW (45%)
EC Member A	7	8	8
EC Member B	7	9	6
EC Member C	5	7	5
EC Member D	7	8	7
EC Member E	7	8	6

Two Evaluators (“A” and “E” in the tables above) assigned Maximus and Conduent an equal score (8/10) for Criterion B (Experience of Firm), while scoring Conduent higher than Maximus for Criterion A (Personnel) and Criterion C (Ability). The other three Evaluators consistently scored Conduent higher than Maximus for all three Criteria.

The Evaluator who scored Maximus 5/10 for Criteria A and C scored Conduent an 8/10 and 7/10 in those criteria, respectively. The Evaluator who assigned Conduent a 10/10 in Criteria A and B scored assigned Maximus 7/10 and 9/10 for those respective criteria. Accordingly, Maximus’ claim that a single Evaluator had plainly inconsistent and arbitrary scoring, while based on an understandable reading of the

⁵ The raw scores for AHS are omitted for brevity, as AHS has not participated in this Protest. Across 15 individual scores (3 Criteria x 5 Evaluators), AHS scored below Maximus on 9, and tied with Maximus on 6. AHS was consistently scored below Conduent across all Criteria and Evaluators.

⁶ While identities of Committee Members are not subject to release in accordance with N.J.S.A. 52:34-10.3, the scores are presented here in such a way as to enable the reader to compare the scores given by each member of the Evaluation Committee, referred to here as A, B, C, D, and E.

ordering of the redacted Evaluators' scoring sheets in the compilation of documents produced in response to Maximus' OPRA request, is nevertheless incorrect.

Based on the above, there was no member of the Evaluation Committee whose scoring was biased against Maximus or in favor of Conduent. As such, there is no reason to remand this matter back to the Bureau for re-scoring.

III. There was no incumbent bias in the evaluation of the Quotes

Maximus furthers its allegation of an incumbency bias with several arguments: that the Division "changed the weighting of each category in a way that favored the incumbent" between the 2015 and 2019 solicitations, that Division overlooked Conduent's "fail[ure] to supply resumes for its subcontractor's personnel", and "as further evidence of [Division's] favoritism, the Division ignored Conduent's multiple litigations". Protest p. 21-23. Maximus further complains that none of the references it provided were contacted during the evaluation process. *Id.* Maximus alludes to an improper purpose in the cancellation of the 2015 solicitation, continuation of the incumbent contract and subsequent award to Conduent in the 2019 solicitation more broadly, referring to it as a "disturbing backdrop" to the award to Conduent. Protest, p. 1. The allusion of impropriety is unfounded.

A. The weighting of the evaluation criteria did not favor one bidder over another.

Maximus argues that "[t]he 2019 procurement is . . . fraught with incumbency bias throughout". Protest, p. 21. Specifically, Maximus alleges that the relative weights assigned to the three Evaluation Criteria were changed from the weights assigned in the canceled 2015 procurement, and that this change favored the incumbent, Conduent.⁷

With respect to the 2015 solicitation, I note that during the evaluation of that solicitation, the Bureau determined that the pricing framework presented within the RFP was unclear, and requested that the four (4) Bidders under consideration submit new pricing using a revised price schedule/sheet.

After the issuance of the notice of intent to award, in reviewing this atypical process, the Division determined that the revision to the price sheet after Quote opening created an un-level playing field for all potential bidders such that the procurement had to be canceled and re-bid. Accordingly, by letter dated December 20, 2017 (the "Notice of Cancellation"), the Bureau informed Maximus that the Notice of Intent to Award letter dated June 16, 2017 was rescinded in consideration of the public interest. Specifically, the Notice of Cancellation stated:

the request that Bidders submit revised proposal pricing, utilizing a revised price sheet, after the proposal opening date resulted in an unlevel playing field for all potential bidders as the revised price sheet also resulted in a change to the evaluation methodology employed to review the Bidders' proposal pricing.

In addition, the Bidders were advised that the contract would be re-procured at a later date. At the time, neither Maximus nor any other Bidder challenged the cancellation. As noted above, the services provided under this contract are essential services to residents of New Jersey and Medicaid clients through screening

⁷ Conduent spun off from Xerox, the Bidder who was ranked 2nd in the Technical Ranking in the cancelled 2015 procurement. The separation of the two companies was complete by January 2017. *See* "Conduent Completes Separation from Xerox", January 3, 2017, available at: <https://www.news.conduent.com/news/conduent-completes-separation-from-xerox>.

of applications for NJ FamilyCare eligibility, assessing and collecting premiums, providing outreach, marketing, and education, and conducting and maintaining enrollment with contracted Managed Care organizations (MCOs). Therefore, the Contract with Conduent was extended pending the completion of this re-reprocurement to ensure that DHS was able to provide the residents of the state with these essential services.

Over the course of the following two years, the Bureau and DHS made refinements to the scope of work required under the Contract, revisions to the pricing structure, and other changes to the Bid Solicitation. Prior to the public advertisement of the Bid Solicitation, in October 2019, representatives from DMAHS and the Bureau assigned relative weights for the three (3) Evaluation Criteria reflecting the current needs and priorities of the State. As stated above, the Bureau issued the current Bid Solicitation on December 3, 2019.

Now, Maximus complains that during the instant Bid Solicitation, “the Ability category was re-weighted and intended to be increased to 45%—without explanation.” Protest, p. 21. Maximus alleges that the Division failed in its “duty . . . to find the necessary facts [and] explain its reasoning” for adjusting the relative weights of the evaluation criteria from the cancelled 2015 solicitation (when the three (3) criteria were weighted 33/33/34%) to the weights assigned for the current procurement. *Id.* at p. 22 (Quoting In re Hackensack Water Co., 249 N.J. Super. 164, 175 (App. Div. 1991)).

The current Bid Solicitation is a wholly separate procurement from the cancelled 2015 solicitation. The current Bid Solicitation incorporates changes to federal and state law between 2015 and 2020, as well as the State’s most current needs and priorities, such as the coordination of services with the State Based Exchange, and various Workforce Development goals. Indeed, the description of Criteria C in the current Bid Solicitation is not the same as it had been in the cancelled 2015 procurement. The changes are italicized for emphasis below:

2015 RFP: Criterion C – Ability of firm to complete the Scope of Work based on its Technical Proposal: The *overall ability of the bidder to undertake and successfully complete* the technical requirements of the contract in a timely manner.

2020 Solicitation § 6.7.1: Criterion C - Ability of firm to complete the Scope of Work based on the Technical Quote: The *Vendor’s demonstration in the Quote that the Vendor understands the requirements of the Scope of Work and presents an approach that would permit successful performance.*

The previous Evaluation Committee appeared to agree that each of the three (3) Evaluation Criteria was equally important; however, the current Evaluation Committee included participants who were not involved in the issuance of 2015 Bid Solicitation. Every solicitation stands alone and is not governed by the requirements of any previous solicitation, whether that solicitation was awarded or cancelled; moreover, the extrinsic fact of the prior weighting does nothing to help interpret the current weighting because Criteria C changed. See Atlantic Northern Airlines, Inc. v. Schwimmer, 12 N.J. 293, 301-302 (1953). It is clear that with respect to the current solicitation, the Evaluation Committee determined to give greatest weight to the demonstration in each Bidders Quote’s that it understood the requirement of the scope of work and had the ability to successfully complete the scope of work as required by the State.

Importantly, the Division’s governing regulations require that the criteria to be utilized in the evaluation of Quotes are set prior to the Quote opening date. N.J.A.C. 17:12-2.7. This ensures that criteria are not skewed to advantage or disadvantage any particular bidder or bidders, but rather, reflect the

evaluation committee's determination of relative importance of the various requirements of the scope of work.⁸ Specifically, N.J.A.C. 17:12-2.7(b) states that

[f]or all RFPs that set forth evaluation criteria, values, or utility models to be applied by the evaluators in assessing the proposals, and that do not reveal specific, assigned weights or elements, the evaluation committee or assigned Division staff member shall, prior to the opening of proposals, determine, document, and date-stamp such weighted evaluation criteria, values, or utility models.

As noted above, Bid Solicitation 20DPP00442 contains additional requirements that were not included in RFP 16-x-24130, including the coordination of services with the State Based Exchange as well as DHS' WorkForce Development goals. The Evaluation Committee determined which aspects were the most critical for this Solicitation, and assigned the relative weights accordingly. The relative weights were time and date stamped on October 8, 2019 during the development of the current Bid Solicitation, and were not shared with Bidders in an effort by the Bureau to ensure a fair competition.

As stated above, Maximus relies on In re Hackensack Water Company, 249 N.J. Super. 164. (App. Div. 1991) to assert that the Division has a duty to formally find the necessary facts and explain its reasoning when adjusting the relative weights of evaluation criteria from one procurement to the next. This reliance is misplaced, because the case does not concern the development of Evaluation Criteria, as Maximus implies.

In the cited passage from In re Hackensack Water Company, the Court is discussing "quasi-judicial administrative decisions"; it is in that context that detailed findings of fact and explanation of reasoning are required. 249 N.J. Super. at 174. But in the instant case, neither the preparation of specifications by Division nor the establishment of relative weights for the three (3) Evaluation Criteria by the Evaluation Committee is an adjudicatory procedure such that formal findings of fact are required. Here, unlike in In re Hackensack Water Company, the Bureau was not performing a quasi-judicial function; rather, it was performing the routine administrative work of the Bureau to develop and advertise procurements, evaluate the Quotes received, and award contracts.

Accordingly, because the development of a Bid Solicitation and Evaluation Criteria falls directly within the discretion of the Division, there was no requirement that the adjusted relative weights be disseminated to bidders prior to the Quote opening date. Therefore, I do not find that the grounds raised by Maximus support its demand for cancelation or rescission of the anticipated award.

B. Resumes were not required for subcontractor staff.

Maximus alleges that Conduent failed to supply resumes for its subcontractor's personnel, which Maximus asserts was a requirement in the Bid Solicitation. Maximus states that this demonstrates that the Division showed its preference for Conduent by ignoring Conduent's failure to comply with the requirements of the Bid Solicitation. Protest, p. 22. In support of its allegation, Maximus refers to Bid Solicitation Section 4.4.4 *Organizational Support and Experience* which states:

⁸ Moreover, it is important to recall that Conduent received either equal or higher raw scores than did Maximus from each Committee Member for each Criteria. Accordingly, there is no set of relative weights for the three (3) Evaluation Criteria that could result in Maximus being ranked above Conduent.

The Vendor {Bidder} should include information relating to its organization, personnel, and experience, including, but not limited to, references, together with contact names and telephone numbers, evidencing the Vendor's {Bidder's} qualifications, and capabilities to perform the services required by this Bid Solicitation.

The Vendor {Bidder} should include the level of detail it determines necessary to assist the evaluation committee in its review of Vendor's {Bidder's} Quote.

[Emphasis added.]

In addition, Maximus refers to 4.4.4.3 *Resumes* which states in pertinent part “The Vendor {Bidder} should provide detailed resumes for each Subcontractor’s management, supervisory, and other key personnel that demonstrate knowledge, ability, and experience relevant to that part of the work which the Subcontractor is designated to perform.” Emphasis added.

Maximus, however, has once again misread the terms of the Bid Solicitation. Bid Solicitations 4.4.4 and 4.4.4.3 state that the Vendor {Bidder} “should” provide the requested items – here resumes. As discussed above, use of the term “should” in the Bid Solicitation signifies that the item is requested or permissive, not mandatory. Bid Solicitation Section 2.2 *General Definitions* defines “should” as “that which is permissible or recommended, not mandatory.” By way of comparison, where an item is required or mandatory, the Bid Solicitation used the term “shall” or “must” denoting “that which is a mandatory requirement.”

As such, while Conduent may not have submitted resumes for its subcontractors, the terms of the Bid Solicitation, did not require it to do so.

I note that Conduent provided a list of its intended subcontractors, including information about their roles, and their performance on similar contracts. As noted in the Evaluation Committee Report, “[t]he Committee determined Conduent’s technical Quote met or exceeded the requirements of the Bid Solicitation and presented an approach that would permit successful performance of the technical requirements of the [Contract]” *Id.* at 13. Accordingly, I find no reason to overturn the Evaluation Committee’s determination that Conduent’s Quote was responsive to the requirements of the Bid Solicitation.

C. Maximus’ other arguments do not show incumbency bias.

In support of its position that the Division showed favoritism for the Quote submitted by Conduent, Maximus further claims that the Division ignored the contents of Conduent’s *Disclosure of Investigations and Other Actions Involving the Vendor Form* which identified four (4) litigations in the five (5) years prior to the submission of its Quote. Protest, p. 23. Furthermore, Maximus complains that none of its references identified in response to Bid Solicitation Section 4.4.4 *Organizational Support and Experience* were contacted as part of the evaluation of its Quote. *Id.* Taken together, Maximus argues that these issues reveal an incumbency bias in favor of Conduent and against Maximus such that “[t]he award to Conduent must be overturned and the Solicitation must be re-issued to provide a level procurement that is not designed to favor the incumbent.” *Id.*

Conduent’s *Disclosure of Investigations and Other Actions Involving the Vendor Form* does not constitute grounds to rescind the Notice of Intent to Award. Conduent disclosed four (4) litigation matters with a public sector client as the adverse party, none of which involved New Jersey. Of these, only one (1)

was active at the time the Quotes were opened. The case concerned certain Medicaid overbillings prior to July 2015, and, as stated by Conduent, the State of Hawaii dismissed its claims against Xerox⁹ in September 2016. Only the crossclaims filed by Liberty Dialysis against Xerox for negligence, professional negligence, and indemnification remained pending as of May 20, 2021. Had the Committee or the Bureau determined that any of the referenced matters rose to the level of disqualifying Conduent, or even substantially impacting its assigned scores, the same would have been discussed in the Evaluation Committee Report or Recommendation Report.¹⁰

Moreover, the decision to contact references, or not, was solely within the discretion of the Evaluation Committee and the Bureau in evaluating the Quotes. There is no guarantee in the Bid Solicitation that references would be contacted, nor is there any statutory or regulatory requirement to do so. No references for any of the Bidders were contacted during the Evaluation process. Had the Evaluation Committee determined that there was a need to contact any Bidder's references it would have done so. Accordingly, I do not find cause to disturb the Notice of Intent to Award on these grounds.

IV. Maximus Was Not Denied Due Process.

Maximus alleges it has been deprived of a fair opportunity to formulate this Protest, because it has requested, but not received, "certain documents from [Division] in connection with both the 2015 procurement and the current procurement" pursuant to OPRA (N.J.S.A. 47:1A-1 to -13), and the common law right of access. Protest, p. 24. In particular, Maximus states that it "requested information regarding whether there were any evaluators common to both the 2015 and 2019 solicitation and for the [Division] to identify the scoring sheet by common evaluator" but it "did not receive the individual score sheets from the 2015 procurement and it received a heavily redacted version of the Evaluation Committee's comments [on the Quotes for the current procurement]". Id.

Following the issuance of the NOI on Friday, February 11, 2022, Maximus requested the Bid Award File. On Monday, February 14, 2022, a CD with all of the documents was sent overnight to Maximus.

On February 15, 2022, Maximus sent a letter to the Bureau acknowledging receipt of the Bid Solicitation Award File for the current Bid Solicitation (which it calls the "Second Bid Solicitation"), and requesting additional documents related to the current Bid Solicitation, including:

- All cont[r]acts;
- All records of initial evaluations;
- Any correspondence with any Bidder other than Maximus related to any request for clarification, negotiation or Best and Final Offer;
- Any revised technical and/or price Quotes from any Bidder other than Maximus;
- Copies of all bids (including, without limitation, any revisions to any bids) submitted in connection with the Second Bid Solicitation, excluding the bid submitted by Maximus;
- All communications between [Division] with any Bidder other than Maximus;
- All communications between [Division] and any third-party other than a Bidder, including communications with Bidder references;
- All documents (including, without limitation, original evaluation and scoring sheets) from each voting member of the Evaluation Committee that refer, reflect, or relate to the development of their technical scores, independent analysis of each Bidder's quote,

⁹ As noted above, Conduent spun off from Xerox, prior to January 2017.

¹⁰ The Recommendation Report noted that the Conduent did submit the form.

Evaluation Committee discussions, and Evaluation Committee deliberations as identified in Section IV.B.3 of the Evaluation Committee Report dated January 25, 2022;

- All documents relating to the October 5 and 14, 2021 meetings of the Evaluation Committee to determine responsiveness, provide technical scoring, review pricing, and make a recommendation as stated in Section IV.C of the Evaluation Committee Report dated January 25, 2022;
- All documents identifying each Evaluation Committee “finding” (including, without limitation, those findings not identified in the summary of, or highlighted by, the narrative in the Evaluation Committee Report dated January 25, 2022) as stated in Section VI of the Evaluation Committee Report dated January 25, 2022; and
- All documents relating to the Evaluation Committee’s communications with any references identified by any Bidder.

In addition, Maximus requested the following documents related to the cancelled 2015 procurement, including:

- The entire “Bid Solicitation Award File” (within the meaning of that term as used in the [Division’s] February 11, 2022 letter) for the First Bid Solicitation File;
- All contracts;
- All records of initial evaluations;
- Any correspondence with any Bidder other than Maximus related to any request for clarification, negotiation or Best and Final Offer;
- Any revised technical and/or price Quotes from any Bidder other than Maximus;
- Copies of all bids (including, without limitation, any revisions to any bids) submitted in connection with the Second Bid Solicitation, excluding the bid submitted by Maximus;
- All communications between [the Division] with any Bidder other than Maximus;
- All communications between [the Division] and any third-party other than a Bidder, including communications with Bidder references;
- All documents (including, without limitation, original evaluation and scoring sheets) from each voting member of the Evaluation Committee that refer, reflect, or relate to the development of their technical scores, independent analysis of each Bidder’s quote, Evaluation Committee discussions, and Evaluation Committee deliberations as identified in Section V.B.3 of the Evaluation Committee Report dated April 18, 2017;
- All documents relating to the April 6, 2016 meeting of the Evaluation Committee to determine responsiveness, provide technical scoring, review pricing, and make a recommendation as stated in Section V.C of the Evaluation Committee Report dated April 18, 2017;
- All documents identifying each Evaluation Committee “finding” (including, without limitation, those findings not identified in the summary of, or highlighted by, the narrative in the Evaluation Committee Report dated April 18, 2017) as stated in Section VII of the Evaluation Committee Report dated April 18, 2017

Maximus further requested that

[Division] advise whether any of the members of the Evaluation Committee in the First Bid Solicitation were also members of the Evaluation Committee in the Second Bid Solicitation. At this time, Maximus is not requesting that [Division] specifically identify the names of the individual members of the two (2) Evaluation Committees. However, to the extent any individual was a member of both Evaluation

Committees we request that [Division] specify which documents (including, without limitation, original evaluation and scoring sheets) produced in response to the above-requests concerning the First and Second Bid Solicitations are from each such individual.

[Maximus Letter to Bureau dated February 15, 2022.]

The request for documents was forwarded to the Treasury Government Records Access Unit (TGRAU). On February 22, 2022 TGRAU responded to Maximus OPRA request by providing a Dropbox link for all of the requested documents related to Bid Solicitation 16-X-24130, the cancelled 2015 procurement. On February 25, 2022, TGRAU responded to Maximus OPRA request by providing a Dropbox link for all of the requested documents related to Bid Solicitation 20DPP00442. The documents were redacted pursuant to N.J.S.A. 47:1A-1.1. All redactions either cited to the relevant statutory exemption directly, or were detailed on the exemption log provided to Maximus with the February 25, 2022 document release.

On March 3, 2022, Maximus sent a follow-up letter to TGRAU requesting individual score sheets from the cancelled 2015 solicitation, redacted versions of which had already been released to Maximus via download link sent February 22nd. Maximus also requested an unredacted version of the Quote Review Technical Checklist for the current procurement, asserting that, notwithstanding the cited rationale for redaction, Maximus was nevertheless “entitled to the underlying information that formed the basis for the Evaluation Committee’s scoring.” Maximus Letter to TGRAU dated March 3, 2022.

On March 4, 2022, TGRAU responded to Maximus stating “On behalf of the records Custodian of [Division] we are providing the following response. [Division] has no responsive documents associated with a Quote Review Technical Checklist for 16-X-21430. The individual score sheets for 16-X-21430 are attached but were also contained in [Division’s] first release of documents on February 22, 2022.”¹¹

First, with respect to Maximus request for unredacted score sheets for the current procurement, OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access, unless such records fall within the twenty-one (21) categories of information specifically excluded from mandatory disclosure. N.J.S.A. 47:1A-1-1.1; Education Law Center v. New Jersey Dept. of Ed., 198 N.J. 274. Specifically, OPRA states in part that “all government records shall be subject to public access unless exempt from such access by...any other statute....” N.J.S.A. 47:1A-1. The composition of an Evaluation Committee is governed by N.J.S.A. 52:34-10.3, which states in part that the names of the Evaluation Committee members shall not be made publicly available until after the contract is awarded. Accordingly, as it related to Maximus’ request for unredacted score sheets for the current procurement, the names of the Evaluation Committee members were properly redacted in accordance with N.J.S.A. 52:34-10.3.

Turning to Maximus’ request that the Division “advise whether any of the members of the Evaluation Committee in the First Bid Solicitation were also members of the Evaluation Committee in the Second Bid Solicitation”, the New Jersey Supreme Court has held that an OPRA request cannot not require the records custodian undertake research or analysis in order to respond to the request. Paff v. Galloway Tp., 229 N.J. 340, 355 (2017) (“Seeking particular information from the custodian is permissible; expecting the custodian to do research is not.”). The Division never had a document comparing the makeup of the two Evaluation Committees, and would have needed to create one to convey the requested information; a

¹¹ While the Division advised TGRAU that, under OPRA, the Division is not required to conduct research regarding the members of the committee who are in common from 2015 from 2020, it appears that TGRAU inadvertently did not include that response in its correspondence to Maximus.

task not mandated under OPRA. Importantly, as noted above, the Division could not provide the requested information in response to Maximus' OPRA request prior to the Contract award being finalized to the extent it involved identification of the Evaluation Committee members for the Bid Solicitation. N.J.S.A. 52:34-10.3.

With respect to the score sheets from the 2015 procurement - the cancelled 2015 solicitation, Maximus received copies of the score sheets which showed the raw scores assigned by each Committee Member but the Committee Members' names were inadvertently redacted. Consistent with N.J.S.A. 52:34-10.3, after award, the Committee Member names can be released. In the case of the 2015 procurement, while there was no contract award, the procurement had been completed by way of cancellation so the names of the Committee Members could have been released. However, I note that the names of the Evaluation Committee members were identified on the 2015 Evaluation Committee Recommendation Report which was provided to Maximus unredacted. Accordingly, while the Committee Member names were inadvertently redacted on the scoresheets, this information was nevertheless provided to Maximus in a different document, namely the 2015 Evaluation Committee Recommendation Report. Thus, this oversight in redaction had no impact on the evaluation of the current solicitation or Maximus' ability to formulate and file its protest as it had the requested information regarding the 2015 Evaluation Committee membership available to it. If Maximus' goal was to demonstrate bias by a single member of the committee across both procurements, Maximus would have been unable to flesh out this argument because, in accordance with N.J.S.A. 52:34-10.3, the names of the Evaluation Committee members for the current procurement were redacted and will not be publicly available until after the contract is awarded. The State has a greater interest in protecting the integrity of its decision-making process, which is reliant on "open, frank discussion . . . concerning administrative action" than does Maximus in crafting its Protest. Integrity 165 N.J. at 84.

With respect to Maximus' request for unredacted copies of the Quote Review Technical Checklist for the current Solicitation, the information was redacted pursuant to N.J.S.A. 47:1A-1.1, as intra-agency deliberative material.

[N]either the statute nor the courts have defined the terms . . . "advisory, consultative, or deliberative" in the context of the public records law. The [Government Records] Council looks to an analogous concept, the deliberative process privilege, for guidance in the implementation of OPRA's ACD exemption. Both the ACD exemption and the deliberative process privilege enable a governmental entity to shield from disclosure material that is pre-decisional and deliberative in nature. Deliberative material contains opinions, recommendations, or advice about agency policies.

[O'Shea v. West Milford BOE, GRC Complaint No. 2004-93 (April 2006) (citations omitted).]

As noted by the New Jersey Supreme Court in In re Integrity,

A document must meet two requirements for the deliberative process privilege to apply. First, it must have been generated before the adoption of an agency's policy or decision. In other words, it must be pre-decisional . . . Second, the document must be deliberative in nature, containing opinions, recommendations, or advice about agency policies . . . Purely factual material that does not reflect deliberative processes is not protected . . . Once the government demonstrates that the subject materials meet

those threshold requirements, the privilege comes into play. In such circumstances, the government's interest in candor is the “preponderating policy” and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure.

[In Re the Liquidation of Integrity Ins. Co., 165 N.J. at 84-85 (citations omitted).]

The Quote Review Technical Checklist reveals the deliberations and opinions of the Evaluation Committee members as they reviewed each Quote against the requirements of the Bid Solicitation, prior to the individual members scoring each Quote. Accordingly, the information was properly redacted pursuant to N.J.S.A. 47:1A-1.1 as intra-agency deliberative material.

Maximus has been given a fair opportunity, consistent with the goal of a fair and expeditious conclusion to the procurement process, to present the facts and law supporting its Protest. It has received notice of the Division’s intended action and the Evaluation Committee Report recommending that action. Accordingly, Maximus received all of the information necessary to formulate and file its protest such that it was not denied due process.

Finally, in the protest Maximus requests that the Contract award be stayed until the protest is resolved. The Division’s governing regulations state that “if the contract award is protested pursuant to (a)2 above, the Division shall not award the contract in question until a final decision is rendered by the Director on the merits of the protest.” N.J.A.C. 17:12-3.3(c)¹². While the Director has the authority to award a contract notwithstanding the receipt of protest, such awards are only made if the award will result in a substantial cost savings to the State or if public exigency so requires. Ibid. Here, the Division chose to resolve this protest prior to the Contract being awarded.

CONCLUSION

Based on the foregoing, I find no reason to disturb the Bureau’s recommendation that the Contract for T1392 – Health Benefits Coordinator for NJ FamilyCare Managed Care Programs be awarded to Conduent. Accordingly, I sustain the February 11, 2022 Notice of Intent to Award.

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,



Maurice A. Griffin
Acting Director

MAG: RUD: EEL

c: Paul P. Josephson, Esq.

¹² N.J.A.C. 17:12-3.3(a)(2) grants bidders the right to protest a notice of intent to award a contract.