



State of New Jersey

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

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March 13, 2023

Via Electronic Mail only mbolling@ctcotechnology.com

Michael Bolling
Director of Public Sector Sales
Commercial Technology Contractors, Inc.
152 Huron Ave.
Clifton, NJ 07013

Re: I/M/O Bid Solicitation #22DPP00747– Commercial Technology Contractors, Inc.
Protest of Notice of Intent to Award
T1778 – Communications/ Telecommunications Cable, Wire, and Associated Products

Dear Mr. Bolling:

This final agency decision is in response to your correspondence dated January 25, 2023, submitted on behalf of Commercial Technology Contractors, Inc. (CTCI). In that correspondence CTCI protests the Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #22DPP00747 – T1778 Communications / Telecommunications Cable, Wire and Associated Products (Bid Solicitation). The record of this procurement reveals that the Quote submitted by CTCI was deemed non-responsive for including in its Quote, terms and conditions that conflicted with the State's terms and conditions contrary to Bid Solicitation Section 3.11, *Bidder Additional Terms Submitted with Quote*.

By way of background, on April 14, 2022, the Bureau issued the Bid Solicitation on behalf of all State agencies and Cooperative Purchasing Program participants. Bid Solicitation §1.1 *Purpose and Intent*. The purpose of the Bid Solicitation was to solicit Quotes for the purchase of telecommunication cable, wire, and associated equipment and services including, but not limited to:

- A. Category 1 – Cable, Wire, and Optical Fiber;
- B. Category 2 – Custom Length Cables;
- C. Category 3 – Associated Cable and Wire Hardware;
- D. Category 4 – Test Equipment;
- E. Category 5 – Installation Tools;
- F. Category 6 – Training; and
- G. Category 7 – Data Center Management Solutions and Installation.

It is the intent of the State to award Contracts to those responsible Bidders whose Quotes, conforming to this Bid Solicitation, are most advantageous to the State of New Jersey (State), price and other factors considered. The State may award any or all price lines. Ibid.

On July 27, 2022, the Division's Proposal Review Unit opened seven (7) Quotes which were received by the submission deadline of 2:00 p.m. Eastern Time. After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirements, all seven Quotes were forwarded to the Bureau for evaluation.

In conducting the review of the Quotes, the Bureau determined that CTCI's submitted Quote was non-responsive to the requirements of the Bid Solicitation because CTCI submitted additional terms which conflicted with the requirement of the Bid Solicitation. After completing its review and evaluation the Bureau prepared a Recommendation Report that recommended that Contracts be awarded to three (3) Bidders. Accordingly, on January 11, 2023, the Bureau issued the NOI advising the Bidders that it was the State's intent to award Blanket P.O.s consistent with the January 5, 2023, Recommendation Report.

On January 25, 2023, CTCI submitted a protest letter to the Division challenging the Bureau's determination that its Quote was non-responsive. By way of summary, CTCI states the conflicting terms in its Quote were included in error, the conflicting terms were responsive to a separate, unrelated bid solicitation and CTCI otherwise agreed to all the terms and conditions of the Bid Solicitation by way of execution of the State's Offer and Acceptance form.

In consideration of the CTCI's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest.

Here CTCI submitted required information pursuant to Bid Solicitation Section 3.14 *Technical Quote* wherein it makes clear that "the Bidder shall describe its approach and plans for accomplishing the work outlined in the Scope of Work." In its Technical Quote submission CTCI included the following language:

Unless otherwise specified the Price is based on the assumption that the Delivery of the Equipment and (where applicable) Installation Services will be completed in one continuous visit to the site agreed with the Customer and accordingly Commercial Technology may at its discretion at any time increase the Price to take account of any additional costs to the Company (including but not limited to storage and delivery costs) by reason of Delivery and/or the Installation Services taking more than one visit.

Notwithstanding Delivery and the passing of risk, the property and the legal and beneficial title in the Equipment supplied under the Contract shall not pass to the Customer until Commercial Technology has received in cash or cleared funds payment in full of all sums due for the Equipment and Installation Services (where applicable) and all other equipment and/or services agreed to be sold by the CTCI to the Customer for which payment is then due.

Accordingly, the Vendor is reserving to itself the unilateral right to increase its price and also substantially revising the product delivery and payment terms. These are additional bidder terms that conflict with the bid solicitation and or the State Standard Terms and Conditions. *See*, 4.4.1 *Price Guarantee Period* & 4.3 *Shipping & Handling*. Bidders are expressly warned not to include conflicting terms with its Quote:

3.11 BIDDER ADDITIONAL TERMS SUBMITTED WITH THE QUOTE

A Bidder may submit additional terms as part of its Quote. Additional terms are Bidder-proposed terms or conditions that do not conflict with the scope of work required in this Bid Solicitation, the terms and conditions of this Bid Solicitation, or the State of New Jersey Standard Terms and Conditions. **Bidder proposed terms or conditions that conflict with those contained the State of New Jersey Standard Terms and Conditions will render a Quote non-responsive.** It is incumbent upon the Bidder to identify and remove its conflicting proposed terms and conditions prior to Quote submission.

Quotes including Bidder proposed additional terms may be accepted, rejected, or negotiated, in whole or in part, at the State’s sole discretion.

If Bidder intends to propose terms and conditions that conflict with the State of New Jersey Standard Terms and Conditions, those Bidder proposed terms and conditions shall only be considered if submitted and agreed to pursuant to the electronic question and answer procedure. Bidders shall not submit exceptions or modifications as part of the Quote or on the “Terms and Conditions” Tab through *NJSTART*.

[Emphasis added.]

On June 23, 2022, the Division posted Bid Amendment #1 which amendment answered the Vendor questions submitted during the Question and Answer period as outlined in Bid Solicitation Section 2.1 *Electronic Questions and Answer Period*. During the Q & A process, some bidders did ask questions seeking to modify certain Standard Terms and Conditions, including Indemnification and Insurance, and those requested modifications were rejected by the State. In addition Bid Question #4 expressly addressed additional terms and conditions:

4	Exceptions	<p>Will the State allow Vendors {Bidders} to take exception to any of the Standard Terms and Conditions?</p> <p>As stated in Bid Solicitation Section 2.2, Exceptions to the State of NJ Standard Terms and Conditions (SSTC): "Questions regarding the State of New Jersey Standard Terms and Conditions and exceptions to mandatory requirements MUST be posed during the Electronic Question and Answer period and shall contain the Bidder's suggested changes and the reason(s) for the suggested change(s)." Additionally, as stated in Section 3.11, Bidder Additional Terms Submitted with the Quote: "Quotes including Bidder proposed additional terms may be accepted, rejected, or negotiated, in whole or in part, at the State's sole discretion.</p> <p>If Bidder intends to propose terms and conditions that conflict with the State of New Jersey Standard Terms and Conditions, those Bidder proposed terms and conditions shall only be considered if submitted and agreed to pursuant to the electronic question and answer procedure. Bidders shall not submit exceptions or modifications as part of the Quote or on the "Terms and Conditions" Tab through NJSTART."</p>
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Pursuant to Bid Solicitation Section 2.3, Bid Amendments become part of the Bid Solicitation when posted. Both the Language in the Bid Solicitation, and as repeated and restated in the Bid Amendment, make clear that conflicting terms and conditions not submitted during Q & A shall render the Quote non-responsive.

CTCI also argues that because it executed the *Offer and Acceptance* form, it agreed to all terms, conditions and requirements in the Bid Solicitation. The *Offer and Acceptance* form states:

By submitting a Quote the Bidder certifies and confirms that: (1) It has read, understands, and agrees to all terms, conditions and specification set forth in the Bid Solicitation and the State of New Jersey Standard Terms and Conditions and agrees to furnish the goods and products and/or services in compliance with those terms.

Even though CTCI executed the *Offer and Acceptance*, its submission of non-conforming terms nonetheless rendered the Quote non-responsive. A Bidder stating agreement to all the terms and conditions of the Bid Solicitation while at the same time proposing terms that deviate from the mandatory terms and conditions in the Bid Solicitation, has the potential to deprive the State of the assurance that the contract will be performed according to its specified requirements as the State would not know which terms would apply and govern the work to be performed under the Contract. Further, the submission of non-conforming terms could adversely affect competitive bidding by placing the Bidder in a position of advantage over other Bidders in that a Bidder may presume that its alternate proposed terms will be accepted, and then if not, reserve for itself the right to withdraw a submitted Quote to the detriment of the State. *See, Twp. of River Vale v. Longo Constr. Co.*, 127 N.J. Super. 207, 216 (Law Div. 1974).

The New Jersey Courts have long recognized that the purpose of the public bidding process is to "secure for the public the benefits of unfettered competition." *Meadowbrook Carting Co. v.*

Borough of Island Heights, 138 N.J. 307, 313 (1994). To that end, the “public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good.” Borough of Princeton v. Board of Chosen Freeholders, 169 N.J. 135, 159-60 (1997). The objective of New Jersey’s statutory procurement scheme is “to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.” Barrick v. State of New Jersey, 218 N.J. 247, 258 (2014) (citing Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop., 99 N.J. 244, 256 (1985)).

As such, when evaluating Quotes received the Division is charged with reviewing the Quotes to ensure that the Contract is awarded to that responsible Bidder whose Quote, conforming to the Bid Solicitation, is most advantageous to the State, price and other factors considered. RFP § 1.1 *Purpose and Intent*. To be deemed responsive, a submitted Quote must conform to the requirements of a Bid Solicitation. A Quote cannot materially deviate from the requirements of the Bid Solicitation or the State will have no assurances that the contract would be performed consistent with the requirements of the RFP. In determining whether a material deviation exists, it is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Sternin, 25 N.J. 317, 324 (1957). “If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” River Vale, *supra*, 127 N.J. Super. at 222.

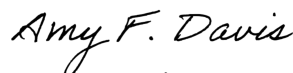
Here the proposed modifications / conflicting terms would allow the Vendor to unilaterally increase its price, and also substantially revise the product delivery and payment terms. These are substantial terms in the Bid Solicitation, and thus non-waivable.

In light of the findings set forth above, I sustain the conclusions in the Bureau’s January 5, 2023, Recommendation Report, that CTCI’s Quote was non-responsive for the inclusion of conflicting terms and uphold the January 11, 2023, Notice of Intent to Award. This is an unfortunate situation for the State, as the Division encourages competition and appreciates the time and effort put forth in preparing and submitting the Quote.

Thank you for your company’s continuing interest in doing business, I encourage you to log into [NJSTART](#) to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities.

This is the Division’s final agency decision. Pursuant to N.J.A.C. 17:12-3.1, this determination is appealable to the Appellate Division of the Superior Court in accordance with the New Jersey Court Rules (R. 2:4-1) which provide a party 45 days to appeal this final agency decision.

Sincerely,



Amy F. Davis
Acting Director

AFD: DPK

c: M. Dunn
S. Brandbergh