



## State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PURCHASE AND PROPERTY

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November 21, 2016

Via Electronic Mail [[jonathan.light@cgi.com](mailto:jonathan.light@cgi.com)] and USPS Regular Mail

Jonathan F. Light, Vice President, Consulting Services  
CGI Technologies and Solutions Inc.  
11325 Random Hills Road  
Fairfax, VA 22030

RE: Bid Solicitation Specification Challenge  
Bid Solicitation {RFP} # 16DPP00055 *Revenue Enhancements from Federal And Other Programs*

Dear Mr. Light:

This correspondence is in response to your letter dated October 28, 2016, referencing the subject Bid Solicitation {Request for Proposal} (hereinafter "RFP") submitted to the Division of Purchase and Property (Division) on behalf of CGI Technologies and Solutions Inc. (CGI). In that letter, CGI challenges certain specifications of the subject RFP in accordance with N.J.A.C. 17:12-3.2 and requests its proposed changes be incorporated into a revised RFP to produce "more competition and better pricing."

In consideration of CGI's specification challenge, I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of CGI's specification challenge.

By way of background, the subject RFP was issued by the Division's Procurement Bureau (Bureau) on behalf of the Office of Management and Budget (OMB) to solicit Quotes {Proposals} (hereinafter proposals) for one or more Vendors {Contractors} "to maximize federal and other reimbursements and enhancements and/or cost avoidance initiatives." RFP §1.1 *Purpose and Intent*. Vendors' {Bidders'} (hereinafter bidder) electronic questions were due to the Bureau by September 27, 2016. On October 21, 2016, the Bureau advised all bidders that the Bid Opening Date had been extended from October 28, 2016, to November 4, 2016, and also posted Bid Amendment {Addendum} #1, which included answers to bidder-submitted questions.

Thereafter, on November 2, 2016, the Bureau extended the Bid Opening Date to November 30, 2016.

In its specification challenge, CGI states that "there are a number of RFP terms that are not in the State's best interests as they will not result in the most cost effective approach." CGI further states that its

requested changes will “result in more competition and better pricing from bidders qualified to maximize revenue enhancement opportunities for the State.”

The record of this procurement shows that CGI submitted 19 questions through the specified electronic Question and Answer (Q&A) process as set forth in the RFP by the Q&A submission deadline. All of these questions were reviewed by both the Bureau and OMB and responded to in Bid Amendment {Addendum} #1. Bid Amendment {Addendum} #1 resulted in several changes to the terms of the RFP. Listed below are those specification changes that resulted in concessions in response to CGI’s questions:

- Added language to several sections in the RFP modifying requirements for mandatory project and contingency plans, etc., to “if applicable” and “if requested” in response to question #10;
- Clarified the requirement for the contractor’s confidential information in response to question #14;
- Reduced limitation of liability for data breach and breach of confidentiality from an uncapped amount to a \$5,000,000.00 cap in response to question #19;
- Replaced professional liability insurance requirements in response to question #22.

The specification challenges posed in CGI’s protest represent three specific challenges previously considered by the Bureau during the Q&A process, but which did not result in changes to the RFP. CGI’s three specification challenge points are below, along with the corresponding question posed during the Q&A process. The Division’s Hearing Unit addresses each of these points below.

In its first point, CGI requests that the State limit the contractor’s financial liability in the event of a breach of confidentiality. CGI Specification Challenge #1:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
Section 5.9.1 – Data Confidentiality	The Vendor {Contractor} shall assume total financial liability incurred by the Vendor {Contractor} associated with any breach of confidentiality.	While contractors are willing to be accountable for their own performance, they should not have to shoulder the State's responsibility for protecting their own data. In addition, liability should only arise if data is actually (or reasonably likely to have been) disclosed in a manner not permitted under the contract. Accordingly, will the State consider revising the second paragraph to reflect this concept?	We provide the following language for your consideration: "The Vendor {Contractor} shall assume financial liability incurred by the Vendor {Contractor} associated with any breach of Confidentiality to the extent resulting solely from Contractor's failure to comply with Contractor's data security obligations under the Contract."

As noted below, CGI posed the identical question during the Q&A period, which was considered by the Bureau and addressed Bid Amendment {Addendum} #1:

Question #	Page #	RFP Section Reference	Question	Answer
12		Section 5.9.1 – Data Confidentiality	While contractors are willing to be accountable for their own performance, they should not have to shoulder the State's responsibility for protecting their own data. In addition, liability should only arise if data is actually (or reasonably likely to have been) disclosed in a manner not permitted under the contract. Accordingly, will the State consider revising the second paragraph to	No, the State does not accept these proposed modifications.

			reflect this concept? We provide the following language for your consideration: "The Vendor {Contractor} shall assume financial liability incurred by the Vendor {Contractor} associated with any breach of confidentiality to the extent resulting solely from Contractor?s (sic) failure to comply with Contractor?s (sic) data security obligations under the Contract."	
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A review of CGI’s first specification challenge shows it sought to limit the contractor’s financial liability to those circumstances where contractor failed to comply with its specified data security obligations. The Bureau previously considered this request and CGI’s suggested language and declined to alter the language of the RFP. It is the State’s standard position that the contractor is responsible for securing all data and maintaining confidentiality. Accepting CGI’s proposed language would result in the State assuming an unacceptable risk.

Based on the foregoing, Specification Challenge #1 is denied.

In its second point, CGI requests the addition of a gross negligence or willful misconduct trigger for notification and notification compliance obligations. CGI submits in its Specification Challenge #2:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
Section 5.9.2 – Data Security Standards	Data Breach: Unauthorized Release Notification: The Vendor {Contractor} must comply with all applicable State and Federal laws that require the notification of individuals in the event of unauthorized release of personally identifiable information or other event requiring notification. In the event of a breach of any of the Vendor’s {Contractor’s} security obligations or other event requiring notification under applicable law ("Notification Event") [...]	While we acknowledge the requirement to accept responsibility for notifications resulting from breach of our security obligations; however, it would present an inappropriate level of risk to also indemnify the State for any claims related to an “other event requiring notification under applicable law” that was caused by the State or other third party not under our control.	Accordingly, we request the State to please modify this section as follows: “The Vendor {Contractor} must comply with all applicable State and Federal laws that require the notification of individuals in the event of unauthorized release of personally identifiable information or other event requiring notification <u>to the extent such other event resulted from the gross negligence or misconduct of the Contractor or from conditions or events beyond its reasonable control</u> . In the event of a breach of any of the Vendor {Contractor}’s security obligations or other event <u>to the extent such other event resulted from the gross negligence or misconduct of the Contractor or from conditions or events beyond its reasonable control</u> requiring notification under applicable law (“Notification Event”),[...]"

The Bureau previously addressed in Bid Amendment {Addendum} #1 a similar request posed by CGI during the Q&A process:

Question #	Page #	RFP Section Reference	Question	Answer
15	48	Section 5.9.2 – Data Security Standards	While we acknowledge the requirement to accept responsibility for notifications resulting from breach of our security obligations; however, it would present an inappropriate level of risk to also indemnify the State for any claims related to an ? (sic) other event requiring notification under applicable law? (sic) that was caused by the State or other third party not under our control. Accordingly, we request the State to please modify this section as follows: ? (sic) The Vendor {Contractor} must comply with all applicable State and Federal laws that require the notification of individuals in the event of unauthorized release of personally identifiable information or other event requiring notification to the extent such other event resulted from the gross negligence or misconduct of the Contractor or from conditions or events beyond its reasonable control. In the event of a breach of any of the Vendor {Contractor}'s (sic) security obligations or other event to the extent such other event resulted from the gross negligence or misconduct of the Contractor or from conditions or events beyond its reasonable control requiring notification under applicable law (?Notification Event?), (sic)[...]"	No, the State does not accept these proposed modifications.

As noted above, the Bureau previously considered and denied CGI's second point that the Bureau limit the contractor's notification requirements in the event of an unauthorized release of personally identifiable information or "other event requiring notification" to those instances resulting from the gross negligence or misconduct of the contractor or conditions/events beyond the contractor's reasonable control. The RFP provided that "[i]n the event of a breach of any of the [contractor's] security obligations or other event requiring notification[,] the contractor "must assume responsibility for informing the State Contract Manager within 24 hours and all such individuals in accordance with applicable law and to indemnify, hold harmless and defend the State of New Jersey, its officials, and employees from and against any claims, damages, or other harm related to such Notification Event" in accordance with RFP 5.17. RFP § 5.9.2, *Data Security Standards*. CGI's proposed language would shift some or all of this liability to the State, which the Bureau determined to be unacceptable.

The proposed solution to this RFP could include data elements that may trigger notification obligations in the event of a breach of security obligations. For example, a contractor could offer to enhance federal Medicaid revenue by reviewing all of the State's patient-specific medical claims data to ensure all family planning services are being claimed at the appropriate amount offered by the federal government. Accordingly, the Bureau determined it could not make the requested changes. Additionally, the terms of RFP Section 5.9.2 and Section 5.17 were approved by the Office of Information Technology (OIT) and the reduction of the threshold triggering the contractor's indemnification obligations could materially and unacceptably diminish the State's rights.

Based on the foregoing, Specification Challenge #2 is denied.

In its third point, CGI requests that indirect, punitive, and exemplary damages be added to the limitation of liability clause. CGI Specification Challenge #3:

RFP Section Reference	RFP Language	CGI Concern	Desired Change
Section 5.17.1 – Indemnification (Limitation of Liability (SSTC 4.1.1))	The Vendor {Contractor} shall not be liable for special, consequential, or incidental damages.	We have a long history of successful performance in support of the State under contracts that include a disclaimer of indirect, special, punitive and exemplary damages. The absence of such a disclaimer increases liability for performance and would make it difficult for large or publicly held IT firms, to participate in these types of projects since such liability places risk on the Contractor inordinate to their performance responsibilities and associated ability to secure appropriate insurance.	Please revise the provision to read: “The Vendor {Contractor} shall not be liable for special, consequential, <u>indirect, punitive, exemplary,</u> or incidental damages.”

During the electronic question and answer period, a similar question, reproduced below, was submitted, which the Bureau responded to in Bid Amendment {Addendum} #1:

Question #	Page #	RFP Section Reference	Question	Answer
20	53	Section 5.17.1 – Indemnification (Limitation of Liability (SSTC 4.1.1))	The absence of a disclaimer of indirect damages increase liability for performance and would make it difficult for large or publicly held IT firms, to participate in these types of projects since such liability places risk on the Contractor inordinate to their performance responsibilities and associated ability to secure appropriate insurance. We have a long history of successful performance in support of the State under contracts that have included exclusions for "indirect, special, punitive or exemplary damages even if Contractor has been advised of the possibility of such damages." Will the State please consider adding ",indirect, and punitive" to the last sentence in this section?	No, the State does not accept these proposed modifications.

RFP Section 4.1.1, *Limitation of Liability*, provides that a contractor is liable to the State only for “actual, direct damages resulting from the [contractor’s] performance or non-performance of, or in any manner related to, this Blanket PO {Contract} . . . .” Because the contractor will only be liable for “actual, direct damages,” it is not necessary to specify the converse: that a contractor will not be liable for indirect damages. Rather, this is implicit. The addition of “indirect,” “punitive,” and “exemplary” damages to the limitation of liability would materially and unacceptably alter the State’s assumption of risk. As originally reviewed by the Division of Risk Management, the RFP represents the State’s standard practice concerning limitation of liability. The State declines the request to accept these express limitations regarding liability.

Based on the foregoing, CGI’s specification challenge #3 is denied.

As outlined above, the specification challenges posed by CGI are denied. Each of CGI's challenges was previously considered and where appropriate, and in the sole discretion of the State, addressed by the Bureau, in consultation with the Division of Law, OIT, OMB, and the Division of Risk Management. The Division will not approve these specification challenges as they will result in the State assuming unprecedented and unacceptable levels of risks. The Hearing Unit finds no reason to disturb these determinations.

The RFP is upheld and the Procurement Bureau is directed to proceed with the subject solicitation. While this determination may affect any possible proposal submission, I note that the decision to submit a proposal subject to the requirements of the RFP is at the discretion of the bidder. This is my final agency decision.

Sincerely,



Maurice A. Griffin  
Chief Hearing Officer

MAG:DF

c: P. Michaels  
L. Spildener  
M. Tagliaferri