



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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October 11, 2018

Via Electronic Mail [pjbbbr@aol.com] and USPS Regular Mail

Pamela J. Brodowski
BRB Valuation & Consulting Services
22 Windham Drive
Eastampton, NJ 08060

Re: I/M/O Bid Solicitation #19DPP00287 BRB Valuation & Consulting Services
Protest of Notice of Proposal Rejection
T3069 Easement Review Appraisal Services: SADC

Dear Ms. Brodowski:

This letter is in response to your email of September 5, 2018, on behalf of BRB Valuation & Consulting Services (“BRB”) which was received by the Division of Purchase and Property’s (“Division”) Hearing Unit. In that email, BRB protests the Notice of Proposal Rejection issued by the Division’s Proposal Review Unit for Bid Solicitation #18DPP00287 – T3069 Easement Review Appraisal Services: SADC (“Bid Solicitation”).¹ The record of this procurement reveals that BRB’s Quote was rejected for failing to submit the necessary pricing information with its Quote.

By way of background, on July 19, 2018, the Division’s Procurement Bureau (“Bureau”) issued the Bid Solicitation on behalf of the Department of Agriculture’s State Agriculture Development Committee (SADC) for SADC certified Appraisers to conduct a review of Independent Appraiser’s reports for Farmland Preservation and subsequently recommend the Market Value of the Development Easement

¹ For consistency, this final agency decision uses terminology employed by the State of New Jersey’s **NJSTART** eProcurement system. For ease of reference, the following is a table which references the **NJSTART** term and the statutory, regulatory and/or legacy term.

NJSTART Term	Statutory, Regulatory and/or Legacy Term
Bid Solicitation	Request For Proposal
Bid Amendment	Addendum
Change Order	Contract Amendment
Master Blanket Purchase Order	Contract
Offer and Acceptance Page	Signatory Page
Quote	Proposal
Vendor {Bidder}	Bidder
Vendor {Contractor}	Contractor

to the SADC. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award up to 12 Master Blanket Purchase Orders ("Blanket P.O.s") to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation, are most advantageous to the State, price and other factors considered. Ibid.

On August 23, 2018, the Division's Proposal Review Unit opened 13 Quotes which were received by the submission deadline of 2:00 pm eastern time. After conducting a review of the Quotes received, the Division's Proposal Review Unit issued a Notice of Proposal Rejection to BRB for missing pricing information. BRB's Quote did not include any attachments.

In response to the Notice of Proposal Rejection, on September 5, 2018, BRB sent an email to the Division's Hearing Unit stating:

I submitted a bid proposal to the State of New Jersey, NJSTART for Review Appraisal work for SADC. I received a notice on August 28, 2018 that my bid was rejected (see attached). The reason for the rejection was that I had Missing pricing information. When I filled out the online form, I know I put \$900 per review in there. Maybe I put it in the wrong place. I have been doing Appraisal Reviews for a number of years for the SADC. I would like to continue to do reviews for the SADC. The online process was a little confusing and am hoping you will take that into account and allow me to continue doing work for the SADC. Please advise as to how I should move forward in my protest filing of this decision. Thanks for your time.

In consideration of BRB's protest, I have reviewed the record of this procurement, including the Bid Solicitation, BRB's proposal and protest, 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. I set forth herein the Division's Final Agency Decision.

The Division's administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal shall² conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:
 - ...
 - 4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), *emphasis added.*]

² "Shall or Must – Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a Quote {Proposal} as non-responsive." Should or May – "Denotes that which is permissible or recommended, not mandatory." Bid Solicitation § 2.2 *General Definitions.*

Among those forms required to be submitted with the Quote is the State-Supplied Price Sheet discussed in Bid Solicitation Section 4.4.5.

With respect the submission of Quote pricing, the Bid Solicitation cautioned Vendors {Bidders} regarding the need to ensure that all required forms, including the State-Supplied Price Sheet, are properly submitted. Specifically, Bid Solicitation Section 4.4 *Quote Content* states in part:

Note: Vendors {Bidders} submitting Quotes through NJSTART must complete the State-supplied price sheet/schedule(s) (Volume 3) accompanying this Bid Solicitation and upload it as an attachment on the “Attachments” Tab (See Section 4.4.5 of this Bid Solicitation).

The requirement to use the State-supplied price sheet for Vendor pricing was reiterated in Bid Solicitation Section 4.4.5 *State-Supplied Price Sheet* which states “[t]he Vendor {Bidder} must submit its pricing using the State-Supplied Price Sheet accompanying this Bid Solicitation and located on the “Attachments” Tab.” With respect to the submission of pricing on the *NJSTART* Items Tab, the Bid Solicitation advised:

If the Vendor {Bidder} is submitting a *NJSTART* Quote, the Vendor {Bidder} must enter a Unit Cost of \$1.00 for each price line item on the “Items” Tab in *NJSTART*. The Vendor {Bidder} is instructed to do so only as a mechanism to comply with Bid Solicitation Section 6.8 and prevent all pricing from being publicly displayed in *NJSTART*.

[Bid Solicitation Sections 4.4 *Quote Content* and 4.4.5.1 *NJSTART Pricing Submission Instructions*.]

To assist Vendors {Bidders} in completing the State-Supplied Price Sheet, the Bid Solicitation further advised:

The Vendor {Contractor} shall:

- A. Provide a Firm Fixed price for the completion of all deliverables required in a Desk Review (Reference Bid Solicitation Section 3.3.1, for each year of the proposed Blanket P.O. term (Price Line #1);
- B. Provide a Firm Fixed price for the completion of additional reporting engagements as referenced in Bid Solicitation Section 3.3.2. The Vendor’s {Bidder’s} proposed pricing must not exceed the limits demonstrated below for each Assignment type:
 1. Letter of Addendum – The Vendor’s {Bidder’s} proposed Firm Fixed price must not exceed \$150 per Letter of Addendum;
 2. Highlands Dual Appraisal Consideration Report: The Vendor’s {Bidder’s} proposed Firm Fixed price must not exceed \$300 per Pineland Review Appraisal;
 3. Pinelands Review Appraisal Report: The Vendor’s {Bidder’s} proposed Firm Fixed price must not exceed \$300 per Pineland Review Appraisal;

4. Subdivision Method Report – The Vendor’s {Bidder’s} proposed Firm Fixed price must not exceed \$500 per assignment.

C. Provide an All-inclusive Hourly Rate for the provision of testimony and litigation support as described in Bid Solicitation Section 3.3.3.

The Vendor {Bidder} must submit pricing for all price lines on the State-supplied price schedule. Failure to submit all information required may result in the Vendor’s {Bidder’s} Quote being deemed non-responsive.

[Bid Solicitation § 4.4.5.2 *State-Supplied Price Sheet Instructions.*]

As shown in the screen shot below, each of the six price lines included on the State-Supplied Price Sheet represents a specific task or service for which easement appraisal-related services are sought by SADC.

T3069 - Easement Review Appraisal Services- SADC Price Schedule Bid Solicitation [RFP]: 19DPP00XXX				
Please reference Bid Solicitation Section 4.4.5 for instructions.				
Bidder {Vendor} Name:	Enter Vendor {Bidder} Name Here	Date:	Enter Date Here	
Price Line	Price Line Description - Desk Review (Reference Bid Solicitation 3.3.1)	Firm Fixed Price (Each)		
		Year 1	Year 2	Year 3
1	Appraisal Desk Review (Reference Bid Solicitation Section 3.3.1)			
Average Firm Fixed Unit Cost Years 1-3 (Automatically Populates)		#DIV/0!		
Price Line	Price Line Description - Additional Reporting Engagements (Reference Bid Solicitation Section 3.3.2)	Firm Fixed Price (Each)		
2	Letter of Addendum SUBMITTED PRICING MUST NOT EXCEED \$150 (Reference Bid Solicitation Section 3.3.2(A))			
3	Highlands Dual Appraisal Consideration Report SUBMITTED PRICING MUST NOT EXCEED \$300 (Reference Bid Solicitation Section 3.3.2(B))			
4	Pinelands Review Appraisal Report SUBMITTED PRICING MUST NOT EXCEED \$300 (Reference Bid Solicitation Section 3.3.2(C))			
5	Subdivision Method Report SUBMITTED PRICING MUST NOT EXCEED \$500 (Reference Bid Solicitation Section 3.3.2(D))			
Price Line	Price Line Description - Testimony/Litigation Support (Reference Bid Solicitation Section 3.3.3)	All-Inclusive Hourly Rate (Each)		
6	Testimony/Litigation Support			

BRB did not submit the State-Supplied Price Sheet with its Quote. Rather, BRB wrote “\$900.00” on the “Items” Tab within *NJSTART*.

Quote 00002450 - BRB Valuation & Consulting Services

General **Items** Questions Subcontractors Terms & Conditions Attachments Evaluations Preference Reminders Summary

General Evaluations

Sort by Column: Print Sequence Sort Descending Go

Item #	Print Sequence	Questions Exist	Quantity	UOM	Unit Cost	Discount %	Tax Rate	Freight	Extended Amount	No Bid	No Charge	See Quote Attachment(s)
1	1.0	No	The Vendor (Bidder) must enter a Unit Cost of \$1.00 for each price line item on the Items Tab. The Vendor (Bidder) must ... View Detail									
			1.0	EA	\$900.00	0.0%		\$0.00	\$900.00	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Alternate Description:												
										Quote Response Total \$900.00		

The question then is whether BRB’s pricing information that was submitted on the “Items” Tab results in a deviation from the requirements of the Bid Solicitation. In order for BRB’s Quote to be considered responsive, BRB’s failure to submit all of the information required by the State-Supplied Price Sheet with its Quote would have to be deemed a minor irregularity. Minor irregularities can be waived pursuant to the authority vested by N.J.A.C. 17:12-2.7(d) and Bid Solicitation Section 1.4.10, *Quote {Proposal} Acceptances and Rejections*. 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). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the court in Twp. of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). “In River Vale, Judge Pressler declared that after identifying the existence of a deviation, the issue is whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity.” In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), citing River Vale, *supra*, 127 N.J. at 216. The River Vale court set forth a two-part test for determining whether a deviation is material:

First, whether the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[River Vale, *supra*, 127 N.J. at 216.]

“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.” Id. at 222.

BRB’s only pricing submission was on the Items Tab. As shown on the screen shot above, the unit of measure identified on the Items Tab is “each.” The instructions for the State-Supplied Price Sheet required that for Price Line 1, the Vendor {Bidder} provide a yearly firm fixed price for the Appraisal Desk Review. Price Lines 2 – 5 required that the Vendor {Bidder} propose a per task rate, not to exceed the maximum rate as indicated in the Price Lines. Specifically,

- Price Line 2- Submitted Pricing Must Not Exceed \$150
- Price Line 3 - Submitted Pricing Must Not Exceed \$300
- Price Line 4 - Submitted Pricing Must Not Exceed \$300
- Price Line 5- Submitted Pricing Must Not Exceed \$500

Finally, Price Line 6 sought an hourly rate for litigation support.

The Division cannot accept the \$900 Quote price identified as “each”, as a yearly rate (Price Line 1), a per task rate (Price Lines 2 – 5), and an hourly rate (Price Line 6), as those are distinct units of measurement.

Moreover, with respect to Price Lines 2 – 5, if the Division could accept BRB’s Quote price of \$900 as the Quote price for each Price Line, the Quote price would far exceeded the maximum per task price allowed. In the alternative, if the Division were to accept BRB’s Quote price of \$900 as the total cost for all of the tasks identified in Price Lines 2 – 5, the State would not have a firm fixed price for the cost it would be charged for each of the individual services sought in Price Lines 2 – 5 as the Division cannot make a determination as to how the \$900 Quote price should be distributed among those four Price Lines. The Division cannot allow BRB to clarify how the \$900 Quote price should be distributed as doing so would result in an impermissible clarification, contrary to the Court’s holding in In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995) (“In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP”); In re Motor Vehicle Comm’n Surcharge Sys. Accounting and Billing Servs., No. A-3136-16, at *32 (App. Div. Feb. 8, 2018) (explaining the Vendor’s “original bid was non-conforming, but the Division impermissibly allowed the bid thereafter to be materially altered”).

The responsibility for ensuring that all necessary forms and other submittals are uploaded into **NJSTART** necessarily and appropriately rests solely with the Vendor {Bidder}. Bid Solicitation § 1.4.2 *Vendor {Bidder} Responsibility*. Here, unfortunately, BRB submitted a Quote without all of the necessary pricing information included. If the requirements of N.J.A.C. 17:12-2.2 are not met, a Quote must be rejected. This regulation mandates stringent enforcement to maintain the equal footing of all Vendors {Bidders} and to ensure the integrity of the State’s bidding process. BRB’s failure to submit its Quote Pricing consistent with the requirements of the Bid Solicitation, is a material deviation. Permitting BRB, or any other Vendor {Bidder}, to submit the required information after the Quote opening deadline has passed, would place that Vendor {Bidder} in a position of advantage over other Vendors {Bidders} who timely submitted the required pricing information with the Quote.

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. However, in light of the findings set forth above, I have no choice but to deny your request for eligibility to participate in the competition for the subject Bid Solicitation. This is my final agency decision on this matter.

Thank you for your company's interest in doing business with the State of New Jersey and for registering your business with **NJSTART** at www.njstart.gov, the State of New Jersey's eProcurement system. I also invite you to visit the **NJSTART** Vendor Support Page and review the Division's Quick Reference Guide entitled "How to review a submitted Quote" which provides information and instructions on how to review your company's submitted Quote.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: TCR

c: A. Davis
K. Popso