



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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July 8, 2020

Via Electronic Mail Only BSholk2@comcast.net

Bettina Durmaskin Sholk
5 Rosemary Road
East Brunswick, NJ 08816

Re: I/M/O Bid Solicitation #19DPP00335 Sholk
Protest of Notice of Intent to Award
T2957 - Appraisal Services for NJ Department of Environmental Protection

Dear Ms. Sholk:

This letter is in response to your correspondence of April 23, 2020, which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that letter, you protest the April 20, 2020, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #19DPP00335 – T2957 Appraisal Services for New Jersey Department of Environmental Protection (Bid Solicitation).

By way of background, on July 12, 2019, the Bureau issued the Bid Solicitation on behalf of the New Jersey Department of Environmental Protection (DEP). Bid Solicitation § 1.1 *Purpose and Intent*. The purpose of the Bid Solicitation was to solicit Quotes for Real Estate Appraisal services from qualified New Jersey Certified General Real Estate Appraisers for the purpose of acquiring properties as open space preservation or flood plain protection by the State of New Jersey. *Ibid*.

On September 13, 2019, the Division's Proposal Review Unit opened thirty-eight (38) Quotes, which were received by the submission deadline of 2:00 pm eastern time. After conducting an initial review of the Quotes received for the compliance with mandatory Quote submission requirements, the Division's Proposal Review Unit forwarded thirty-seven (37) Quotes to the Bureau for further review and evaluation consistent with the requirements of the Bid Solicitation Section 6.7 *Evaluation Criteria*.

On March 25, 2020, after completing the review and evaluation of the submitted Quotes, the Bureau issued a Recommendation Report which recommended Blanket P.O. awards to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation are most advantageous to the State, price and other factors considered. On April 20, 2020, the NOI was issued advising all Vendors {Bidders} that it was the State's intent to award Blanket P.O.s consistent with the Bureau's Recommendation Report.

With respect to the Quote submitted by Bettina, the Bureau's Recommendation Report noted the following:

Bettina

The Quote submitted by Bettina was determined by the Bureau to be non-responsive to the mandatory material requirements of the Bid Solicitation, as it failed to provide the required pricing for Price Line 4 in the Central Region as required by Section 4.4.5.2, *State Supplied Price Sheet Instructions*. Section 4.4.5.2 states, "The Vendor {Bidder} must provide a Firm-Fixed all-inclusive hourly rate for both price lines of a Region in order to be eligible for award of that Region. The Vendor {Bidder} must be willing and able to service the entire Region that is bid. Quotes submitted for less than an entire Region will be rejected and deemed as non-responsive for the respective Region. The Vendor {Bidder} is able to submit a Quote for a single Region, or any combination of Regions." The Bureau notes that the Vendor {Bidder} did not submit a Quote for any other Region.

Subsequently, the Bureau found Bettina to be non-responsive to the mandatory material requirements of the Bid Solicitation and its Quote was not further evaluated.

On April 23, 2020, Bettina sent a protest letter to the Division challenging the Bureau's April 20, 2020 NOI and the determination that its submitted Quote was non-responsive.

In consideration of Bettina's protest, I have reviewed the record of this procurement, including the Bid Solicitation, Molinari's Quote 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 shall¹ conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

6. Include all RFP-required pricing information.

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

Among those attachments required to be submitted with the Quote is the State-Supplied Price Sheet discussed in Bid Solicitation Section 4.4.5 *State-Supplied Price Sheet*. More specifically, to assist Vendors {Bidders} in completing the State-Supplied Price Sheet, the Bid Solicitation advised in part:

The Vendor {Bidder} must submit its pricing using the State-Supplied Price Sheet accompanying this Bid Solicitation and located on the "Attachments" Tab.

The Vendor {Bidder} must provide a Firm-Fixed all-inclusive hourly rate for both price lines of a Region in order to be eligible for award of that Region. The Vendor {Bidder} must be willing and able to service the entire Region that is bid. Quotes submitted for less than an entire Region will be rejected and deemed as non-responsive for the respective Region.

¹ "Shall – Denotes that which is a mandatory requirement." Bid Solicitation § 2.2 *General Definitions*.

The Vendor {Bidder} is able to submit a Quote for a single Region, or any combination of Regions.

In the event that a Vendor {Bidder} using *NJSTART* to submit a Quote uploads a State-Supplied Price Sheet and completes the “Items” Tab in *NJSTART* (instead of entering a Unit Cost of \$1.00 as instructed), the State-Supplied Price Sheet will govern.

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

The review of Bettina’s submitted Quote reveals that the submitted Price Sheet did not include pricing for Price Line 4 for the Central Region as required. As indicated above, Bid Solicitation § 4.4.5.2 *State-Supplied Price Sheet Instructions* required that the Vendor {Bidder} submit “a Firm-Fixed all-inclusive hourly rate for both price lines of a Region in order to be eligible for award of that Region.” Emphasis added. Because Bettina did not provide a Firm-Fixed all-inclusive hourly rate for both price lines of the Region as required; the Bureau deemed Bettina’s Quote non-responsive. Recommendation Report, pg. 3.

In its protest letter Bettina states that it did not submit a Firm Fixed Unit Price for Price Line 4 “Legal Services Hourly Rate”, because

[I was baffled when I received notification that I had been “nonresponsive” to the application. I have reread the instructions and see that it directs us to provide an hourly rate “for both price lines.” The form lists “Appraisal Services Hourly Rate” and I provided an hourly rate. The next line lists “Legal Services Hourly Rate.” I am not an attorney and I am not licensed to provide legal services. As an appraiser I am hired to provide “litigation support services”, but that is different from “legal services”. I work with legal professionals. Typically, I submit bids to Counties and Municipalities that are directed to appraisers, engineers, planners and attorneys. The attorneys provide “legal services.” In Section 3.6 of the Green Acres Solicitation you refer to “Litigation Support.” The form that you required us to complete asks for a fee for “Legal Services.” The bid form was not clear, was inaccurate and misleading. It was inconsistent with the Bid Solicitation.

[Bettina’s April 23, 2020 protest letter.]

With the protest, Bettina submitted a price Quote for providing “Litigation Support”.

First, a review of the subject Bid Solicitation reveals that “Testimony and Litigation Support” is described as follows:

The Vendor {Contractor} shall ensure that its personnel are available to answer questions from the Using Agency and to testify at depositions and/or administrative hearings regarding other Appraisal services work. The Using Agency shall notify the Vendor {Contractor} via email of all requests to schedule consultation, preparation, testimony and litigation support and the Vendor {Contractor} must confirm via e-mail, within 48 hours, that its personnel are available to appear. In such instance, the Vendor {Contractor} awarded the all-inclusive hourly rate shall be paid

with no more than three (3) hours billed by the Vendor {Contractor} for preparation relating to scheduled testimony before a deposition or administrative hearing unless otherwise approved by the Using Agency.

The Vendor's {Contractor's} personnel shall be required to cooperate with the Attorney General's office in responding to discovery requests and preparing for testimony. In preparation for the depositions, the Vendor {Contractor} may charge up to three (3) hours. If preparation is beyond three (3) hours, this time must be justified by Vendor {Contractor}, and approved in advance by the respective Using Agency.

If the Vendor {Contractor} is not advised prior to the day of the deposition or administrative hearing at which Vendor {Contractor} personnel has been scheduled to appear that the event has been cancelled, and the Vendor {Contractor} personnel travels to such event, or the Vendor {Contractor} personnel travels to a deposition or administrative hearing at which the Vendor {Contractor} personnel has been scheduled to appear but where testimony is not required, the Vendor {Contractor} may bill the Using Agency the awarded all-inclusive hourly rate for only the first hour of the Vendor {Contractor} personnel's testimony. There are no pre-payments for testimony or depositions.

[Bid Solicitation Section 3.6 *Testimony and Litigation Support*.]

However, there is no similar description or definition for the term "Legal Services". In fact, the only places the term "Legal Services" is used is on the State-Supplied Price Sheet and in Bid Solicitation Section 6.7.1 *Vendor's {Bidder's} State-Supplied Price Sheet* which stated:

For evaluation purposes, Vendors {Bidders} will be ranked from lowest to highest according to the hourly rate supplied on the Appraisal Services line in each Region on the State-Supplied Price Sheet accompanying this Bid Solicitation. Although the Legal Services hourly rate will not be part of the ranking, it will be evaluated for reasonableness.

While the Bureau may have intended that the terms "Testimony and Litigation Support" and "Legal Services" be used interchangeably, the terms were not defined as such. The Bureau's failure to define "Legal Services" in the Bid Solicitation and/or State-Supplied Price Sheet, and in an absence of any explanation in the Bid Solicitation documents that "Legal Services" and "Testimony and Litigation Support" are the same for the purposes of this Bid Solicitation, created an ambiguity in the procurement. This ambiguity lead to confusion among the Vendors {Bidders} and resulted in eleven (11) out of thirty eight (38) Vendors {Bidders} being found non-responsive to the mandatory material requirements of the Bid Solicitation, because they failed to provide required pricing for "Legal Services Hourly Rate". See Recommendation Report, pgs. 3-6.

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). Consistent with this purpose, the New Jersey procurement law provides that “any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do.” *Ibid.* Here, after reviewing this record of this procurement, because of the ambiguity between the Bid Solicitation and the State supplied price sheet I have determined that it is in the public’s interest to reject all Quotes submitted and cancel the subject Bid Solicitation.

In the light of the findings set forth above, I remand this matter back to the Bureau with direction to rescind the Notice of Intent to Award, to cancel this Bid Solicitation and to re-procure the services sought if desired by the using agency.² 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. 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. Please monitor the Division’s [NJSTART](#) website for future bidding opportunities for these services.

Sincerely,


Maurice A. Griffin
Acting Director

MAG: RUD

c: R. Regan
K. Popso
M. Dunn

² Although, I need not address Bettina’s second protest point in light of the finding of this decision, with the protest Bettina included the hourly rate for price line 4 as required by the Bid Solicitation; however, allowing Bettina to revise its pricing information after the Quote submission deadline would result in an impermissible supplementation of the Quote, which the Division cannot allow as doing so would be 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 *On-Line Games* the Appellate Division held that “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”. Here, the Division would not be able to accept Bettina’s hourly rate for Price Line 4, after the Quote opening as requested, as doing so is an impermissible supplementation, change and correction to the submitted Quote.