



State of New Jersey

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

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June 27, 2024

Via Electronic Mail ellingwood@berrydunn.com

Christopher S. Ellingwood, CISA, Principal
Berry, Dunn, McNeil & Parker, LLC
2211 Congress Street
Portland, ME 04102

Re: I/M/O Bid Solicitation 23DPP00821 Berry, Dunn, McNeil & Parker, LLC
Protest of Notice of Intent to Award
T3141 Lottery Performance Audit

Dear Mr. Ellingwood:

This final agency decision is in response to your letter of June 12, 2024, submitted on behalf of Berry, Dunn, McNeil & Parker, LLC (BerryDunn) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that letter, BerryDunn protests the May 29, 2024, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation 23DPP00821 – T3141 Lottery Performance Audit (Bid Solicitation). The record of this procurement reveals that the Quote submitted by BerryDunn was deemed non-responsive on the grounds that BerryDunn submitted terms and conditions that conflicted with the State's Standard Terms and Conditions. Specifically, BerryDunn proposed alternative indemnification terms that had already been rejected during the electronic question and answer period.

By way of background, on August 16, 2023, the Procurement Bureau issued the Bid Solicitation on behalf of the Division of State Lottery (Lottery). The purpose of the Bid Solicitation was to solicit Quotes for the creation and completion of annual performance audits of the Lottery and its contracted vendors. Bid Solicitation Sec. 1.1, *Purpose and Intent*. It is the intent of the State to award a Contract to that responsible Bidder whose Quote, conforming to this Bid Solicitation is most advantageous to the State, price and other factors considered. The State may award any or all price lines.

In accordance with Bid Solicitation Section 2.1, *Electronic Question and Answer Period*, an electronic portal enabling the Bureau to receive questions electronically was available to all potential Bidders until 2:00 p.m. on September 19, 2023. Six (6) Bid Amendments were issued for this Bid Solicitation, which provided revisions to the Bid Solicitation and responses to questions received from potential Bidders.

On November 15, 2023, the Division's Proposal Review Unit opened four (4) Quotes which were received by the submission deadline of 2:00 pm eastern time. After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirements, the Quotes were released

to the Bureau on February 15, 2024, for further review of compliance with mandatory requirements specific to the Bid Solicitation.

On May 24, 2024, the Evaluation Committee issued its report which recommended that a Contract be awarded to CliftonLarsonAllen, LLP. Evaluation Committee Report, P. 19. On May 28, 2024, the Bureau completed a Recommendation Report, which similarly recommended that a Contract be awarded to CliftonLarsonAllen, LLP as the Bidder's contract represents the most advantageous offer to the State price, and other factors considered. Recommendation Report, p. 1.

On May 29, 2024, the Bureau issued the NOI, indicating that it was the State's intent to make Contract awards consistent with the Bureau's recommendation in the May 28, 2024, Recommendation Report.

On June 12, 2024, BerryDunn submitted a protest to the Division's Hearing Unit challenging the State's determination that its submitted Quote was non-responsive to the requirements of the Bid Solicitation. By way of summary, BerryDunn states:

We are submitting our protest in response to the Department of the Treasury, Division of Purchase and Property (the "Division") determination that BerryDunn's Proposal to the Bid Solicitation was non-responsive due to our clarification over a contract clause that we firmly believe is required based on the wording of the Bid Solicitation. The Bid requires that our work is performed in compliance with the Generally Accepted Government Audit Standards (GAGAS). As a Certified Public Accounting (CPA) Firm, we are also required to follow the rules of the American Institute of Certified Public Accountants (AICPA), which is the basis for our exception to the wording of the contract (which we put forward during the question and answer period). We feel that simply adjusting the wording of the requirement is fair and allows us to be compliant with the rules which we must adhere to. Specific information is detailed in this letter.

[BerryDunn protest, p. 1.]

In the protest, BerryDunn claims that it only explained the basis of the proposed exception in Bid Amendment Question 26 rather than submit additional terms or conditions with its Quote that would render it non-responsive, believed the indemnification section in the State's Standard Terms and Conditions conflicts with relevant independence requirements, and the Division has handled similar situations differently in the past in different procurements. BerryDunn further states that the modified term was not material and therefore could have been waived in accordance with the Director's right to waiver minor irregularities pursuant to N.J.A.C. 17:12-2.7(d). Therefore, BerryDunn believes the Division should have waived the modified terms and evaluated BerryDunn's Quote along with the other Quotes received. BerryDunn does not request the opportunity for an in-person presentation as permitted by N.J.A.C. 17:12-3.3(b)(1)(iii).

Although BerryDunn did not request an in-person presentation to challenge the intended Contract award, pursuant to 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, case law, and the protest submitted by BerryDunn. The issues raised in BerryDunn's 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 BerryDunn on the written record, as such an in-person hearing is not warranted.

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." N.J.S.A. 52:34-12(a).

Here, the State determined that the Quote submitted by BerryDunn contained a material deviation from the requirements of the Bid Solicitation rendering the Quote non-responsive. The question before me is whether BerryDunn's statement modified the terms and conditions of its Quote, and whether it was a material deviation rendering the Quote non-responsive or if the modified term could have been waived. To be deemed non-responsive, BerryDunn's Quote would have had to materially deviate from the requirements of the Bid Solicitation such that the State would have no assurances that the Contract would be performed consistent with the requirements of the Bid Solicitation. 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).

In Meadowbrook Carting, *supra*, 138 N.J. at 315, 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 Award of On-Line Games Prod. And Operation Servs. Contract, 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." River Vale, *supra*, 127 N.J. Super. at 222.

Although the State has broad discretion to select among qualified and responsive Bidders in public contracting matters, the discretion afforded to the Director, “is not limitless.” See, In re Request for Proposals #17DPP00144, 454 N.J. Super. 527, 559 (App Div. 2018). “In line with the policy goal of thwarting favoritism, improvidence, extravagance, and corruption, the Division may not award a contract to a bidder whose proposal deviates materially from the [RFQ’s] requirements.” Ibid., quoting, Barrick v. State, 218 N.J. 247, 258-59 (2014)). For that reason, the Division’s governing regulations mandate stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State’s bidding process. Notably, “a proposal that is not...responsive to the material requirements of the [RFQ] shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.” N.J.A.C. 17:12-2.7(c).

Here, Bid Solicitation Section 3.11, *Bidder Additional Terms Submitted with the Quote*, stated as follows:

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 in 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](#).

Potential Bidders were permitted to submit questions regarding the terms and conditions of the Bid Solicitation by September 19, 2023. Thirty-two questions were received. One question was received from BerryDunn regarding Bid Solicitation Section 7.1.3, as shown in the insert from Bid Amendment #6, Question 26, below:

26	Bid Solicitation Section 7.1.3, Indemnification	<p>Our firm is concerned that the indemnification clause in the Standard Terms and Conditions, Section 4.1, page 7, could impair the independence required of an auditor performing an audit under the GAGAS standard. We believe that simply adding “The contractor shall not be required to indemnify the State of New Jersey for its own negligence” to the end of the clause will sufficiently address this concern.</p> <p>The State does not accept this proposed modification. However, the State has revised this section in the Bid Solicitation. Please refer to <i>Revised Bid Solicitation Section 7.1.3, Indemnification</i>, as this section has been revised.</p>
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The State rejected similar proposed modifications in Bid Amendment Questions 27 and 28.

Despite these responses, BerryDunn included the following on Page 6 of its Quote:

BerryDunn appreciates the Division's updates to the indemnification clause, but we still believe this does not comply with the independence requirement for generally accepted government auditing standards (GAGAS) audits. Please see the "Indemnification of an Attest Client" interpretation (ET sec. 1.228.020) of the "Engagement Contractual Terms" subtopic (ETC sec 1.228) under the "Independence Rule" of the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct (AICPA, Professional Standards), which states that that auditors cannot agree to indemnify the client for damages, losses or costs arising from lawsuits, claims, or settlements that relate, directly or indirectly, to the client's acts. We believe that an agreement to indemnify the Division for claims that are partially caused by the Division would impair our independence and cause us to be unable to give an independent audit opinion. We are happy to discuss further with you if needed.

As noted above, in conducting the initial review of the Quotes received, the State determined that the Quote submitted by BerryDunn was non-responsive. Specifically,

The Bureau deemed the Quote submitted by BerryDunn to be non-responsive to the mandatory requirements of the Bid Solicitation and thus ineligible for further evaluation and consideration for award.

The Bureau deemed BerryDunn's Quote non-responsive due to submitting additional terms that conflict with the State Standard Terms and Conditions Section 4.1 Indemnification, in accordance with Bid Solicitation Section 3.11, Bidder Additional Terms Submitted with the Quote which states: "Bidder proposed terms or conditions that conflict with those contained in the State of New Jersey Standard Terms and Conditions will render a Quote non-responsive." BerryDunn submitted the following additional term: "We believe that an agreement to indemnify the Division for claims that are partially caused by the Division would impair our independence and cause us to be unable to give an independent audit opinion." (BerryDunn Quote File – Page 6)

BerryDunn's failure to comply with the requirements of the Bid Solicitation renders the respective Quotes non-responsive, and as a result, the Quotes were removed from further consideration.

[Evaluation Committee Report, p. 7.]

In the protest, BerryDunn claims that it "did not submit additional terms or conditions with its Proposal that would render it non-responsive, but rather only explained the basis of the proposed exception taken during the Q&A period." Additionally, it states that the sentence would not have become a part of the Contract, and that it was permitted as an "additional term" in accordance with Bid Solicitation Section 3.11. In further support of its position, BerryDunn claims that in recent contracts the State addressed past requests to modify similar terms differently.

First, the State determined that the Quote submitted by BerryDunn contained a material deviation from the requirements of the Bid Solicitation rendering the Quote non-responsive. As noted above, the

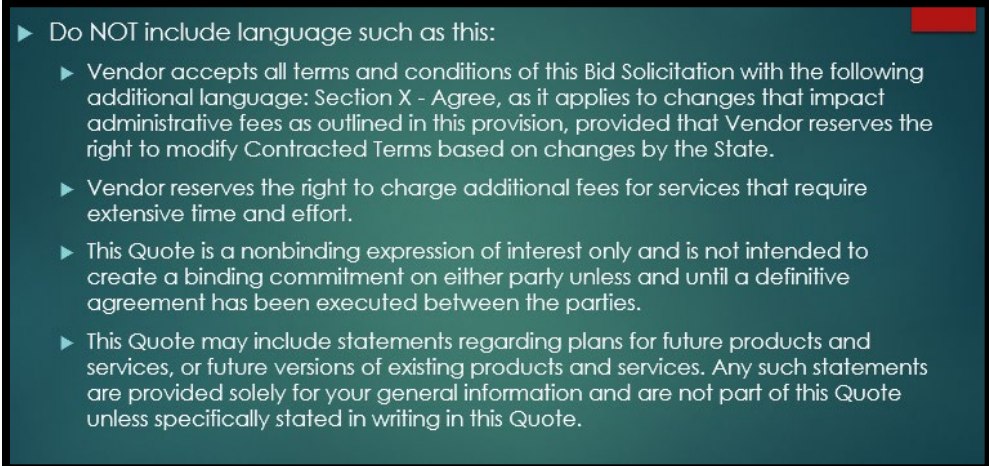
question before me is whether BerryDunn's statement modified the terms and conditions of its Quote, and whether it was a material deviation rendering the Quote non-responsive or if the modified term could have been waived.

Looking at BerryDunn's statement submitted with its Quote regarding the Contract's indemnification language and BerryDunn's ability to perform as a vendor with the inclusion of that language, whether added as an explanation or a conflicting term, the Bid Solicitation required Bidders to seek any proposed changes to the Bid Solicitation's requirements during the electronic question and answer period. BerryDunn and several other bidders expressed their concerns during the electronic question and answer period, and the State provided a response through its modification of the language.

As part of the Bid process the Division conducted an Optional Pre-Quote Conference pursuant to Bid Solicitation Section 2.5. The purpose and intent of the Pre-Quote Conference is set forth in that section:

The purpose of the Optional Pre-Quote Conference is to address procedural questions regarding the Bid Solicitation and Bidder Quote Submission Requirements only. No substantive questions regarding the Bid Solicitation Scope of Work will be accepted or answered during the pre-Quote conference. All questions are to be submitted during the Electronic Question and Answer Period.

As part of this Pre-Quote Conference, and because the Division has been presented with this issue multiple times in the past, the following information is specifically included in the standard Pre-Quote Conference presentation:

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- ▶ Do NOT include language such as this:
 - ▶ Vendor accepts all terms and conditions of this Bid Solicitation with the following additional language: Section X - Agree, as it applies to changes that impact administrative fees as outlined in this provision, provided that Vendor reserves the right to modify Contracted Terms based on changes by the State.
 - ▶ Vendor reserves the right to charge additional fees for services that require extensive time and effort.
 - ▶ This Quote is a nonbinding expression of interest only and is not intended to create a binding commitment on either party unless and until a definitive agreement has been executed between the parties.
 - ▶ This Quote may include statements regarding plans for future products and services, or future versions of existing products and services. Any such statements are provided solely for your general information and are not part of this Quote unless specifically stated in writing in this Quote.

[Pre-Quote Conference – Slide Deck page #7]

The Division expressly advises and warns Bidders not to include language that reserves to the Bidder the future right, as here, to enter into discussions regarding a certain topic that it agrees or disagrees with in the Bid Solicitation. The Division includes this language knowing how the courts have addressed this issue in the past and to help Bidder's avoid repeating the same mistakes.

Despite the clear language provided as guidance in the Pre-Quote Conference Slide Deck, included in the Bid Solicitation, and after the proposed changes requested in the electronic question and answer period were rejected, BerryDunn included its statement in its Quote that they would "be unable to give an

independent audit” with the indemnification language as part of the Contract. Such a clear contradiction with the express requirements of the Bid Solicitation, whether an explanation or an additional term, deprives the Division of its assurance, identified in River Vale, “that the contract will be entered into, performed and guaranteed according to its specified requirements.”

Finally, BerryDunn claims that the Division’s supplemental indemnification language added to the Standard Terms after the question and answer period differed substantially from how requests to modify similar terms have been addressed in the past. Regardless of past action on a different contract, N.J.S.A. 52:34-12a(g) grants the Division discretion to make and award

with reasonable promptness, after negotiation with bidders where authorized, by written or electronic notice to that responsible bidder whose bid, **conforming to the invitation for bids**, will be most advantageous to the State, price and other factors considered[.]

[Emphasis added.]

Similar language is found in N.J.A.C. 17:12-2.7(c), which states that a

proposal that is not compliant with the provisions of N.J.A.C. 17:12-2.2 or **responsive to the material requirements of the RFP shall not be eligible for further consideration for award of contract**, and the bidder offering said proposal shall receive notice of the rejection of its proposal.

[Emphasis added.]

The clear statutory and regulatory language makes no exception for inclusion of material requirements or terms from prior contracts. To be eligible for evaluation and eventual award, a bidder must be responsive to the material requirements of the current Bid Solicitation. As noted above, BerryDunn included its statement in its Quote that they would “be unable to give an independent audit” with the indemnification language as part of the Contract, and this language conflicted with the express requirements of the Bid Solicitation. Thus, BerryDunn was properly removed from consideration for evaluation and award under the Division’s statutory and regulatory obligations.

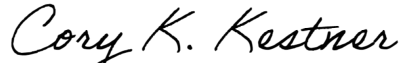
“Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract.” Barrick v. State, 218 N.J. 247, 259 (2014). BerryDunn’s language was not an additional term, but rather was a change which directly conflicted with the terms and conditions of the Bid Solicitation. Because the requirements of Bid Solicitation are equally applicable to all Bidders who submitted Quotes, BerryDunn’s language is a material deviation from the requirements of Bid Solicitation because, applying the River Vale materiality test, it deprives the State of assurance that BerryDunn will perform the contract according to its specified requirements. Waiving BerryDunn’s language would adversely affect competitive bidding by placing BerryDunn in a position of advantage over other bidders, who submitted Quotes without proposed alternate language in conformance with the requirements of the Bid Solicitation. Accordingly, the State correctly determined that the Quote submitted by BerryDunn was nonresponsive because the language directly conflicted with the terms and conditions of the Bid Solicitation.

Based upon the findings set forth above, I find no reason to disturb the determination that the Quote submitted by BerryDunn was non-responsive to the requirements of the Bid Solicitation. Accordingly, I sustain the May 29, 2024, Notice of Intent to Award. This is my final agency decision.

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.

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,

A handwritten signature in black ink that reads "Cory K. Kestner". The signature is written in a cursive, flowing style.

Cory K. Kestner
Acting Chief Hearing Officer

c: M. Maguire
A. Santos