



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 23, 2024

Via Electronic Mail only jtattoni@windelsmarx.com

Julie R. Tattoni, Esq.
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120 Albany Street Plaza
New Brunswick, NJ 08901

Re: I/M/O Bid Solicitation #23DPP00888 – Horizon Healthcare Services, Inc.
Protest of Bid Rejection for Dental Provider Organization portion of contract
T2794 – Dental Program: State Health Benefits Program and School Employees' Health Benefits Program

Dear Ms. Tattoni:

This final agency decision is in response to your correspondence dated August 16, 2024 ("Protest"), submitted on behalf of Horizon Healthcare Services, Inc. ("Horizon"), received by the Division of Purchase and Property's ("Division") Hearing Unit on August 16, 2024. In that correspondence, Horizon protests the rejection of their bid by the Division's Procurement Bureau ("Bureau") for Bid Solicitation T2794 - 23DPP00888 Dental Program: State Health Benefits Program and School Employees' Health Benefits Program ("Bid Solicitation"). The record of this procurement reveals that the quote submitted by Horizon ("Quote") for the Dental Provider Organization ("DPO") portion of the Bid Solicitation was deemed non-responsive for having failed to provide dollar amounts in any of the cells for: "Implementation Credit", "Audit Credit", and "Communication Credit" for any of the three (3) years of the contract on the State-Supplied Price Sheet ("Price Sheet"), as required by Bid Solicitation Section 3.26, *State-Supplied Price Sheet Instructions*.

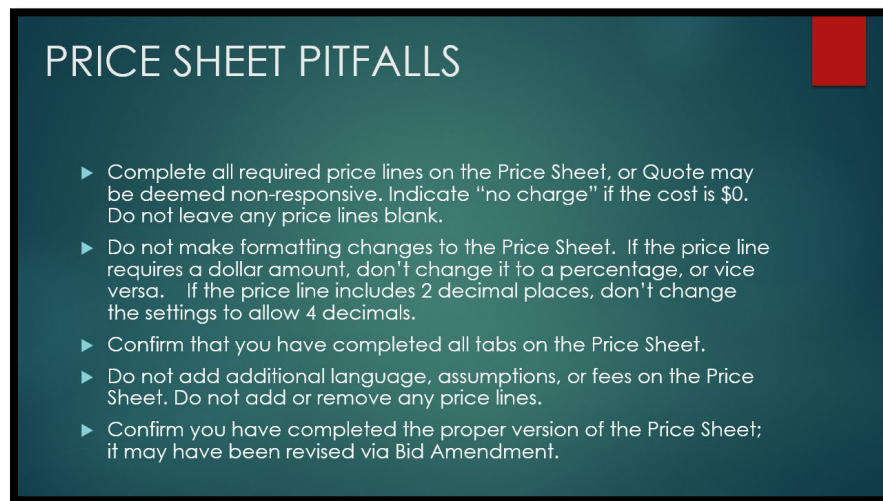
By way of background, on December 20, 2023, the Bureau issued the Bid Solicitation on behalf of the Department of the Treasury's Division of Pensions and Benefits ("DPB"). Pursuant to Bid Solicitation Section 1.1, *Purpose and Intent*, the purpose of the Bid Solicitation was to solicit quotes from qualified Bidders to provide Dental Expense Plan ("DEP") and DPO services for Active Employees, Retirees, Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) Members, and Dependents that participate in the State Health Benefits Program ("SHBP") and the School Employees' Health Benefits Program ("SEHBP"). A bidder could bid on the DEP portion of the Bid Solicitation, the DPO portion of the Bid Solicitation, or both portions of the Bid Solicitation.

On January 3, 2024, the Division conducted an Optional Pre-Quote Conference, which was attended by Horizon.

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.

[Bid Solicitation Section 2.5.]

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:



[Pre-Quote Conference – Slide Deck page #6.]

The Division expressly advises and warns bidders complete all required price lines, as well as to not “add additional language, assumptions, or fees on the Price Sheet.” The Division includes this language knowing how the Courts have addressed this issue in the past and to help bidders avoid repeating the same mistakes.

In accordance with Bid Solicitation Section 2.1, *Electronic Questions and Answer Period*, potential bidders were permitted to submit questions regarding the Bid Solicitation by January 10, 2024. On February 2, 2024 the Bureau posted Bid Amendment #1 to update the quote-opening date and to review any questions posed during the Q&A period. On February 23, 2024, the Bureau posted Bid Amendment #2, which provided answers to the questions posed. No questions were submitted requesting instructions or clarification on completing the State-Supplied Price Sheet, or the credit cells thereof.

On March 8, 2024, the Division’s Proposal Review Unit opened the two (2) quotes they received by the submission deadline of 2:00 p.m. Eastern Time. The bidders Aetna (“Aetna”) and Horizon each provided quotes for both the DEP and DPO portions of the Bid Solicitation. After conducting an initial review of the quotes received for compliance with mandatory quote submission requirements, the two quotes were forwarded to the Bureau for evaluation.

In conducting the review of the quotes, the Bureau determined that Horizon’s Quote for the DPO portion of the Bid Solicitation was non-responsive as further explained in the Bureau Recommendation Report, dated July 10, 2024 (“Recommendation Report”), shown below:

Per the language in Bid Solicitation Section 3.26, *State-Supplied Price Sheet Instructions*, the requirement to submit credits for both the DEP and the DPO is mandatory and therefore a material part of the Bid Solicitation. Horizon's failure to submit pricing on the State Supplied Price Sheet for credits for the DPO, renders Horizon's Quote non-responsive with respect to the DPO portion of the Bid Solicitation. Rather than provide the DPO credit as required, Horizon indicated that the "Requested credits are not necessary to support State expenses related to the DPO, as Horizon is an incumbent. Further, offering credits for insured business is generally prohibited under New Jersey law as an unfair trade practice." The Bureau is unable to waive Horizon's failure to meet the mandatory requirements of the DPO portion of the Bid Solicitation, as doing so would un-level the playing field between the Bidders. Based on Horizon's failing to meet mandatory requirements related to the DPO portion of the Bid Solicitation, Horizon's Quote is rendered non-responsive and ineligible for award of the DPO portion only.

After completing its review of the quotes received for the Bid Solicitation, the Bureau recommended that Aetna and Horizon both be awarded the DEP portion of the Bid Solicitation and that Aetna be awarded the DPO portion of the Bid Solicitation. Recommendation Report, page 1.

In the Protest, Horizon argues that "the Bureau should have evaluated Horizon's DPO quote using the Minimum Required Annual Credit amounts listed in the Price Sheet based on the Note in Section 3.26E." Protest pg. 5. Horizon further requests that the "Division reconsider the Bureau's position that Horizon's bid as to the DPO credits deviated from the bid specifications and such deviation (or requirement) could not be waived". Protest, pg. 6. According to the Protest, the basis for this argument is that if the Division "giv[es] effect to the Note", that would allow Horizon's bid to be compliant with the Bid Solicitation and additionally, the "omission should be considered an inconsequential discrepancy and a technical omission not bearing on the premium price of the plans". Protest, pg. 6. The Protest then states that "implementation credit is not a material term of the bid solicitation and Horizon's omission of including a credit should be waived by the Division as a technical error". Protest pg. 7. Finally, Horizon argues that because it is the incumbent DPO contractor and as a result of being found non-responsive it will force all "34,000 members from their current carrier simply due to Horizon leaving one blank on its bid response (and adding a comment instead) is certainly not in the best interests of those plan members. This will cause 34,000 people to find new providers and navigate a new plan over a mere bid technicality". Protest, pg. 10.

With respect to Horizon's request for an in-person presentation as permitted by 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). In consideration of Horizon'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.

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)). Pursuant to Bid Solicitation Section 1.1, *Purpose and Intent*, during the initial responsive review of a quote, the Division is charged with ensuring that the Contract is awarded to the bidder(s) whose quote, "conforming to [the] Bid Solicitation, [is] most advantageous to the State, price and other factors considered." A responsive quote is a quote that is deemed by the Division and/or evaluation committee to have adequately addressed all material provisions of a Bid Solicitation's terms and conditions, specifications, and other requirements. N.J.A.C. 17:12-1.3. A quote that is not compliant or responsive to the material requirements of the Bid Solicitation shall not be eligible for further consideration for award of a contract and the bidder offering said quote shall receive notice of the rejection of its quote. N.J.A.C. 17:12-2.7(c).

If a deviation is found when evaluating a quote, “the issue is whether a specific non-compliance constitutes a substantial [i.e. 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 Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. at 216. Material defects cannot be cured after the opening of bids, even by the good faith of the parties. Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 222 (Law Div. 1974). The reason material deviations may not be waived is “obvious”; if a waiver were to occur, “the bidders would no longer stand on a basis of equality and the advantages of competition [would be] lost.” Twp. of Hillside v. Sternin, 25 N.J. 317, 325 (1957). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994), the New Jersey Supreme Court adopted a two-prong 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.

[Id. at 315, citing River Vale, 127 N.J. Super. 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.” On-Line Games, 279 N.J. Super. at 595 (citing River Vale, 127 N.J. Super. at 222).

The Division agrees with the Bureau’s determination that Horizon’s Quote deviated from the specifications set forth in the Bid Solicitation. The Bid Solicitation makes clear that certain requirements are mandatory and not subject to discretion. Specifically, Bid Solicitation Section 9.0, *Glossary*, states:

Must – Denotes that which is a mandatory requirement.

Shall – Denotes that which is a mandatory requirement.

This mandatory language of “shall” is found in Bid Solicitation Section 3.26, *State-Supplied Price Sheet Instructions*, which states in relevant part:

The Bidder shall ...:

- E. For the ‘DEP Credits’ and ‘DPO Credits’ tabs:
 - 4. Excel Rows 12 to 16:
 - a. Submit a proposed minimum annual credit for the following categories:
 - i. Implementation credit. **Note:** Implementation credit shall be available for Contract Plan Year 1 beginning three (3) months prior to the Contract Effective Date through three (3) months after the Contract Effective Date. This will not be available during any other year of the Contract. The State prohibits any implementation fee being charged back to the State;
 - ii. Audit credit. **Note:** Audit credit shall apply prior to the Contract Effective Date and shall be used for a pre-implementation audit. The Audit credit will be used in

following years to conduct audits of Claims in the prior calendar year. If the State chooses to skip an audit one year, the Credit for the current year and the prior year shall be available. For example, if the State skips an audit in Contract Plan Year 2 (of Contract Plan Year 1 Claims), in Contract Plan Year 3, both the Contract Plan Year 2 and Contract Plan Year 3 credits shall be available for an Audit of Contract Plan Year 2 Claims;

iii. Communication credit; and

iv. Other: Bidders should use the “Other (Specify)” lines to specify any additional Credits included to the State;

b. Submit a description of what each credit can be used for.

Note: For any proposed credit amounts that are less than those values under Minimum Required Annual Credit, that amount under Minimum Required Annual Credit shall prevail.

[Emphasis in the original.]

Bid Solicitation Section 3.26.2, *Use Of “No Bid” Versus “No Charge” On The State-Supplied Price Sheet*, further states:

All price lines must be filled out in accordance with the instructions above. If the Bidder is not submitting a price for an item on a price line, the Bidder must indicate “No Bid” on the State-Supplied Price Sheet accompanying this Bid Solicitation. If the Bidder will supply an item on a price line free of charge, the Bidder must indicate “No Charge” on the State-Supplied Price Sheet accompanying this Bid Solicitation. **The use of any other identifier may result in the Bidder’s Quote being deemed non-responsive.**

[Emphasis added.]

Horizon filled out the Price Sheet for the DPO portion of the Bid Solicitation as shown below.

	Minimum Required Annual Credit	Bidder Proposed Annual Credit for Contract Plan Year 1	Bidder Proposed Annual Credit for Contract Plan Year 2	Bidder Proposed Annual Credit for Contract Plan Year 3	Bidder Description of What Credit Can Be Used For
Implementation Credit*	\$75,000		N/A	N/A	o the DPO, as Horizon is an incumbent. Further, offering credits for insured business
Audit Credit**	\$50,000				o the DPO, as Horizon is an incumbent. Further, offering credits for insured business
Communication Credit	\$50,000				o the DPO, as Horizon is an incumbent. Further, offering credits for insured business
Other (Specify)	n/a				
Other (Specify)	n/a				
Total Annual Credit Allowance (per Plan Year)		\$0.00	\$0.00	\$0.00	

In the fields for “Bidder Description of What Credit Can Be Used For”, Horizon entered “Requested credits are not necessary to support State expenses related to the DPO, as Horizon is an incumbent. Further, offering credits for insured business is generally prohibited under New Jersey law as an unfair trade practice.” Horizon State-Supplied Price Sheet, Price Lines 12-14.

Despite Bid Solicitation Section 3.26’s clear instructions that the Bidder **shall** . . . Submit a proposed minimum annual credit for the following categories: i. Implementation credit . . . ii. Audit credit . . . iii. Communication credit”, Horizon did not submit a proposed minimum annual credit. (Emphasis added). Instead, Horizon stated credits are unnecessary, and further, that they are generally prohibited

under New Jersey State law for insured business.¹ Horizon also included this response on a line reserved for explaining what the credit can be used for, not for explaining a credit will not be given or that credits might be unlawful. Horizon's response also did not comply with the "No Bid" instructions for not submitting a price for an item on a price line. As such, this is a clear deviation from the Bid Solicitation's specifications.

The Division further agrees with the Bureau's determination that Horizon's failure to submit the minimum annual credits for the categories contemplated under the Price Sheet is a material deviation from the Bid Solicitation. Horizon failed to submit a dollar amount for either the Implementation credit, the Audit Credit, or the Communication Credit. Horizon then questioned the legality of such credits. Such drastic deviation from the Bid Solicitation deprived the Bureau of any assurances that Horizon would enter into and perform the contract according to the Division's specified requirements. Meadowbrook at 315.

The Division disagrees with Horizon's assessment that these requirements to submit minimum annual credits were a "mere technicality." The Price Sheet lays out the extensive and important procedures for a bidder to submit a quintessential part of their quote, the price, which is bid required by all bidders. The Price Sheet unambiguously lays out what is required of a bidder and explicitly states how to indicate that a price for an item on a price line will not be supplied by the bidder. The Price Sheet also clearly indicates that any other identifier may result in a bid being deemed non-responsive. Further, Horizon's own response, that credits are unnecessary and generally prohibited, seems to infer that credits are of a substantive importance, or else they would hardly rise to the level of being "generally prohibited under New Jersey law as an unfair trade practice."

Additionally, the Division finds Horizon's failure to provide minimum annual credits based on their assumption that incumbency renders the credits unnecessary unfounded. The minimum annual credits were a mandatory price line on the Price Sheet. It is not up to a bidder to determine what the Division may or may not need. The Division itself is in the best position to determine what is material to the Bid Solicitation and here has found the minimum annual credits material to the Bid Solicitation.

Moreover, the Division believes granting a waiver to Horizon would adversely affect the competitive bidding process. As detailed above, Horizon was granted an opportunity to seek clarification and guidance from the Division as to the Bid Solicitation. To treat the minimum annual credits as "mere technicalities" for Horizon, and not for any other bidder, would unlevel the playing field in Horizon's favor.

In their Protest, Horizon states that "the Bureau should have evaluated Horizon's DPO quote using the Minimum Required Annual Credit amounts listed in the Price Sheet based on the Note in Section 3.26E". Protest, page 5. The Division is not convinced of such. The Note portion of Bid Solicitation, Section 3.26E states, "**Note:** For any proposed credit amounts that are less than those values under Minimum Required Annual Credit, that amount under Minimum Required Annual Credit shall prevail," (emphasis in the original). This Note is not intended to fix critical failures in a bidder's quote, but to inform bidders of the Division's bottom line price point so as to avoid confusion and alleviate unnecessary negotiations.

The Division notes that Horizon undermines its own argument on this point by explicitly stating the minimum annual credits for the DPO plans were "prohibited under New Jersey law." Horizon cannot claim that the credits were contrary to law in their Quote but now claim in their Protest that the Division should have applied the minimum required credit. To condone as much plainly allows Horizon to bid no credits whatsoever and then simply slide to an alternative bidding position if/when their initial position fails them. Thus, the action which Horizon seeks from the Division would be placing a bidder, Horizon, in a

¹ It is noted that Horizon did not raise an objection to the same credit for the DEP portion of the bid, and in fact submitted the requested information and was awarded for that portion of the contract.

position of advantage over other bidders thereby undermining the necessary common standard of competition. Ibid.

In sum, by affirmatively rejecting to engage in the Bid Solicitation's required activities, in addition to failing to provide a dollar amount credit for each, Horizon's Quote contained a non-waivable deviation rendering the Quote non-responsive as the State would not be ensured that the contract would be performed as required by the Bid Solicitation's requirements. Ibid.

Here, then, the Bureau took the correct course of action based on Horizon's refusal to participate in the bidding process as required by the Bid Solicitation. The alternative would have been to create an unfair situation for the other bidders by granting a course of action in where Horizon had clearly stated its intent to not engage in the bidding process for certain price lines but still be allowed to bid on the DPO plans – an unacceptably unbalanced procurement process.

In their Protest, Horizon relies heavily on their current status as the incumbent provider, stating that “the Bureau's determination that Horizon's bid was non-responsive based on a technical omission that does not impact plan premium rates, frustrates the purpose of the DPO Bid by depressing competition among carriers and causes avoidable disruption to 34,000 members.” Protest, pg. 6. While the Division takes any potential inconvenience for the State's employees and their families into account, it cannot be the deciding factor in the Division's determination and the Bureau cannot ignore Horizon's failure to adhere to the mandatory requirements of the Bid Solicitation.

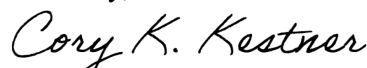
As noted above, the State is legally bound to only make awards “to that responsible bidder whose bid, **conforming to the invitation for bids**, will be most advantageous to the State, price and other factors considered.” N.J.S.A. 52:34-12(g) (emphasis added). Quotes must be rejected that are not compliant or responsive to the material requirements of the Bid Solicitation. N.J.A.C. 17:12-2.7(c). Ignoring Horizon's failure to complete the Price Sheet as instructed would put Horizon in a position of advantage over other bidders or undermine the common standard of competition. Meadowbrook at 315.

In light of the findings set forth above, I sustain the conclusions in the Bureau's July 10, 2024, Recommendation Report, that Horizon's Quote was non-responsive for the DPO portion of the Bid Solicitation and uphold the Bureau's award as outlined in the August 2, 2024, Notice of Intent to Award letter.

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,



Cory K. Kestner
Chief Hearing Officer

CKK:CMD

c: R. Regan
M. Maguire
B. Tran