



State of New Jersey

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

33 WEST STATE STREET

P. O. BOX 039

TRENTON, NEW JERSEY 08625-0039

<https://www.njstart.gov>

Telephone (609) 292-4886 / Facsimile (609) 984-2575

PHILIP D. MURPHY
Governor

ELIZABETH MAHER MUOIO
State Treasurer

TAHESHA L. WAY
Lt. Governor

AMY F. DAVIS
Acting Director

July 15, 2025

Via Electronic Mail Only: Ashley.taylor@empower.com

Ashley J. Taylor
Retention Sales Director
Empower Annuity Insurance Company
8515 E. Orchard Road
Greenwood Village, CO 80111

Re: I/M/O Bid Solicitation #24DPP01010 - Empower Annuity Insurance Company
Protest of Notice of Cancellation
T2327 - Defined Contribution Retirement Program Administration Services

Dear Ms. Taylor:

This final agency decision is in response to the letter dated June 11, 2025, submitted by Empower Annuity Insurance Company (Empower). That Protest Letter was received by the Division of Purchase and Property's (Division) Hearing Unit on June 12, 2025. In that correspondence, Empower protests the Notice of Cancellation issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #24DPP01010 – T2327 - Defined Contribution Retirement Program Administration Services (Bid Solicitation). The record of this procurement reveals that the Quote submitted by Empower was deemed non-responsive for including conflicting terms that deviated from the mandatory requirements of the Bid Solicitation.

By way of background, on October 7, 2024, the Bureau issued the Bid Solicitation on behalf of Department of the Treasury, Office of Fiscal & Resources. The purpose of the Bid Solicitation was to solicit "Quotes for proposals from qualified Bidders to provide 457(b) Deferred Compensation and 401(a) Defined Contribution services to support the current investment structure for the New Jersey State Deferred Compensation Plan (NJSEDCP) and the New Jersey Defined Contribution Retirement Program (NJDCRP)". Bid Solicitation Section 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. The State intends to award to a single Bidder.

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 February

19, 2025. On March 6, 2025, the Bureau posted Bid Amendment #7 with the answers to questions posed, along with a Revised Bid Solicitation, a Revised State-Supplied Price Sheet, and a Revised Exhibit to the Bid Solicitation.

On March 19, 2025, the Division's Proposal Review Unit opened two (2) Quotes¹ 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, both Quotes were forwarded to the Bureau for evaluation.

In conducting the review of the Quotes, the Bureau determined that both quotes were non-responsive due to non-compliance with the mandatory material requirements.

Empower's submitted Quote was non-responsive because Empower submitted a redlined version of Appendix A – Performance Standards along with a separate performance standards agreement as part of its Quote, which conflicted with the attachment in the Bid Solicitation. Additionally, Empower submitted a separate "Disclosures" document that states the Quote was only valid for 90 days and that it is not intended to serve as a Contract, but rather as a basis for a future agreement to be negotiated with the State. For both of these reasons, Empower's Quote was deemed nonresponsive. The other Bidder, Voya, failed to comply with Bid Solicitation Section 3.18, *Mobilization Plan*, and Bid Solicitation Sections 4.1.2 through 4.1.5, *90-Day Mobilization Plan*, and thus was deemed nonresponsive. Accordingly, the Bid Solicitation was canceled and cancelation letters were sent to all Bidders on May 28, 2025.

On June 11, 2025, Empower submitted a protest to the Division's Hearing Unit challenging the Bid Solicitation cancellation by stating in part:

Respectfully, Empower's submission was responsive to the mandatory requirements of the Bid Solicitation. In accordance with the Division's administrative regulations, N.J.A.C. 17:12-3.3 *Protest Procedures*, please accept this letter of protest. We request that the Division revisit our original proposal and deem it responsive. Ultimately, we respectfully request that the Division reverse the cancellation and continue the evaluation process and score our Bid Solicitation and award a contract.

Empower further protests the State's determination that its submitted Quote was non-responsive to the requirements of the Request for Quotes. In summary, Empower protests both counts of unresponsiveness:

- 1) [Empower's] inclusion of a redlined Appendix A and a separate performance standards document was not intended to deviate from the mandatory requirements, but rather to illustrate how Empower operationalizes service delivery in alignment with those requirements.
- 2) The reference to a 90-day quote validity in our Disclosures document is standard industry language to honor our fee proposal

¹ Quotes were submitted by Empower Annuity Insurance Company and Voya Retirement Insurance and Annuity Company.

during the RFP. This was not an attempt to reserve future negotiation rights or to introduce contingency into our bid.

[Empower protest, pgs. 1-2.]

In consideration of the Empower 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 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), emphasis added. 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).

The Appellate Division has held that “where the contracting authority has rejected all bids after opening and publicizing them... and each bidder's competitive position has been exposed, rejection of all bids should only occur for cogent or compelling reasons.” In re Failure to Award to the Lowest Responsible Bidder RFP 09-X-20513 Contract T0002 for Provision of Bottled Water Servs., 2010 N.J. Super. Unpub. LEXIS 1641, *7 (App. Div. July 2, 2010) (quoting Bodies by Lembo, Inc. v. County of Middlesex, 286 N.J. Super. 298, 309 (App. Div. 1996) (relying on the local public contracts law N.J.S.A. 40A:11-1 et seq., which does not explicitly contain the authority to cancel an RFP); See also PENPAC, Inc. v. Morris Cty. Mun. Utilities Auth., 299 N.J. Super. 288, 296 (App. Div. 1997), certif. denied, 150 N.J. 28 (1997) (stating that “[t]he decision to reject all bids must not be ‘arbitrary or capricious and it must be free from fraud, collusion and bad faith.’”). Here, the Bureau recommended, and I concur, that it is in the public interest to cancel the Bid Solicitation. As discussed in the Recommendation Report, NOC, and below, this decision was based on both cogent and compelling reasons.

Here, the State determined that the Quote submitted by Empower contained a material deviation from the requirements of the Request for Quotes rendering the Quote non-responsive. The question before me is whether Empower's modified term and the notation that its Quote was subject to negotiation, were material deviations rendering the Quote non-responsive or if the modified term could have been waived. To be deemed non-responsive, Empower's Quote would have had to materially deviate from the requirements of the Request for Quote such that the State would have no assurances that the Contract would be performed consistent with the requirements of the Request for Quote. 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 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 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 Request for Quotes by October 30, 2024. Forty-eight questions were received. During the question and answer period, Empower did not submit the new and conflicting terms of the redlined Appendix A – Performance Standards. If the new and conflicting terms of the redlined Appendix A are deemed to materially conflict with the scope of work required in the Bid Solicitation, the additional terms will render Empower's Quote non-responsive.

Within the redlined Appendix A, Empower included material revisions to Appendix A – Performance Standards, including a revised forfeited revenue:

If Empower fails to meet the performance standard, Empower agrees to forfeit revenue for each performance standard not met pursuant to the "Fees at Risk" column below. The forfeited revenue will be credited on the next invoice if the plan is invoiced for Empower's recordkeeping fee. If the recordkeeping fee is deducted against participant accounts, the forfeited revenue will be deposited to the plan expense account. In no event, however, shall the total amount forfeited by Empower in any given calendar quarter exceed 20% of Empower's quarterly per Participant fees determined as of the beginning of each calendar quarter based upon the number of Participants with a balance in the Plan as of the last day in any given quarter. For illustrative purposes, the calculation for quarterly revenue placed at risk would be: $[(A*B) * C]$, in which

"A" is the quarterly per Participant fee of for Defined Contribution Plan(s) and;
"B" is the number of Participants in the Plan with an account balance as of the last day of each calendar quarter; and
"C" equals the lesser of the sum of the percentages attributed to each performance standard not met by Empower for a calendar quarter or 20%.

The above would affect the listed guidelines the State set forth regarding fees at risk. Additionally, Empower materially altered other terms of Appendix A, including:

- 1.) Decreasing the Service Level Requirement for Call Center Average Speed to Answer, Section 4.4.4,

2.) Removing the \$1,000 per violation fees at risk for failing to provide Quarterly Reporting and Disclosure of Performance Standards, Section 4.7, and

3.) Removing liability for the performance standard for failure to meet any of the performance standards as a result of suspension of Participant Call Center Service Level Requirements.

While Empower portends that the redlined Appendix A and the separate performance standard was not intended to deviate from the mandatory requirements, but to instead illustrate Empower's ability to perform the contract more efficiently and exceed the standards set forth in the Bid Solicitation, the deviations set forth within the redlined Appendix A are material changes that renders Empower's Quote non-responsive.

Finally, the submitted "Disclosures" documents states that the following:

The proposed fee schedule is valid for a period of 90 days but it is subject to revision if the information provided is inaccurate or changes or upon receipt of additional plan information. The proposed services and fees included in this proposal are based on the information currently provided to Empower and are subject to final negotiation by the parties involved. Services are performed by Empower pursuant to the ASA with appropriate schedules to be added based on services selected. This proposal is not a contract to perform services. The final fee arrangement will be set forth in an agreement between Empower and the plan sponsor.

Empower's protest states that this was "not reserving any right to negotiate contract terms after submission" and "not an attempt to reserve future negotiation rights or to introduce contingency into our bid" but rather simply standard industry language to honor their fee proposal during the RFP, and that Empower affirms that it was and is ready to execute a contract on the State's terms without qualification. While Empower may argue that the price reservation is an industry standard, the principles of In Re MVC Surcharge, 2018 N.J. Super Unpub. LEXIS 285 (App. Div. Feb. 8, 2019), holds such language deprives the State of the assurance that a contract will be entered into, performed, and guaranteed in accordance with the State's specifications at the time of Quote opening, and that it gives the bidder an unfair advantage over other competitors.

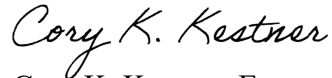
This Bid Section's functionality within the Scope of Work and its Standard Terms and Conditions is not discretionary, but necessary and incident to the work that the using agency needs completed by a Contractor and Empower misreads the Bid to grant itself discretion to ignore or decline to perform the services required under this portion of the Bid. Empower's Quote contained a non-waivable deviation rendering the Quote non-responsive. Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 222 (Law Div. 1974).

In light of the findings set forth above, I sustain the conclusions in the Bureau's May 5, 2025, Recommendation Report, that the Empower Quote was non-responsive and uphold May 28, 2025, Notice of Cancellation.

Thank you for your company's continuing 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.

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 cursive script that reads "Cory K. Kestner".

Cory K. Kestner, Esq.
Acting Chief Hearing Officer

CKK:NAA

- c. R. Reagan
- W. Higgins
- A. McFarland