



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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March 11, 2015

Via Electronic Mail [pdonahue@rfpnj.com] and USPS Regular Mail

Paul Donahue, President
RFP Solutions, Inc.
10-F Greenwood Avenue
Woodbury, NJ 08096

RE: Protest of Notice of Award of State Contract # T2989
RFP #15-X-23512 Communications Wiring Services

Dear Mr. Donahue:

This is in response to your letter dated October 31, 2014, and received November 5, 2014, referencing the subject Request for Proposal (“RFP”) and regarding the award of the subject contract by the Procurement Bureau (“Bureau”) of the Division of Purchase and Property (“the Division”). In your letter, you protest the slated award of Contract T2989 to all seven vendors, and contend that the proposal submitted by RFP Solutions, Inc. (“Solutions Inc.”) was misevaluated by the Bureau. As such, you request the Division reconsider the intended award and include Solutions Inc. as a contractor to this term contract.

I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law, and relevant proposal submissions. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of Solutions Inc.’s protest.

By way of background, the Bureau publicly advertised the subject RFP to solicit proposals from bidders for communication wiring services on May 1, 2014. These services include “installation and maintenance of the communications wiring infrastructure within State or local government facilities, including building and campus wiring from the demarcation point to the user outlets.” The Bureau intended to award up to seven contracts to responsible bidders, whose proposals, conforming to the RFP, are most advantageous to the State, price and other factors considered. The Bureau also intended to award two contracts to small businesses under the New Jersey Small Business Set-Aside program, if possible.

Following receipt of proposals by the revised proposal opening date of July 22, 2014, and an initial review to determine responsiveness to the requirements of the RFP, 11 of the 15

companies that submitted proposals were asked to provide a best and final offer (“BAFO”). The BAFO pricing was incorporated into the proposals, and the Evaluation Committee (“Committee”)¹ evaluated each proposal using a price comparison ranking methodology and a technical evaluation methodology. Following this review, the Committee unanimously recommended the term contract be awarded to seven bidders (listed alphabetically): AT&T Inc., Extel Communications, Inc., GM Data Communications, Inc., Johnston Communications, Inc., Millennium Communications Group, NetQ Multimedia Co., and New Jersey Business Systems Solutions Inc.’s proposal was ranked eighth overall.

Solutions Inc. raises two main arguments in its letter of protest: first, that the Procurement Bureau erroneously evaluated its proposal as providing “little detail” in response to RFP Sections 3.2.1 *Method of Operation*, 3.2.2 *Security Clearance*, 3.3 *Labor Rates*, and 3.5 *Vendor Billing and Payment*; and second, that the Division should reconsider its evaluation and award of the subject contract based on Solutions Inc.’s pricing proposal.

The Committee scored Solutions Inc.’s proposal 11th in the technical ranking. The Committee determined that Solutions Inc.’s personnel, including management, supervisory, and key personnel assigned to the contract, was rated “in the good range based on its submitted resumes.” Solutions Inc.’s submitted experience was also “rated in the good range,” and its references “supported its contention that it had the capability to provide [communication wiring services] required by the State.” However, the Committee also determined that Solutions Inc.’s proposal did not adequately address certain requirements of the RFP, finding:

[Solutions Inc.] provided little detail to its response to RFP Sections: 3.2.1 Paragraph 5 which requires that a contractor respond and be on-site in any part of the State within 4 hours; 3.2.1 Paragraphs 8 & 9 which deal with contract responsibilities and using agency regulations; 3.2.1 Paragraph 11 which requires that all installations shall be in accordance with DPMC Wiring Schedule B, part 2 of 4; 3.2.2 Security Clearance requirements; 3.2.3 testing requirements; 3.3 labor rate requirements; and section 3.5 vendor billing and payment requirements. Based on the listed shortcomings of its response their Technical Proposal was rated in the fair range. The proposal demonstrated that [Solutions Inc.] did not completely understand the objectives that the contract is intended to meet, including but not limited to the installation and on-going support for [communication wiring services], including installation labor and parts associated with the installation and maintenance of low voltage fiber and copper cabling to the State.

The Committee recognized that Solutions Inc. provided the fourth lowest pricing of the submitted proposals; however, the proposals of 10 responsive bidders received higher technical scores. Therefore, based on Solutions Inc.’s overall ranking of eighth, the Committee members unanimously determined Solutions Inc. should not be awarded a contract.

Solutions Inc. contends that the aforementioned RFP sections did not require a bidder to affirmatively acknowledge its compliance with the expressed specifications. It argues that because there were no “alternative responses” that a bidder could provide and continue to maintain compliance with the RFP, Solutions Inc. did not provide a response to these sections.

¹ The Committee was comprised of four representatives from the Office of Information Technology and one Procurement Specialist from the Procurement Bureau specializing in technology procurements.

This is a misunderstanding of the procurement process and ignores the instructions of the RFP. Here, the RFP provided that it was a bidder's responsibility to describe and document how it planned to achieve the work outlined in Section 3.0 *Scope of Work*:

4.4.3 TECHNICAL PROPOSAL

In this section, the Bidder *shall* describe its approach and plans for accomplishing the work outlined in the Scope of Work section, i.e., Section 3.0. The Bidder must set forth its understanding of the requirements of this RFP and its ability to successfully complete the contract. This section of the proposal should minimally contain the information identified below.

The Bidder *shall* document that it can meet and fulfill the technical requirements and service standards of this RFP.

Section 3.2.1. Method Of Operation: The Bidder shall provide its State of New Jersey Division Of Property Management & Construction (DPM&C) trade certifications upon award. Bidder shall submit to DPM&C for both a Contractor Classification (Form DPMC – 27) which is used in accordance with N.J.S.A. 52:35-1 et seq. to allow its firm to bid on various state and local school board public works construction projects and an application for classification in the trade category of Telecommunications per N.J.S.A. 52:35-1 thru 52:35-12. These forms can be found at <http://www.state.nj.us/treasury/dpmc/forms.shtml>.

There are seven (7) labor categories represented by Schedules A-G. Bidder *shall* complete each appropriate schedule representing the corresponding labor category it proposes. Labor categories not proposed will not be awarded during the term of the contract.

The Bidder *shall* complete **Schedules B and E** representing the hourly labor rate for the corresponding labor category it proposes:

- Hourly Labor Rate Schedule B: Technician C/Cable Installer/Journeyman 15 or less;
- Hourly Labor Rate Schedule E: Senior Technician/ Foreman 16 or more drops/Assistant General.

The Bidder *shall* provide a resume for a representative employee for each labor category proposed (with the exception of Apprentice), as required in Section 4.4.4.3 Resumes.

Proposals that fail to provide the mandatory Schedules B and E shall be deemed nonresponsive and shall not be considered for an award.

Bidder *shall* describe its commitment to participation in the Federal Communications Commission's E-Rate discount program established under authority of the Federal Telecommunications Commission Act of 1996 by supplying their E-Rate contractor identification number and the list of E-Rate qualifying services as described in Section 3.4.7, E-Rate Plan.

[The Bidder shall provide a listing of its vendor holidays for the current calendar year.]^[2]

² Language reflects alterations contained in Addendum #4 dated June 12, 2014.

[(All emphasis in original.)]

All bidders were also advised that proposals would be evaluated, in addition to the price schedule, on the following criteria:

6.7.1 TECHNICAL EVALUATION CRITERIA

- a. Personnel: The qualifications and experience of the Bidder's management, supervisory, and key personnel assigned to the contract, including the candidates recommended for each of the positions/roles required.
- b. Experience of firm: The Bidder's documented experience in successfully completing contracts of a similar size and scope in relation to the work required by this RFP.
- c. Ability of firm to complete the Scope of Work based on its Technical Proposal: The overall ability of the Bidder to undertake and successfully complete the technical requirements of the contract in a timely manner.

Therefore, even if a requirement described in the *Scope of Work* was mandatory, it was still the bidder's responsibility to address in its technical proposal how it would fulfill the requirement. Through this process, the State assesses a bidder's understanding of the actions necessary for compliance with mandatory contractual requirements.

The Committee noted that Solutions Inc.'s proposal was not in compliance with the following paragraphs of Section 3.2.1 *Method of Operation*:

3.2.1 METHOD OF OPERATION

....

5. The Contractor shall be able to respond and be on-site in any part of the State within four (4) hours, 24 hours a day, 7 days per week, 365 days per year.^[3]

....

8. The Contractor shall assume all responsibility for its actions, its employee actions and subcontractor's(s') actions while engaged in any activity connected with the contract resulting from this RFP (See Section 5.5 Contractor Responsibilities).
9. Contractor and subcontractor personnel shall observe all regulations in effect at the Using Agency. While on State property employees shall be subject to the control of the State, but under no circumstance shall such persons be deemed employees of the State. The Contractor's personnel shall not represent themselves as employees of the State. The Director of Purchase and Property may request the Contractor to transfer employees from the work crew who are deemed incompetent, are excessively tardy, absent or have been accused of theft or undesirable behavior.

³ Quoted language reflects the addition of Addendum #4.

....

11. Installation shall be in accordance with the standards outlined in the State of New Jersey DPMC Wiring Schedule B, Part 2 of 4 "Standards for Construction, Alteration and Maintenance, Minimum Lessor Requirements for State Space Fit-Out." (See Attachment 1) The quality of service/work shall be subject to inspection by the State of New Jersey at any time. Should it be found that the quality of services/work being performed is not satisfactory, and the requirements of the specifications are not being met, the Agency representative acting on behalf of the Authorized User or its own behalf, may terminate the project contract, and employ another awarded Contractor to fulfill the requirements of the contract. The removed Contractor shall be liable to the State of New Jersey for costs incurred on account thereof.

A review of Solution Inc.'s proposal reveals it did state "the principals of [Solution Inc.] are hands on owners who participate in the operations of the company 24 hours a day seven days a week," but does not describe how a representative from the company would respond and be on-site anywhere in the State within four hours. Additionally, Solutions Inc. did not address paragraphs 8, 9, or 11.

The Committee noted that Solutions Inc.'s proposal failed to address the requirements contained in Sections 3.2.2, 3.2.3, 3.3, and 3.5, which contained the following:

3.2.2 SECURITY CLEARANCE

1. Contractor, its employees and any subcontractors, shall be able to pass a New Jersey State Police background check.
2. Contractor(s) shall be required to provide a list of all its employees that will be working at the State Police sites, nuclear power plants and correctional facilities. This list shall be updated and maintained throughout the contract so that a State audit may verify that a background check has been performed.

3.2.3 TESTING

The following test procedures shall be performed for each of the specified media. All cable testing shall be done as an ongoing process during the installation phase of the project and test results provided confirming that all tests were passed.

1. **Twisted Pair Wire**

....

2. **Fiber-Optic Cable**

....

3.3 LABOR RATES

All inclusive hourly rate categories are defined as follows:

1. Business Day (Straight Time): The fixed hourly labor rate for on-site T&M support during normal business hours of Monday to Friday, 8:00AM to 5:00PM ET.
2. Over Time: The fixed hourly rate for on-site T&M support Monday to Thursday, 5:01PM to 7:59AM ET, Friday, 5:01 PM to 11:59 PM.
Saturday – All Day
Sunday – All Day,
Vendor Holiday – All Day

[The Contractor shall provide to The State Contract Manager, during the month of December, a listing of its vendor holidays for the following calendar year during the term of the contract.]^[4]

All hourly rates for labor include travel time. The State will not pay for travel time as a separate item.

The State will not pay a site visit charge.

The Contractor shall use its hourly labor rates provided on Schedules A - G. These rates or any approved reductions shall remain in effect throughout the term of the contract and all extensions.

....

3.5 VENDOR BILLING AND PAYMENT

Contractor shall comply with the following billing and payment instructions:

1. Contractor shall provide a dedicated billing representative to address all billing related issues and questions;
2. Contractor shall not withhold support and or service to the State due to non-payment;
3. Contractor shall render accurate invoices. The State is not obligated to pay for incorrect invoices and Contractors should be proactive in working with State agencies if corrections on invoices are required. The State will not pay a bill deemed inaccurate;
4. Contractor shall not put the State on payment notice or send the State to collections; and
5. The State will not pay for 3rd party services. All services must be billed under the awarded contractor or one of their State approved business partners.

Support or service shall not be withheld by the Contractor in response to non-payment. Billing or payment disputes shall be referred to the Contractor's SPOC for resolution with the using agency. Where escalation is required the using agency will notify the State Contract Manager / OIT POC. The Contractor SPOC will further escalate its problem utilizing the submitted escalation list of names, locations and telephone numbers of sales and service contacts submitted in its proposal.

The record reveals that Solutions Inc. did not address how it would comply with or fulfill the requirements of Sections 3.2.2 and 3.3.3. It did however list all vendor-observed holidays and include the appropriate price schedules A though I. In regard to Section 3.5, Solutions Inc. did

⁴ Language reflects alterations contained in Addendum #4, dated June 12, 2014.

not provide information on how it would fulfill the vendor billing and payment requirements. The aforementioned qualitative deficiencies of Solutions Inc.'s proposal were the basis for the Evaluation Committee's determination that Solutions Inc.'s proposal did not adequately convey an understanding and commitment to the RFP's contract performance requirements and thus appropriately scored the proposal accordingly.

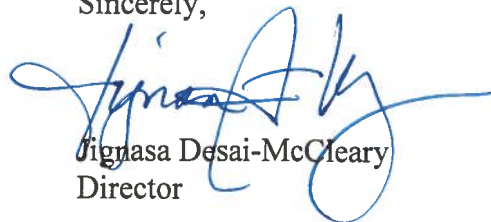
Furthermore, the Division's final agency decision dated February 11, 2013, included as an attachment to Solution Inc.'s letter of protest, does not provide guidance in the present matter. The February 11, 2013 final agency decision, referencing RFP #12-X-22363, an independent procurement, overturned the intended award of a contract due to an inconsistency in the scoring rubric. In the current protest, Solutions Inc. does not argue that the scoring was calculated incorrectly, rather that its proposal's ranking of fourth in price should merit an award of contract, notwithstanding a technical rank of 11.

Pursuant to N.J.S.A. 52:34-12(a), the Division is statutorily mandated to award a contract "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.) Courts have routinely held "the Director is to consider not only price, but also the conformity of respective bids to the invitation, in deciding which bid will be most advantageous to the State. In awarding a contract, the Director necessarily exercises business-like judgment." Motorola Commc'ns & Elecs., Inc. v. O'Connor, 115 N.J. Super. 317, 321 (App. Div. 1971); see also In re Protest of the Award of the On-Line Games Prod. & Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 591 (App. Div. 1995) and Burroughs Corp. v. Division of Purchase and Property, 184 N.J. Super. 416, 421 (App. Div. 1981). I find the Bureau properly evaluated the proposals under these guidelines.

In light of the findings set forth above, I must deny Solutions Inc.'s request to be reevaluated and included in the subject contract. This is my final agency decision on the matter.

Thank you for your interest in doing business with the State of New Jersey and for registering your business with **NJ START** at www.njstart.gov, the State of New Jersey's new eProcurement system. The State welcomes your proposals in future solicitations.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: G. Olivera
P. MacMeekin
J. Strype