State of New Jersey

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June 5, 2015

Via Electronic Mail [mfleder@connellfoley.com] and USPS Regular Mail

Mark L. Fleder, Esq.
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RE: Protest of Notice of Award of State Contract #T0278
RFP #15-X-23539 Concrete: Construction, Curb and Gutter (New, Removal, Repair Replace)

Dear Mr. Fleder:

This correspondence is in response to your letter of protest dated and received December 23, 2014, and supplemental letter dated and received January 6, 2015, submitted on behalf of your client Custom Concrete Construction ("CCC"), 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 ("Division"). You protest the slated award of Term Contract #T0278 to IEW Construction Group, Inc. ("IEW") and challenge the weighted "consumption model" used to evaluate responsive proposals. As such, you request the Division rescind its Notice of Intent to Award and award the subject contract to CCC.

I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law, and CCC's and IEW's proposals. 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 CCC's protest.

By way of background, the subject term contract is a long-standing contract with the New Jersey Department of Transportation ("DOT") and has been reprocured a number of times. CCC was awarded the term contract in 2009, and IEW was awarded the term contract in 2012. Following recent solicitations, the Bureau altered its pricing evaluation to take into account different price lines and corresponding DOT usage in an attempt to create an evaluation methodology that more accurately reflected contract spend.

Prior to the award to IEW in 2012, CCC's protest concerning the Bureau's use of a consumption model, rather than a sum total of all proposed price lines, was denied and the award was upheld. In that opinion, I noted that there had been a recurring practice of some experienced bidders offering unbalanced proposal pricing. In this way, bidders would offer unrealistically lower pricing on less frequently used, high dollar value work tasks, and offset these prices by offering increased proposal pricing for RFP price lines for oft-used, lower dollar work tasks, in an evident attempt to be recognized as the bidder offering the total lowest priced proposal. With the intent to combat this practice, the Bureau implemented the consumption model, which, because it was unknown to bidders at time of proposal submission, created a playing field where bidders would be unaware of what RFP price lines, and at what weighted percentage, would be included in evaluation.

In the present matter, the Bureau publicly advertised the subject RFP on behalf of DOT to solicit proposals from bidders for the construction of concrete curbs, sidewalks, and gutters (new, removal, repair, and replacement) on State highways and properties entitled or owned by the State. The Bureau intended to award up to three separate regional contracts based upon price and other factors.

Following the opening of proposals on September 12, 2014, and an initial review to determine responsiveness to the requirements of the RFP, two of three bidders were asked to provide a best and final offer ("BAFO").[1] BAFO pricing was incorporated into the proposals, and the Bureau and DOT evaluated the proposals using a pre-established consumption model to determine the overall lowest-cost responsive bidder in each region. The consumption model included 20 price line items from each of the three regions, weighted according to previous usage by DOT. Following the review and scoring, the Bureau recommended the award be made to IEW, the bidder offering the lowest pricing in each region as determined by application of the consumption model.

In CCC's letter of protest, it argues that of the 20 price lines included from each region in the consumption model, nine lines should not have been considered because "the prior experience of [DOT] was to pay out very little, if any, monies for these work items." Specifically, CCC contends that the following line items should not have been included in the consumption model:[2]

Price Line	Commodity Code	Description	Weight
25	North Region 029533	Reset inlet with curb piece – each	5%
35	North Region 045704	Construct inlets type b	5%
38	North Region 051687	Install ductile iron pipe 16"	5%
80	Central Region 029533	Reset inlet with curb piece - each	5%
90	Central Region 045707	Construct inlets type b	5%
93	Central Region 051690	Install ductile iron pipe 16"	5%
137	South Region 036654	Traffic control (maintenance & protection) per Section 3.6 of this RFP	8%
145	South Region 045710	Construct inlets type b	5%
148	South Region 047134	Install ductile iron pipe 16"	5%

Additionally, CCC argues that the Division "paid no heed" to the prices submitted on price lines 27, 82, and 137, each referencing traffic control. For each region, IEW offered $500/hour and CCC offered $50/hour. CCC argues that because traffic control is a work item on "virtually all NJDOT road projects, the vast difference in the pricing offered should have clearly indicated to the Division that IEW did not submit the most advantageous" pricing.

In a supplemental letter, CCC reiterates that the RFP price lines relating to "inlet, ductile iron pipe, and curb piece" were not utilized by DOT in the last year, and that, on the other hand, DOT did utilize the detectable warning system item, which was not included in the consumption model. CCC also notes that

[1] The third proposal was deemed non-responsive for the absence of properly completed mandatory forms.

[2] Based on the pattern of the contested lines, it appears that the inclusion of price line 137 may be a typographical error on the part of CCC. As included in the north and central regions, price line item 135, not 137, relates to "reset inlet with curb piece – each" in the south region. I note that IEW proposed $1/each and CCC proposed $600/each on price line 135.

the "traffic safety item" cost the State $2,500/day[3] last year, yet IEW's offered price of $500/hour would result in a cost of $4,000/day per eight-hour day.[4]

The RFP provided all bidders with information relating to proposal evaluation. RFP Section 6.6, *Evaluation Criteria,* specified that proposals would be evaluated in the following manner:

1) Price:

North Region will be made to the lowest total overall bidder based on a consumption model.
Central Region will be made to the lowest total overall bidder based on a consumption model.
South Region will be made to the lowest total overall bidder based on a consumption model.

2) Experience of the bidder:

The bidder's past performance under similar contracts, including if applicable, the Division's vendor performance database.

The consumption model used to evaluate pricing for the subject RFP was developed based on DOT's historical usage on term contract T0278. While the procurement methodology for the term contract awarded in 2012 utilized a consumption model that evaluated only the top 10 spend items per region, the evaluation in the instant matter utilized 20 line items per region, including the traffic control line item in each region. The Bureau selected these 60 line items without the bidders' knowledge and time-stamped the consumption model 1:07 p.m. on August 28, 2014, before the opening of proposals. By applying a pre-set consumption model, the Bureau established a basis for assessing price while creating a playing field where bidders, including incumbents, had no knowledge at the time of bidding which price lines would be included in the evaluation. In addition to utilizing high spend items, the consumption model incorporated a random pick of usage to prevent the State from receiving skewed proposed pricing. The selected price lines were then weighted based on historical usage to ensure a higher score value be given to higher usage items.

In response to CCC's first argument, the following is a break-down of the pricing submitted on the contested price lines, along with a breakdown of DOT's historical usage[5] as provided by DOT expenditure reports:

Price Line	Unit	IEW	CCC	Weight	Historical Use
25	Each	$1	$600	5%	$24,342,25
35	Each	$1	$2,500	5%	$0
38	Ln. Ft.	$1	$85	5%	$0
80	Each	$1	$600	5%	$0
90	Each	$1	$2,500	5%	$0
93	Ln. Ft.	$1	$85	5%	$0
137	Hour	$500	$50	8%	$7,500
145	Each	$1	$2,500	55	$0
148	Ln. Ft.	$1	$85	5%	$0

[3] IEW, the incumbent, is currently under contract to provide a price of $2,500 per day on the traffic control line items.

[4] Despite this contention, RFP Section 3.7.1, *Maintenance and Protection of Traffic,* notes the "normal hours for construction will be from 9:00 a.m. to 3:30 p.m." This is equivalent to 6.5 hours, giving a total daily rate of $3,250.

[5] "Historical usage" in this context refers to DOT spend on the current T0278 contract from 2012 to present.

Based on these numbers, CCC's assertion that the consumption model utilized some weighted line items that have not been utilized by DOT is correct. However, as noted above, the Bureau specified that it included additional, random lines in the model with the intent to prevent skewed bids. CCC argues that the line item relating to "detectable warning surfaces" was used on the current contract, yet was not included in the current consumption model. While this assertion is true, there are other price lines that were previously used by DOT that were also not included in the current consumption model. By utilizing the consumption model, the Bureau was not obligated to include every line that had historical spend.

Also, further review of the consumption model shows that the weighted percentages in the current evaluation were not proportionate to the usage of the current contract by DOT. For example, six price lines were weighted at 10 percent, the highest percentage used, in the current consumption model: "remove curb – under 100 linear feet" (lines 1, 56, and 111); and "construct sidewalk 4 inch thick – over 40 square yards" (lines 12, 67, and 122). Under the current contract, from 2012 to present, the first line grouping received the following spend from DOT: $62,766 (north) and $5,173 (central), $0 (south), totaling $67,939. Based on the total spend by DOT on the contract as a whole, $394,168, these line items amounted to 17 percent of the total contract. However, in the current evaluation these lines were weighted at 30 percent total. The second line grouping received the following spend: $13,330 (north), $29,884 (central), and $0 (south) totaling $43,214. Of the total spend by DOT, these lines amounted to 11 percent of the contract. Despite this percentage, in the current evaluation this line grouping was weighted a total 30 percent. As is evident from these numbers, the percentage spend of each line varied greatly in the north, central, and south, yet the consumption model did not account for these discrepancies.

Concerning CCC's second argument, i.e., that the evaluation "paid no heed" to the traffic control line items, the record reveals that the consumption model did include the traffic control line item in all three regions: line 27 (north), line 82 (central), and line 137(south). These lines were each weighted at eight percent.

A review of previous usage by DOT may indicate an inconsistency with how these line items were weighted. Traffic control in each of the three regions was weighted at eight percent, or a total of 24 percent. Between years 2012 and 2014, DOT reported the following usage in each region: $71,250 (north), $40,000 (central), and $7,500 (south), totaling $118,750. Of the total DOT contract spend of $394,168 from this three-year time period, traffic control amounted to 30 percent of the total contract.

The RFP included the following information concerning traffic control:

> **3.5.5 CONTRACTOR PERSONNEL**
>
> . . . .
>
> The contractor may be required to furnish other equipment and crew which shall be included in pricing, such as:
>
> • Traffic Observer/Flagperson
>
> . . . .
>
> [(Emphasis added.)]
>
> . . . .
>
> **3.7.1 MAINTENANCE AND PROTECTION OF TRAFFIC**
>
> Maintenance and protection of traffic shall be provided by the contractor. The contractor will

> provide traffic control on a per hour basis. Please note that at least one Truck Mounted Attenuator (TMA) will be required on all work zones and safety setups.
>
> The contractor is responsible for traffic control and safety setup on the highway only. The contractor shall adhere to the NJDOT Standard Specifications for Road and Bridge Construction and details (Traffic Control plan numbers TCD-1 through TCD-22), NJDOT Maintenance Work Zone Safety Set-up Guide and MUTCD (Manual of Uniform Traffic Control Devices) and will include the necessary signs and safety devices for a standard setup. Maintenance and protection of traffic shall be provided by the contractor.
>
> All traffic restrictions, including lane width reductions, lane closures, and detours are subject to the approval of the Engineer, Traffic Signal & Safety Engineering, Regional Traffic Engineer-Work Zone and Traffic Operations, North/South. Post detours and cover detours during non-closure hours. If County routes are used for detours, obtain approval from appropriate County Engineer.
>
> The normal hours for construction will be from 9:00 a.m. to 3:30 p.m. The NJDOT reserves the right to adjust these hours, due to the varying traffic conditions throughout the state.

As T0278 pertains primarily to State highways, traffic control has been and will be a commonly utilized line item. As such, by proposing $500/hour for this line, and $1 on numerous other lines, IEW has indicated an assumed risk that the preponderance of projects will require traffic control, as past contract usage has indicated. Compared to CCC's proposed rate of $50/hour, along with no nominal pricing, appears that CCC may have included traffic control in the pre-set price of other line items. Moreover, despite the emphasized language in RFP Section 3.5.5, it is unclear why the Bureau included a separate price line for "traffic observer/flagperson."

An unbalanced proposal is a proposal "'based on nominal prices for some work and enhanced prices for other work for some work and enhanced prices for other work.'" (Turner Const. Co. v. New Jersey Transit Corp., 296 N.J. Super. 530, 537 (App. Div. 1997) (quoting Frank Stamato & Co. v. New Brunswick, 20 N.J. Super. 340, 344 (App. Div. 1952). The "submission of unbalanced bids distorts the public bidding and may make a 'mockery of fair competition between bidders.'" M.J. Paquet v. New Jersey Dept. of Transp., 171 N.J. 378, 400 (2002) (quoting M.J. Paquet, Inc. v. New Jersey Dept. of Transp., 335, N.J. Super. 130, 138 (App. Div. 2000)).

Courts have determined that unbalanced proposal need not be automatically invalidated. See generally Riverland Constr. Co. v. Lombardo Contracting Co., 154 N.J. Super. 42, 45 (App. Div. 1977). Rather, for a proposal offering unbalanced proposal pricing to be deemed non-responsive, "'[t]here must be proof of collusion or of fraudulent conduct on the part of such bidder and the city or its engineer or other agent, or proof of other irregularity of such substantial nature as will operate to affect fair and competitive bidding.'" Ibid. (quoting Stamato, supra, 20 N.J. Super. at 344). In the absence of a showing of collusion, courts have recognized that a high price for one item, offset by nominal bids on other items, could still result in an exceptionally high cost if the high price items is required in substantial quantities. Armaniaco v. Cresskill, 62 N.J. Super. 476, 486 (App. Div. 1960).

In this case, I find no cause to consider IEW's offered pricing to constitute fraud or collusion. While the consumption model developed for and applied to this procurement was intended to preclude or discourage unbalanced bidding, there remains an inherent flaw in utilizing a consumption model based on a 159 price-line contract under which approximately 120 price lines have not been, and will likely not be, utilized by the using agency. It is reasonable to conclude that IEW, the incumbent contractor, and CCC, a previous T0278 contractor, would both have been aware of this circumstance.

Because "[p]ublic bidding statutes exist for the benefit of taxpayers, not bidders" and are "construed with sole reference to the public good[,]" the Division must make contract awards with the taxpayer in mind. Nat'l Waste Recycling, Inc. v. Middlesex Cnty. Improvement Auth., 150 N.J. 209, 220 (1997). Due to the construction of the price lines and the prices offered by IEW, combined with the structure of this particular consumption model, the award of the subject contract to IEW could result in an overpayment of State funds and is not in the best interests of the State. I also note an apparent ambiguity contained in RFP Section 3.10.1, which allows a contractor to request one price increase at the end of each contract term year following the first 12 months of the contract. This section does not specify to whom such a request shall be made and does not specify how the validity of such a request will be determined. Due to this ambiguity, this RFP Section could also result in an overpayment by the State.

Therefore, I have determined that awarding this flawed contract to any party would not be in the best interests of the State. This is my final agency decision on the matter.

Thank you for bringing this matter to my attention and for your interest in doing business with the State of New Jersey. Also, the Division appreciates CCC registering with NJSTART at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,

Jignasa Desai-McCleary
Director

JD-M:DF

c: M. Griffin
L. Spildener
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