



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

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

FORD M. SCUDDER
Acting State Treasurer

JIGNASA DESAI-MCCLEARY
Director

August 15, 2016

Via Email [LTaylor@iwt-law.com] and USPS Regular Mail

Lisa D. Taylor, Esq.
Inglesino Webster Wyciskala Taylor, LLC
600 Parsippany Road, Suite 402
Parsippany, New Jersey 07054

Re: Remand of Protest of Notice of Intent to Award
RFP# 16-X-23964: Fiscal Intermediary and Financial Cash and Counseling Services: DHS

Dear Ms. Taylor:

This letter shall serve as the Division of Purchase and Property's (Division) supplemental response to the protest letters filed by Community Access Unlimited (CAU) on December 8, 2015 and December 22, 2015, following the issuance of the Division's Procurement Bureau's (Bureau) November 23, 2015, Notice of Intent to Award (NOI) a contract for Solicitation #16-X-23964: *Fiscal Intermediary and Financial Cash and Counseling Services: DHS*. In the protest letters, CAU alleged that the proposal submitted by the intended awardee, PCG Public Partnerships, LLC (PPL) was non-responsive because PPL's proposal failed to comply with numerous terms, conditions, and requirements of the Request for Proposal (RFP). On May 13, 2016, the Division issued its final agency decision (FAD) on CAU's protest. On May 24, 2016, CAU filed an application for Permission to File an Emergent Motion for Stay with the Appellate Division which contained documents that had not been included in CAU's multiple submissions to the Division related to CAU's protest. The Division opposed the stay and filed a motion to remand the matter back to it for consideration of these new documents as they related to an allegation of ex parte communications and a CAU email containing supplemental questions. On June 8, 2016, the Court granted CAU's request for a stay and on July 15, 2016, the Court, granted the Division's motion to remand the matter back to the Division. Specifically, the remand allows the Division to further investigate whether ex parte communications between PPL and the Department of Human Services (DHS) occurred during the procurement and to further investigate whether the Division in fact received a specific email from CAU with supplemental questions related to the procurement and if so, to determine its impact on the procurement.

By way of background, the subject RFP was issued on August 4, 2015, by the Bureau on behalf of the Department of Human Services (DHS) to solicit proposals to engage one contractor to provide statewide fiscal management services, administrative services, and financial counseling services to individuals enrolled in DHS programs (Program).¹ (RFP § 1.1 *Purpose and Intent*.) As noted in the RFP, DHS administers a number of programs that promote and provide participant-directed care to the elderly, individuals with disabilities, the medically needy, and veterans. These programs are based upon the

¹ The contract awarded through this solicitation will be used by DHS' Divisions of Disability Services (DDS), Aging Services (DOAS), Developmental Disabilities (DDD), and Medical Assistance and Health Services (DMAHS).

concept of participant direction which allows participants to have choice and control over the selection of their home and community-based services, as well as purchase goods and to pay the individuals and entities that provide them with the services. Participants, or their authorized representatives, function as the employing authority, and in that capacity hire, discharge, train, and supervise their own directly hired workers. The participants have the authority to manage their budgets, determine the type of goods and services to be purchased, and establish their worker's wage rates.

In order to provide for efficiencies of operation for DHS and its constituents, this solicitation consolidated three current State contracts (two procured by the Division; one procured by DHS) which provided for similar services. (RFP § 1.2 *Background*.) This RFP specifically sought a contractor with the knowledge, experience, resources, and infrastructure to provide the statewide fiscal management services (FMS) and financial counseling services (FCS) requested. (*Ibid.*) Specifically, the contractor shall:

- A. Provide the Vendor Fiscal/Employer Agent (VF/EA) model of FMS² services in accordance with Agent Employment Tax Liability...
- B. Provide administrative services to the participants enrolled in DDS, DOAS, and DDD Programs; and provide fiscal conduit functions and financial counseling services to the participants enrolled in DDS and DOAS programs, to include, at a minimum, orientation, explanation, and training about the Program to participants—the DDD-enrolled individuals only require the fiscal conduit function as these individuals receive their financial counseling services separate and apart from the contract resulting from this RFP; and
- C. Have the financial capability to advance funds (i.e., using a Just-in-Time payment processing approach and methodology, or similar approach) to pay participants' workers and vendor.³

[RFP § 1.1 *Purpose and Intent*.]

It is the intent of the State to award one contract to the responsible bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered. (RFP § 1.1 *Purpose and Intent*.)

On November 23, 2015, the Bureau issued its NOI indicating its intent to award a contract to PPL. CAU's protest followed.

In its letter of protest, CAU alleged that

PPL failed to comply with numerous terms, condition and requirements of the RFP, including terms with which the bidder must or shall comply. Indeed, PPL was non-responsive in at least 38 areas which the RFP requires that the bidder shall comply. There were also at least 12 areas where the RFP outlines specific items but PPL's proposal omits all or some of the requirements in a particular section. These failures require

² The current DHS contracts utilize the "Agency with Choice" model of FMS services, not the VF/EA model which was sought by this RFP.

³ Under the current contracts, the State advances funds to the contractors to provide the services to the enrolled participants. Under this RFP, the contractors are required to advance funds to pay for services and then seek reimbursement from the State.

rejection of PPL's proposal as non-compliant and non-responsive . . . In fact, in response to several material requirements, PPL specifically states its intention not to comply with the requirement of the RFP.

On December 8, 2015, the Division extended the protest deadline to December 22, 2015, and on that date, the Division received CAU's supplemental protest letter, which raised challenges to the specifications and the contract award. PPL, the intended awardee, was provided an opportunity to respond to CAU's protest letters and on January 15, 2016, PPL submitted its response to the Division. On February 10, 2016, CAU submitted an unsolicited "Responsive Protest" to the Division responding to the statements submitted by PPL in response to CAU's protest.

On May 13, 2016, I issued my final agency decision (FAD) addressing each of the protest points raised by CAU. In that decision, I concluded:

With respect to CAU's protest points, the information provided in the PPL's proposal provided a response to the RFP requirements. In addition, I find that the Bureau's responses to bidder questions were appropriate and responsive, ensuring that all bidders were on a level playing field and that this procurement was conducted in conformance with the applicable laws and regulations.

Based upon the foregoing, I sustain the NOI. This is my final agency decision with respect to the protest submitted by CAU. Nonetheless, in light of the consolidation of services, I do encourage all qualified bidders to discuss legal and cost-effective opportunities that would benefit delivery of these programs by DHS.

[Division's May 13, 2016 Final Agency Decision, p. 80.]

On May 17, 2016, CAU advised the Division that it intended to appeal the FAD and requested that the Division stay the award of the subject contract. Before the Division had an opportunity to review and issue its decision regarding CAU's stay request, on May 24, 2016, CAU filed an application for permission to file an Emergent Motion for a Stay with the Appellate Division. CAU's request was granted by the Court on May 26, 2016. In its appeal, CAU alleged in part that (1) there were *ex parte* communications between PPL and DHS; and (2) that CAU submitted supplemental questions to the State prior to bid opening which were unanswered. On June 2, 2016 the Division denied CAU's request for a stay.

As noted above, the Division's motion for remand was granted on July 15, 2016. Pursuant to the remand, the Division's Hearing Unit conducted an independent review and investigation of both remanded issues. That review and investigation found as follows.

A. *Ex parte* Communications

As part of PPL's counsel's January 15, 2016 response to CAU's protest, PPL's counsel stated "PPL did not, and was not required to, reiterate each requirement due to space limitations and based on guidance from the DHS. Failing to reiterate the RFP requirements in detail does not reflect a lack of understanding nor relieve PPL from fulfilling each requirement if awarded the contract."

On February 10, 2016, CAU submitted an unsolicited 'responsive protest' to the Division stating:

...PPL's response suggests, however, that it relied on other representations from the State in preparing its bid. (See page 5, point 8) It would be a violation of New Jersey procurement law and serve to

invalidate the RFP and any award, if the State engaged in *ex parte* communications with PPL about the RFP, or information was provided PPL which was not provided to CAU.

CAU did not, however, indicate on what it was basing this allegation, and the FAD noted that this allegation was not supported by the record. It was only much later, in its motions for stays to this Division and to the Appellate Division, that CAU pointed to the statement in PPL's counsel's January 15, 2016 letter as the basis for its allegation of *ex parte* communication during the protest. This statement is the sole basis that CAU has pointed to for an alleged *ex parte* communication.

On remand, the Hearing Unit contacted each of the voting members and technical advisors on the evaluation committee as well as the current state contract managers. All persons contacted advised the Hearing Unit that he/she had no communications with PPL regarding this solicitation.

In addition, the Hearing Unit requested that PPL respond to CAU's allegation that PPL had *ex parte* communications with DHS employees related to this solicitation. PPL submitted a certification from David Horvath, the manager at PPL who was primarily responsible for overseeing PPL's response to the solicitation. Mr. Horvath denied any *ex parte* communications and in pertinent part, certified as follows:

5. In fact, in making that statement in its January 15, 2016 letter, PPL was referring to the written instructions in the RFP regarding page limits and the reiteration of RFP tasks: Aa0096-97 (bidder's submission is limited to 25 pages); Aa0102-03 ("Mere reiterations of RFP tasks and subtasks are strongly discouraged, as they do not provide insight into the bidder's ability to complete the contract"). Copies of the referenced RFP pages are attached hereto.
6. Furthermore, and in response to the Division's July 19, 2016 inquiry, I conducted an internal inquiry of those who had anything to do with PPL's RFP response as I had primary responsibility for overseeing the company's response to the RFP; I confirmed that no one with PPL, or on behalf of PPL, engaged in any *ex-parte* communications with the State regarding how to respond to the RFP.

[Exhibit A - Horvath Certification dated July 26, 2016.]

Again, CAU submitted an unsolicited response to PPL's certification. This response provided no evidence to support CAU's allegation that an *ex parte* communication had occurred between PPL and DHS. The response merely expressed CAU's disbelief of the content of Mr. Horvath's certification.

Based upon the Hearing Unit's independent investigation, and my review of the record, I find no evidence that any *ex parte* communication occurred between PPL and DHS regarding the subject solicitation. All members of the evaluation committee as well as the State contract managers and PPL's manager who was responsible for overseeing PPL's response to the solicitation advised the Hearing Unit that they had no communications regarding the subject solicitation.

I also note that it is appropriate for a bidder to refer to the specifications and instructions in all of the Division's RFPs as "guidance" to all bidders on how to prepare a proposal. With regard to PPL's specific statement which also refers to space limitations, I am persuaded that the statement was made in the context of the RFP's instructions.

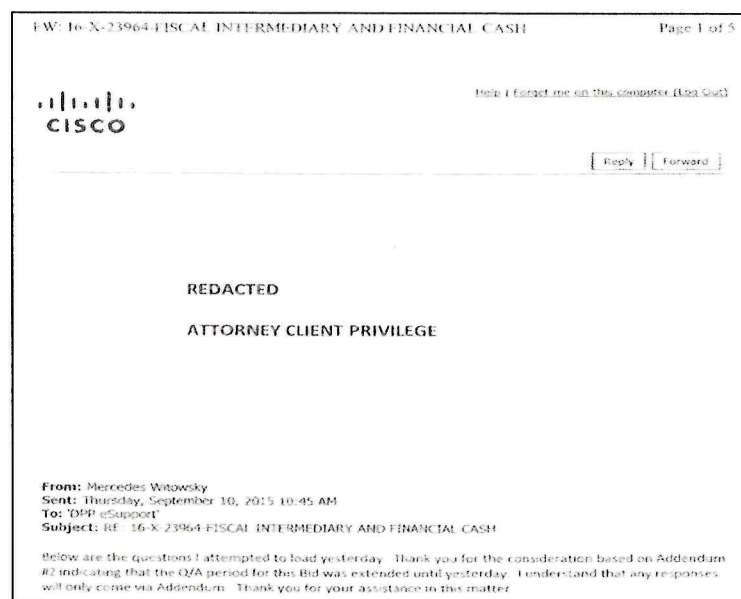
B. CAU's Supplemental Questions.

As noted above, on September 1, 2015, the Bureau issued Addendum #2 responding to bidder questions received prior to the close of the Question and Answer Period (Q&A Period) on August 18, 2015. In response to one question, the Bureau mistakenly noted that the Q&A Period had been extended. When the error was brought to the attention of the Procurement Specialist Addendum #4 was issued on September 11, 2015 advising prospective bidders that the Q&A Period had not been extended; instead, it was the proposal submission deadline that had been extended.

During CAU's original protest, CAU alleged that the procurement process was not conducted in conformance with the applicable laws and regulations. Specifically, CAU alleged that the Division extended the time for prospective bidders to submit questions and then rescinded the extension without notice, leaving some questions unanswered. The Hearing Unit took steps to investigate whether any supplemental questions had been received from CAU. In conducting this investigation, the Division of Revenue and Enterprise Services (DORES) was contacted.

By way of background and process I note that, the DPP eSupport mailbox (esupport@treas.nj.gov) is maintained and housed by DORES, a Division of the Department of the Treasury, separate and apart from the Division. DORES advised the Hearing Unit that no supplemental questions were received from any bidder. Moreover, with its original protest, CAU did not provide either the supplemental questions or proof that an email containing supplemental questions had been forwarded to the Division. Accordingly, in the May 13, 2016 final agency decision I concluded that "despite the fact that there was a typographical error in the September 1, 2015 Q&A response, no supplemental questions were received from any bidder, and all questions previously received by the Division related to this RFP were answered."

In its May 24, 2016 application for Permission to File an Emergent Motion for Stay, CAU came forward for the first time with a copy of the email⁴ (below) containing the supplemental questions that it alleged had been sent to the Division.



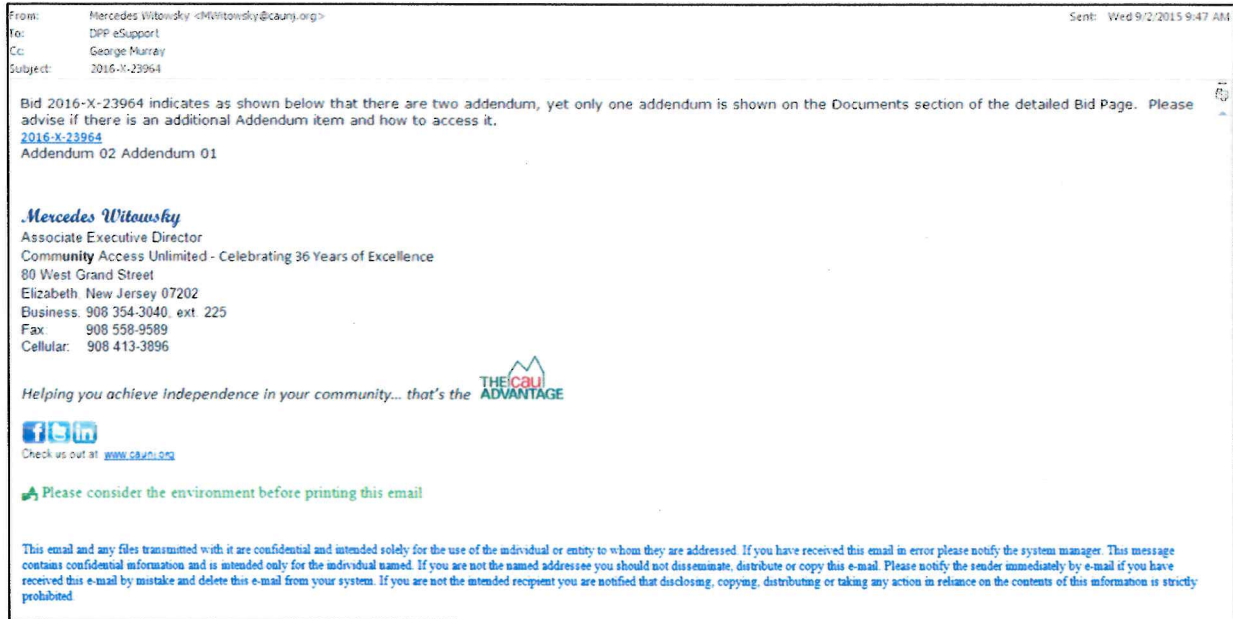
This email information, filed with the Court, provided the date, time and sender of CAU's alleged email containing the supplemental questions. With this new information provided, the State requested that the Court remand the matter to the Division for review and investigation. Upon receipt of this email in

⁴ This email was included in CAU's appeal as Exhibit A.

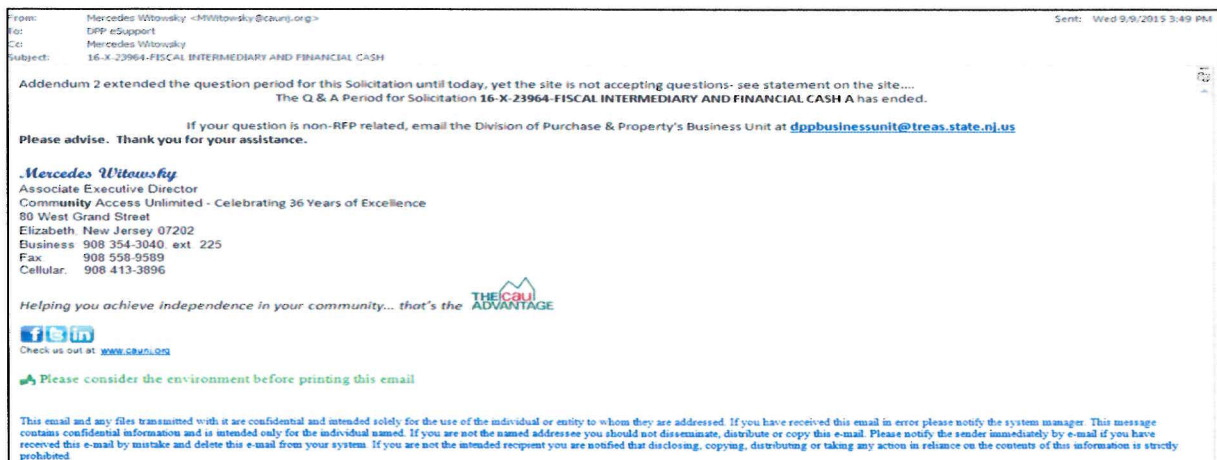
connection with the remand, the Hearing Unit reviewed the email which had been submitted by CAU to the Court.

When emails are received into the eSupport mailbox, DORES staff, who act as a clearing house for the emails received into the mailbox, review each email for the solicitation number and/or the solicitation title, and then forward the email to the appropriate procurement specialist.⁵

Emails from CAU received into the eSupport mailbox prior to September 10, 2015, appeared as follows:

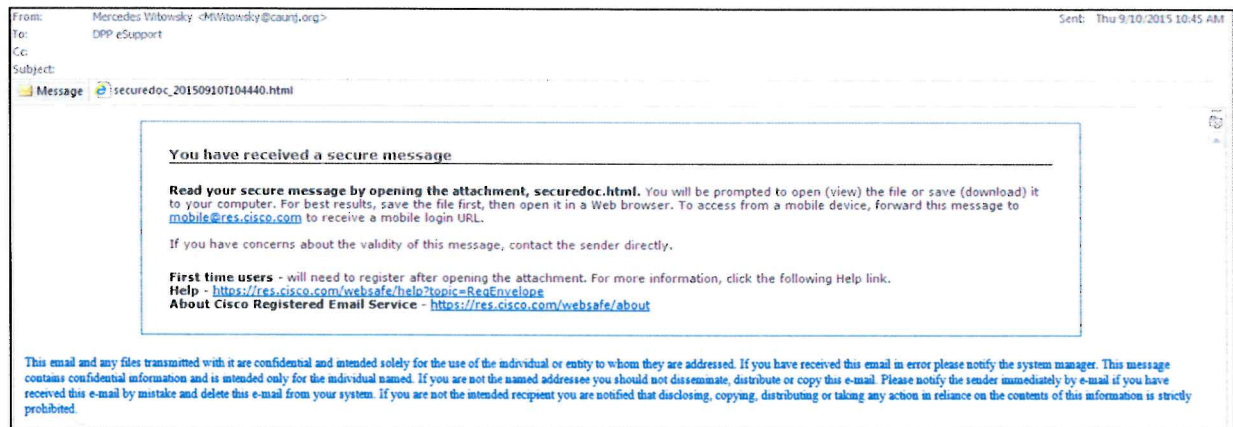


and



However, when the email in question here was received into the eSupport mailbox on September 10, 2016, it was inexplicably sent as a secure file. It appeared as follows:⁵

⁵ While I am disappointed in this unusual gap in the electronic process here, I am pleased to share that the State of New Jersey's new eProcurement system, **NJSTART**, went live on June 20, 2016. In **NJSTART**, questions are posted directly to the Bid Solicitation {RFP} and are viewable by the Bureau without having to pass through a clearing house.

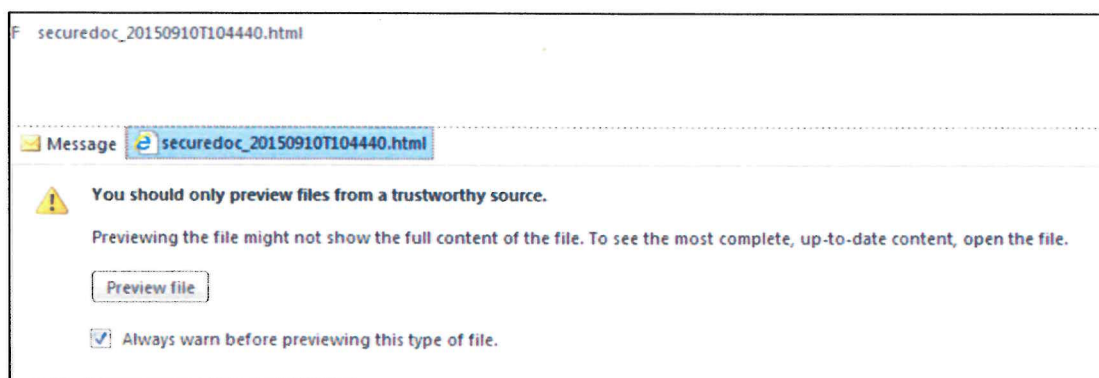


There was no RFP solicitation related content in the email (above) by which DORES could identify this communication as related to this, or any, procurement. It was simply not recognized by DORES. It is an unusual circumstance for DORES or this Division to receive an email, secure or otherwise, which does not contain identifying content related to the RFP. Consistent with RFP § 1.3.1 *Electronic Question and Answer Period*, bidders are directed to tie their submitted questions to the RFP. Here, because the secure email received by DORES did not display this information, the email was not forwarded to any procurement specialist for review as neither the solicitation, nor the procurement specialist could be ascertained from the email, nor was DORES able to locate any such questions during the Hearing Unit's initial investigation.

In connection with the Division's more informed review on this remand from the Appellate Division related to the email referenced as CAU's Exhibit A in its brief on appeal, based upon the date, time stamp and sender's email address, in working with DORES the Hearing Unit was able to determine that an email depicted in the screen shot above, was CAU's email in question.

To reveal the email content, the Hearing Unit, on June 20, 2016, in undertaking a new investigation related to CAU supplemental questions, took the extra steps necessary to open the secure attachment. Those steps are detailed as follows:

- First, when the link ([securedoc_20150910T104440.html](#)) is clicked the following appears:

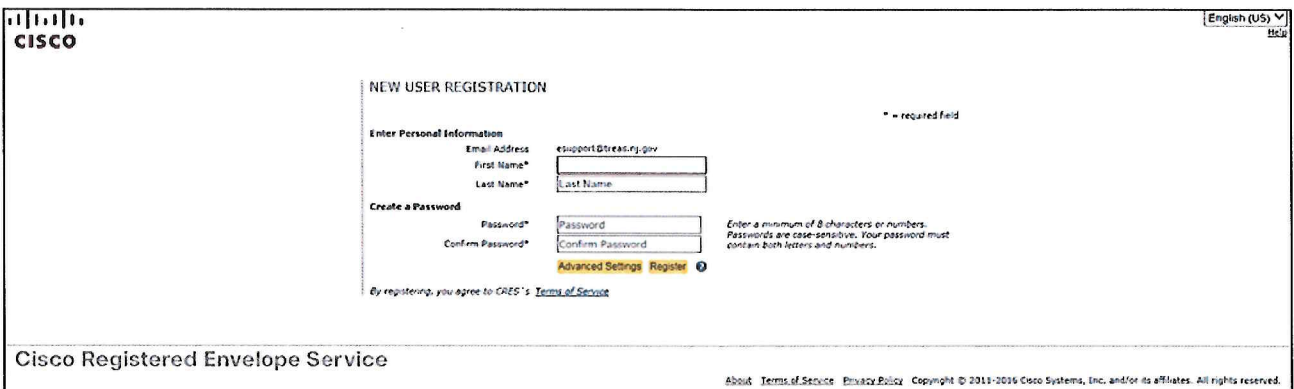


- If you agree that the email is from a trustworthy source, and again click on the link ([securedoc_20150910T104440.html](#)), the following appears:

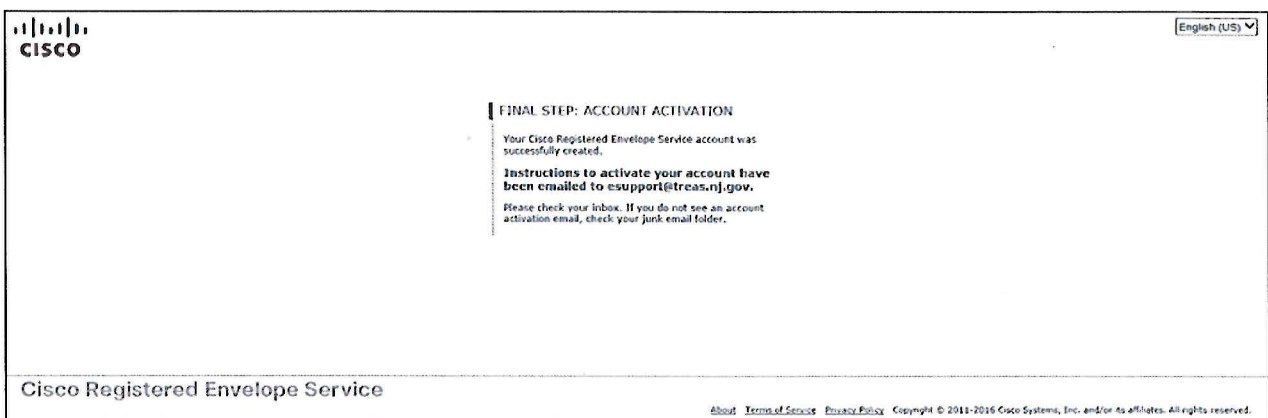
⁵ All emails were sent by Mercedes Witowsky (MWitowsky@caunj.org).



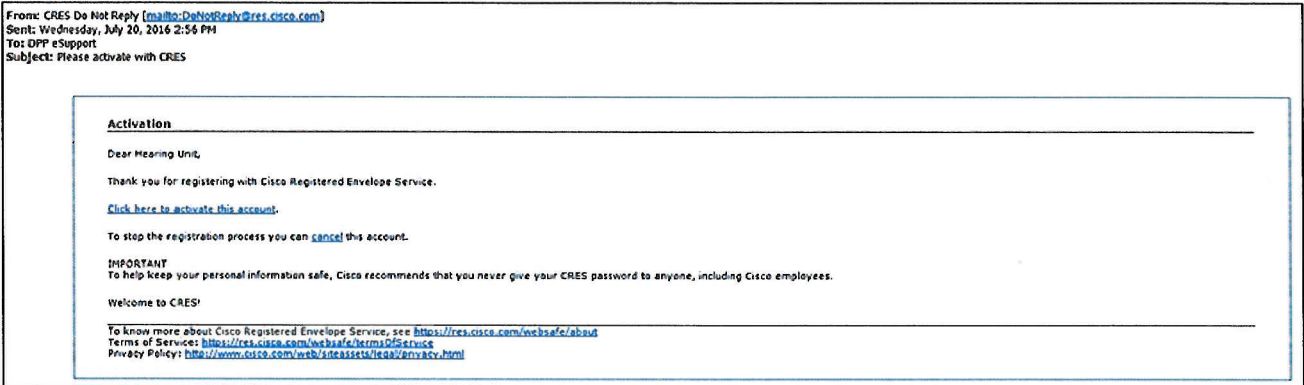
- It is only at this stage that the solicitation number and title appear. In order to access the email, the Hearing Unit was then required to register with CISCO, entering personal identifying information and creating a password.



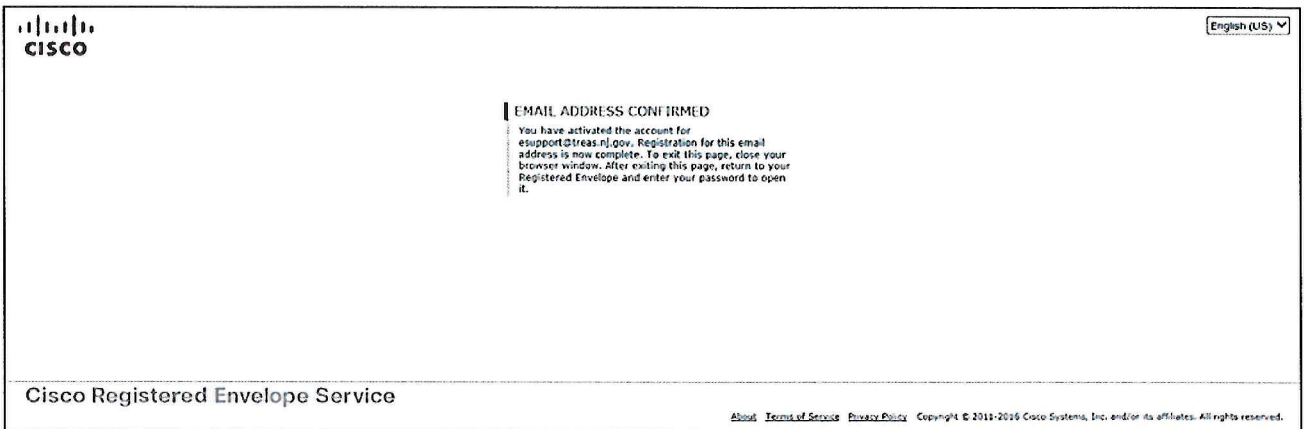
- Once registration was completed, account activation was necessary to access the email:



- Thereafter, an account activation email was received:

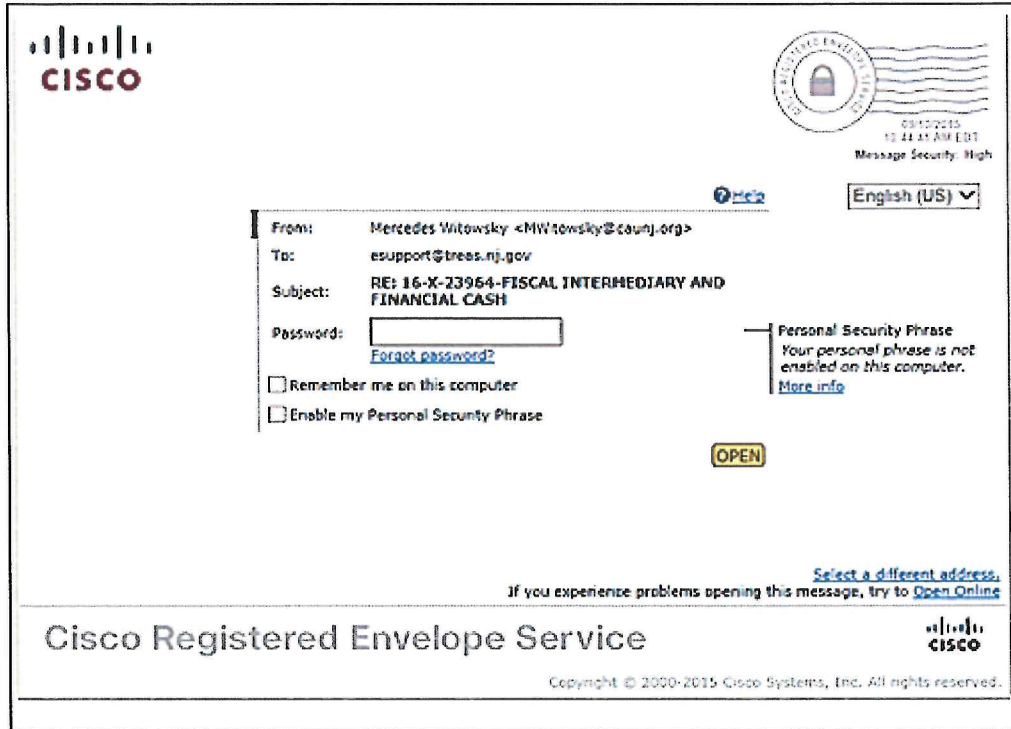


- Only after the account activation was confirmed,

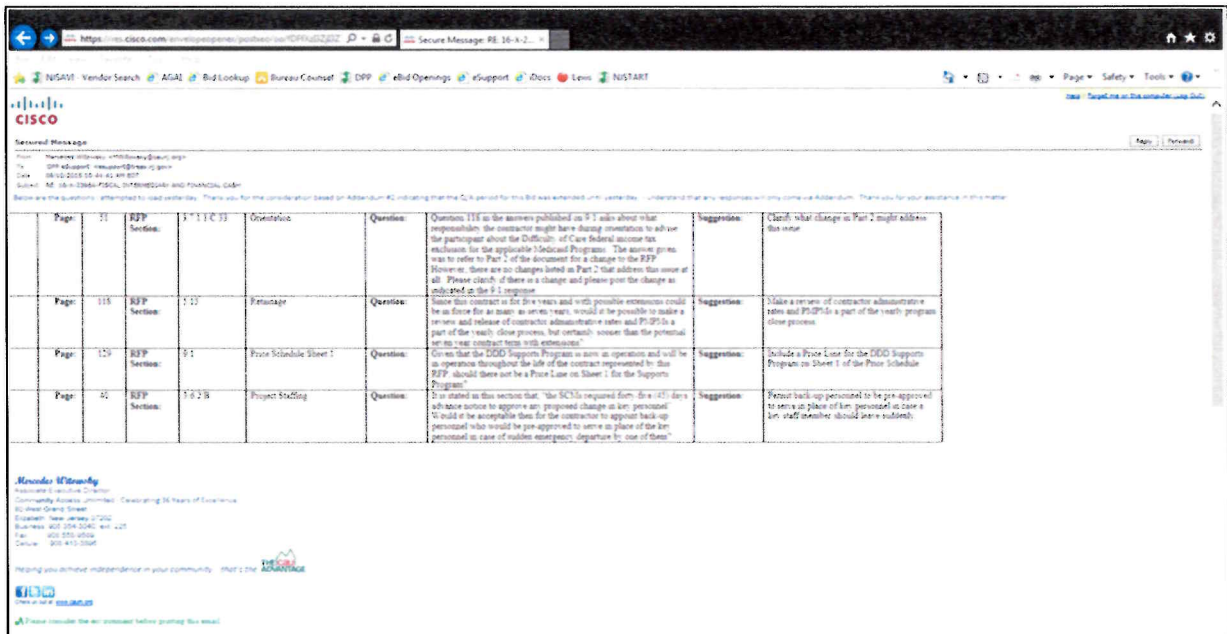


- was the Hearing Unit finally able to login using the screen below⁶:

⁶ Even now, if the Hearing Unit attempts to reopen the email for review, it must login to the “Cisco Registered Envelope Service” to access the email content.



- and open the email, which finally revealed the following:



Thus, the Hearing Unit determined that CAU did in fact submit additional questions in response to Addendum #2. Because CAU, however, submitted the email as a secured file, the email content was not viewable or identifiable by DORES as related to a solicitation; and, therefore was not forwarded to the Bureau for review, prior to the proposal opening date.

Now, on remand, I have reviewed each of these supplemental questions to determine whether any of them would have mandated an answer prior to proposal opening or an amendment to the specifications,

and whether a lack of response affected the procurement. As to each of CAU’s supplemental questions, I find as follows:

1. RFP § 3.7.1.1 Orientation

CAU’s first supplemental question and suggested action was as follows:

#	Page #	RFP Section Reference	Question	Suggestion
1	51	3.7.1.1 C 33 Orientation	Question 118 in the answers published on 9/1 asks about what responsibility the contractor might have during orientation to advise the participant about the Difficulty of Care federal income tax exclusion for the applicable Medicaid Programs. The answer given was to refer to Part 2 of the document for a change to the RFP. However, there are no changes listed in Part 2 that address this issue at all. Please clarify if there is a change and please post the change as indicated in the 9/1 response.	Clarify what change in Part 2 might address this issue.

Question #118 of Addendum #2 stated:

#	Page #	RFP Section Reference	Question	Answer
118	52	3.7.1.1 C 40	Orientation – C 40 Is the contractor expected to inform participants and employees regarding IRS Notice 2014-7 regarding the Difficulty of Care federal income tax exclusion for the applicable Medicaid programs, capture and record the employees’ eligibility, and cease to report payments as federal income where applicable? If not, why not?	Please refer to Part 2 of this document for a change to the RFP.

RFP § 3.7.1.1(C)(40) stated in pertinent part:

RFP § 3.7.1.1 *Orientation*

...

C. Please note: the respective SCM will supply the contractor with the following DHS-numbered forms at the Project Launch meeting. The Orientation curriculum shall include, but not be limited to, the following:

...

- 40. Process explaining the Participant/ Authorized Representative- Employer Satisfaction Surveys.

IRS Notice 2014-7, referenced in the original question, provides guidance on the federal income tax treatment of certain payments for persons who provide home care for eligible individuals under a state Medicaid Home and Community-Based Services waiver program for individuals who otherwise would require care in a hospital, nursing facility, or intermediate care facility. The notice provides that Medicaid

waiver payments will be treated as difficulty of care payments excludable from gross income under §131 of the Internal Revenue Code.

A review of CAU’s supplemental question does not change the reasoning in the May 13, 2016, final agency decision. RFP § 3.12.1 *Related Federal and New Jersey Taxes* and RFP § 3.3(F) *Administrative Requirements for the Contract’s Operations* require that the contractor comply with applicable federal and State laws related to tax withholdings and require the contractor to identify and interpret changes to federal regulations or policies as necessary. While there was no addition, deletion, clarification or modification to the RFP contained in PART 2 of Addendum #2 related to Question 118 for RFP § 3.7.1.1 C 40, such language was not necessary as the RFP, as noted above, required the contractor comply with applicable federal and State laws related to tax withholdings and require the contractor to identify and interpret changes to federal regulations or policies as necessary. The reference to Part 2 was a clerical mistake which did not result in a deviation from the substantive procurement process.

While a response to the supplemental question could have clarified that no Part 2 RFP modification was intended, the Bureau’s failure to answer this supplemental question did not impact the procurement process. The supplemental question posed by CAU would not have resulted in a revision to the RFP. Therefore, this procurement was conducted in conformance with the applicable laws and regulations.

2. RFP § 5.15 Retainage

CAU’s second supplemental question and suggested action was as follows:

#	Page #	RFP Section Reference	Question	Suggestion
2	118	5.15 Retainage	Since this contract is for five years and with possible extensions could be in force for as many as seven years, would it be possible to make a review and release of contractor administrative rates and PMPMs a part of the yearly close process, but certainly sooner than the potential seven year contract term with extensions?	Make a review of contractor administrative rates and PMPMs a part of the yearly program close process.

RFP § 5.15 *Retainage* states:

The amount of retainage is noted on the RFP signatory page accompanying this RFP. The using agency shall retain the stated percentage of each invoice submitted. At the end of each three (3) month period, the using agency shall review the contractor's performance. If performance has been satisfactory, the Using Agency shall release ninety percent (90%) of the retainage for the preceding three (3) month period. Following certification by the State Contract Manager that all services have been satisfactorily performed the balance of the retainage shall be released to the contractor.

Upon review, it is unlikely that the RFP would have been revised as requested; however, even assuming arguendo the RFP was revised, the revision would not have impacted a bidder’s proposal as the required review of the contractor’s performance, whether it occurs every three months or annually is a requirement of the State, not the contractor. The supplemental question posed by CAU would not have resulted in a revision to the RFP. The Bureau’s failure to answer this supplemental question did not impact the

05	DDD- CCW	Firm-Fixed Per-Member, Per-Month						10,900 Members x 12 Months x 5 Years = =	
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Had the Bureau received CAU’s question prior to bid opening, the information provided to potential bidders would not have been amended and the price sheet would not have been changed. As noted in the RFP, DDD’s new Supports Program is part of the CCW program; therefore, it was not necessary that a separate price line be added to the price sheet as requested by CAU. The price line, as it was listed in the price sheet, incorporated DDD’s existing enrollments and accounted for potential future enrollments in the CCW program and its subsidiary Supports Program.

The supplemental question posed by CAU would not have resulted in a revision to the RFP. Therefore, a response not being given for this supplemental question did not impact the procurement process, and this procurement was conducted in conformance with the applicable laws and regulations.

4. RFP § 3.6.2 Project Staffing

CAU’s fourth supplemental question and suggested action was as follows:

#	Page #	RFP Section Reference	Question	Suggestion
4	40	3.6.2B Project Staffing	It is stated in this section that, “the SCMs Required forty-five (45) days advance notice to approve any proposed change in key personnel”. Would it be acceptable then for the contractor to appoint backup personnel who would be pre-approved to serve in place of the key personnel in case of sudden emergency departure by one of them?	Permit backup personnel to be preapproved to serve in place of key personnel in case a key staff member should leave suddenly.

RFP § 3.6.2 *Project Staffing* states:

The [Account Manager (AM)] shall submit a written request to the [State Contract Managers (SCMs)] for prior approval of proposed key personnel at the Project Launch meeting, and throughout the contract term; the SCMs require forty-five (45) days’ advance notice to approve any proposed change in key personnel. The contractor shall provide the resume of the AM, whenever an AM is being proposed for consideration throughout the contract term. Section 4.4.4.3 of the RFP provides the requirements for the format of resumes. Changes in key personnel shall be reported to the SCMs immediately. No key personnel change may be made without prior, written approval from the SCMs.

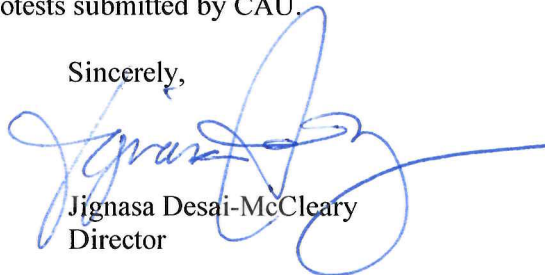
The RFP requires that the SCM have a minimum of 45 days’ notice of change in key personnel so that the new personnel can be approved. Nothing in the RFP precludes a contractor from having back-up key personnel pre-approved. In fact, in response to similar questions posed by a potential bidder during the Q&A Period, the Bureau advised potential bidders that a contractor shall provide a succession plan.

#	Page #	RFP Section Reference	Question	Answer
85	39	3.6.2	<p>...</p> <ul style="list-style-type: none"> When a position becomes vacant, may the contractor hire or assign an employee on an "acting" basis pending SCM approval to ensure uninterrupted service? <p>...</p> <ul style="list-style-type: none"> Will the State have an "emergent" process to fill vacancies? For example, where a preferred candidate has been identified but is unwilling or unable to wait 45 days for approval? Suggestion: The RFP should request that the Bidder provide the organizational capacity and expertise to accomplish the tasks under this RFP and not comingle state HR practices with the hiring practices of the contractor. 	<p>The response to all of these bulleted questions follows: The State requires no authority over the contractor's staff; however, the contractor shall provide a succession plan to the respective SCM, for approval as per RFP Section 3.6.2B, to include how the contractor's level of service (LOS) will be maintained and how the contractor expects to fulfill the duties of the contract and ensure uninterrupted service.</p> <p>(Emphasis added.)</p>

Based on the original question posed during the Q&A Period and the Bureau's response, and the fact that the RFP did not preclude CAU, or another contractor from submitting an approval request for backup staff, so long as the SCM was provided 45 days' notice for approval, the Bureau's failure to address CAU's specific supplemental question did not impact the procurement process. The supplemental question posed by CAU would not have resulted in a revision to the RFP. Therefore, this question did not impact the procurement process; and, this procurement was conducted in conformance with the applicable laws and regulations.

Based upon the foregoing, I sustain the NOI. This is my final agency decision with respect to the remand from the Superior Court, Appellate Division and supplements my May 13, 2016 FAD and becomes a part of it. Together, this supplement and my May 13, 2016 FAD are the complete final agency decision in response to all of the protests submitted by CAU.

Sincerely,



Jignasa Desai-McCleary
 Director

JD-M: RUD

c: B. Montag
 P. Michaels
 L. Spildener
 S. Fletcher