



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
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July 10, 2019

Via Electronic Mail [kdepew55@comcast.net] and USPS Regular Mail

Ken Depew
Depew Real Estate Appraisal
25 Spruce Court
P.O. Box 379
Moorestown, NJ 08057

Re: I/M/O Bid Solicitation #19DPP00287 Depew Real Estate Appraisal
Protest of Notice of Intent to Award
Bid Solicitation T3069 Easement Review Appraisal Services: SADC

Dear Mr. Depew:

This letter is in response to your email of June 12, 2019, on behalf of Depew Real Estate Appraisal (Depew) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that email, Depew protests the June 5, 2019, Notice of Intent to Award (NOI) letter issued for Bid Solicitation #18DPP00287 – T3069 Easement Review Appraisal Services: SADC (Bid Solicitation) asking why it was not included among the list of awarded Vendors {Bidders}. The record of this procurement reveals that Depew's Quote was deemed non-responsive by the Division's Procurement Bureau (Bureau) for failing to submit the necessary pricing information with its Quote.

By way of background, on July 19, 2018, the Bureau issued the Bid Solicitation on behalf of the Department of Agriculture's State Agriculture Development Committee (SADC) for SADC certified Appraisers to conduct a review of Independent Appraiser's reports for Farmland Preservation and subsequently recommend the Market Value of the Development Easement to the SADC. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award up to 12 Master Blanket Purchase Orders (Blanket P.O.s) to those responsible Vendors {Bidders} whose Quotes, conforming to this Bid Solicitation, are most advantageous to the State, price and other factors considered. Ibid.

On August 23, 2018, the Division's Proposal Review Unit opened 11 Quotes which were received by the submission deadline of 2:00 pm eastern time. After conducting a review of the Quotes received, the Division determined that Depew's Quote was non-responsive, as Depew's State-supplied Price Sheet did not include any pricing for Price Line 6.

On June 5, 2019, the Bureau issued the NOI advising all Vendors {Bidders} of Division's intent to award Blanket P.O.s to the following Vendors {Bidders}: Integra Realty Resources Coastal NJ; James Stuart; Landmark Appraisal; Steve W. Bartlet, MAI, SRA, AI-GRS; Tom Rodriguez Associates; TW Sheehan & Associates; and Wade Appraisal LLC. On June 10, 2019, Depew emailed the Bureau inquiring

as to why it was not included among the Vendor(s) Bidder(s) intended for award. In response, the Bureau provided Depew with a copy of the Recommendation Report for its review.

On June 12, 2019, Depew sent an email the Division's Hearing Unit stating in part:

I just got back from a trip to Spain and wanted to respond to the letter dated June 5, 2019, regarding Easement Review Appraisal Services- SADC. I notice that I was not accepted as per the letter. I was wondering why, since I have been doing review work for the SADC for many years for Paul Burns and now Rich Martin.

...I was made aware that the reason for me not being on the list was because on the State-Supplied Price Sheet Instructions, I failed to submit with its quote an All-inclusive hourly rate for the provision of testimony and litigation support on Price Line 6. I did not fill out those fees since it is not typical for the reviews, that we are ever asked to give testimony or litigation support. If I were to fill out that line item, my standard fee would be at the rate of \$100.00 per hour.

In consideration of Depew's protest, I have reviewed the record of this procurement, including the Bid Solicitation, Depew's Quote and protest, 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. I set forth herein the Division's Final Agency Decision.

The Division's administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal shall¹ conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), *emphasis added*.]

With respect the submission of Quote pricing, the Bid Solicitation cautioned Vendors {Bidders} regarding the need to ensure that all required forms, including the State-Supplied Price Sheet, are properly submitted. Specifically, Bid Solicitation Section 4.4 *Quote Content* stated in part:

¹ "Shall or Must – Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a Quote {Proposal} as non-responsive." Should or May – "Denotes that which is permissible or recommended, not mandatory." Bid Solicitation § 2.2 *General Definitions*.

Note: Vendors {Bidders} submitting Quotes through NJSTART must complete the State-supplied price sheet/schedule(s) (Volume 3) accompanying this Bid Solicitation and upload it as an attachment on the "Attachments" Tab (See Section 4.4.5 of this Bid Solicitation).

The requirement to use to State-supplied price sheet for Vendor pricing was reiterated in Bid Solicitation Section 4.4.5 *State-Supplied Price Sheet* which stated "[t]he Vendor {Bidder} must submit its pricing using the State-Supplied Price Sheet accompanying this Bid Solicitation and located on the "Attachments" Tab."

To assist Vendors {Bidders} in completing the State-Supplied Price Sheet, the Bid Solicitation further advised:

The Vendor {Contractor} shall:

- A. Provide a Firm Fixed price for the completion of all deliverables required in a Desk Review (Reference Bid Solicitation Section 3.3.1, for each year of the proposed Blanket P.O. term (Price Line #1);
- B. Provide a Firm Fixed price for the completion of additional reporting engagements as referenced in Bid Solicitation Section 3.3.2. The Vendor's {Bidder's} proposed pricing must not exceed the limits demonstrated below for each Assignment type:
 1. Letter of Addendum – The Vendor's {Bidder's} proposed Firm Fixed price must not exceed \$150 per Letter of Addendum;
 2. Highlands Dual Appraisal Consideration Report: The Vendor's {Bidder's} proposed Firm Fixed price must not exceed \$300 per Pineland Review Appraisal;
 3. Pinelands Review Appraisal Report: The Vendor's {Bidder's} proposed Firm Fixed price must not exceed \$300 per Pineland Review Appraisal;
 4. Subdivision Method Report – The Vendor's {Bidder's} proposed Firm Fixed price must not exceed \$500 per assignment.
- C. Provide an All-inclusive Hourly Rate for the provision of testimony and litigation support as described in Bid Solicitation Section 3.3.3.

The Vendor {Bidder} must submit pricing for all price lines on the State-supplied price schedule. Failure to submit all information required may result in the Vendor's {Bidder's} Quote being deemed non-responsive.

[Bid Solicitation § 4.4.5.2 *State-Supplied Price Sheet Instructions*, emphasis added.]

As set forth in the Bureau's June 3, 2019 Recommendation Report, "[t]he Bureau determined Depew to be non-responsive to the mandatory material requirements of Bid Solicitation Section 4.4.5.2, State Supplied Price Sheet Instructions, as it failed to submit with its Quote an All-Inclusive Hourly Rate for the provision of testimony and litigation support on Price Line 6." A review of Depew's State-Supplied Price Sheet shows that Depew left Price Line 6, Testimony/Litigation Support Blank, a fact that Depew concedes in its protest email.

T3069 - Easement Review Appraisal Services- SADC				
Price Schedule				
Bid Solicitation {RFP}: 18DPP00XXX				
Please reference Bid Solicitation Section 4.4.5 for instructions.				
Bidder (Vendor) Name:	Kenneth R. Depew - Depew Real Estate Appr		Date:	7/30/2018
Price Line	Price Line Description - Desk Review (Reference Bid Solicitation 3.3.1)	Firm Fixed Price (Each)		
		Year 1	Year 2	Year 3
1	Appraisal Desk Review (Reference Bid Solicitation Section 3.3.1)	\$900	\$900	\$900
Average Firm Fixed Unit Cost Years 1-3 (Automatically Populated)		\$ 900.00		
Price Line	Price Line Description - Additional Reporting Engagements (Reference Bid Solicitation Section 3.3.2)	Firm Fixed Price (Each)		
2	Letter of Addendum SUBMITTED PRICING MUST NOT EXCEED \$150 (Reference Bid Solicitation Section 3.3.2(A))	\$150		
3	Highlands Dual Appraisal Consideration Report SUBMITTED PRICING MUST NOT EXCEED \$300 (Reference Bid Solicitation Section 3.3.2(B))	\$300		
4	Pinelands Review Appraisal Report SUBMITTED PRICING MUST NOT EXCEED \$300 (Reference Bid Solicitation Section 3.3.2(C))	\$300		
5	Subdivision Method Report SUBMITTED PRICING MUST NOT EXCEED \$500 (Reference Bid Solicitation Section 3.3.2(D))	\$500		
Price Line	Price Line Description - Testimony/Litigation Support (Reference Bid Solicitation Section 3.3.3)	All-Inclusive Hourly Rate (Each)		
6	Testimony/Litigation Support			

The question, then, is whether Depew's submission of its State-Supplied Price Sheet with no pricing information submitted for Price Line 6 results in a deviation from the requirements of the Bid Solicitation. In order for Depew's Quote to be considered responsive, Depew's failure to submit all of the information required by the State-Supplied Price Sheet with its Quote would have to be deemed a minor irregularity. Minor irregularities can be waived pursuant to the authority vested by N.J.A.C. 17:12-2.7(d) and Bid Solicitation Section 1.4.10, *Quote {Proposal} Acceptances and Rejections*. It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Stermin, 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 the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 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.” Id. at 222.

Because Depew did not include any pricing for Price Line 6, Testimony/Litigation Support, the State has no assurance that the Blanket P.O. would be performed in accordance with the specified requirements. River Vale, *supra*, 127 N.J. at 216. Depew’s failure to include all of necessary information with its Quote submission is a material deviation from the requirements of the Bid Solicitation. Permitting Depew, or any other Vendor {Bidder}, to submit the required information after the Quote opening deadline has passed, as Depew has offered in its protest, would place that Vendor {Bidder} in a position of advantage over other Vendors {Bidders} who timely submitted the required pricing information with the Quote.

The *NJSTART* system does not prevent a Vendor {Bidder} from submitting a Quote without all of the required forms, documents, and pricing information attached as mandated by the specifications. The responsibility for ensuring that all necessary forms and other submittals are uploaded into *NJSTART* necessarily and appropriately rests solely with the Vendor {Bidder}. Bid Solicitation § 1.4.2 *Vendor {Bidder} Responsibility*. Here, unfortunately, Depew submitted a Quote without all of the necessary pricing information included. If the requirements of N.J.A.C. 17:12-2.2 are not met, a Quote must be rejected. This regulation mandates stringent enforcement to maintain the equal footing of all Vendors {Bidders} and to ensure the integrity of the State’s bidding process.

This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put forth in preparing and submitting the Quote. However, in light of the findings set forth above, I have no choice but to deny your request for eligibility to participate in the competition for the subject Bid Solicitation. This is my final agency decision on this matter.

Thank you for your company’s interest in doing business with the State of New Jersey and for registering your business with *NJSTART* at www.njstart.gov, the State of New Jersey’s eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: TCR

c: A. Davis
R. Regan
K. Popso