



State of New Jersey

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March 1, 2016

Via Electronic [Haywood.Talcove@Inssi.com] and USPS Regular Mail

Haywood Talcove, CEO LNSSI
LexisNexis Risk Solutions
1150 18th Street NW, Suite 250
Washington, DC 20036

Re: Protest of Notice of Intent to Award
RFP #: 16-X-23923: Data Access Services: Web-Based Investigative and Locator Data

Dear Mr. Talcove:

This letter is in response to your correspondence on behalf of LexisNexis Risk Solutions (Lexis) received by the Hearing Unit of the Division of Purchase and Property (Division) on January 27, 2016. In that letter, Lexis protests the Notice of Intent to Award (NOI) a contract to Thomson Reuters West (West) for Solicitation #16-X-23923: Data Access Services: Web-Based Investigative and Locator Data. Lexis alleges: (1) West has not committed to a firm fixed price for any category of service; (2) West's proposal is nearly ten times more costly per transaction, yet lower rated; (3) West withdrew all ordering forms and T&Cs for ordering; and, (4) West failed to provide the required proof of experience. Lexis concludes that there are only two legal outcomes to this solicitation: (1) cancellation of the intended award to West or (2) cancellation of all intended awards to West and Lexis and have a new round of BAFOs issued.

By way of background, the Request for Proposal (RFP) was issued by the Division's Procurement Bureau (Bureau) on March 13, 2015, on behalf of the State of New Jersey and Cooperative Purchasing Partners to solicit proposals for web-based investigative and locator data services.¹ (RFP § 1.1 *Purpose and Intent*.) The intent of the RFP is to award contracts by category as follows: One contract award for Category 1 – Tier Based Pricing; up to three (3) contract awards for Category 2 – Batch Processing; and contract awards to all responsive Bidders for Category 3 – Transactional. (*Ibid.*; RFP § 7.2 *Final Contract Award*.) The services covered by this RFP have been available to State agencies through term contracts for many years and the using agencies have indicated a continuing need for access to online research services to support investigations (both civil and criminal); the screening of persons and firms; and for news research. (RFP § 1.2 *Background*.) Specifically the RFP states:

This contract requires the capability to access an online service 24 hours a day, 7 days a week for conducting investigative searches. Upon an investigative inquiry, the Contractor's service shall provide results/information that includes the location of individuals and businesses, the identification of their assets, and the verification of

¹ This RFP was to procure similar services offered by term contract T-1616. (RFP § 1.2 *Background*.)

background information, as well as uncovering other pertinent information.

[RFP § 3.0 *Scope of Work.*]

Information provided through the online services may be grouped into two broad categories: public records, typically acquired from government and public sources, and general news and corporate information, typically acquired from commercial or private sources. Authorized contract users will make inquiries based on the name of an individual person, a probable residence location or other personal identification; or may make inquiries based on similar information regarding a business or corporate entity. The system requires that the Contractor's web-based service must respond to the user's inquiry by providing additional information related to the inquiry subject. In addition, whenever possible, the Contractor's web-based service shall also provide automated updates to individual users to update any subsequent information the investigative service locates after the initial inquiry was completed.

[RFP § 3.1 *Required Services.*]

Contract awards will be made to those responsible Bidders whose proposals, conforming to this RFP are most advantageous to the State, price and other factors considered. (RFP § 1.1 *Purpose and Intent*; N.J.S.A. 52:34-12.)

On June 10, 2015, two proposals received by the submission deadline of 2:00 p.m. were opened by the Proposal Review Unit. Both proposals were forwarded to the Bureau. The Bureau provided the proposals to an Evaluation Committee (Committee) for review and consideration. The Committee included technical experts of their agencies' requirements from the Department of the Treasury, Department of Human Services, Department of Law and Public Safety and the Administrative Office of the Courts. The Committee invited both Lexis and West to make presentations regarding their proposals on September 2, 2015. On September 3, 2015, the Bureau sent requests for a Best and Final Offer (BAFO) pursuant to RFP § 6.8 *Negotiation and Best and Final Offer* to both Lexis and West.

After completing its evaluation of the submitted proposals, on January 20, 2015 the Bureau issued its NOI which indicated:

It is the intent of the Director of the Division of Purchase of Property (Division) to make a contract award to the following vendors pursuant to the proposals submitted in response to the referenced Request for Proposal (RFP).

Category	Vendor	Price Lines
1: Basic & Advanced Services	Thomson Reuters d/b/a West	00001 – 00100
2a: AdHoc Batch Processing	LexisNexis	00101 – 00105
2b: High Volume Batch Processing	LexisNexis, West	00106 – 00125
3: Transactional Processing	LexisNexis, West	00126 – 00130

On January 27, 2015, the Division's Hearing Unit received a protest letter from Lexis. By way of summary, Lexis alleges: (1) West has not committed to a firm fixed price for any category of service; (2) West's proposal is nearly ten times more costly per transaction, yet lower rated; (3) West withdrew all

ordering forms and terms and conditions for ordering; and, (4) West failed to provide the required proof of experience. In its protest letter, Lexis concludes that there are only two legal outcomes to this solicitation:

(1) cancellation of the noncompliant, incomplete, and unenforceable awards to West as required by N.J.A.C. § 17:12-2.11(e), and awards to the only eligible offeror at the prices proposed, or (2) cancellation of all existing awards to West and LexisNexis, and a new round of BAFOs from each, to allow West to make a compliant offer for evaluation that (a) offers a firm price with NO CONDITIONS, (b) includes the mandatory examples of comparable state contracts (not just \$0-dollar-minimum multi-award term contracts to states), and (c) includes the T&Cs of its services that must be coordinated with RFP terms (rather withdrawal of its offered terms).

Each of Lexis' protest points will be addressed below.

1. Lexis alleges that West did not commit to a firm fixed price for any category of service.

Lexis alleges that contrary to Section 6.1 of the State of New Jersey Standard Terms and Conditions (SSTC), West did not commit to a firm fixed price for each category of service bid in its proposal.

With respect to the submission of pricing for each category of service sought, the RFP required:

4.4.5 PRICE SCHEDULE/SHEET

The bidder must submit its pricing using the format set forth in the State-supplied price sheet/schedule(s) accompanying this RFP. Failure to submit all information required will result in the proposal being considered non-responsive. Each bidder is required to hold its prices firm through issuance of contract.

1. The Bidder shall provide separate pricing options for the following types of services/Categories:

Category 1

- a. **Basic Service - Monthly Flat Fee User Access:** The Bidder shall provide monthly flat fee pricing on lines 00001–00050 for access to its investigative research databases to include at least 50% of the requirements defined in Section 3.1.1a through 3.1.1k.
- b. **Advanced Service - Monthly Flat Fee User Access:** The Bidder shall provide monthly flat fee pricing on lines 00051–00100 for access to its investigative research databases on a monthly flat fee to include at least 50% of the requirements defined in Section 3.1.1a through 3.1.1gg.

The Bidder should provide separate pricing options for the following types of services:

Category 2

- a. **Ad-Hoc Batch Processing – Flat Rate per Match.** The Bidder shall provide flat rate batch processing pricing on lines 00101–00105 per each matched transaction. For example, if the state requests that 5,000 records be researched for batch processing, which yields 100 matched records, the Bidder shall invoice for the 100 matches.
- b. **High Volume Batch Processing**
The Bidder shall provide pricing on lines 00106–00125 for high volume batch processing. The State is requesting that the Bidder provide a monthly flat fee for high volume batch processing for the following options:
- i. Up to 100,000 location searches per month
 - ii. 100,001 to 250,000 location searches per month
 - iii. 250,001 to 500,000 location searches per month
 - iv. 500,001 to 1,000,000 location searches per month

Category 3

- a. **Transactional Access**

The Bidder shall provide pricing on lines 00126-00130 for access to at least 50% of the requirements defined in Section 3.1.1a through 3.1.1gg on a per transaction basis. The Bidder shall attach a price list with percent discounts clearly identified.

The Bidder shall invoice each Using Agency on a monthly basis based on the corresponding price lines in this RFP.

Further SSTC § 6.1 states, in pertinent part:

PRICE FLUCTUATION DURING CONTRACT - Unless otherwise agreed to in writing by the State, all prices quoted shall be firm through issuance of contract or purchase order and shall not be subject to increase during the period of the contract.

[Emphasis added.]

In its June 10, 2015 proposal, West submitted pricing for each category of service sought by the RFP. For Category 1 - Basic Service Access and Advanced Service Access, West presented flat-rate fixed pricing. For Category 2a – Ad-Hoc Batch Processing, West proposed a range of pricing based on input, rather than the flat-rate pricing required by the RFP.² For Category 2b - High-Volume Interface Batch Processing, West proposed a monthly rate corresponding to the tiered windows of usage identified in the RFP. For Category 3 - Transactional Access, West proposed a per transaction rate and identified the percentage discount of the current commercial rate. Specifically, West’s proposal stated:

The current Transactional rates (equivalent to “Schedule A Price Plan”) for CLEAR, as applicable and proposed for the state of New Jersey, are provided in the attached Thomson Reuters CLEAR Transactional Price List. The percentage discounts offered would be applied to then-current

² The Committee determined West’s proposal for Category 2a – Ad-Hoc Batch Processing to be non-responsive to the requirement of the RFP and therefore West was not eligible for award of this category.

commercial rates, and the resulting discounted rates would apply to each new search or report that is run.

[Volume 2: Price Proposal – Basic, Advanced, Batch, Transactional, page 1.]

On the price schedule West noted that the “per-input rate [was] based on current commercial rates. Discount would apply to then-current commercial rates.” (Vol. 2 Price Proposal – Original Pricing Category 3 Transactional Pricelist.) While West proposed a per transaction rate for services as required by the RFP, it noted that the rate was subject to change.³

Accordingly, on November 17, 2015 the Bureau wrote to West stating:

In the review of your firm’s proposal submitted in response to the above referenced RFP, the following statement included in your firm’s pricing submitted with the proposal are not accepted by the State:

Thomson Reuters submitted a price sheet, including a transactional price list which includes the following language, “**Based on current commercial rates. Discount would apply to then current commercial rates.”

Section 6.1 of the State’s Standard Terms and Conditions states in part, “Price Fluctuation During Contract – Unless otherwise agreed to in writing by the State, all prices quoted shall be firm through issuance of the contract or purchase order and shall not be subject to increase during the period of the contract.”

Please withdraw the above statement from the transactional price sheet or withdraw your pricing for Category 3 - Transactional.

[*Emphasis added.*]

On November 20, 2015, West responded stating:

In response to the State’s clarification request sent by email on November 17, [West] agrees to remove from our schedule the notation “Based on current commercial rates, discount would apply to then-current commercial rates.” While we agree not to increase the transactional rates during the contract period, we do reserve the right to negotiate with the state in the event that suppliers of pertinent Thomson Reuters (sic) data raise their rates by greater than 5%.

With its response, West included a price schedule with the unacceptable language removed. No further requests for clarification were sought from West.

In evaluating West’s proposal, the Bureau concluded that the fixed-price language of RFP § 4.4.5 as well as SSTC § 6.1 prevailed over West’s request to negotiate with the State in the future, and no negotiations would be conducted during the course of the contract. Consistent with West’s statement in its November 20, 2015 response, that it would not “increase the transactional rates during the contract

³ As discussed more fully below, RFP § 4.1 *General* indicates that supplemental terms or conditions that conflict with the RFP or the SSTCs, such as this proposed language proposed by West, is considered null and void.

period,” the Bureau deemed West’s proposal for Category 3 to be responsive to the requirements of the RFP.

On January 20, 2016, the Bureau issued its NOI stating that a contract would be awarded to West for Categories 1, 2b and 3. With the NOI, all intended awardees were advised that:

This award is also made subject to the requirements of RFP Section 4.1 General, as amended by addenda. Each Contractor awarded a contract is advised that supplemental terms and conditions submitted as part of its proposal are accepted by the State only to the extent that such supplemental terms or conditions do not conflict with those contained in the RFP or the State’s NJ Standard Terms and Conditions (“RFP/SSTC”), as may be amended by addenda, and to the extent that such supplemental terms do not diminish the State’s rights under any contract resulting from the RFP. Supplemental terms or conditions that conflict with the RFP or the State’s NJ Standard Terms and Conditions (“RFP/SSTC”), as may be amended by addenda, or that diminish the State’s rights are considered null and void. The State is not responsible for identifying conflicting supplemental terms and conditions before issuing a contract award.

Lexis acknowledges that subsequent to a request for clarification from the State, West did withdraw the proposal statement that its discount for Category 3 would be applied to West’s then current commercial rate. However, Lexis alleges that a violation of SSTC § 6.1 still exists because West conditioned its proposal on its ability “to negotiate with the state in the event that suppliers of pertinent [West] data raise their rates by greater than 5%.”

The State’s requirements regarding contract pricing were clearly communicated with the bidders through the RFP, SSTCs, Addendum 1 – responding to questions posed by potential bidders, and the NOI. As noted above, SSTC § 6.1 requires that “all prices quoted shall be firm through issuance of contract or purchase order and **shall not be subject to increase during the period of the contract.**” (*Emphasis added.*) Moreover, RFP § 4.1 *General* states, in pertinent part:

Proposals including supplemental terms and conditions may be accepted, but supplemental terms or conditions that conflict with those contained in this RFP or the State’s NJ Standard Terms and Conditions (“RFP/SSTC”), as may be amended by addenda, or that diminish the State’s rights under any contract resulting from the RFP will be considered null and void. The State is not responsible for identifying conflicting supplemental terms and conditions before issuing a contract award. In the event that prior to notice of intent to award, the Division notifies the Bidder of any such term or condition and the conflict it poses, the Division may require the Bidder to either withdraw it or withdraw its proposal. After award of contract:

- a) if conflict arises between a supplemental term or condition included in the proposal and a term or condition of the RFP/SSTC, the term or condition of the RFP/SSTC will prevail; and
- b) if the result of the application of a supplemental term or condition included in the proposal would diminish the State’s rights, the supplemental term or condition will be considered null and void.

While West's request to negotiate future price increases appears to be in conflict with SSTC § 6.1, consistent with RFP § 4.1, the Bureau considered this request to be null and void. Based upon the RFP terms, "[t]he contract awarded as a result of this RFP shall consist of this RFP, addenda to this RFP, the State of New Jersey Standard Terms and Conditions as modified by this RFP and the addenda to this RFP, the Contractor's proposal and the Contractor's agreement document to the extent they comply with the requirements of RFP Section 4.1, any best and final offer and the Division's Notice of Award." (RFP § 5.1 *Precedence of Special Contractual Terms and Conditions*.) West's request to negotiate future price increases is just that, a request. Because this request was considered null and void, it is not made part of the contract between the State and West.

With respect to West's proposal pricing for Categories 1, 2b and 3, West's proposal conforms to the requirements of the RFP or SSTC that require the bidder to submit a firm fixed price. In connection with the review of this protest, the Hearing Unit sought a clarification regarding West's request to negotiate future price increases and regarding the terms, conditions and forms included.⁴ On February 29, 2016 West responded to the clarification letter stating:

Any contract that may be awarded to West will consist of the RFP (and any addenda), the SSTC (as modified by the RFP), West's original proposal and those original documents submitted with West's original proposal - which will comprise West's terms and conditions for ordering. All pricing during the term of the contract (including extensions) is as set forth in West's original proposal and the Best and Final Offer (BAFO) submitted by West.

Based upon this information contained in the proposal and West's response to the clarification request of the Hearing Unit which I note is consistent with the clarifications made to the Bureau, West's proposal is responsive to the RFP requirements for pricing.

2. Lexis alleges that West's proposal is nearly ten times more costly per transaction.

Lexis asserts that the award for Category 3 to West should be cancelled because an award to West cannot be in the best interest of the State. Lexis alleges that West's price proposal for Category 3 – Transactional Access is almost 10 times more costly, stating:

Lexis charges \$0.50 and West charges \$4.84 per person lookup – an absurd premium of \$4.34 for a *lower-rated* service. For a person report, West raises its price delta even more, to \$14.51 -- \$8.51 (more than twice) above the \$6 price of the higher-rated LexisNexis services. There is no scenario under which such an order issued to West would be in the best interest of the State; the category 3 award to West for Transactional Processing should be cancelled.

The purpose of the Category 3 - Transactional Access is to provide the State with access to the features identified in RFP § 3.1.1a through § 3.1.1gg on a per transaction basis without having to purchase an individual license. RFP § 3.1 *Required Services* states:

⁴ A request for clarification is consistent with the Court's reasoning in In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175 where the court held that "[t]he RFP specifically approved of bidders' clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP." 279 N.J. Super. 566, 597 (App. Div. 1995).

Category 3 – Transactional: The Contractor must provide transactional activity priced out as a discount off of the Contractor’s price list, as defined in RFP Section 4.4.5 Price Schedule/Sheet. The Contractor shall provide access to each of its investigative research databases on a per individual transaction basis that shall not require the purchasing of an individual license.

Bidders were required to provide pricing for at least 50% of the requirements listed in RFP § 3.1.1a through § 3.1.1gg on a per transaction basis to be deemed responsive to the RFP requirement for Category 3. Both Lexis and West submitted proposals providing at least 50% of the requirements listed in the RFP; and therefore the Bureau deemed both proposals responsive for Category 3 – Transactional.

The standard for awarding State contracts is established by N.J.S.A. 52:34-12 which states in pertinent part that: “(g) **award shall be made with reasonable promptness, after negotiation with bidders where authorized, by written or electronic notice 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.) This standard is reiterated in RFP § 1.1 *Purpose and Intent* which states “[c]ontract awards will be made to those responsible Bidders whose proposals, conforming to this RFP are most advantageous to the State, price and other factors considered.” For Category 3, the Bureau intends to award contracts to all responsive bidders. RFP § 7.2 *Final Contract Award* states:

Contract award[s] shall be made on a per Category basis (as specified below) with reasonable promptness by written notice to that responsible bidder(s), whose proposal(s), conforming to this RFP, is(are) most advantageous to the State, price, and other factors considered. Contract awards shall be made based on the Bidder’s combined technical and price score to determine a total proposal score. Bidder(s) with the highest proposal score(s) shall be considered for contract award. Any or all proposals may be rejected when the State Treasurer or the Director determines that it is in the public interest to do so.

Category 1 – One Contract award will be made.

Category 2 – Up to three (3) contract awards will be made.

Category 3 – Awards will be made to each responsive bidder that demonstrates it has legal control of the proprietary database(s) offered in its proposal and has the administrative rights and protocols in place to allow Using Agencies access to those databases.

[*Emphasis added.*]

In reviewing the proposals submitted, “for evaluation purposes, pricing submitted by bidders will be evaluated utilizing a weighted score sheet based on a market basket of line items for current and anticipated usage by the agencies in need of the services that are contained in this RFP and on the Price Sheet/Schedule accompanying this RFP.” RFP § 6.7.2 *Bidder’s Price Schedule*. For Category 3, the Bureau utilized two market basket items: “per person lookup” and “per person report.”⁵ These market basket items were based on a consumption model of previous usage and derived from each using agencies needs based on price and other factors. (Evaluation Committee Report, P. 10).

While West’s pricing proposal for the two market basket items identified is higher than that proposed by Lexis, price is only one factor considered in making the award. With respect to Lexis’

⁵ The market basket items used for the pricing analysis were based upon the past consumption/usage data and varied for each Category of service sought by the RFP.

allegation that West proposed a “lower-rated” service, I note that there is nothing in West’s proposal, the Committee evaluation report, or the Bureau recommendation report which would indicate that the West’s “per person lookup” or “per person report” services are lower-rated; therefore, Lexis’ allegation is without basis. While West’s proposal may be more costly, there were no specific requirements in the RFP to define a “per person lookup” or “per person report;” therefore, the bidders’ definitions and proprietary features of the “per person lookup” and “per person report” varied. As noted above, the intent of the Bureau was to award contracts to all responsive bidders for this Category and therefore, because the Committee concluded that both Lexis and West had submitted responsive proposals the NOI listed both Lexis and West as intended awardees.

Notwithstanding the Bureau’s NOI, as noted above “[c]ontract awards will be made to those responsible Bidders whose proposals, conforming to this RFP are **most advantageous to the State, price and other factors considered.**” (N.J.S.A. 52:34-12, RFP § 1.1 *Purpose and Intent*, emphasis added.) The results for the market basket items analyzed for Category 3 is as follows:⁶

	Line Item	Quantity	Years 1 - 5 ⁷	Avg. # of Monthly Transactions	Estimated Cost Over 5 Years
Lexis	00126-00130	Per Person Look up	\$0.50	561	\$16,830
West	00126-00130	Per Person Look up	\$4.84	194	\$162,914.40
Lexis	00126-00130	Per Person Report	\$6.00	561	\$69,840
West	00126-00130	Per Person Report	\$14.51	194	\$168,896.40

While West’s proposal for Category 3 is responsive to the requirements of the RFP, its proposed price for Category 3 was not within the competitive range. Therefore, in accordance with RFP § 1.1 *Purpose and Intent* and N.J.S.A. 52:34-12, based upon its proposal pricing, West is not eligible for a contract award for Category 3. Accordingly, the Bureau’s NOI for Category 3 to West, is rescinded.

3. Lexis alleges that West withdrew all ordering forms and its terms and conditions for ordering; therefore, West is not eligible for a contract award.

Lexis asserts that on October 15, 2015, in response to a request for clarification, West withdrew the material terms of its offer and substituted new ones. Lexis claims that the Bureau did not analyze or address the impact of the withdrawn terms and order forms in the evaluation of West’s technical proposal. Lexis claims that as a result, there is no enforceable contract for ordering the services sought by this RFP; therefore, West is not eligible for a contract award.

In its proposal, West stated:

The following terms and conditions apply to any contract resulting from this proposal (hereinafter “contract”)

Research Subscriber Agreement, Order Form, and AVC Form – All access to and usage of CLEAR is governed by the then-current Research Subscriber Agreement and applicable West Order Form. In addition, access to and usage of CLEAR requires completion of the then-current Account Validation and Certification (AVC) form. These documents

⁶On September 3, 2015 the Bureau requested that both Lexis and West submit Best and Final Offers (BAFO) in accordance with RFP § 6.8 *Negotiation and Best and Final Offer*. Both bidders provided responses to the State’s request for a BAFO.

⁷ Neither Lexis nor West reduced its proposal pricing for Category 3 in response to the Bureau’s BAFO request.

will be incorporated by reference into and made part of any contract awarded to West pursuant to this proposal. (Samples of these documents are included at the end of this pricing proposal.)

[Volume 2: Price Proposal – West Terms and Conditions, p. 4.]

On October 15, 2015, the Bureau sent a request for clarification to West stating:

In the review of your firm’s proposal submitted in response to the above referenced RFP, the State would like to clarify the below:

...

Section 4 Part 3 – Price Proposal – West Terms, Conditions:

2. The proposal contains several additional agreements: Price Proposal, West Terms, Conditions, Research Subscriber Agreement 909.dot and addenda, Research Subscriber Agreement 910.dot, West Order Form Sample, CLEAR ® SERVICES, West Order Form, PROFLEX™, Account Validation and Certification Form and Addendum, Supplier Additional Terms & Disclaimer, and Supplier Disclaimers. With respect to these documents:

- a. Please clarify the difference between Research Subscriber Agreement 909.dot and addenda, and Research Subscriber Agreement 910.dot;
- b. Please clarify which of these agreements would be required for an award of Category 1, Category 2 and Category 3; and
- c. The State’s acceptance of any of the additional terms and conditions above are subject to RFP Section 4.1, as amended by addenda.

On October 20, 2015, West responded to the Bureau’s request for clarification stating in part:

...

Section 4 Part 3 – Price Proposal – West Terms, Conditions

2. The proposal contain several additional agreements: Price, Proposal, West Terms, Conditions, Research Subscriber Agreement 909.dot and addenda, Research Subscriber Agreement 910.dot, West Order Form Sample, CLEAR SERVICES, West Order Form, PROFLEX, Account Validation and Certification Form and Addendum, Supplier Additional Terms and Disclaimers, and Supplier Disclaimers.

With Respect to these documents:

- a. Please clarify the difference between Research Subscriber Agreement 909.dot and addenda, and Research Subscriber Agreement 910.dot.

West Response: Research Subscriber Agreement 909 (RSA 909) would be used for transactional plans (Category 3), while RSA 910 would be used for flat-rate plans (Category 1). Because RSA 910 would be used in conjunction with a West Order Form or a Special Offer Amendment to

the RSA, this document does not contain the order form pages that the RSA 909 includes (last four pages of the document file).

We should point out that, since the submission of our offer, West has streamlined our subscriber terms and accordingly updated other ordering documents. Therefore, we have provided these new documents with this clarification response. The newly updated subscriber terms are labeled General Terms and Conditions and would apply to all subscribers of CLEAR data in all award categories.

Any changes to the RSA or the General Terms and Conditions would be provided in a separate Addendum to the Order Form because the Order Form (which contains the products being purchased, the term, and the pricing) takes precedence over the RSA or General Terms and Conditions.

- b. Please clarify which of these agreements would be required for an award of Category 1, Category 2 and Category 3

West Response: Here we respond based on the award category.

Category 1: West uses different order documents for different plan types. Regarding the originally provided documents, the West Order Form (West Order Form Proflex for multiple locations) would be used to capture the plan details for a monthly flat-rate plan of relatively modest size (e.g., up to 100 users), while a monthly flat-rate plan of more considerable size would be considered a Special Offer, and West's finance team would generate a Special Offer amendment/document that would capture the plan details. Either of these documents (West Order Form/Proflex or Special Offer amendment/document) would be used in conjunction with the RSA910.

Regarding the updated subscriber terms and order documents, the General Terms and Conditions apply to all subscribers, and the explanation above would still apply to the revised West Order Form and West Order Form Proflex documents. Special Offers would be documented by a West finance-generated Special Offer order document.

The Account Validation and Certification (AVC) Form is required for all new customers to launch the credentialing process. The AVC Addendum is used when a customer has multiple locations that need to be credentialed. The CLEAR Additional/Supplier Terms are applicable to all customers accessing affected data from the suppliers reflected in the terms. (These terms are available for viewing within CLEAR by users, and were provided in our proposal for informational purposes.)

Category 2: For batch processing services, the explanation above for originally provided documents applies. Regarding updated documents, the General Terms and Conditions apply, as would potentially the West Order Form, West Order Form Proflex, West Order Form Proflex/Windows, or Special Offer order document, depending on the size and nature of the plan.

The Account Validation and Certification (AVC) Form is required for all new customers to launch the credentialing process. The AVC Addendum is used when a customer has multiple locations that need to be credentialed. The CLEAR Additional/Supplier Terms are applicable to all customers accessing affected data from the suppliers reflected in the terms. (These terms are available for viewing within CLEAR by users, and were provided in our proposal for informational purposes.)

Category 3: For transactional plans, RSA 909 would be used and no order form or Special Offer documentation would apply. Regarding the updated order documents, the General Terms and Conditions would apply, as would the West Order Form.

As mentioned above, the Account Validation and Certification (AVC) Form is required for all new customers to launch the credentialing process. The AVC Addendum is used when a customer has multiple locations that need to be credentialed. The CLEAR Additional/Supplier Terms are applicable to all customers accessing affected data from the suppliers reflected in the terms. (These terms are available for viewing within CLEAR by users, and were provided in our proposal for informational purposes.)

- c. The State's acceptance of any of the additional terms and conditions above are subject to RFP Section 4.1, as amended by addenda.

West Response: We acknowledge the amended RFP Section 4.1.

West's October 20, 2015 letter provided the Bureau with a clarification regarding which user agreement went with each category of service and described the difference between the forms identified and included with the proposal. The Bureau advises that supplemental documents included in the clarification letter were not given any effect and were not considered in the evaluation processes because it was deemed an attempt to revise or modify the proposal contrary to the Division's regulations which state that "[t]he process of clarification is not an opportunity for a bidder to revise or modify its proposal, and any response or portion of a response by a bidder to the Division's written request for clarification that attempts to revise or modify its proposal shall be given no effect." N.J.A.C. 17:12-2.7(e); RFP § 6.6 *Oral Presentation and/or Clarification of Proposal*. Permitting West to supplement its proposal with the additional documents would also be contrary to the Appellate Division's reasoning in In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175 where the court held that "[t]he RFP specifically approved of bidders' clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP." 279 N.J. Super. 566, 597 (App. Div. 1995). The Bureau properly did not consider the supplemental documents submitted by West.

Contrary to Lexis' assertion, West did not condition its proposal on the State's acceptance of its supplemental documents, terms and conditions, and specifically acknowledged the requirements of RFP § 4.1 in its October 20 clarification letter. As previously noted, RFP section 4.1 states in pertinent part:

Proposals including supplemental terms and conditions may be accepted, but supplemental terms or conditions that conflict with those contained in this RFP or the State's NJ Standard Terms and Conditions ("RFP/SSTC"), as may be amended by addenda, or that diminish the

State's rights under any contract resulting from the RFP will be considered null and void. The State is not responsible for identifying conflicting supplemental terms and conditions before issuing a contract award. In the event that prior to notice of intent to award, the Division notifies the Bidder of any such term or condition and the conflict it poses, the Division may require the Bidder to either withdraw it or withdraw its proposal. After award of contract:

- A. If conflict arises between a supplemental term or condition included in the proposal and a term or condition of the RFP/SSTC, the term or condition of the RFP/SSTC will prevail; and
- B. If the result of the application of a supplemental term or condition included in the proposal would diminish the State's rights, the supplemental term or condition will be considered null and void.

Based upon the Divisions regulations, applicable case law, and the RFP, West's original proposal documents prevailed over any attempt at supplementation and were considered in connection with the evaluation of West's proposal. In reviewing the proposals submitted, the Bureau deemed West's proposal to be in compliance with the RFP requirements. The Hearing Unit's review of the record concurs with the Bureau's conclusion. As previously noted, the contract to be awarded will consist of the "RFP, addenda to this RFP, the State of New Jersey Standard Terms and Conditions as modified by this RFP and the addenda to this RFP, the Contractor's proposal and the Contractor's agreement document to the extent they comply with the requirements of RFP Section 4.1, any best and final offer and the Division's Notice of Award." (RFP § 5.1 *Precedence of Special Contractual Terms and Conditions*, as amended by Addendum 1, Part 2, Item 4.) Contrary to Lexis' assertion, West's proposal does contain order forms and terms and conditions in conformance with the RFP requirements, as these items were submitted with West's proposal.

4. Lexis alleges that West failed to provide proof of experience.

Lexis asserts that West did not provide evidence of its experience performing the work required by the RFP. Specifically, Lexis claims that West provided general assertions but no specific evidence of contracts of a similar size and scope to the work as required by RFP § 4.4.4.5 and RFP § 4.4.4.6. Lexis claims that the contracts identified in West's proposal as evidence of experience are multi-award term contracts that are not comparable to the work required by the subject RFP. Lexis states that the Evaluation Committee unreasonably evaluated West's experience and could not substantiate its rating of "good."

Related to this protest point by Lexis, RFP § 4.4.4.5 *Experience with Contracts of Similar Size and Scope* states, in pertinent part:

The bidder **should**⁸ provide a comprehensive listing of contracts of similar size and scope that it has successfully completed, as evidence of the bidder's ability to successfully complete the services required by this RFP. Emphasis should be placed on contracts that are similar in size and scope to the work required by this RFP. A description of all such contracts **should** be included and should show how such contracts relate to the ability of the firm to complete the services required by this RFP. For each such contract, the bidder should provide two names and telephone numbers of individuals for the other contract party. Beginning and ending dates should also be given for each contract.

⁸ "Should" denotes that which is recommended, not mandatory. RFP § 2.1 *General Definitions*.

[Emphasis added.]

In its proposal, with respect to contracts of a similar size and scope, West stated:

West is well recognized for providing exceptional products and customer service to government agencies. West customers appreciate the quality of our public record information, technologies, analytics, and customer service. Our online products are currently used by thousands of government customers, collectively spanning federal, regional, tribal, state, and local levels of government. Many of these customers are long-term customers who have continued to choose our products to service their needs. We believe that our long-term customers are testimony not only to our productions but also to the exemplary customer service that our government team is known and recognized for.

West administers several state-wide contracts that include the CLEAR product being offered for this RFP. In New Jersey, West currently holds state contract #68460, for CLEAR transactional plans. For example, our contract with the state of New York's Office of General Services includes the CLEAR product, and can be accessed via this link:
<http://www.ogs.state.ny.us/purchase/snt/awardnotes/7913102516can.htm>

[Volume 1: Proposal, Section 3 – Organization Support and Experience, Experience with Contracts of Similar Size and Scope, page 30.]⁹

Further, RFP § 4.4.4.6 *Experience of The Bidder With Contracts Providing Web-Based Investigative and Locator Data Services* states:

The Bidder(s) shall have a minimum of three (3) years of experience in providing Web-based investigative and locator data services with a government entity or a large private organization similar in size to the State, that complies with the range of search capabilities as explained in Section 3.0 Scope of Work, in its entirety.

With respect to experience with contracts providing web-based investigative and locator data services, West's proposal stated:

West's government team for public records has significant and lengthy experience in delivering data solutions to government agencies, in some instances dating to the 1990's, when public records were first being made available online. The government team well understands the distinct missions of government agencies and how public records information and delivery tools can help agencies optimize their efforts. West's public records deliver comprehensive and reliable data that agencies can be confident will help them to avert fraud and successfully close investigations. By providing access to up-to-date public records data, agencies are able to more efficiently and effectively verify identities of individuals, reveal affiliations amongst individuals and businesses, conduct due diligence investigations, identify and locate subjects, and investigate criminal activity. Thomson Reuters' public records contribute

⁹ With respect to New Jersey's contract the Bureau confirmed that there are no complaints on file with the Division's Contract Compliance and Audit Unit nor is West listed on the State's debarment list.

to the integrity of public services and to public safety by providing the relevant data needed to do this work quickly and successfully.

[Volume 1: Proposal, Section 3 – Organization Support and Experience, Experience with Contracts Providing Web-Based Investigative and Locator Data Services, page 30.]

In reviewing West’s proposal, the Committee noted:

West submitted a responsive proposal and received a total evaluation score of 3880 points out of a possible 5000, a good rating. This was the lower technical score of the two responsive Bidders...

...

West indicates in its proposal that its experience in this field dates back to the 1990s when public records were first being made available online. West’s online programs are currently in use by thousands of government customers spanning federal, regional, tribal, state and local agencies.

...The proposal states, “West administers several state-wide contracts that include the CLEAR product being offered for this RFP. In New Jersey, West currently holds state contract #68460, for CLEAR transactional plans. For example, our contract with the state of New York’s Office of General Services includes the CLEAR product, and can be accessed via this link: <http://www.ogs.state.ny.us/purchase/snt/awardnotes/7913102516can.htm>.” In addition, West provides references, and stipulates, “West considers our customer contracts proprietary and confidential, and thus we typically do not publish customer lists. We do offer the following customers to serve as references for CLEAR, and ask that this information not be disclosed beyond evaluating our proposal.”

While West satisfied the requirements of the RFP it did not provide the suggested comprehensive listing of successfully completed contracts of similar size and scope. West states that it has long term customers who have continued to choose its products; however, its response includes limited evidence of successful performance of similar projects.

In reviewing West’s proposal, the Committee utilized the link contained in West’s proposal for the New York State Office of General Services. Based upon the documents accessed, the Bureau determined that West has held a contract with New York State Office of General Services since December 2008, which evidences West having at least 3 years of experience providing web-based investigative and locator data services with a government entity of similar scope as required in the RFP. Based upon the information contained in West’s proposal and the Committee report, the Bureau concluded that West’s proposal complied with the requirements of RFP § 4.4.4.5 and 4.4.4.6 and issued the NOI awarding contracts to West.

As part of this protest, the Hearing Unit conducted an independent review of West’s proposal, including the contracts submitted by West as addressing work on contracts of similar size and scope. With respect to evidence of “contracts of a similar size and scope that [the bidder] has successfully completed,” RFP § 4.4.4.5 states that a bidder **should** provide the information requested. I note that with respect to the New Jersey State contracts held by West, the State can take notice of those contracts and ascertain whether the State contract referenced in the proposal or even other contracts held by the State are of a similar size and scope in relation to the work required by the RFP. West’s current contract with the State

as referenced in its proposal is for a portion of the same services currently being sought through this procurement and while it does not match the breadth of the currently sought services, it does provide indicia of satisfaction of delivery of related services.¹⁰

With respect to the contract held by West with New York's Office of General Services, in its proposal, West provided a link to the contract documents. A review of those contract documents reveals that in 2003 the contract was awarded¹¹ by the State of New York for on-line databases and on-line information services. The scope of work for the New York contract includes Batch Processing Services, Basic Reporting Services (transactional), and AutoTrackXP – an online, internet-based interface for searching public record data sets.¹² The New York contract evidences a contract of similar size and scope to that required by this RFP. As further evidence, West did provide a list of county and municipal contracts for consideration by the Bureau during the evaluation of its proposal.¹³ The information contained in West's proposal supports the Bureau's determination that West has completed contracts of a similar size and scope in relation to the work required by the RFP. As noted in the Committee report, West satisfied the requirements of the RFP by providing information requested in RFP § 4.4.4.5. While West did not provide a comprehensive listing of contracts of similar size and scope; this was not a mandatory requirement per Section 4.4.4.5 of the RFP and does not render West's proposal non-responsive. See River Vale, *supra*, 127 N.J. at 216.

With respect to RFP § 4.4.4.6 which states that a "bidder shall have a minimum of three (3) years of experience providing web-based investigative and locator data services" West's proposal evidences that it has more than three years of experience providing Web-based investigative and locator data services. West's experience in this field dates back to the 1990s and its products are currently used by thousands of government customers. Further, the New York contract evidences that West has more than "three (3) years of experience in providing Web-based investigative and locator data services with a government entity" as required by the RFP. In reviewing this proposal, I find that the Committee did have sufficient information in the proposal to make a determination regarding West's experience in providing Web-based investigative and locator data services with a government entity or a large private organization similar in size and scope to that sought by the State. Therefore, West's proposal was responsive to the requirements of the RFP.

Based upon the foregoing, West did propose a firm fixed price for each category of services for which it is an intended awardee, it submitted a proposal that was responsive to the RFP requirements, submitted a proposal with appropriate forms, terms and conditions, and provided proof of its experience

¹⁰ New Jersey's contract was awarded to ChoicePoint Government Services in May 2007. This contract was later assigned to West Publishing Corporation. Thomson Reuters acquired West Publishing Corp. in 1996. A prior contract with West for online research provides indicia of the satisfactory provision of a contract of a similar size.

¹¹ During the term of New York's contract, ChoicePoint was acquired by West Government Services, a subsidiary of West Publishing Corp.

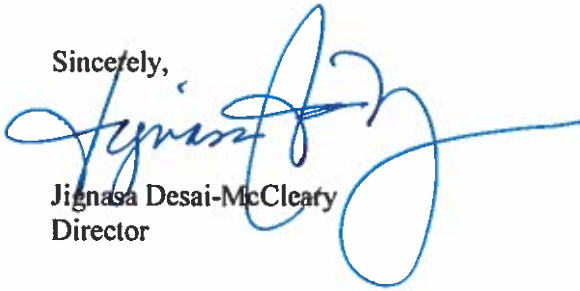
¹² Searchable databases include current and past addresses, telephone numbers, neighbors, associates, professional licenses, driving histories, business profile reports, real estate, death records, vehicles and other assets, and liens/judgements and bankruptcies.

¹³ At West's request, this information was redacted from proposals made available to the public as "West considers our customer contracts proprietary and confidential, and thus we typically do not publish customer lists. We do offer the following customers to serve as references for CLEAR, and ask that this information not be disclosed beyond evaluating our proposal." I note that in its proposal Lexis also noted that it "considers client reference information to be proprietary and confidential information that shall not be disclosed to third parties pursuant to N.J.S.A. 47:1A-1.1. [Lexis] regards client references as proprietary commercial information." (Lexis Proposal, p. 74.)

for successfully completing contracts of a similar size and scope to the work required by the RFP, specifically that it has experience providing web-based investigative and locator data services. Accordingly, for the reasons set forth above, I sustain the Bureau's NOI for Categories 1, 2a and 2b. As to Category 3 the Bureau's NOI for Lexis is sustained; however the NOI to West for this Category is rescinded. This is my final agency decision with respect to the protest submitted by Lexis.

Thank you for your company's interest in doing business with the State of New Jersey and for registering your company with [NJSTART](http://www.njstart.gov) at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M: RUD

c: G. Olivera
G. Terwilliger
J. Descoteaux
K. Snellings