



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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January 26, 2016

Via Email [pjhagan@alcoholtest.com] and USPS Regular Mail

Toby S. Hall, President
Pamela J. Hagan, Technical Sales Manager
CMI, Inc.
316 East Ninth Street
Owensboro, Kentucky 42303

Re: Protest of Notice of Proposal Rejection
RFP #16-X-23995: Evidential Breath Testing Equipment and Services

Dear Mr. Hall and Ms. Hagan:

This correspondence is in response to your letter dated October 21, 2015, to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of CMI, Inc. (CMI). In that letter, CMI protests the Division's Proposal Review Unit's Notice of Proposal Rejection for Solicitation #16-X-23995. The record of this procurement reveals that CMI's proposal was rejected because the proposal was not signed by a representative of the bidding entity and no pricing information was included with the proposal. With the protest, CMI submitted supplemental information with which it seeks to cure the deficiencies in its original proposal and requests that the Division accept same as a complement to its proposal.

In consideration of this protest, I have reviewed the record of this procurement, including the Request for Proposal (RFP), CMI's proposal, 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 submitted by CMI.

By way of background, this RFP was issued by the Division's Procurement Bureau (Bureau) on behalf of the Department of Law and Public Safety, New Jersey State Police (NJSP) Office of Forensic Sciences (OFS) to solicit proposals for bench-mounted (non-handheld) evidential breath testers (EBT), alcohol analyzers. (RFP § 1.1 *Purpose and Intent*.) The EBT must analyze and indicate results to the legally accepted norms of precision mandated by the Supreme Court of New Jersey in State v. Chun, 191 N.J. 308, 923 A.2d 226, 2007 N.J. Lexis 579 (2007). (RFP § 3.1 *Specification Overview*.) It is the intent of the State to award a contract to the responsible bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered. (*Ibid.*)

On October 8, 2015 proposals received by the submission deadline were opened by the Proposal Review Unit. In its proposal cover letter dated October 7, 2015, CMI stated:

Thank you for the opportunity to submit a proposal to supply evidential breath testing instruments to the State of New Jersey. Enclosed please

find our response to RFP 16-x-23995. Regrettably, we cannot agree to several terms of the Agreement in their current form. Those terms are as follows:

1. Request for Proposal Section 3.16 – Expert Testimony
2. Signature page – Requested delivery schedule
3. Signature page – Signature agreeing to all the terms of the Agreement
4. Price Sheet – Installation
5. Request for Proposal Section Addendum #3, Section 5.14 – Liquidated Damages

We respectfully request an opportunity to negotiate a clarification to the proposal terms. Upon successful negotiation, we will provide a competitive price quote to the State and will also supply two (2) Intoxilyzer 9000s for evaluation.

We look forward to working with you to supply the Intoxilyzer 9000 and the COBRA V5 data management software to the State of New Jersey.

Upon conducting the intake review of CMI's proposal, the Division's Proposal Review Unit found that the *Signatory Page* was not signed by a representative of CMI and that no pricing information had been included with the proposal. Accordingly a Notice of Proposal Rejection was issued pursuant to N.J.A.C. 17:2-2.2.

On October 15, 2015, the Bureau contacted CMI to obtain shipping information to return the sample equipment which CMI has submitted to the State for testing. During that same conversation, the Bureau and CMI's representative discussed the reasons why CMI's proposal had been rejected and the method for CMI to submit a protest.

In response to the Notice of Proposal Rejection, on October 21, 2015, CMI wrote to the Hearing Unit requesting that its proposal not be disqualified and that the Hearing Unit accept the supplemental documents attached to its protest letter to cure the deficiencies of its original proposal submission. In support of its request that its proposal not be disqualified, CMI states:

On October 15, CMI Technical Sales Manager Pam Hagan was contacted by [a Bureau] IT Specialist for the State of New Jersey Department of Treasury, Division of Purchasing. During the course of the conversation, [the Bureau specialist] indicated that CMI should have submitted a completed bid document with exceptions noted and that after receipt by the state, the terms in question could be negotiated. Further, [the Bureau specialist] stated that CMI's initial deficient response was quite common for request for proposals issued by the State of New Jersey.

Due to the lack of clarity and uncertainty of the Contractor's responsibilities, CMI's original submission lacked pricing information and did not include the required signatory page. CMI did not submit a complete proposal due to taking issue to the following terms in the Proposal:

1. Request for Proposal Section 3.16 – Expert Testimony – Exceptions and obligations need further clarification

2. Signature page – Requested delivery schedule – 500 instruments cannot be delivered in 30 days
3. Signature page – Signature agreeing to all the terms of the Agreement
4. Price Sheet – Installation – Installation requirements need further clarification
5. Request for Proposal Section Addendum #3, Section 5.14 – Liquidated Damages – The increased liquidated damage provision appears to be excessive.

Based on wording found on the signatory page, CMI understood that all of the terms were final and had to be agreed to without negotiations. CMI also understood that the proposal became the contract immediately upon acceptance by the State, again without question, clarification or negotiation. With the release of Addendum 3, the original terms to the agreement changed and there was not an opportunity for CMI or any other vendor to ask questions regarding the new terms of the RFP. It was not until [the Bureau] advised CMI of the unwritten bid process, did we know there would be an opportunity for negotiation of non-agreeable terms of the bid.

Had CMI known there would be an opportunity for negotiation, CMI would have completed its proposal and submitted the required information as we are doing now. Any company that has contracted with the State of New Jersey would have a distinctive advantage as they would already be familiar with this process.

To fully correct our deficiencies, CMI has shipped two Intoxilyzer 9000s to the Hamilton address listed in the RFP.

We ask that our proposal not be disqualified and have the opportunity to move forward in this RFP process.

First, consistent with N.J.S.A. 52:34-12, RFP Section 1.1 *Purpose and Intent*, provides that “[t]he intent of this RFP is to award a contract to that responsible Bidder whose proposal, conforming to the RFP is most advantageous to the State, price and other factors considered.” (RFP § 1.1 Purpose and Intent.) Notwithstanding this standard for awarding State contracts, prior to the bid opening, the Division entertains all bidder questions and inquiries during the Question and Answer period. Specifically,

1.3.1 ELECTRONIC QUESTION AND ANSWER PERIOD

The Division will electronically accept questions and inquiries from all potential Bidders via the web at <http://ebid.nj.gov/QA.aspx>.

- Questions should be directly tied to the RFP and asked in consecutive order, from beginning to end, following the organization of the RFP.
- Each question should begin by referencing the RFP page number and section number to which it relates.

Note: Questions regarding the State of NJ Standard Terms and Conditions and exceptions to mandatory requirements must be

posed during this Electronic Question and Answer period and should contain the Bidder's suggested changes.

[(Emphasis in the original.)]

With respect to this RFP, the Question and Answer period closed on August 7, 2015. Sixty-six questions were posed to the Bureau during the Question and Answer Period. On September 23, 2015 the Bureau posted Addendum #3 responding the questions posed by potential bidders. In addition, Addendum #3 included additions, deletions, clarifications and modifications to the RFP based upon some of the questions posed.

CMI's protest letter raises five (5) specific issues:

1. RFP Section 3.16 Expert Testimony

During the Question and Answer period, 3 questions were posed by potential bidders regarding RFP Section 3.16 *Expert Testimony*, which requires that the contractor provide expert testimony in court proceedings necessary to establish and "achieve judicial acceptance and recognition of the validity, accuracy and the scientific reliability if the EBT, its results and software." The questions posed requested clarification regarding the requirement for expert testimony noting that the current RFP language was broad. One potential bidder submitted revised RFP language for the Bureau's consideration. In response to the questions posed, the Bureau amended the RFP language to further specify the conditions under which a contractor would be required to provide expert testimony. Moreover, in Addendum #3, the Bureau responded to bidder questions advising that "the State will revise Section 3.16 to make some, but not all of the revisions requested in this question" and further noted that "flexibility is required in anticipation of legal challenges. The State will seek to select meeting times and places that are agreeable to the State, the Court, the Contractor and Third Parties."

Signatory Page (Issues 2 and 3)

2. Signatory Page - Delivery Schedule (RFP § 1.2 Background/Signatory Page)

During the Question and Answer period one question was raised regarding the 30-day delivery schedule set forth on the *Signatory Page*. Specifically, a potential bidder inquired whether "the State intended to work with the chosen vendor to establish a reasonable delivery schedule for the 500 EBTs once the award is made?" The Bureau responded that "the requested delivery timeframe listed in item 16 of the *Signatory [Page]* will not be changed." No other questions were posed during the Question and Answer Period regarding the *Signature Page*.

3. Signatory Page – Failure to Include

As previously noted, CMI did not submit a signed *Signatory Page*, with its proposal; therefore, a Notice of Proposal Rejection was issued by the Proposal Review Unit. RFP Section 4.4.1 addresses the necessity of the signatory page.

4.4.1.1 SIGNATORY PAGE

The Bidder shall complete, including the signature of an authorized representative of the Bidder, and submit the Signatory Page accompanying this RFP. If the Bidder is a limited partnership, the Signatory Page must be signed by a general partner. If the Bidder is a joint venture, the Signatory Page must be signed by a principal of each party to the joint venture. Failure to comply will result in rejection of the proposal.

Note: A Bidder's written signature on the Signatory Page, or entry of a Personal Identification Number (PIN) if using the eBid system, shall not serve as a certifying signature on the forms comprising the NJ STANDARD RFP FORMS document. (See 4.4.1.2)

[RFP §4.4.1.1 *Signatory Page* (first emphasis added.)]

The requirement for signing the proposal was uniformly conveyed to all bidders in RFP section 4.4.1.1 and through item #2 on the *Signatory Page* which states that "THE BIDDER MUST SIGN THE PROPOSAL." Moreover, as a courtesy to all bidders, the Division provided a *Proposal Checklist* as an accompaniment to the RFP. The checklist included the following:

**N.J. Department of the Treasury
Division of Purchase and Property
PROPOSAL CHECKLIST**

Solicitation Number: _____ Solicitation Title: _____

This checklist was created as a guide to assist bidders in preparing a complete and responsive proposal. It is only advisory in nature. It is the bidder's responsibility to ensure that all requirements of the RFP have been met.

FORMS THAT MUST BE SUBMITTED WITH YOUR PROPOSAL:

<input type="checkbox"/>	RFP Signatory Page with physical signature or PIN (PIN is for eBid submission ONLY)
<input type="checkbox"/>	Completed Price Sheets as Instructed in Section 4.4.5 of the RFP
<input type="checkbox"/>	Completed and signed Ownership Disclosure Form*
<input type="checkbox"/>	Completed and signed Disclosure of Investments in Iran Form*

The Proposal Checklist notes that the RFP *Signatory Page* is one of the documents that must be submitted with the bidder's proposal (emphasis in original). Despite being notified of the *Signatory Page* requirements in several places, in its protest letter, CMI admits that it did not sign and submit the *Signatory Page* because it could not agree to the delivery schedule or to the terms of the RFP.

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Sternin, 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 (App. Div. 1995), citing, River Vale, *supra*, 127 N.J. at 216.

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.]

Further, N.J.A.C. 17:12-2.2 specifically states:

- (a) In order to be eligible for consideration for award of a contract, the bidder's proposal shall conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:
- ...
- (3) Be signed by a representative of the bidding entity in accordance with the provisions for such signature as set forth in the RFP
- (b) Any proposal Failing to comply with the provisions of (a) above shall be subject to automatic rejection.¹

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

CMI's failure to sign its proposal is not in dispute. Looking at CMI's proposal through the lens of the River Vale criteria, I find that the failure to sign the *Signatory Page* is material, and therefore non-waivable. Absent the required signature on its proposal, CMI is not bound to the RFP specifications, the Standard Terms and Conditions, its proposal or the contract that would result from its proposal. This places CMI in a position of advantage over other bidders who submitted fully executed proposals binding them to the mandatory terms and conditions. Importantly, the Division's regulations require that the proposal be signed or the proposal will be considered non-responsive. (N.J.A.C. 17:12-2.2) Therefore, the Proposal Review Unit properly rejected CMI's proposal. As the River Vale Court held, "[i]f 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.

4. Price Sheet – Installation requirements/clarification and failure to include

During the Question and Answer period two questions were raised regarding the price sheet. One potential bidder specifically asked about the installation requirement stating "[p]lease clarify what is meant by 'Installation.' Will the vendor be responsible for the installation of all 500 instruments?" The Bureau responded that "[t]he Contractor shall be responsible for the installation of all EBT's purchased under this contract."

CMI's failed to include the price sheet and in its protest letter states that due to the lack of clarity and uncertainty of the contractor's responsibility, CMI did not submit pricing information. This failure to submit pricing is fatal to CMI's proposal. As noted above any requests for clarification to the RFP or the State's Standard Terms and Conditions were required to be submitted during the Q&A period as outlined in RFP section 1.3.1. This solicitation was comprised of the RFP and other documents, one of which was the proposal price sheet. RFP Section 4.4.1.6 *Pricing* states that "[t]he bidder must submit its pricing on the State supplied price Sheet/Schedule and supply any additional pricing information as directed in RFP Section 4.4.5." RFP Section 4.4.5 *Price Schedule/Sheet* states "[t]he bidder must submit its pricing using the format set forth in the State-supplied price sheet accompanying this RFP...Failure to submit all information required will result in the proposal being considered non-responsive." Moreover, as noted above, as a courtesy to all bidders the Division provided a *Proposal Checklist* as an accompaniment to the RFP. As noted on the checklist, a completed price sheet is among the forms that must be submitted with the proposal. Further, in accordance with N.J.A.C. 17:12-2.2(a)(6) a proposal must "include all RFP-required pricing information." If a proposal fails to include the required pricing information, the proposal "shall be subject to automatic rejection." (N.J.A.C. 17:12-2.2(b).)

¹ RFP Section 2.1 *General Definitions*, "[s]hall or [m]ust– [d]enotes that which is mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive."

Based upon CMI's failure to provide the mandatory pricing information in its proposal, the proposal must be deemed non-responsive. The submission of pricing information, with the proposal, is a material non-waivable condition. River Vale, supra, 127 N.J. Super. 207, 216. Here, the failure to provide the required pricing information is a material deviation from the RFP requirements.

CMI acknowledges that it did not submit the price sheet with its proposal. Permitting CMI to provide this pricing information after the proposal opening is contrary to the Appellate Division's reasoning in On-Line Games where the court held that "[i]n 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." On-Line Games, supra, 279 N.J. Super. at 597. The Division cannot permit CMI to correct its proposal by providing the pricing information after the proposal submission deadline.

5. RFP Section 5.14 Late Delivery/Liquidated Damages

No questions were raised during the Question and Answer period regarding RFP Section 5.14 *Late Delivery* which stated:

RFP 5.14 Late Delivery

...If the Contractor cannot meet the contract completion date for any task or subtask required to be completed by a date certain, the Contractor agrees to be liable to the State for the sum of \$831.00 per workday that such task, subtask or work remains incomplete following its contractually agreed upon completion date. Such sum shall be treated as liquidated damages and not as penalty.

In Addendum #3, the Bureau amended the RFP language as follows:

RFP 5.14 Liquidated Damages

...The State and Contractor agree that the following formulations of liquidated damages outlined below represent a reasonable estimate of the damages the State will sustain from the Contractor's performance deficiencies and not a penalty.

Late delivery of a unit:	\$103 per unit, per day beginning the day after delivery was promised
Unit Nonconformance to design requirements:	\$103 per unit, per day beginning the day after Contractor was notified of the nonconformance
Unit downtime:	\$103 per unit, per day of unit downtime, beginning the day Contractor was notified that the unit(s) were down

Neither the State's assessment of liquidated damages nor the Contractor's subsequent payment relieves the Contractor of its obligation to remedy any breach or nonconformance of the task, subtask, or work.

In its protest, CMI alleges that "the increased liquidated damage provision appears to be excessive." Admittedly, there was an amendment to the liquidated damages. The amendment however serves to clarify those circumstances under which liquated damages will be assessed. Further, the amendment does not result in an excessive charge, and could result in lower per day liquidated damages assessment to a vendor.

Finally, contrary to CMI's belief, there is no unwritten bid process. Rather, with respect to proposals including supplemental terms and conditions the RFP states:

4.0 PROPOSAL PREPARATION AND SUBMISSION

4.1 GENERAL

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.

[Emphasis added.]

CMI did not submit alternate language, supplemental terms and/or conditions in its proposal. Rather, in its October 7, 2015 proposal cover letter, CMI requested an "opportunity to negotiate a clarification to the proposal terms. Upon successful negotiation, we will provide a competitive price quote to the State." CMI did not include the supplemental terms and conditions with its proposal. Therefore, there was no alternate language for the Bureau to consider. Importantly, to the extent that any proposed alternate language conflicted with the RFP or the State's Standard Terms and Conditions; that alternate language would be considered null and void. As noted in the RFP, in order to ensure a level playing field, the contract to be awarded "shall consist of this RFP, addenda to this RFP, the Contractor's proposal, any best and final offer and the Division's Notice of Award." (RFP § 5.1 *Precedence of Special Contractual Terms and Conditions.*) Permitting an amendment to RFP language after proposals have been received and opened, would give CMI an advantage over other bidders who either submitted proposals which conformed to the specifications or did not submit proposals because of the terms contained in the RFP.

Moreover, even if CMI had included supplemental terms and conditions in its proposal, it did not include a signed *Signatory Page* or any pricing information; therefore, its proposal is non-responsive.

Notwithstanding CMI's interest in competing for this procurement, it would not be in the State's best interest to allow a bidder who did not appropriately complete and submit all of the required forms with its proposal, as required by the RFP, to be eligible to participate in the procurement process. Such acceptance would un-level the bidders playing field as the State received responsive proposals in which all necessary documents and information were provide as required. The deficiency at issue cannot be remedied after the proposal submission deadline as acceptance of CMI's proposal under these circumstances would be contrary to the provisions of the governing statute and provide CMI with disclamation options not available to those bidders whose proposals where fully responsive. In light of the findings set forth above, I must deny your request for eligibility to participate in the competition for the subject contract. This is the Division's final agency decision on this matter.

Thank you for your interest in doing business with the State of New Jersey. I further invite you to take this opportunity to register your business with **NJSTART** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Maurice A. Griffin
Chief Hearing Officer

MAG: RUD

c: J. Karamali
J. Strype
G. Olivera
A. Nelson
D. Rodriguez