



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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November 22, 2019

Via Electronic Mail [kkelly@daymarkea.com] and USPS Regular Mail

Kathleen A. Kelly
Vice President and Principal Consultant
Daymark Energy Advisors
370 Main Street, Suite 325,
Worcester, MA 01608

Re: I/M/O Bid Solicitation # 18DPP00237
Protest of Notice of Intent to Award, Daymark Energy Advisors
T2000 Energy Consulting Services

Dear Ms. Kelly,

This letter is in response to your email, on behalf of Daymark Energy Advisors (Daymark), to the Hearing Unit of the Division of Purchase and Property (Division), dated October 25, 2019, protesting the Notice of Intent to Award letter (NOI) issued on October 17, 2019 by the Division's Procurement Bureau (Bureau) for Bid Solicitation #18DPP00237 T2000 Energy Consulting Services.

By way of background, on June 4, 2018, the Bureau issued Bid Solicitation #18DPP00237 on behalf of the New Jersey Board of Public Utilities (BPU) to solicit Quotes for energy consulting services needed by the BPU when it attempts to obtain energy-related cost savings for the State of New Jersey and participating agencies, and especially for the State facilities, and to promote available programs and services in the areas of clean energy, fuel efficiency and energy conservation. Bid Solicitation § 1.1 *Purpose and Intent*. The intent of this Bid Solicitation is to award 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*. The State may award any and all price lines. *Ibid*. The State Intends to award up to five (5) Blanket P.O.s to establish a qualified pool of Vendors {Contractors}. *Ibid*.

In accordance with the Bid Solicitation Instructions, potential Vendor(s) {Bidder(s)} were permitted to submit questions to the Bureau, using the Division's *NJSTART* eProcurement system by 2:00 pm on December 13, 2018. *See*, Bid Solicitation Section 1.3.1 *Electronic Question and Answer Period*.

On July 23, 2018, Bid Amendment #1 was issued, which included answers to twenty three (23) questions posed, extended the Quote submission due date Tuesday, August 21, 2018 at 2:00 p.m. EST, and included the Revised Bid Solicitation entitled "T2000 – REVISED Bid Solicitation – 072318".

On August 22, 2018, the Division's Proposal Review Unit opened seven (7) Quotes, received by the submission deadline of 2:00 pm EST, from the following Vendors {Bidders}:

1. ATD Consulting Services LLC (ATD);
2. Concord Engineering Group (Concord);
3. Daymark;
4. London Economics International LLC (London);
5. Nest IQ (Nest);
6. NORESO LLC (NORESO);
7. NuEnergen.

The Proposal Review Unit determined that the seven (7) Quotes met the administrative requirements, and forwarded the Quotes to the Bureau for a substantive review. (See Recommendation Report, pg. 2.) After conducting an initial Quote review for responsiveness to the requirements of the Bid Solicitation, the Bureau determined that Daymark's Quote was non-response for the following reason:

The Quote included a section called, Appendix B: One Proposed Contract Modification. In the section Daymark states, "We respectfully request that the BPU consider the following contract modification to subsection 5.8, "Ownership of Materials." As stated in Bid Solicitation Section 1.3.1.1, Exceptions to the State of NJ Standard Terms and Conditions (SSTC), "Questions regarding the State of New Jersey Standard Terms and Conditions (SSTC) and exceptions to mandatory requirements must be posed during this Electronic Question and Answer period and shall contain the Vendor's {Bidder's} suggested changes and the reason(s) for the suggested changes." The Bureau does not accept modification proposed in Quotes, therefore making Daymark nonresponsive.

[See Evaluation Committee Report, pg. 5; Recommendation Report, pg. 2.]

On October 17, 2019, a NOI letter was issued to all Vendors {Bidders}, notifying the Vendors {Bidders} that it was the intent of the Director of the Division of Purchase and Property (Division) to award a Master Blanket Purchase Order (Blanket P.O.) to the following Vendor(s) {Bidder(s)} in accordance with the Quote(s) submitted in response to the above referenced Bid Solicitation:

- Concord Engineering;
- London Economics International LLC;
- NORESO LLC; and
- NuEnergen.

[See October 17, 2019 NOI.]

On October 25, 2019, Daymark submitted an email protesting the Bureau's determination that its Quote was non-responsive to the mandatory requirements of the Bid Specification. (See Daymark October 25, 2019 Protest Letter, pg. 2). Particularly, Daymark asserts that it "respectfully requested consideration" of one contract modification and elsewhere in the required forms we had agreed to the standard terms and conditions. It is evident from the sum of the directions in the RFP that the Director could allow the submission to be considered despite our respectful request." *Id.* Daymark further states that the Bureau should not have deemed Daymark's Quote nonresponsive, because the modification was "suggested

contract modification that was included to protect our intellectual property” and should be null and void. Id. at 4.

In consideration of the Daymark’s protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the protest, the relevant statutes, regulations, and case law. The issues raised by the Daymark are sufficiently clear such that a review of the record of this procurement 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 based on the written record. I set forth herein my Final Agency Decision.

On August 21, 2018, Daymark submitted its Quote for the Bid Solicitation #18DPP00237. Volume 2 of Daymark’s Quote included a section called *Appendix B: One Proposed Contract Modification*.

APPENDIX B

One Proposed Contract Modification

We have reviewed the proposed contract terms and conditions, as provided in Section 9.0, “State of New Jersey Standard Terms and Conditions, revised July 18, 2018,” and in Section 5.0, “Special Contractual Terms and Conditions Applicable to the Blanket P.O.,” of the RFP. We respectfully request that the BPU consider the following contract modification to subsection 5.8, “Ownership of Materials,”:

Modify to include the following language:

Proprietary rights.

- a. Consultant agrees that all Deliverables provided under this Engagement Agreement shall, as between Consultant and Client, be the property of the Client. This excludes any models, software or other intellectual property licensed by Consultant from third parties (which licenses Consultant shall identify to Client and, if necessary, instruct Client as to how to obtain its own license to such materials); and also excludes any Background Information of Consultant and improvements thereto made in the creation of the Deliverables unless such those improvements are specifically identified as Deliverables (in which case the improvement, but not the pre-existing Background Information, shall be the property of Client). To the extent necessary to provide Client with the full enjoyment of the Deliverables as contemplated in the work orders, Consultant shall provide Client with a perpetual, royalty-free non-exclusive license to the Background Information embedded in the Deliverables for the purpose of using them for the purposes contemplated in the work orders. Consultant warrants that none of the Deliverables will infringe or violate the intellectual property rights of any third party, or violate any agreement or confidentiality obligation by which Consultant may be bound. If any Deliverable becomes the subject of any claim, suit, or proceeding for infringement or other intellectual property right violation, the Consultant shall, at its sole expense and at its option defend, indemnify and hold Client harmless from and against such claim, suit or proceeding. Consultant shall control the defense of such action and may, at its discretion: 1) secure for the Client the right to the continued use of the Deliverable, 2) replace the Deliverable with a substantially equivalent, non-infringing item, or 3) modify the Deliverable so that it is non-infringing. The foregoing are Consultants sole obligations regarding infringement.
- b. “Background Information” means all tools (such as economic and statistical models, algorithms and methods that are relevant to analyzing energy markets) that are owned or controlled by Consultant on or before the Effective Date (as defined below), or developed or acquired by Consultant outside of the scope of this Engagement Agreement.

In accordance with the Bid Solicitation Section 1.3.1.1 *Exceptions to the State of NJ Standard Terms and Conditions (SSTC)*, “Questions regarding the State of New Jersey Standard Terms and Conditions (SSTC) and exceptions to mandatory requirements **must¹ be posed during this electronic question and answer period** and shall contain the Vendor’s {Bidder’s} suggested changes and the reason(s) for the suggested changes.” (Emphasis added).

On July 23, 2018, the Bureau issued Bid Amendment #1, which contained answers to twenty-three (23) questions received by 2:00 pm on December 13, 2018, as required by the Bid Solicitation. Only one of those questions posed a request for a modification to any of the SSTC’s of the Bid Solicitation.

#	Bid Solicitation Section Reference	Question (Bolded) and Answer
23	New Jersey Standard Terms and Conditions – Section 4.2 – Insurance	<p>Our insurance policies allow for 30 day advanced notice for cancellation, which is what we feel is standard in the industry, is this acceptable?</p> <p>Bid Solicitation Section 9.0, <i>The State of New Jersey Standard Terms and Conditions</i>, has been updated. Please refer to the revised Bid Solicitation New Jersey Standard Terms and Conditions Section 4.2, <i>Insurance</i>.</p>

There were no other questions or requests for exceptions to mandatory requirements of the SSTC as permitted by Bid Solicitation Section 1.3.1.1.

Daymark incorrectly argues that its modification should be treated as “minor irregularities or omissions in a Quote” and should be waived by the Director as permitted by Bid Solicitation Section 1.4.10 *Quote Acceptance and Rejections*. (See Daymark October 25, 2019 Protest Letter, pg. 3). In Meadowbrook Carting Co. v. Borough of Island Heights, the court espoused a two-part test for determining if a change is material:

[F]irst, whether the effect of a waiver [of the Bid Solicitation’s terms] would be to deprive the [contracting party] of its assurance that the contract will be ... performed ... according to its specified requirements, and second, whether ... 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 standards of competition.

[138 N.J. 307, 315 (1994).]

Here, it is clear that by allowing the Daymark to delete Appendix B from its proposal post bids opening date would place the Daymark into a position of advantage over other bidders who did not have the opportunity to include SSTC modifications with their Quote in hopes that the State would accept them. The Bid Solicitation Section 1.3.1.1 was clear that all “exceptions to mandatory requirements must be posed during this electronic question and answer period”, and allowing the Daymark to withdraw its Appendix B at this stage of the procurement will create an un-level playing field for all bidders. “Although broad, the grant of discretion to the Director to administer the public bidding process is not limitless. . . . the Division

¹ **Must** – Denotes that which is a mandatory requirement. Bid Solicitation Section 2.2 *General Definitions*.

may not award a contract to a bidder whose proposal deviates materially from the RFP's requirements." *Barrick v. State*, 218 N.J. 247, 258-259 (2014). "Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract. Thus, requirements that are material to an RFP are non-waivable; the winning bidder's proposal must comply with all material specifications." *Id.* at 259. As stated above, the requirements of Bid Solicitation Section 1.3.1.1 are mandatory, and therefore cannot be waived as "as minor irregularities or omissions".

Similarly, the Daymark's reference to Bid Solicitation Section 4.1 *General* is also incorrect. Bid Solicitation Section 4.1 is inapplicable to the current situation, as Bid Solicitation Section 1.3.1.1 is a mandatory requirement of this procurement. In *I/M/O Protest of Award of On-Line Games Production and Operation Svs. Contract*, Bid No. 95-X-20175, the court held that a post-opening commitment to supply an essential missing element for a bid is not a clarification but rather is an "impermissible supplementation ... and flies in the face of our public bidding scheme." 279 N.J. Super. 566 (App. Div. 1995). Allowing the Daymark to withdraw its Appendix B from its Quote at this time will constitute an impermissible supplementation.

"The Vendor {Bidder} assumes sole responsibility for the complete effort required in submitting a Quote in response to this Bid Solicitation. No special consideration will be given after Quotes are opened because of a Vendor's {Bidder's} failure to be knowledgeable as to all of the requirements of this Bid Solicitation." Bid Solicitation Section 1.4.2. *Vendor {Bidder} Responsibility*. Daymark had the opportunity to request SSTC modification during the Electronic Question and Answer Period, as required by Section 1.4.1.1. However, it failed to do so.

This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put on preparing and submitting the Quote. However, in light of the findings set forth above, I have no choice but to sustain Bureau's Notice of Intent to Award. 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: RD

c: A. McMullen
L. Spildener