



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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June 30, 2014

Via Electronic Mail [rick@bellssecurity.com] and USPS Regular Mail

Richard Middleton II
Vice President
Bell's Security Sales, Inc.
426 Bloomfield Avenue
Bloomfield, NJ 07003

RE: Protest of Notice of Intent to Award State Contract #T2981
RFP #15-X-23426 Locking Hardware (Parts Only)

Dear Mr. Middleton:

This letter is in response to your letter dated April 2, 2014, and received April 7, 2014, referencing the subject Request for Proposal ("RFP") and regarding the slated award of the subject contract by the Procurement Bureau, which conducts the formal competitive procurement program of the Division of Purchase and Property ("the Division"). You, on behalf of Bell's Security Sales, Inc. ("BSS"), contend that certain price lines of BSS's proposal were rejected due to a discrepancy in the RFP instructions and the lack of a response to a question you submitted to the Bureau during the proposal preparation period. Taking exception to the RFP's restrictions regarding a bidder's offering of percentage mark-up pricing rather than percentage discount pricing, you assert that in a prior contract award, RFP #09-X-20639,¹ markups were permitted. On these bases, you protest the intended award of select lines of the subject contract and request that the RFP be reissued.

I have reviewed the record of this procurement, including the RFP, BSS's proposal, and relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of BSS's protest.

The subject procurement, conducted as RFP #15-X-23426, was publicly advertised in *The Star-Ledger* newspaper on or about January 21, 2014 and announced on the Division's website at that time. RFP Paragraph 1.3.1, *Electronic Question and Answer Period*, as part of Subsection 1.3, *Key Events*, advised potential bidders as follows:

¹ Contract effective from August 1, 2009 to July 31, 2014.

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

....

As indicated in the subparagraph immediately above, questions and/or inquiries had to be submitted to a specific email address, and the RFP cover sheet/page established they had to be transmitted electronically to that email address prior to 5:00 p.m. on February 14, 2014.

The record of this procurement indicates that, at 11:37 a.m. on January 30, 2014, BSS electronically submitted a question using the Division's eQ&A web function at approximately 11:37 a.m., stating, "What items am I bidding on?" A review of the record confirms that BSS did not receive a response from the Procurement Bureau.

In response to your letter, an investigation was conducted by staff of the Department of the Treasury's division which maintains and oversees the technical aspects of the Division's e-procurement programs. That division reported that there was a temporary server-based problem, now rectified, that delayed and ultimately precluded the transmission of BSS's question to the Procurement Bureau's specialist conducting the subject procurement.

In consideration of the potential effect of the non-transmission of, and the resultant non-response by the Procurement Bureau to, BSS's general "What items am I bidding on?" inquiry, I note that the assigned procurement specialist has reported that the only permitted and possible response to that question would have been communicated by the issuance of an RFP Addendum that referred bidders to Subparagraph H of RFP Paragraph 4.4.7, *Method of Bidding / Price Sheet Instructions*, which reads as follows:

- H. The bidder must enter on the price sheet its percentage discount for the brand price list(s) submitted with the bid proposal on the price line corresponding with that brand price list(s). If it is left blank, the bid proposal for the affected line item will be rejected. If the bidder is offering net pricing from the price list then a zero or the word "net" must be entered on the price line. Multiple discounts or markups or range of discounts or markups are not permitted and will result in rejection of the bid proposal for the affected line item.

Thus, if BSS's question had been transmitted to and addressed by the Procurement Bureau, there would have been no alteration of the text of the RFP and no additional information provided that was not already available to all bidders. Therefore, I find the impact of the server-based glitch to be of no or nominal significance relative to the rejection of certain price line offers made by BSS. In fact, BSS's successful participation in the competition, as evidenced by the slated award of two brands of locking devices, affirms that BSS was able to discern on its own, from the RFP provisions, the answer to its "What items am I bidding on?" question. Despite the temporary technical issue affecting the eRFP server, the deficiency contained in BSS's proposal would not have been remedied by an answer to its question, as the procurement specialist would have directed BSS to the section of the RFP listed above.

In its next point of protest, BSS argues that on the previous contract it was awarded in 2009 in response to RFP #09-X-20639, the RFP “provided information to exactly what products and parts were required to bid on” and that markups were permitted. BSS also argues the instructions contained in the subject procurement, RFP #15-X-23426, did not reference any indication that “mark-ups were not allowed.”

The subject procurement, RFP #15-X-23426, provided the following instructions regarding price submissions:

4.4.3 SUBMITTALS

Bidders must submit the most current dated manufacturer’s preprinted retail price list for each price line brand offered. Only if a manufacturer’s preprinted retail price list is not available from the manufacturer listing the retail prices for a particular brand as described above, will the State accept the most current dated manufacturer’s preprinted distributor price list. Additionally, only if a manufacturer’s preprinted distributor price list is not available from the manufacturer listing the distributor prices for a particular brand as described above, will the State accept the most current dated manufacturer’s preprinted wholesale price list.

All price lists must be clearly labeled with the bidder’s name, address and bid number. The price list submitted for each price line brand must be for the brand indicated on the price lines; otherwise the proposal for the affected line item will be rejected. **All price lists submitted MUST be clearly marked, as manufacturer’s retail price list, manufacturer’s distributor price list, or manufacturer’s wholesale price list and a price list date and type must be on the list cover page.** [(Emphasis added.)]

In addition to the above requirements, the bidder is encouraged to submit its price list(s) in the form of a CD in PDF or text format. However, a preprinted hard copy paper price list must be included with the bidder’s proposal. (See Section 4.4.7, Method of Bidding)

NOTE: Manufactures [sic] will be permitted to allow authorized distributors to process orders. However, a list of distributors must be submitted with the bidder’s proposal indicating the distributor’s name, address, business registration (BCR), affirmative action certification and federal identification number.

....

4.4.5 PRICE SCHEDULE/SHEET

In order for the State to make sound business judgments regarding products and prices offered in response to this RFP, the bidder must supply, with its proposal, the information requested on the RFP’s pricing lines in sufficient detail as to allow the State to determine the firm, fixed proposal pricing and the precise product or service being offered, i.e., with no possible misinterpretation of the price or product/service being offered by the bidder. A bidder’s failure to provide, within its proposal, the information deemed by the State to be essential for product identification or price determination will result in rejection of that bidder’s proposal.

Notwithstanding the aforementioned material obligation, in order to support the State’s decision-making process, the State may require a bidder to provide additional information or documentation that has been deemed not to be material to product identification or price determination, in which case, the bidder shall, within the time limit set forth in the written request, comply with said request. Each bidder is required to hold its prices firm through issuance of contract. **The bidder shall provide one percentage (%) discount for each price line brand it intends to bid.** [(Emphasis added.)]

....

4.4.7 METHOD OF BIDDING/PRICE SHEET INSTRUCTIONS

MANDATORY PRICE LIST SUBMISSION

NOTE: Bidders must submit price lists electronically if they are submitting eBid submissions.

....

- C. Only if a manufacturer's preprinted distributor price list is not available from the manufacturer listing the distributor prices for a particular brand as describe above, will the State accept the most current dated manufacturer's preprinted wholesale price list. In those cases where multiple columns are present, the lowest wholesale price column will prevail. If the multiple columns represent tiered quantity pricing, i.e. pricing decreases for higher quantity purchases; then the discount will apply to the lowest quantity column up to and including the highest quantity column and agencies will be permitted to apply the discount to all other higher quantity (lower priced) columns for larger purchases. If a markup is applicable rather than discount; then the bidder must clearly indicate as such on the price line by adding the word "markup" to the percentage provided. Otherwise, a percentage will be interpreted by the State to be a discount from the price list submitted. [(Emphasis added.)]
- D. All price lists should be clearly labeled with the bidder's name, address and bid number, in addition to the price list date and type of list. (retail, distributor wholesale)
- E. Bidders should not submit catalogs with its proposal – only price lists. If requested, the bidder shall submit catalog(s) to the Procurement Bureau within five (5) business days of request. Failure to submit catalog(s), if requested, will result in your bid being rejected for that brand line.

....

- H. The bidder must enter on the price sheet its percentage discount for the brand price list(s) submitted with the bid proposal on the price line corresponding with that brand price list(s). If it is left blank, the bid proposal for the affected line item will be rejected. If the bidder is offering net pricing from the price list then a zero or the word "net" must be entered on the price line. Multiple discounts or markups or range of discounts or markups are not permitted and will result in rejection of the bid proposal for the affected line item. [(Emphasis added.)]

....

Thus, the subject RFP permitted markups under certain circumstances. BSS included with its proposal a properly signed *Signatory Page*, thereby certifying: "[T]he bidder **has read, understands, and agrees** to all terms, conditions, and specification set forth in the request for proposal, including all addenda." (Emphasis added.)

The procurement record revealed that BSS's proposal included 26 price lines from 15 different manufacturers. Of the 26 submitted price lines, 11 prices included a markup percentage.

On March 10, 2014, a procurement specialist from the Procurement Bureau sought clarification from BSS concerning the markups in its proposal. By email, the specialist asked "which book applies" to the Kaba (locks) listed with a 50% and the Kaba (parts) listed with a 15% markup. In response, BSS clarified, "It is the same book. The parts are the accessories." BSS further clarified that the "two Kaba price books (Electronic Products Catalog & Simplex Catalog) are under the Kaba Locks @ 50% [discount]. The accessories are the parts which is a markup of

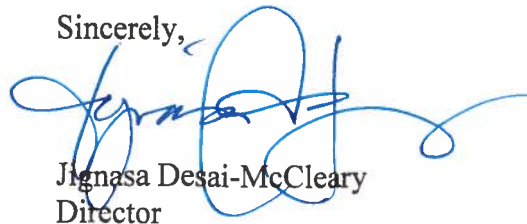
15%.” The specialist also requested BSS to provide clarification on its Schlage brand offer. BSS stated that the “complete locks or panic bars are the discount. Parts or accessories are the markup.”²

Thereafter, on March 25, 2014, as its standard procedure, the Procurement Bureau issued a Notice of Intent to Award to all participating bidders. Regarding BSS, the Notice stated that “[m]ark-ups were not considered for award.” The Notice indicated the Procurement Bureau’s intent to award BSS two price lines: Falcone (price list dated March 3, 2014) and Glynn Johnson (price list dated March 3, 2013). The Procurement Bureau also recommended that awards be made to three additional vendors offering products made by a total of 30 different manufacturers.

As emphasized in RFP Paragraph 4.4.7 listed above, a markup was only permissible in those instances in which a wholesale price list was available, and a distributor price list was not. BSS’s proposal contained markups on retail/distributor price lists, not wholesale price lists. As stated in Paragraph 6.6 *Evaluation Criteria*, “Price — will be evaluated by the lowest cost per brand line bid, based on the discounts provided for retail, distributor or wholesale price list bid, in accordance with Section 4.4.7 of this RFP.” The provisions of a prior procurement or contract do not provide authoritative guidance on subsequent procurements of similar goods or services; many re-procurements contain revised provisions, which is the reason bidders must thoroughly and carefully read each RFP. Therefore, I find that the Procurement Bureau’s determinations and recommendations were proper under the requirements of the RFP.

In light of the findings set forth above, I must deny BSS’s request to conduct another procurement of the T2981 contract. This is my final agency decision on this matter. Thank you for your interest in doing business with the State of New Jersey and for registering your business with *NJ START* at www.njstart.gov, the State of New Jersey’s new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: L. DuBois
M. Quinn
L. Spildener
P. Locane

² The procurement specialist confirmed that all of the books mentioned in this clarification were retail, *not* wholesale, catalogues.