



State of New Jersey

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March 11, 2015

Via Electronic Mail [kemp@xpresscomputers.net] and USPS Regular Mail

Kemp Cook, President
Xpress Electronic Services, Inc.
P.O. Box 803
Vineland, NJ 08362-0803

RE: Protest of Notice of Award of State Contract #T2989
RFP #15-X-23512 Communications Wiring Services

Dear Mr. Cook:

This letter is in response to your emails¹ dated October 29, 2014, and November 3, 2014, referencing the subject Request for Proposal (“RFP”) and regarding the award of the subject contract by the Procurement Bureau (“Bureau”) of the Division of Purchase and Property (“the Division”). You protest the slated award of Contract T2989 and contend that Xpress Electronic Services, Inc. (“Xpress”) was incorrectly categorized as non-responsive. As such, you request the Division reevaluate Xpress’s proposal based on its pricing and include it as a contractor to this term contract.

I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law, and Xpress’s proposal. 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 Xpress’s protest.

By way of background, the Bureau publicly advertised the subject RFP to solicit proposals from bidders for communication wiring services. These services include “installation and maintenance of the communications wiring infrastructure within State or local government facilities, including building and campus wiring from the demarcation point to the user outlets.” The Bureau intended to award up to seven contracts to responsible bidders, whose proposals, conforming to the RFP, were most advantageous to the State, price and other factors considered. The Bureau also intended to award two contracts to small businesses under the New Jersey Small Business Set-Aside program, if possible.

¹ These email correspondences are accepted as timely letters of protest.

Following the opening of proposals on July 22, 2014, and an initial review to determine responsiveness to the requirements of the RFP, 11 of the 15 bidders were asked to provide a best and final offer (“BAFO”). The BAFO pricing was incorporated into the proposals, and the Evaluation Committee (“Committee”)² evaluated each proposal using a price comparison ranking methodology and a technical evaluation methodology. Following this review, the Evaluation Committee unanimously recommended the term contract be awarded to seven bidders (listed alphabetically): AT&T Inc., Extel Communications, Inc., GM Data Communications, Inc., Johnston Communications, Inc., Millennium Communications Group, NetQ Multimedia Co., and New Jersey Business Systems. This protest followed.

In its first letter of protest, Xpress argued: “The solicitation was specific in one category that being price. At a minimum the State’s response to this should have itemized the order in which the bidders responded from the cheapest to the most expensive. If the requirement was based on other criteria it was not mentioned.” This argument is not persuasive.

The RFP specified in Section 6.0 *Proposal Evaluation* that all proposals would be evaluated and ranked separately according to technical categories and pricing. The following language detailed the evaluation methodology:

6.7 EVALUATION CRITERIA

The following evaluation criteria categories, not necessarily listed in order of significance and based in part on Sections: 4.4.3, 4.4.3.1, 4.4.3.2, 4.4.4.3 and 4.4.4.5, will be used to evaluate proposals received in response to this RFP. The evaluation criteria categories may be used to develop more detailed evaluation criteria to be used in the evaluation process:

6.7.1 TECHNICAL EVALUATION CRITERIA

- a. **Personnel**: The qualifications and experience of the Bidder’s management, supervisory, and key personnel assigned to the contract, including the candidates recommended for each of the positions/roles required.
- b. **Experience of firm**: The Bidder’s documented experience in successfully completing contracts of a similar size and scope in relation to the work required by this RFP.
- c. **Ability of firm to complete the Scope of Work based on its Technical Proposal**: The overall ability of the Bidder to undertake and successfully complete the technical requirements of the contract in a timely manner.

6.7.2 BIDDER’S PRICE SCHEDULE

For evaluation purposes, Bidders will be ranked according to the total proposal labor rates located on the Price Schedules B and E accompanying this RFP.

....

² The Committee was comprised of four representatives from the Office of Information Technology and one Procurement Specialist from the Procurement Bureau specializing in technology procurements.

6.7.4 EVALUATION OF THE PROPOSALS

After the Evaluation Committee completes its evaluation, it recommends to the Director for award the responsible Bidder(s) whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered. The Evaluation Committee considers and assesses price, technical criteria, and other factors during the evaluation process and makes a recommendation to the Director. The Director may accept, reject or modify the recommendation of the Evaluation Committee. Whether or not there has been a negotiation process as outlined in Section 6.8 below, the Director reserves the right to negotiate price reductions with the selected Bidder.

Therefore, all bidders were informed by the RFP that proposals would be evaluated on technical aspects, as well as pricing. In its initial review, the Committee determined that Xpress's proposal did not include certain RFP-required information/documentation. After making this determination, the Committee discontinued the evaluation and did not assign Xpress's proposal a technical score. The Committee explained why it found Xpress's proposal to be non-responsive in the Evaluation Committee Report, stating:

Non-Responsive Bidders

While it was the Bidder's responsibility to comply with the mandatory requirements of the RFP the Committee was particularly interested in each bidder's technical credentials and project experience as demonstrated by its resumes and project references. The following bidders did not provide the required resumes and or references and were deemed non-responsive.

....

Xpress

Xpress's proposal did not comply with mandatory requirements of the RFP.

- As required by RFP Section 4.4.4.5 Experience with Contracts of Similar Size and Scope, the Bidder was required to 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. For each such contract, the Bidder shall provide two names and telephone numbers of individuals for the other contract party. It provided no list of contracts or references names and telephone numbers of individuals for the other contract party.

The Committee unanimously agreed that Xpress's proposal was non-responsive to mandatory requirements of the RFP. Its proposals were not scored and evaluated further. The Committee unanimously recommends that Xpress not be awarded a contract based on its proposal as submitted.

Indeed, the RFP specifically required certain information be included a bidder's technical proposal to "describe its approach and plans for accomplishing the work outlined in the Scope of Work section[.]" Section 4.4.3 specified that in a technical proposal, the bidder "must set forth its understanding of the requirements of this RFP and its ability to successfully complete the contract." More specifically, it was the bidder's responsibility to describe how it planned to achieve the work outlined in Section 3.0 *Scope of Work*, by providing the following:

4.4.4.5 EXPERIENCE WITH CONTRACTS OF SIMILAR SIZE AND SCOPE

The Bidder *shall*^{3]} 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 shall be included and must 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 shall provide two names and telephone numbers of individuals for the other contract party. Beginning and ending dates should also be given for each contract.

....

[(Emphasis in original.)]

A review of Xpress's proposal shows it did devote a page of its technical proposal to Section 4.4.4.5 *Experience with Contracts of Similar Size* and included two contracts to demonstrate its prior experience: Bid #12-12 *Telephone and Data Line Wiring for the County of Cumberland*, and State Contract T0201, RFP #01-X-32197 *Office Equipment Maintenance Various Using Agencies*. However, Xpress did not include two names and telephone numbers of individuals associated with these contracts, nor did Xpress describe how these contracts demonstrate its ability to complete the subject contract, as required by the RFP. While Xpress's omission of contact information contravened the instructions of the RFP, contact information for the two identified contracts was available and accessible by the Division. Thus, this omission alone is not sufficient cause for rejection of a proposal. I do note that the procurement specialist advises that the two contracts he researched based upon the limited information provided were limited in their similarity to the subject RFP.

Upon further review of Xpress's proposal, it is evident that Xpress failed to comply with a separate requirement of RFP Section 4.4.3, which mandated: "Bidder *shall* describe its commitment to participation in the Federal Communications Commission's E-Rate discount program established under authority of the Federal Telecommunications Commission Act of 1996 by supplying their E-Rate contractor identification number and the list of E-Rate qualifying services as described in Section [3.4], E-Rate Plan."⁴ (Emphasis in original.) This requirement was also addressed in Addendum #04, Part 1 *Responses to Electronic Questions*, in question #11, where the Bureau clarified, "The Bidder shall describe its commitment to participation in the Federal Communications Commission's E-Rate discount program."

³ "Shall or Must" is defined in RFP Section 2.1 as "[d]enotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive."

⁴ "The Schools and Libraries Program of the Universal Service Fund, commonly known as 'E-Rate,' is administered by the Universal Service Administrative Company (USAC) under the direction of the Federal Communications Commission (FCC), and provides discounts to assist most schools and libraries in the United States to obtain affordable telecommunications and Internet access. It is one of four support programs funded through a Universal Service fee charged to companies that provide interstate and/or international telecommunications services." RFP Section 3.4. E-Rate was mandated by Congress in 1996 and implemented by the FCC, an independent U.S. government agency overseen by Congress to regulate interstate and international communications. See Federal Communications Commission website: <http://www.fcc.gov/guides/universal-service-program-schools-and-libraries>.

Xpress's proposal is void of any reference of its commitment to participate in the E-Rate program and is therefore noncompliant with the terms of the RFP. New Jersey courts have developed a two-prong test to consider "whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity." Twp. of River Vale v. R. J. Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). The two-prong test requires a determination of

first, whether the effect of a waiver would be to deprive the municipality 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.

[Ibid.; see also Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 315 (1994) (affirming the two-prong River Vale test).]

In this case, under the first prong, the State was deprived of the assurance that Xpress would be able to enter into the contract and guarantee its performance according to the specified requirement to participate in the E-Rate program. Under the second prong, waiving this requirement for Xpress would unlevel the playing field, as other bidders properly addressed this requirement and provided an assurance they would participate in the program. Therefore, Xpress's omission constitutes a material deficiency and I must uphold the Committee's prior determination that Xpress's proposal be deemed non-responsive.

I note further that under the State of New Jersey Standard Terms and Conditions, Section 2.10, the "contractor must comply with all local, State and Federal laws, rules and regulations applicable to this contract and to the goods delivered and/or services performed hereunder." Because E-Rate is a federally mandated program, Xpress was required to adhere to its guidelines.

In addition, it appears that Xpress stated in numerous places that it would require a lengthy start-up period to implement the contract resulting from the subject RFP. In response to RFP Subsection 4.4.3.1, *Management Overview*, Xpress stated: "a time of implementation will be required. This is why we have requested a 60-day start-up period" In response to RFP Subsection 4.4.3.5, *Potential Problems*, Xpress stated, "A contract of this size by nature will have difficulties getting to understand the process. At the moment the problems are unforeseen. The 60-day period between award and implementation will present all the problems."

Furthermore, Xpress also stated it had no back-up staff in response to RFP Subsection 4.4.4.4. This section required that if the bidder "must hire management, supervisory and/or key personnel if awarded the contract, the [b]idder should include, as part of its recruitment plan, a plan to secure backup staff" Xpress did not provide any recruitment plan, despite acknowledging it would use the requested 60-day start-up period to "increase [its] work force to meet the needs of [its] new responsibility." Furthermore, RFP Section 3.2.1, *Method of Operation*, specified that the contractor "shall have sufficient personnel resources and equipment to complete up to three (3) separate assignments at once."

I find this lengthy implementation period to be in direct contradiction to the terms of the RFP. Indeed, it is expected that once a proposal is accepted by the Division, it immediately becomes a binding contract and a contractor is expected to be able to perform the tasks of the contract at that time. Xpress submitted a properly signed *Signatory Page* with its proposal, which stated:

SIGNATURE OF THE BIDDER ATTESTS THAT THE BIDDER HAS READ, UNDERSTANDS, AND AGREES TO ALL TERMS, CONDITIONS, AND SPECIFICATIONS SET FORTH IN THE REQUEST FOR PROPOSAL, INCLUDING ALL ADDENDA, FURTHERMORE, SIGNATURE BY THE BIDDER SIGNIFIES THAT THE REQUEST FOR PROPOSAL AND THE RESPONSIVE PROPOSAL CONSTITUTES A CONTRACT IMMEDIATELY UPON NOTICE OF ACCEPTANCE OF THE PROPOSAL BY THE STATE OF NEW JERSEY FOR ANY OR ALL OF THE ITEMS BID, AND FOR THE LENGTH OF TIME INDICATED IN THE REQUEST FOR PROPOSAL. FAILURE TO ACCEPT THE CONTRACT WITHIN THE TIME PERIOD INDICATED IN THE REQUEST FOR PROPOSAL, OR FAILURE TO HOLD PRICES OR TO MEET ANY OTHER TERMS AND CONDITIONS AS DEFINED IN EITHER THE REQUEST FOR PROPOSAL OR THE PROPOSAL DURING THE TERM OF THE CONTRACT, SHALL CONSTITUTE A BREACH AND MAY RESULT IN SUSPENSION OR DEBARMENT FROM FURTHER STATE BIDDING. . . .

[(Emphasis added.)]

New Jersey case law confirms that a proposal submitted in response to an RFP becomes a contract upon acceptance. “A bid submitted in response to an RFP is an offer that confers an option to contract upon the State.” *State v. Ernst & Young, L.L.P.*, 386 N.J. Super. 600, 612 (App. Div. 2006) (citing *Kingston Bituminous Prods. Co. v. N.J. Tpk. Auth.*, 80 N.J. Super. 25, 36 (App. Div.1963)). “As long as the option remains unaccepted, it is a unilateral writing lacking the mutual elements of a contract; when it is accepted, an executory contract arises that is mutually binding upon the parties.” *Ibid.* (citing *Schlein v. Gairoard*, 127 N.J.L. 358, 359 (E. & A.1941)).

Under the *River Vale* two-prong test set forth above, Xpress’s requirement of a lengthy implementation period deprived the State of the assurance that Xpress had the ability to complete the subject contract in the required timeframe. Under the second prong, waiving the requirement of immediate implementation for Xpress would unlevel the playing field, as other bidders were able to perform under the contract immediately upon acceptance. Therefore, Xpress’s exception to the RFP requirement also constitutes a material deficiency.

In its next argument, Xpress raises the following point:

If our company could not meet the criteria it should have been specified in the solicitation whether it be, union affiliation, business size, or industry experience or any other arbitrary requirement; it should have been stated so we could have been spared the [ruse] of the imagined chance of providing services to our neighboring Cities, Counties and small state agencies.

Accepting this sentence as meaning that the RFP should have been more precise concerning the minimum standards the State had set for a potential bidder to qualify for an award of the subject

contract, the subject RFP was based upon standard language, which reflects the Division's practice with regard to the matter of establishing minimum experience and other qualification standards for bidders to consider. As noted in Xpress's statement, such requirements or standards may be seen as "arbitrary." In the past, the Division issued RFPs containing minimum experience, size, and/or other restrictions necessary for a bidder's eligibility for contract award. It became obvious that these limitations reduced bidder participation and, more importantly, had the effect of precluding awards of contracts to viable businesses that were just short of the required experience, size, or other RFP-specified minimum requirements. As a result, it was determined the Division's best practice would be to permit a potential bidder, after reading the Scope of Work and all other sections of the RFP, to determine whether it could meet and perform the bidding and contract requirements. It is with this precept in mind that the RFP provisions do not specify exact experience, size, or other eligibility requirements for bidders. Furthermore, potential bidders can, and are expected to, question or seek clarification of any aspect of the RFP by participating in the RFP-defined period for bidder inquiry (see RFP Paragraph 1.3.2, *Electronic Question and Answer Period*), as occurred with the subject procurement.

Xpress also protests "the notion that [it] must go to Trenton and look through endless amounts of legal jargon to [determine] that the bid was conducted fairly." Xpress should be advised that documents relating to all solicitations are available upon request to the Procurement Bureau's assigned specialist or through the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13. Information relating to OPRA is provided on the Division's website in the lower left-hand corner and instructs the public on submitting OPRA requests. Under these guidelines, a vendor can request to view documents in person or request the documents be delivered via email or U.S. Mail.

The Division's records indicate that Xpress did not submit an OPRA request related to this solicitation. Additionally, as a courtesy, the procurement specialist provided Xpress with a copy of the Evaluation Report via email outlining the evaluation process. Therefore, its assertion that a representative had to review all solicitation-related documents in person in Trenton, NJ, is incorrect.

Xpress's fourth argument, that it submitted competitive pricing based on the "prevailing rate schedule along with a modest mark-up," was addressed previously in this letter. Because the technical aspects of Xpress's proposal were not in compliance with the requirements of the RFP, it was, per procedure, not evaluated on pricing.

The fifth point of protest, that the subject contract was not awarded to any NJ Small Businesses, is also without merit. As noted in the Evaluation Committee Report, NetQ Multimedia Co. and Extel Communications, Inc., both registered as NJ Small Business Enterprises, were recommended for an award of the contract.

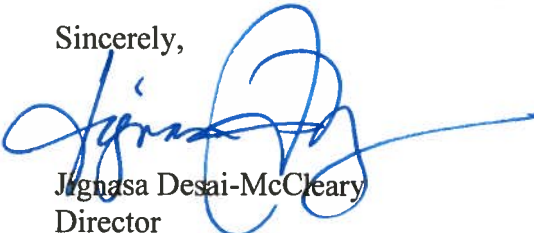
Xpress finally argues that the dismissal of its proposal as "non-responsive" was "arbitrary." As previously addressed, the proposal submitted by Xpress was deemed non-responsive due to its material deficiencies. The Committee did not act arbitrarily in making this determination, as all bidders' proposals were evaluated based on the same criteria.

I also note that during the evaluation of proposals, a bidder may be asked to clarify its proposal; however, “[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). Therefore, Xpress would not have been permitted to cure any defect in its proposal prior to proposal opening.

In light of the findings set forth above, I must deny Xpress’s request that its proposal be reevaluated and that Xpress be added as a contractor for the subject contract. This is my final agency decision on the 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. The State welcomes Xpress’s proposals in future solicitations.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: G. Olivera
P. MacMeekin
J. Strype