



State of New Jersey

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January 3, 2018

Via Email [meca@stevenslee.com] and USPS Regular Mail

Maeve E. Cannon, Esq.
Stevens & Lee
100 Lenox Drive, Suite 200
Lawrenceville, NJ 08648

Re: IMO RFP 16-X-24049
Protest of Notice of Intent to Award
Bid Solicitation Title: Enhanced Motor Vehicle Inspection/Maintenance System

Dear Ms. Cannon:

This letter is in response to your correspondence of September 11, 2017, to the Division of Purchase and Property's (Division) Hearing Unit on behalf of Parsons Environment and Infrastructure Technology, Inc. (Parsons). In that letter, Parsons protests the August 18, 2017, Notice of Intent to Award (NOI) a contract to Opus Inspection, Inc. (Opus) for RFP# 16-X-24049: Enhanced Motor Vehicle Inspection/Maintenance System. Parsons alleges that the proposal submitted by Opus had numerous material deviations from the requirements of the solicitation. Parsons requests that the Division rescind the August 18, 2017 NOI and award it the contract, or in the alternative re-solicit the contract with revised specifications.

BACKGROUND

By way of background, the subject Request for Proposal (RFP) was issued on December 21, 2015, by the Division's Procurement Bureau (Bureau) on behalf of the New Jersey Motor Vehicle Commission (MVC) and the New Jersey Department of Environmental Protection (DEP). The purpose of the RFP was to solicit proposals to engage a contractor to implement a next generation motor vehicle inspection and maintenance system. RFP § 1.1 *Purpose and Intent*. It is the intent of the Division to award one contract to that responsible bidder whose proposal, conforming to the RFP, is most advantageous to the State, price and other factors considered. *Ibid.* On February 22, 2016, four proposals received by the submission deadline were opened by the Division's Proposal Review Unit. All four proposals were forwarded to the Bureau and the Evaluation Committee (Committee) for review and evaluation consistent with the criteria set forth in the RFP § 6.7 *Evaluation Criteria*. Based upon that evaluation, on May 13, 2016, the Bureau issued the NOI advising all bidders that it was the State's intent to award a contract to SGS Testcom, Inc. (SGS Testcom).

As will be discussed more fully below, subsequent to the issuance of the NOI, Parsons made a document request to the Division for copies of the proposals submitted by all other bidders. Parsons was

provided with over 3000 pages of information including the redacted proposals, correspondence and the bidder responses to the State's request for Best and Final Offers (BAFO). Along with the redacted proposals, Parsons was provided with an exemption log identifying the pages redacted and the specific reason for the redaction. Parsons however challenged the redactions made to the proposals submitted by its competitors and in July 2016 filed a summary action with the Clerk of Law Division, Superior Court of New Jersey, Mercer County (Law Division) seeking un-redacted copies of the proposals submitted by all bidders. On October 14, 2017, the Law Division entered an order upholding the Division's redactions but for the names of the SGS employees who had been identified to work on the contract. Parsons filed an appeal of the Law Division's decision which is currently pending before the Appellate Division.

On October 24, 2016, Parsons and Opus submitted protests to the Division challenging the intended award of a contract to SGS. On July 31, 2017, the Division issued its final agency decisions with respect to the two (2) protests filed. In response to the protest filed by Opus, the Division found that the *Ownership Disclosure Form* submitted by SGS contained a material deviation, as such SGS' proposal was non-responsive and SGS was not eligible for a contract award.^{1,2} The Bureau was directed to rescind the May 13, 2016 NOI.

August 18, 2017, the Bureau issued an Amended Notice of Intent to Award (Amended NOI) indicating that it was the State's intent to award a contract to Opus. On September 11, 2017, Parsons filed the instant protest. On September 22, 2017, Opus filed its opposition to the protest. On September 28, 2017, Parsons submitted a reply to the Division, and on October 4, 2017 Opus submitted its response.

DISCUSSION

In the instant protest Parsons' alleges that it has been denied the opportunity to review Opus' un-redacted proposal. Therefore, Parsons' asserts that its administrative due process rights have been violated. As will be addressed below, Parsons' administrative due process rights have not been violated.

Further, Parsons claims that Opus' proposal materially deviated from the requirements of the RFP; and therefore, Opus' proposal should have been rejected as non-responsive.

Finally, Parsons states its proposal is the most advantageous to the State, price and other factors considered. Parsons' protest p. 3. Parsons notes that while the Director has broad discretion to exercise sound judgment in reviewing proposals and making an award, Parsons believes that it is "the only vendor that understands and has managed all of the variable factors in New Jersey, from the weather conditions to the union environment, to the [Private Inspection Facility (PIF)] network relationship, and most importantly to the peaks and valleys of a non-level network." Parsons' protest p. 35. Therefore, Parsons asserts that it should be awarded the contract.

In consideration of Parsons' protest, I have reviewed the record of this procurement, including the RFP, the proposals submitted, the Committee Report, the Bureau's Recommendation Reports, and 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. I set forth herein the Division's Final Agency Decision.

¹ Based upon that finding, Parsons' allegations against SGS are moot and need were not addressed.

² SGS has filed an appeal of the Division's July 31, 2017 Final Agency Decision which is currently pending before the Appellate Division.

I. Parsons' Request for Documents.

First, Parsons claims that its administrative due process rights have been violated because the Division issued the Amended NOI without providing Parsons' copies of the un-redacted proposals. Parsons claims that its ability to rebut the basis for the award is hampered because the redactions made to the Opus' proposal pertain to "mandatory and material components of the RFP" and that the "redactions are so comprehensive that they render it impossible for bidders to fully consider, articulate and file a protest." Parsons' protest, p. 2-3. In support of its position Parsons states that "the tenets of administrative due process expressly prohibit an administrative agency from acting on undisclosed evidence that parties have had no opportunity to rebut." Ibid., citing, Nachtigall v. New Jersey Turnpike Authority³, 302 N.J. Super. 123, 129 (App. Div. 1997).

A review of the Court's decision in Nachtigall, reveals that the Plaintiff-Appellant Lockheed Martin had asserted that it was "denied adequate due process in respect of the protest proceedings because its notice time was too short, discovery was unduly limited, relevant evidence was excluded, both hearing officers had a conflict of interest, and Scaccetti lacked authority to act as a hearing officer."⁴ Id. at 143. The Appellate Division rejected each of the contentions noting that Lockheed had extensive discovery and a hearing. Ibid. The Appellate Division noted that "[i]n sum, a plenary quasi-judicial hearing need not be afforded provided there is a fair opportunity, consistent with the desideratum of a fair and expeditious conclusion of the procurement process, for the protesting bidder to present the facts and law supporting the protest. We think it plain that Lockheed had at least that opportunity." Ibid., citing, George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8 (1994). In George Harms, the New Jersey Supreme Court set forth the due process rights of a bid protester stating "so long as the parties had adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response, due process would be fundamentally satisfied." Id. at 19-20.

The case cited by Parsons supports the proposition that a bid protester should have "adequate notice, a chance to know opposing evidence, and the opportunity to present evidence and argument in response," Parsons was provided with the due process requirements, twice. Subsequent to the issuance of the NOI, the Bureau received a request from Parsons for copies of the proposals submitted by other bidders. Parsons was provided with over 3000 pages of information including the proposals, correspondence and BAFO responses. Along with the redacted proposals, Parsons was provided with an exemption log identifying the specific pages redacted and the specific reason for the redaction. Those redactions were consistent with the exemptions permitted under the New Jersey Open Public Records Act (OPRA) and the common law.

Parsons however challenged the redactions made to the proposals submitted by its competitors. On July 1, 2016, Parsons filed a Verified Complaint with the Law Division challenging the redactions made to the proposals submitted by its competitors, SGS Testcom and Opus, and requested that the Law Division issue an order requiring that the Division "immediately produce all documents and records, in an un-redacted form which are responsive to Parsons' records request."

³ Underlying protest captioned as "In The Matter Of The Protest Of Lockheed Martin IMS Re: Electronic Toll Collection Implementation Program Procurement. The Protest Of Procurement Procedures And Award."

⁴ The procurement sought to award a contract to the lowest responsible bidder to install, implement, and service an integrated electronic toll collection system. Following an extensive bidding and negotiation process spanning many months and involving two bidders, MFS Network Technologies, Inc. and Lockheed Martin a contract was awarded to MFS. That award was challenged both by Lockheed, who filed a notice of appeal directly with this court, and a taxpayer, Nachtigall. Nachtigall, supra, 302 N.J. Super. at 128.

In conjunction with its Law Division action, on June 30, 2016, Parsons filed a request with the Division for a stay of the protest period, which was set to expire on July 6, 2016. In that original July 2016 stay request Parsons sought to stay the protest period and the contract award in order to provide it the opportunity to file an action in the Law Division to “determine the propriety of the redactions asserted by the State.” Parsons’ June 30, 2016, Request for a Stay. On July 5, 2016 the Division denied Parsons’ request for a stay pending review by the Law Division of the document issue; however, the Division extended the protest period to July 8, 2016.

Parsons did not file a protest by July 8, 2016. Instead, on July 7, 2016, Parsons filed an Application for Permission to File an Emergent Motion with the Superior Court of New Jersey, Appellate Division (Appellate Division) seeking a stay of the protest period. On the same date, the Appellate Division entered an order to stay the protest period until the Appellate Division had an opportunity to review Parsons’ application for emergent relief.

On July 18, 2016, Parsons filed an Order to Show Cause with the Law Division seeking Injunctive Relief under OPRA and the Common Law Right of Access, naming the Division, SGS, OPUS and Applus Technologies, Inc. (Applus) as defendants. On July 22, 2016, a scheduling conference was held wherein the procedural issue was raised that no formal OPRA request had ever been submitted to the Division, nor had any request been submitted to the proper custodian of records for the Division. Pursuant to the Court’s July 22, 2016 scheduling order, Parsons submitted an OPRA request to the Division seeking virtually the same documents previously requested. The Division processed the OPRA request in the normal course and on September 8, 2016, provided Parsons with substantially the same documents previously released, including a detailed exemption log.

On July 26, 2016, the Appellate Division issued an Order granting Parsons’ Emergent Application for a stay of protest period until the earlier of (1) the Law Division’s Review and Denial of Parsons’ motion for release of documents, or (2) following the Law Division’s grant of the release of documents, ten (10) days after actual release of documents sought.

On August 18, 2016, oral argument was held before the Law Division on Parsons’ Order to Show Cause. The Law Division requested that the Division provide a supplemental certification regarding the security Plans required to be submitted by all bidders, along with un-redacted copies of the documents for an in camera review.⁵ The Division responded to the Law Division request. Additionally, Parsons submitted a supplemental brief in response to the Division’s supplemental certification. On October 3, 2016 the Law Division denied Parsons’ request for disclosure of the un-redacted bid proposals under OPRA and the common law.⁶ Parsons filed an appeal of the Law Division’s decision. Oral Argument on the matter was held on December 14, 2017 and the decision is currently pending before the Appellate Division.

Following the Law Division’s denial of Parsons’ request for un-redacted bid proposals, Parsons again choose to request a stay of the contract award. In support of its October 14, 2016 request for a stay, Parsons asserted, as it did before, that it “is simply interested in reviewing the un-redacted bid proposals of SGS and Opus to determine whether they are conforming to the RFP and to thus properly consider, articulate and file a protest of the Division’s proposed award.” Parsons October 14, 2016, Request for a Stay. On October 21, 2016, the Division denied Parsons’ request for a stay.

⁵ Part of Parsons’ OPRA request was for un-redacted copies of the security plans related to the Inspection/Maintenance System. The State’s position is that the release of this information would jeopardize the security of the system against electronic breaches.

⁶ The Law Division directed that the Division release the names of the SGS employees who were identified to work on SGS’ State contract. The names of the SGS employees were released to Parsons on October 7, 2016.

As previously noted, On October 24, 2016, Parsons' and Opus submitted protests to the Division challenging the intended award of a contract to SGS. On July 31, 2017, the Division issued its final agency decisions with respect to the two protests filed and directed the Bureau to rescind the May 13, 2016 NOI.

On August 18, 2017, the Bureau issued an Amended NOI indicating that it was the State's intent to award a contract to Opus. On September 11, 2017, Parsons filed a detailed protest challenging Opus' proposal response to many of the requirements of the RFP. At no time after the issuance of the Amended NOI did Parsons seek any additional documents from the Division, request a stay from the Division or the Appellate Division. Parsons' due process rights have not been violated by the Division's issuance of the Amended NOI. Parsons due process rights have been "fundamentally satisfied." George Harms, supra, at 19-20.

II. Opus Proposal

Second, Parsons alleges that Opus' proposal materially deviated from the requirements of the RFP; and therefore, Opus' proposal should have been rejected as non-responsive. Specifically, Parsons alleges that Opus' proposal was deficient with respect to the following:

- (A) Opus' Transition, Retrofit, Operations and Management Plan did not acknowledge or address many of the RFP requirements;
- (B) Opus did not include a plan for updating the cameras or video monitoring systems;
- (C) Opus' response to the requirement for an undercarriage video inspection system was deficient;
- (D) Opus failed to provide CIF Staffing Plan;
- (E) Opus failed to provide a Mandatory Project Management Plan;
- (F) Opus failed to provide fully completed sub-contractor utilization plan; and,
- (G) Opus failed to address the RFP's requirements regarding back-up services.

Parsons states that Opus failed to explain its means and methods for completing these material requirements of the RFP in its proposal and failed to set forth details regarding how it would satisfy the requirements of the scope of work. Parsons contends that Opus' proposal should be deemed non-responsive.

RFP Section 4.0 sets forth the bidder requirements for proposal preparation and submission. Specifically, RFP § 4.4.3 *Technical Proposal* states in part that:

... [T]he Bidder shall⁷ describe its approach and plans for achieving all the requirements set forth in the Scope of Work (Section 3.0. and all of its subsections). The Bidder must set forth its understanding of the requirements of this RFP and its ability to successfully complete the contract. This Section of the proposal should minimally contain the information identified below:

Details shall include such items as:

Drafts of all plans, manuals and specification documents as specified in Table 3-2 of the RFP.

⁷ "Shall or must – denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive." RFP § 2.1 *General Definitions*.

...

...The bidder shall include and/or discuss in its bid response plans, manuals and specification documents as specified in Table 3-2.

Mere reiterations of RFP tasks and subtasks are strongly discouraged, as they do not provide insight into the bidder's ability or methods to complete the contract. The bidder's bid response must also address each specific mandatory requirement, i.e., "must" or "shall" statements. The bidder's response to this section should be designed to demonstrate to the State that the bidder's detailed plans and approach proposed to complete the Scope of Work are realistic, attainable and appropriate and that the bidder's proposal will lead to successful contract completion.

Note: The submission of draft plans in the bidder's response does not constitute completion of the requirement to submit the plans in a final form subject to State review and approval.

[RFP § 4.4.3 *Technical Proposal*, emphasis added.]

Table 3-2 required that the following items be included in a draft format with the bidder's proposal:⁸

Revised Table 3.2. Plans, Summary		
Document	Due Date	Draft or Outline Required in RFP response
CIF Transition to NGContractor		
Project Management Plan	Start + 30d	Draft
Transition, Retrofit, Operations and Management Plan	Start + 30d	Draft
CIF Network and Lane Configuration Plan	Start + 30d	Draft
CIF Staffing/Training Plan	Start + 30d	Draft
Quality Assurance (Q/A) Plan	Start + 30d	Draft
CIF Security Plan	Start + 30d	Draft
Inspector Reference Manuals	Start + 45d	Optional
Motorist Hotline and Training Manual	Start + 45d	Optional
CIF Maintenance and Grounds Plan	Start + 60d	Draft
CIF Capital Project Plan	Start + 90d	Optional
NGVID Development and Implementation		
NGSystem Requirements Specification	Start + 60d	Optional
NGSystem Architecture and Design Specification	Start + 60d	Draft
NGVID Security Plan	Start + 60d	Draft
NGVID Transition Plan	Start + 60d	Draft
NGVID Data Management Plan	Start + 90d	Draft
Business Continuity and Disaster Recovery Plan	Start + 120d	Draft
NGSystem Performance Testing Plan	Start + 180d	Outline
NGSystem Capacity, Performance and Monitoring Plan	Start + 180d	Optional
NGSystem Training Plan	Start + 300d	Draft
NGSystem Design Specification (initial version and "as built" version)	Start + 180d and Start + 350d respectively	Optional
NGSystem Maintenance Plan	Start + 270d	Outline
NGSystem Transition		
NGWorkstation Hardware and Design Specification	Start + 90d	Draft
PIF and PFF Support Plan	Start + 150d	Draft
NGWorkstation Supply, Maintenance and Repair Plan	Start + 180d	Draft
NGVID and NGWorkstation Acceptance Testing Plan	Start + 220d	Outline
NGWorkstation User Manual	Start + 300d	Optional
Closeout		
Closeout and Data Transition Plan (draft and final)	Start + 360d End - 360d	Outline

⁸ Table 3-2 was amended in the Bureau's February 10, 2016 response to the questions posed by potential bidders.

As noted above, Parsons identifies several areas where it alleges that Opus failed to conform to the RFP requirement that a draft plan be submitted. Each of the deficiencies alleged by Parsons to Opus' proposal relates to RFP § 6.7.1(c), Criteria C – *Ability of the firm to complete the Scope of Work based on its Technical Proposal*, which required bidders to describe their approach and plans for accomplishing the work identified in the RFP.

In reviewing proposals submitted, it is the job of the Evaluation Committee to evaluate and score each proposal received against the requirements of the RFP.⁹ At the conclusion of its evaluation of Opus' proposal, “[t]he Committee determined that the bidder’s ability to complete the scope of work required by the RFP was good. The Opus proposal displayed a clear understanding of the State’s requirements and an overall competence in responding to those needs. Opus’ proposal addressed the RFP requirements, provided an overall explanation of the capabilities of the system and provided its detailed supporting documentation.” Committee Report, p. 15-16.

RFP § 4.4.3 required that the bidder provide a draft plan for each item identified in Table 3-2, including those deficiencies identified by Parsons. The level of detail provided in the draft plan would affect the scoring for Criteria C as a bidder’s proposal response need not detail every aspect of the entire plan.¹⁰ Rather, the requirement for a draft plan was to provide the State with an assurance the bidder had a preliminary plan to satisfy the requirements, if a contract was entered.

In connection with this protest, the Division’s Hearing Unit conducted an independent review of the RFP requirements and the proposal submitted by Opus. I note that it is not the Hearing Unit’s job to second guess the Evaluation Committee’s, which is comprised of industry and subject matter experts, review and scoring of those proposals submitted. Rather, the Hearing Unit must confirm that the Committee’s determination is supported by the proposal documents. Based upon the Hearing Unit’s independent review of the proposal submitted by Opus against the RFP requirements, I find as follows:

- **Centralized Inspection Facility Staffing Plan**

Parsons alleges that Opus failed to submit a draft Centralized Inspection Facility (CIF) Staffing Plan (Staffing Plan) with its proposal despite the fact that the submission of the draft plan was required by the RFP.¹¹

⁹ The Division’s governing regulations require that “members of evaluation committees shall conduct evaluations of proposals objectively, impartially, and with propriety.” N.J.A.C. 17:12-2.7(a)(1). Here, all members of the Committee had the requisite knowledge and experience to conduct an evaluation of the proposals submitted and none had any possible conflicts of interests which could have affected the public’s confidence in the procurement process. See, N.J.S.A. 52:34-10.3 stating “[i]n all cases, persons appointed to an evaluation committee shall have the relevant experience necessary to evaluate the project.”

¹⁰ Final plans will be reviewed, revised and approved by the State Contract Manager (SCM).

¹¹ Parsons additionally asserts that Opus failed to recognize the incumbent union workforce which in part requires that the contractor provide 2 employees to staff each inspection lane. Parsons’ protest p. 28. Given the substantial labor costs involved, Parsons alleges that it is clear that Opus has no intent to operate all of the current 111 CIF inspection lanes, and without a staffing plan, the State cannot be assured that Opus will operate all inspection lanes are required. Parsons’ protest p. 29. In response, Opus states that “the RFP does not require each bidder to make a commitment to the incumbent union workforce” and notes that “Opus Inspection will offer new employment under the new program to currently employed personnel whom are deemed to be qualified and eligible under Opus Inspection hiring standards. We will make commercially reasonable best efforts to retain current, privately employed inspection station staff and personnel at each individual’s present skill level and position.” Opus’ protest response, p. 10.

RFP § 3.2.2.3 *Work Force* required in part that:

...

The [Next Generation Contractor] NGContractor¹² shall provide a sufficient number of trained supervisors, managers and lane inspectors to:

- Conduct inspections and operate test-only inspection stations in accordance with all governing inspection regulations and the terms of this RFP;
- Perform management, administrative and service functions associated with the conduct of such inspections and the operation of the inspection facilities; and
- Meet the wait time standards defined in this RFP.

The NGContractor shall develop a [Centralized Inspection Facility] CIF Staffing/Training Plan to include a description of the inspection lane configuration at each facility, the number of positions on each lane, and an outline of the duties assigned to each position on the inspection lane. The NGContractor's plan shall be submitted within thirty (30) days of the contract effective date. The NGContractor's CIF Staffing/Training Plan shall include: a minimal staffing plan for typical periods throughout the work day, week and month; as well as a plan for periods of maximum throughput; along with a description of the inspection lane staff configuration at each facility; and an outline of the duties anticipated for each position in the inspection lane.

The NGContractor shall assign only licensed inspectors to each position in the inspection lane. The NGContractor may be permitted to allow Inspectors to rotate lane positions, as staffing requires, provided any inspector is not responsible for more than one (1) lane at any given time.

...

[Emphasis added.]

In response to the Parsons' protest, Opus stated

Parsons incorrectly contends that Opus failed to provide the mandatory draft of its CIF Staffing/Training Plan. Section 3.2.2.3 of the RFP addresses work force and states that bidders "shall develop a CIF Staffing/Training Plan." Included in this plan was the requirement that the bidder include "a minimal staffing plan for typical periods throughout the work day, week and month; as well as a plan for periods of maximum throughput; along with a description of the inspection lane staff configuration at each facility; and an outline of the duties anticipated for

¹² "NGContractor – The bidder awarded a contract resulting from this RFP." See, RFP § 2.2 *Contract-Specific Definitions*.

each position in the inspection lane.” Id. However, the RFP expressly states that the “NGContractor’s plan shall be submitted within thirty (30) days of the contract effective date.” Id. In Section 3.2.2.3 of its proposal, Opus directly and in detail addresses the plan. Opus also states that it will provide a sufficient number of trained supervisors, managers and lane inspectors, and will submit its CIF staffing/training plan within the required 30 days. In addition, Opus’ Price Schedule contains an outline of Opus’ staffing plan, including a list of the staff positions which will aid Opus in implementing the project. Thus, it is clear that Opus fully complied with the requirements set forth in the RFP.

[Opus’ protest response, p. 9-10.]

While the submission of the final CIF Staffing/Training Plan required by RFP § 3.2.2.3 *Work Force*, is a Contractor requirement, Table 3-2 of the RFP required that the bidder submit a draft CIF Staffing/Training Plan with its proposal.

In its proposal response to RFP Section 3.2.2.3, Opus stated:

3.2.2.3 WORK FORCE

Opus Inspection is the industry leader for providing competent, experienced, and well-trained workforces of lane inspectors and facility managers as a critical aspect of a successful centralized lane operation. With robust and stable operations in more than 80 centralized inspection facilities in the United States alone—and more than 150 worldwide—Opus Inspection has the most collective experience and highest vested interest in ensuring that our centralized workforce is successful.

Opus Inspection has proposed the most seamless and smooth transition to the new program. We recognize this has a great deal of dependency upon the workforce. Where feasible and reasonable, Opus Inspection will offer new employment under the new program to currently employed personnel whom are deemed to be qualified and eligible under Opus Inspection hiring standards. We will make commercially reasonable best efforts to retain current, privately employed inspection station staff and personnel at each individual’s present skill level and position. In the event Opus Inspection determines it may not be practicable or possible to retain any individual or individuals, we will provide a written report to the SCM documenting our commercially reasonable best efforts along with recommendation to fulfill staffing requirements specified within the RFP.

Opus Inspection will provide a sufficient number of trained supervisors, managers and lane inspectors to:

- Conduct inspections and operate test-only inspection stations in accordance with all governing inspection regulations and the terms of the RFP;
- Perform management, administrative and service functions associated with the conduct of such inspections and the operation of the inspection facilities; and
- Meet or exceed the wait time standards defined in the RFP.

Opus Inspection will develop a CIF Staffing/Training Plan to include a description of the inspection lane configuration at each facility, the number of positions on each lane, and an outline of the duties assigned to each position on the inspection lane. Our plan will be submitted within thirty (30) days of the effective Contract Start Date.

Opus Inspection's CIF Staffing/Training Plan will include:

- A minimal staffing plan for typical periods throughout the work day, week and month;
- A plan for periods of maximum throughput;
- A description of the inspection lane staff configuration at each facility; and
- An outline of the duties anticipated for each position in the inspection lane.

Opus Inspection will assign only licensed/certified inspectors to each position in the inspection lane. We may allow inspectors to rotate lane positions, as staffing requires, provided any inspector is not responsible for more than one (1) lane at any given time. Our personnel will observe all regulations in effect at each of the centralized facilities, including any security protocols and sign-in/sign-out procedures. Under no circumstances will any Opus Inspection employee represent themselves as State employees. Should any employee pose an immediate threat, we will comply with the State's directive to remove that employee.

Opus Inspection personnel will be responsive, polite and cooperative when interacting with representatives of MVC, DEP, OIT or other State employees, and particularly with members of the motoring public. Opus Inspection personnel will work in a professional and harmonious manner at all times. Opus Inspection will comply with the SCM's directive to remove and/or replace any employee identified as a potential threat to the health, safety, security, general wellbeing, or operational mission of the facility and its population.

Neither Opus Inspection nor any of its Agents will employ any person into an inspection lane position who is currently on a work-release program from a correctional institution. All our personnel will be fingerprinted in accordance with N.J.S.A. 39:2A-32 and will meet all other requirements of N.J.S.A. 39:2A-32 prior to assignment by Opus Inspection or any of its Agents. Opus Inspection will be responsible for any costs associated with and/or incurred by this process and we will utilize only State approved and authorized contractor(s) for fingerprint services.

All lane inspectors will wear SCM approved uniforms provided by Opus Inspection or its designee. The Opus Inspection Station Manager will be uniformed in a dress shirt and slacks and will be attired in a distinctively different manner from inspection personnel. Figure 5 provides an example of a uniform from one of our other programs.

Opus Inspection staff and all facility personnel will wear employee identification badges. Each employee's identification badge will include their full name and photograph, and they will be required to remain in physical possession their own uniquely assigned identification badge at all times. Opus Inspection personnel will not share, loan or relinquish possession of an identification badge to any other person at any time. The badge is to be clearly and prominently displayed on the exterior of their work uniform at all times while the employee is present on the grounds of any facility.

...

Appendix 7 contains a draft copy of Opus Inspection's CIF Staffing/Training Plan, which includes our inspection training solution.

...

[Opus proposal, p. 2-18 – 2-31, emphasis added.]

Opus' narrative response to RFP § 3.2.2.3 *Work Force* did not address any of the tasks or subtasks identified except to state that "Opus Inspection's CIF Staffing/Training Plan will include" the required items.

I note that Opus' proposal response to RFP § 4.4.3, acknowledged that RFP Table 3-2 required the submission of a draft CIF Staffing Plan and indicated that the draft CIF Staffing Plan was included in Appendix 7. See, Opus proposal, p. 2-149.

However, a review of Appendix 7 of Opus' proposal did not reveal a draft CIF Staffing Plan. Rather, as shown in the screen shot below, Opus stated: "Staffing plan information is provided in Volume 2: Price Schedule. This portion of the CIF Staffing/Training plan will be populated following contract award." Emphasis added.

<p>Appendix 7 - CIF Staffing/Training Plan (draft)</p> <p>I. STAFFING PLAN</p> <p>Staffing plan information is provided in Volume 2: Price Schedule.</p> <p>This portion of the CIF Staffing/Training plan will be populated following contract award.</p>
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[Opus proposal, p. A-44.]

Volume 2 of Opus' proposal included only Opus' proposal Price Sheet. That Price sheet did not reveal any additional details regarding its Staffing Plan as required by the RFP, specifically Volume 2 of Opus' proposal did not address (1) A minimal staffing plan for typical periods throughout the work day, week and month; (2) A plan for periods of maximum throughput; (3) A description of the inspection lane staff configuration at each facility; or (4) An outline of the duties anticipated for each position in the inspection lane.

Moreover a review of Opus' entire proposal did not reveal any details which could be deemed a draft CIF Staffing Plan. While Opus did provide some staffing information in its proposal, including its key staff members – providing a summary of their individual credentials and job responsibilities, the information did not respond to the RFP requirement for the CIF Staffing Plan. Opus proposal, pp. 3-9 through 3-46. Further, in response to RFP § 3.2.2.2.1 *Centralized Facility Retrofit Plan*, which required

that “[t]he NGContractor’s [Transition, Retrofit, Operations and Management Plan] shall include...[t]he minimum staffing for typical periods throughout the work day and month, as well as staffing for periods of maximum throughput,” similar to the information sought in the CIF Staffing Plan, Opus responded “[o]ur Plan will include [t]he minimum staffing for typical periods throughout the work day and month, as well as staffing for periods of maximum throughput.” Opus proposal, p. 2-25. No details were provided.

Opus’ proposal response represents a deviation from the RFP requirement that the bidder provide a draft CIF Staffing Plan with its proposal. The question then is whether the deviation is material or if it can be waived. To be deemed non-responsive, Opus’ proposal would have to materially deviate from the requirements of the RFP such that the Bureau would have no assurances that the contract would be performed consistent with the requirements of the RFP. In determining whether a material deviation exists, 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). “If 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.” Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 222 (Law Div. 1974). 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 Award of On-Line Games Prod. And Operation Servs. Contract, 279 N.J. Super. 566, 594 (App. Div. 1995), citing River Vale, supra, 127 N.J. at 216. The River Vale court set forth a two-part test for determining whether a deviation is material:

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.]

Despite the RFP’s guidance that “[m]ere reiterations of RFP tasks and subtasks are strongly discouraged,” Opus’ proposal response with respect to the CIF Staffing Plan is simply that – a reiteration of the RFP language with an indication that Opus’ CIF Staffing “will include” the items referenced in the RFP. RFP § 4.4.3 *Technical Proposal*. Opus did not provide its plan or approach to how it would accomplish the tasks or subtasks identified. In fact, in its proposal, Opus acknowledged that the draft CIF Staffing was not included in its proposal response, stating the CIF Staffing Plan “portion of the CIF Staffing/Training plan will be populated following contract award.” Opus proposal, p. A-44.

If the Division were to waive the requirement that a draft CIF Staffing Plan be included and submitted as part of the draft CIF Staffing/Training Plan, with the proposal, the State would be deprived of any assurance that the bidder would perform the contract guaranteed according to the requirements of the RFP. Permitting this deviation places Opus in a position of advantage over other bidders who, in submitting their proposals, expended time and resources to review the RFP requirements and develop an appropriate draft CIF Staffing Plan that could be evaluated. Accordingly, Opus’ proposal contains a material deviation from the requirements of the RFP.

CONCLUSION

Based upon the findings set forth herein, I find that Opus' proposal contains a material deviation from the requirements of the RFP making Opus' proposal nonresponsive. I find that Opus is ineligible for a contract award. Accordingly, I need not address the remaining protest issues raised by Parsons in its September 11, 2017, protest.

I direct the Bureau to rescind the August 18, 2017, Amended NOI indicating that a contract would be awarded to Opus, to thoroughly review the other proposals submitted, and issue a new NOI if appropriate. This is my final agency decision with respect to the protest submitted by Parsons.

Sincerely,

A handwritten signature in blue ink that reads "magriff". The signature is stylized and cursive.

Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Borek, Esq.
D. Greene
L. Leonardi
M. Tagliaferri
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