



State of New Jersey

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April 13, 2017

Via Electronic Mail [rob.weber@mediware.com] and USPS Regular Mail

Robert Weber
Executive Vice President and General Counsel
Mediware Information Systems, Inc.
11711 West 79th St.
Lenexa, Kansas 66214

RE: Protest of Notice of Intent to Award
Bid Solicitation {Request for Proposal} #16DPP00008 – DoAS Care/Case Management System
(C/CMS)

Dear Mr. Weber:

This correspondence is in response to your letter of protest dated September 28, 2016, submitted on behalf of Mediware Information Systems, Inc. (Mediware), referencing the subject Bid Solicitation {Request for Proposal} (hereinafter “RFP”) and regarding the proposal submitted by Mediware in response to the RFP. In that letter, you protest the Notice of Intent to Award (NOI) issued by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division) to RTZ Associates, Inc. (RTZ), contending that Mediware’s Quote {Proposal} (hereinafter proposal) should have been found responsive and considered for an award of a Master Blanket Purchase Order {Contract} (hereinafter contract).

I have reviewed the record of this procurement, including Mediware’s protest, the submitted proposals, the RFP, 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 Mediware’s protest.

By way of background, the subject RFP was issued by the Bureau on behalf of the Department of Human Services (DHS) “to solicit proposals for a cloud-based solution (Base Product) that is configurable and/or customizable to meet the State’s requirements for the care and case management of individuals served by the Division of Aging Services (referred to henceforth as DoAS) as well as to satisfy the federal reporting needs relating to these individuals.” RFP § 1.1 *Purpose and Intent*. The “business objective” of the project was “to procure an end to end integrated solution for the care and case management of individuals served by DoAS.” RFP § 1.21 *Key Requirements*. The new system procured through this RFP is intended to replace an existing commercial off-the-shelf (COTS) product. RFP § 3.1 *Overview of Scope of Work*.

The intent of the RFP is “to award a contract to that single responsible [b]idder that will be responsible for all services over the life of the contract, including software warranty, maintenance, support and hosting and whose proposal, conforming to this [RFP] is most advantageous to the State, price and other factors considered.” RFP § 1.1 *Purpose and Intent*.

The RFP’s Scope of Work set forth both functional and non-functional, or technical, requirements to be incorporated into the proposed solution. See RFP § 3.0 *Scope of Work*. Vendors {Bidders} (hereinafter bidder) were instructed to submit a technical proposal that described their “approach and plans for accomplishing the work outlined in the Scope of Work.” RFP § 4.4.3 *Technical Proposal*. Bidders were also required to include the State-supplied Attachment 3 comprehensive spreadsheet to identify the “fit” between a proposed solution and the C/CMS functional requirements. RFP § 4.4.3.4.1 *Technical Requirements*. Attachment 3 contained numerous functional requirements, including Intake, Assessment, Enrollment, Case Management and Service Delivery, Incident Management, DoAS Web Portal, Reporting, Intefcase, System Administration, General requirements, and System Security Requirements. See RFP §§ 3.2.1 to 3.2.11. Regarding these functional requirements, bidders were instructed to “respond only by completing” Attachment 3 and to indicate “how” the proposed solution would support each requirement in the appropriate column of Attachment 3, “along with an estimated total number of hours” for configuration or customization. RFP § 4.4.3.4.2 *Functional Requirements*. Additionally, bidders were instructed to set forth the “overall technical approach and plans” to meet the RFP specifications in a narrative format.¹ Ibid.

The Division received five proposals by the proposal submission due date of 2:00 p.m. on February 5, 2016. One proposal was administratively rejected for failure to submit required forms; the remaining four were delivered to the Bureau for evaluation in accordance with RFP Section 6.0 *Quote {Proposal} Evaluation*.

Regarding Mediware’s proposal, the Evaluation Committee² found:

[Mediware’s proposal] was deemed nonresponsive due to failure to include all estimated work within its price sheet. On Attachment 3, each vendor was required to indicate its solutions’ compliance with technical and functional requirements of the Bid. Where the solution does not meet the requirement out-of-the-box, the Bidder was required to indicate whether configuration or customization would be necessary to satisfy the requirement, and include an estimated number of hours needed to complete the work ([RFP] Section 4.4.3.4.2). These configuration and customization hours were then to be aggregated and reflected in the price sheet in price lines one, two, and three.

Mediware indicates on its submitted Attachment 3 that a number of functional requirements require configuration or customization, but it only included the estimated hours needed to scope the work. Mediware does not fully comply with RFP Section 4.4.3.4.2 as it fails to provide the estimated total number of hours needed [to] customize the solution for the functionality specified in these requirements.¹ As Attachment 3 did not capture the full work needed to provide the required functionality, the Committee also concluded that Mediware’s price sheet did not capture a firm fixed price on price lines one, two, and three, as only “scoping” hours were included, not the actual configuration or customization hours.

The Committee noted that the requirements affected by this deviation spanned the Assessment Requirements, Section 3.2.2; Case Management and Service Delivery

¹ Although the RFP did not define “functional” and/or “technical” requirements, it differentiated the role and purpose of each in separate RFP sections.

² The Evaluation Committee was comprised of five voting members from the Division, DoAS, and the Office of Information Technology. There were also a number of non-voting technical advisors to the Evaluation Committee.

requirements; Section 3.2.4; General requirements, Section 3.2.10; Interface requirements, Section 3.2.8; Incident Management requirements, Section 3.2.5; Intake requirements, Section 3.2.1; DoAS web Portal requirements, Section 3.2.6; Reporting requirements, Section 3.2.7; and System Security requirements, Section 3.2.11. The Committee determined that Mediware's noncompliance is a material deviation and rendered its proposal non-responsive.

[Evaluation Committee Report, pg.6-7.]

Following the completion of the evaluation, the Bureau issued the NOI on September 14, 2016 to all bidders advising of the intent to award the subject solicitation to RTZ.

Mediware raises two points of protests in its September 28, 2016 protest letter.

Mediware's First Protest Point

First, it protests the Evaluation Committee's determination that its proposal was non-responsive for failing "to include the full price and all estimated work within the price sheet [it] provided." Mediware asserts that, as explained in its responses to the State's requests for clarification, Mediware's pricing was a "firm fixed price" for the entire project. Mediware states its pricing of [REDACTED] on Price Line 1, [REDACTED] on Price Line 2, and [REDACTED] on Price Line 3 represents the "full cost to the State . . . for the required requirements (sic) analysis, configuration and customization, and the other pricing reflected the full cost to the State for the entire project." Although its clarification did not explicitly state the proposed pricing was "firm, fixed" for the entire project, including all configuration and customization, Mediware reasons that because it withdrew the statements, assumptions, and exceptions that qualified its pricing, the proposed pricing was necessarily a firm fixed price, all-inclusive of direct and indirect costs.

Mediware further supports its contention that its proposal was responsive by noting that the Bureau requested Mediware submit a Best and Final Offer (BAFO). Because a bidder is not permitted to clarify its proposal during the BAFO pricing, Mediware reasons that by responding to the BAFO request, it affirmed that its original proposal, as clarified, reflected a firm fixed price to complete the requirements of the RFP and addenda, including "without limitation the cost to complete any customizations and configurations."

A review of the record shows the following. Prior to determining Mediware's proposal to be non-response, the Bureau requested certain clarifications regarding Mediware's proposal via letter dated March 14, 2016. First, concerning pricing, the Bureau noted Mediware's Price Sheet did not include an entry for Year 1 Costs on Price Line 33, *Ongoing Maintenance and Support*, or Price Line 34, *Hosting Fees Per Year*, and requested that Mediware confirm these two price lines would be provided at no cost to the State. Mediware confirmed that *Ongoing Maintenance and Support* and *Hosting Fees* for Year 1 would be "provided at no cost to the State." The Bureau also noted that Mediware's Price Sheet did not include an entry for costs on Years 1 through 5 for Price Lines 36 through 40, *Users/Licensees*; rather "n/a" was entered in the Year 1 Cost column and "inc in maint" was entered in Years 2 through 5. In response, Mediware confirmed "there is no cost to the State for [Years 1, 2, 3, 4, and 5] for any Tier Access."

Second, concerning Mediware's technical proposal, the Bureau noted that Mediware provided the following statement in a narrative accompanying Attachment 3 in response to various interface requirements:³

³ The referenced statement was listed in response to the following Interface Functional Requirements: INT010, INT011, INT012, INT030, INT034, INT035, INT036, ASM025, ASM026, CMT058, RPT011, INF001, INF002, INF003, INF004, INF005, INF006, INF007, INF008.

This interface will require technical services. No hours were provided here due to the fact that further meetings will need to be scheduled in order for Mediware to fully understand the facts of the integration (including exact data elements, formats, and more). You will note in the final cost that Mediware has provided a cost to scope the creation of the interface, which will be done collaboratively with the customer in a series of meetings. Once these meetings conclude, the exact cost of each interface can be provided.

Because the RFP required a total number of hours to configure and/or customize, not just “scope,” a requirement, the Bureau also requested Mediware withdraw the referenced statement. Mediware accepted this request and withdrew all referenced statements in its response letter. Mediware did not provide any additional information or statement clarifying its ability to configure and provide these interfaces, and no additional clarifications on this issue were requested by the Bureau.

Finally, the Bureau requested Mediware withdraw the “Assumptions and Exceptions” contained on pages 4 through 18 in its proposal. Mediware agreed to withdraw the referenced section in its entirety.

The Bureau sought no further clarifications from Mediware, but did request a BAFO on May 2, 2016, in accordance with RFP Section 6.8 *Negotiation and Best and Final Offer (BAFO)*. Mediware submitted a BAFO Price Sheet, including a total cost for Configuration on Price Line 2 and Customization on Price Line 3. Thereafter, the Evaluation Committee noted in its Report,

after additional review, it was determined that the failure to include an estimated number of hours to complete the configuration or customization work on Attachment 3 was an incurable deviation from Bid Section 4.4.3.4.2, which resulted, indirectly, in an artificially low price sheet on price lines one, two, and three because the costs for the actual configuration and customization needed to meet the functional requirements were not reflected in the price sheet. Accordingly, notwithstanding the withdrawal of some of the scoping and pricing assumption language, the failure to include the estimated hours to complete the work and the impact such omission had on the price sheet rendered Mediware’s [proposal] nonresponsive. For this reason, Mediware was not asked to remove additional “scoping” comments from its Attachment 3 that were not captured by the clarification letter withdrawal request.

The RFP set forth guidelines for all bidders to following when submitting a proposal. RFP Section 4.4.3 *Technical Quote {Proposal}* provided the following guidelines for bidders in preparing proposals:

In this section, the Vendor {Bidder} shall describe its approach and plans for accomplishing the work outlined in the Scope of Work section, i.e., Section 3.0. The Vendor {Bidder} must set forth its understanding of the requirements of this Bid Solicitation {RFP} and its ability to successfully complete the Blanket PO {Contract}. The Vendor {Bidder} should include the level of detail it determines necessary to assist the evaluation committee in its review of Vendor’s {Bidder’s} quote {proposal}.

Furthermore, RFP Section 4.4.3.3.3 *Project Plan* required the following of bidders:

The Vendor {Bidder} shall provide its draft plan to accomplish all work required by this Blanket PO {Contract}. The Project Plan shall include:

- a. The Design and Development Plan: The Vendor {Bidder} should describe the methodology by which it will design and develop the required system functionality including the Software Development Lifecycle.
- b. The System Test Plan: The Vendor {Bidder} should describe its plans to complete system and user acceptance testing including its methodology for fixing bugs and defects and retesting.
- c. The Implementation Plan: The Vendor {Bidder} should describe its plans for system roll-out including System Pilot Testing and full deployment.
- d. Operations and Maintenance Plans: The Vendor {Bidder} should describe its plans to support the operational system including application updates, new releases, bug and defect repairs, emergency maintenance/repairs of hardware and software and routine maintenance.

The plan should demonstrate to the Evaluation Committee that the Vendor {Bidder} understands the scope of work required for a successful implementation of the system, its operations and maintenance and support.

Finally, in RFP Section 4.4.3.4 *Additional Functional and Technical Requirements*, the RFP specified the following:

Although the Vendor {Bidder} will not be responsible for providing it, the Vendor {Bidder} must identify in its proposal the minimum hardware and software requirements for end-user workstations.

The Vendor {Bidder} shall describe how it will meet the Bid Solicitation's {RFP's} deliverables and shall provide a draft of the items listed below.

- a. Solution for the State's Case/Care Management requirements (Section 3.1)
- b. Interface Plan (Section 3.2.8)
- c. Security Plan (Section 3.2.11)
- d. Project Work Plan and Schedule, and updates thereto (Section 3.3.1.1)
- e. Issues Management Plan (Section 3.3.1.2)
- f. Communication Plan (Section 3.3.1.3)
- g. Status Reports (Section 3.3.1.4)
- h. Requirements Traceability Matrix (Section 3.3.1.5)
- i. Change Management Plan (Section 3.3.1.6)
- j. Risk Management Plan (Section 3.3.1.7)
- k. Transition Plan (Section 3.3.1.8)
- l. Training Plan (Section 3.3.1.9)
- m. Maintenance and Operations Plan (Section 3.3.1.10)
- n. Quality Management Plan (Section 3.3.1.11)
- o. Data Conversion Plan (Section 3.3.5)
- p. Data Modeling Plan (Section 3.3.5)
- q. System Testing (Section 3.3.6)
- r. User Acceptance Testing Plan (Section 3.3.7)
- s. Implementation Plan (Section 3.3.8)
- t. Documentation (Section 3.3.9)

- u. System Performance, Availability and Reliability Plan (Section 3.3.12)
- v. Business Continuity Plan (Section 3.3.13)

As stated in RFP Section 4.4.3.4.1, bidders were to use the State-supplied Attachment 3 to identify the “fit” between its proposed product and the RFP-required functional requirements. Attachment 3 included all functional requirements and bidders were instructed to respond to these functional requirements only by completing the form. RFP § 4.4.3.4.2 *Functional Requirements*. When discussing the additional “non-functional” requirements listed in RFP Section 3, bidders were instructed to “list each requirement, and directly under each of the requirements, discuss how that requirement will be met.” Ibid. Bidders were also instructed to “document any assumptions, risks, or issues related to satisfying any of the functional or non-functional (technical) requirements listed in [RFP] Section 3.” Ibid.

A review of Mediware’s proposal submission shows that it contained two volumes, Attachment 3, a Response Project Plan, and a Price Sheet. Volume 1 included RFP-required forms, and Volume 2 included a 289-page technical proposal addressing the requirements set forth in RFP Sections 4.4.3.1 to 4.4.3.5 and 4.4.4. Mediware included Attachment 3 with the technical portion of its proposal and also included an additional narrative providing further explanation for Attachment 3 responses.

On its Attachment 3 spreadsheet, Mediware indicated in various rows that the RFP specification would involve customization. For purposes of illustration, the table below captures a small sampling of examples of Mediware’s responses in such circumstances:

Req. Number	The proposed solution must:	Out of the Box	Requires Configuration	Estimated hours to configure	Requires 3rd party software	Estimated hours to integrate 3rd party	Requires Customization	Estimated hours to customize
INT016	Generate internal e-mails to Providers using the C/CMS						x	8 hrs included to scope requirements
INT030	Send a referral to SBUM to determine financial eligibility (for Fast Track) and State-funded programs.						x	0 - covered in interface tab.
ASM007	Capture a variety of statuses for an assessment, including but not limited to <ul style="list-style-type: none"> • Under review • Authorized • Not Authorized • Paperwork pending • Complete • Denied • Withdrawn • Dismissed • Approved • Expired 						x	112/\$ [REDACTED] 0
CMT033	Generate an alert to Care Manager, care manager's Supervisor and Service Coordinator to indicate that a Prior Authorization form is						x	8 hrs included to scope requirements

	required in cases that have received an exception approval.							
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As noted above, Mediware withdrew the statement accompanying Attachment 3 that stipulated: “No hours were provided here due to the fact that further meetings will need to be scheduled in order for Mediware to fully understand the facts of the integration (including exact data elements, formats, and more). You will note in the final cost that Mediware has provided a cost to scope the creation of the interface, which will be done collaboratively with the customer in a series of meetings.” It is unclear how this retraction affected the statements noted above and similar statements contained in the remainder of Attachment 3 because the Bureau did not request any further clarification and no explanation is contained in the Evaluation Committee Report.

Although the Bureau determined Mediware’s proposal to be non-responsive because it did not provide a total number of hours required to configure or customize certain interfaces, the Bureau’s reasoning that “[t]hese configuration and customization hours were then to be aggregated and reflected in the price sheet in price lines one, two, and three” is unclear in light of the RFP language.

Bidders were not required to provide a total hourly projection or an hourly rate related to configuration or customization on the price sheet. Rather Price Lines 2, *Configuration*, and 3, *Customization*, required a total cost. As provided by the RFP:

4.4.1.6.2 PRICE SHEET/SCHEDULE ATTACHMENT INSTRUCTIONS

Vendors {Bidders} must complete the Unit Cost fields, the Yearly Cost fields and the Yearly Rate fields as instructed on the State-supplied price sheet/schedule(s) attachment accompanying this Bid Solicitation {RFP}. Failure to submit all information required may result in the quote {proposal} being considered non-responsive. Each Vendor {Bidder} is required to hold its prices firm through issuance of Blanket PO {Contract}.

Mediware provided these total costs and confirmed them during the BAFO process. Bidders were asked to provide hours required for these tasks on Attachment 3 to give the Bureau an idea of the timeframes required to complete the work. However, as shown by Mediware’s proposal narrative, it included a Contract Schedule and a Mobilization Plan, in addition to a Design and Development Plan to explain timeframes and implementation. The Evaluation Committee Report does not explain why these items do not satisfy the RFP requirements.

Our courts have reiterated that “[t]he public interest underlies the public-bidding process in this State.” *Barrick v. State*, 218 N.J. 247, 258 (2014). “[P]ublic bidding statutes exist for the benefit of the taxpayers and are construed as nearly as possible with sole reference to the public good.” *Ibid.* (internal citation omitted). The object of our statutes is “to guard against favoritism, improvidence, extravagance and corruption [and] to secure for the public the benefits of unfettered competition.” *Ibid.* (internal citation omitted).

I find that the Bureau’s determination that Mediware’s pricing was “artificially low” is not supported by the record. A business is permitted to operate at a loss or below market-value, provided it is able to provide the services as required by the RFP. Absent an allegation of fraud or collusion, such a business decision is the prerogative of the bidding entity.

In response to Mediware's mention of the BAFO request evidencing its proposal's responsiveness, I note that the Bureau's issuance of a BAFO is not to be construed as to infer responsiveness. As stated in the RFP:

6.8 NEGOTIATION AND BEST AND FINAL OFFER (BAFO)

In accordance with N.J.S.A. 52:34-12(f) and N.J.A.C. 17:12-2-7, after evaluating quotes {proposals}, the Division may establish a competitive range and enter into negotiations with one Vendor {Bidder} or multiple Vendors {Bidders} within this competitive range. The primary purpose of negotiations is to maximize the State's ability to obtain the best value based on the mandatory requirements, evaluation criteria, and cost. Multiple rounds of negotiations may be conducted with one Vendor {Bidder} or multiple Vendors {Bidders}. Negotiations will be structured by the Division to safeguard information and ensure that all vendors {bidders} are treated fairly.

Similarly, the Division may invite one Vendor {Bidder} or multiple Vendors {Bidders} to submit a best and final offer (BAFO). Said invitation will establish the time and place for submission of the BAFO. Any BAFO that is not equal to or lower in price than the pricing offered in the Vendor's {Bidder's} original quote {proposal} will be rejected as non-responsive and the State will revert to consideration and evaluation of the Vendor's {Bidder's} original pricing.

If required, after review of the BAFO(s), clarification may be sought from the Vendor(s) {Bidder(s)}. The Division may conduct more than one round of negotiation and/or BAFO in order to attain the best value for the State.

After evaluation of quotes {proposals} and as applicable, negotiation(s), and/or BAFO(s), the Division will recommend, to the Director, the responsible Vendor(s) {Bidder(s)} whose quote(s) {proposal(s)}, conforming to the Bid Solicitation {RFP}, is/are most advantageous to the State, price, and other factors considered. The Director may accept, reject or modify the recommendation of the Division. The Director may initiate additional negotiation or BAFO procedures with the selected Vendor(s) {Bidder(s)}.

....

Neither the RFP nor the Bureau's BAFO letter advised bidders that a request for BAFO was to be construed as notice that a proposal was responsive. Rather, the decision to BAFO is at the discretion of the Bureau in an attempt to gain the best value for the State, contingent on the proposal being deemed response.⁴

In light of the findings set forth above, I find that further evaluation, and/or clarification, is required to determine the responsiveness of Mediware's proposal. The Bureau is directed to evaluate Mediware's proposal keeping in mind the principle that the submitted Price Sheet represented a full cost, not an hourly rate, and that Mediware removed certain scoping language from its proposal during the clarification process and how this is determinative of Mediware's responsiveness, seeking any further clarifications as appropriate.

⁴ In response to the request for BAFO, Mediware reduced its total proposal cost by [REDACTED], approximately [REDACTED], on its BAFO Price Sheet.

Mediware's Second Protest Point

Second, Mediware challenges the intended award to RTZ, stating that had Mediware's proposal been evaluated, it would have provided the best value to the State and resulted in the least amount of risk to the stakeholders and "vulnerable populations served by the DoAS." Mediware also asserts that, because its software is current in use by the State, system users would not be required "to learn a new foreign software system" and "the populations that benefit from this system would not be harmed by the potential negative consequences of 'ramp-up' time associated with a new system[.]"

As noted above, Mediware's proposal requires further evaluation. Therefore, I cannot address this argument until the Bureau's review is complete.

Nonetheless, I add the following comments. To award a contract based on a user's familiarity, as suggested by Mediware, would create an appearance of incumbent bias. This is contrary to the basic tenets of public contracting law. As noted above, the object of the public bidding statutes is "to guard against favoritism, improvidence, extravagance and corruption; [the] aim is to secure for the public the benefits of unfettered competition." Barrick, supra, 218 N.J. at 258 (internal quotations omitted). To fully achieve the purpose of public bidding laws, ". . . all bidding practices which are capable of being used to further corrupt ends or which are likely to affect adversely the bidding process are prohibited, and all awards made or contracts entered into where any such practice may have played a part, will be set aside." George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 36 (1994) (quoting Terminal Constr. Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 410 (1975)). It is a longstanding tenet of public procurement law that "any bidding practice which tends to favor one bidder over another, or impairs the equal basis upon which bids are computed . . . cannot be tolerated, whether or not the practice in fact exerts a harmful effect in the given situation." In re the Award of the Contract for the Constr. Of Bayonne Park, 168 N.J. Super. 33, 39 (App. Div. 1979) (see also Terminal Constr. Corp., supra, 67 N.J. at 410).

Based upon the foregoing, the NOI is rescinded and the matter is remanded for further clarification and evaluation consistent with this decision. This is my final agency decision.

Thank you for your continued interest in doing business with the State and for registering your business with NJSTART, the State's new e-procurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG:DF

c: P. MacMeekin
C. Brennan