



State of New Jersey

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July 1, 2015

Via Electronic Mail [jborek@genovaburns.com] and USPS Regular Mail

Jennifer Borek, Esq.
Genova Burns LLC
494 Broad Street
Newark, NJ 07102

RE: Protest of Notice of Intent to Award State Contract #T2836
RFP #14-X-22340 Printing Production Print Services (NJOIT)

Dear Ms. Borek:

This correspondence is in response to your letter of protest dated and received March 31, 2015, referencing the subject Request for Proposal ("RFP") and regarding the intended award of the subject contract by the Procurement Bureau ("Bureau") of the Division of Purchase and Property ("Division"). On behalf of Barton & Cooney, LLC ("B&C"), you protest the slated award of State Contract #T2836 to RR Donnelly & Sons Co. ("RRD"), primarily alleging that RRD submitted a non-responsive proposal and received an unfair advantage during the procurement process. As such, you request the Division rescind the Notice of Intent to Award and award the subject contract to B&C.

I have reviewed the record of this procurement, including the RFP, relevant statutes, regulations, and case law, and the proposal submitted by RRD. 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 B&C's protest without an in-person presentation. N.J.A.C. 17:12-3.2(d)(1).

I. Background

By way of background, the Bureau issued the subject RFP on behalf of the New Jersey Office of Information Technology ("OIT") to solicit proposals for "Printing: Production Print Services," thereby seeking vendor support for the current print operations performed at OIT's centralized print facility, known as the "Hub." The Bureau intended to award the subject contract to a single bidder, whose proposal, conforming to the RFP, is most advantageous to the State, price and other factors considered. The contract awarded as a result of this RFP will be utilized by numerous State departments under the management of OIT.

Following the advertisement of the RFP, the Bureau conducted a mandatory pre-proposal conference and mandatory Hub print facility site visit on January 9, 2014. Thereafter, the Bureau received two proposals by the revised proposal submission deadline of April 22, 2014. The proposals, submitted by RRD and B&C, were deemed responsive to mandatory RFP requirements. After removing pricing from proposals,

the Evaluation Committee (“Committee”),¹ comprised of seven voting members and seven non-voting technical advisors, reviewed the proposals based on the criteria set forth in RFP Section 6.7.1 *Technical Evaluation Criteria*: A) Personnel; B) Experience of Firm; and C) Ability of firm to implement and perform the scope of work based on the presentation in its technical proposal. The Bureau developed and assigned a weighted percentage for each evaluation criteria prior to the proposal opening date and time.

In addition to its review of the technical proposals, the Committee conducted on-site facility tours of the proposed print production locations. The Committee, inclusive of the voting members, toured B&C’s facility on May 9, 2014, and RRD’s facility on June 26, 2014.

The voting members of the Committee each developed a technical score based upon an independent analysis of the technical proposals, the facility tours, and Committee discussion. Each Committee member’s assigned scores were weighted according to a pre-established percentage to obtain a weighted score for each criterion, and all scores were then combined to produce an overall weighted score for the proposal. The seven weighted scores were then averaged to yield the following total scores:

Average by Evaluation Criterion				
Bidder	Criterion A	Criterion B	Criterion C	Total
RRD	70	295	456	821
B&C	57	140	236	433
Possible Points	100	350	550	1000

Subsequent to the technical scoring, the Bureau requested a Best and Final Offer (BAFO) from both RRD and B&C. In a response received May 21, 2014, RRD indicated it would not alter its pricing. In a response received May 28, 2014, B&C agreed to reduce its pricing by 2.51%. Following a second BAFO request, RRD reduced its pricing by 3% in a response dated March 6, 2015.

In accordance with RFP Section 6.7.2 *Bidder’s Price Schedule*, both proposals were then ranked according to a pre-determined Cost Score Evaluation formula: (Lowest Evaluated Cost Proposal / Evaluating Cost Proposal) x Pre-determined Points. Having set the pre-determined maximum cost points to 667, the two proposals were scored as follows:

Bidder	Original Proposal Cost	1 st BAFO Pricing	Cost Proposal Score	2 nd BAFO	Final Cost Proposal Score
RRD	\$4,744,658.14	\$4,744,658.14	396	\$4,602,136.41	408
B&C	\$2,890,106.51	\$2,817,645.14	667	\$2,817,645.14	667

In keeping with RFP Section 6.7.3 *Total Proposal Score*, the total proposal score was calculated using the following formula: Technical Evaluation Score + Evaluated Cost Proposal Score = Total Proposal Score.

Following the first BAFO request, RRD received a combined score of 821 + 396 = 1217; B&C received a combined score of 433 + 667 = 1100, 667 being the maximum cost points which could be awarded to a bidder. Following the second BAFO, RRD received a combined score of 821 + 408 = 1229; B&C’s score remained unaltered, as it continued to receive the maximum cost points allowed. Based on the final combined scores, the Committee recommended RRD receive the award of the subject contract.

The Bureau issued a Notice of Intent to Award Letter to all bidders on March 18, 2015. This protest followed.

¹ The members of the Committee included representatives from the Department of Human Services, OIT, Department of Law and Public Safety, Division of Purchase and Property, Department of Labor, Division of Taxation, Motor Vehicle Commission, and Office of Management and Budget.

In its letter of protest, B&C raises four main arguments as to why the award to RRD should be overturned: First, RRD violated the ownership disclosure requirements set for in N.J.S.A. 52:25-24.2; second, RRD's pricing proposal materially deviated from RFP specifications; third, RRD was afforded unfair opportunities to increase its proposal score; and fourth, the evaluation methodology of the Committee led to an arbitrary award recommendation. RRD was afforded the opportunity to respond to the allegations against it and submitted a response on May 15, 2015.

II. B&C's Protest Points Against the Intended Award

A. RRD's Proposal Did Not Deviate from Mandatory Ownership Disclosure Requirements

In its first point of protest, B&C alleges that RRD's proposal submission contained an inaccurate Ownership Disclosure Form, rendering its proposal materially deficient to the terms of the RFP. Specifically, B&C alleges that the Ownership Disclosure Form submitted by RRD with its proposal did not reflect ownership information filed with the United State Securities and Exchange Commission ("SEC") and that, although RRD was under a continuing obligation to update its ownership information, it failed to do so.

The requirement to fully disclose corporate ownership is dictated by statute. N.J.S.A. 52:25-24.2 provides that "[n]o corporation or partnership shall be awarded any contract . . . by the State . . . unless prior to the receipt of the bid or accompanying the bid . . . there is submitted a statement setting forth the names and addresses of all stockholders . . . who own 10% or more of its stock[.]" RFP Section 4.4.1.8 advised all bidders of the obligation to include a properly completed Ownership Disclosure Form, specifying:

4.4.1.8 OWNERSHIP DISCLOSURE FORM

Pursuant to N.J.S.A. 52:25-24.2, in the event the Bidder is a corporation, partnership or sole proprietorship, the Bidder must complete the attached Ownership Disclosure Form. A current completed Ownership Disclosure Form must be received prior to or accompany the proposal. Failure to submit the form will preclude the award of a contract.

The Ownership Disclosure Form, included within the downloadable Standard RFP Form and required with all proposals, directed all bidders to identify "any individuals, corporations or partnerships owning a 10% or greater interest in the bidder/offeror." After identifying such ownership, all bidders were required to make the following certification:

I, being duly sworn upon my oath, hereby represent and state that the foregoing information and any attachments thereto to the best of my knowledge are true and complete. I acknowledge that the State of New Jersey is relying on the information contained herein and thereby acknowledge that I am under a continuing obligation from the date of this certification through the completion of any contracts with the State to notify the State in writing of any changes to the answers of information contained herein. I acknowledge that I am aware that it is a criminal offense to make a false statement or misrepresentation in this certification, and if I do so, I recognize that I am subject to criminal prosecution under the law and that it will also constitute a material breach of my agreement(s) with the State of New Jersey and that the State at its option may declare any contract(s) resulting from this certification void and unenforceable.

The record of this procurement shows that RRD submitted a properly signed Ownership Disclosure Form dated January 17, 2014, with its proposal submission. In this document, RRD certified there were no entities owning a 10% or greater interest in RRD.

B&C's protest allegation that this form is inaccurate is based on a Schedule 13G document filed by RRD with the SEC on November 10, 2014. This form specified that as of October 31, 2014, a company identified as a "division of Capital Research and Management Company" owned 10.9% of RRD's shares. B&C further asserts that according to the most recent Schedule 13G filed with the SEC on February 13, 2015, as of December 31, 2014, the same company owned 11% of RRD's shares.

In its letter of reply, RRD asserts that its Ownership Disclosure Form was accurate both at the time of completion and at the time of proposal opening on April 22, 2014. RRD acknowledges that "[w]ell after the bids were opened, one entity purchased stock totaling slightly more than 10% stock ownership" and that RRD publicly filed the proper paperwork with the SEC. RRD states that, while it is under an obligation to notify the State of changes in its ownership, there is no deadline associated with this obligation, and further, because its filings with the SEC are all public, it never intended to hide any changes in ownership.

"The obvious purpose of [N.J.S.A. 52:25-24.2] is to prevent favoritism by denying an individual the use of a corporate or partnership name to hide his or her true identity, when knowledge of this identity could affect public bidding." Schlumberger Indus., Inc. v. Borough of Avalon, 252 N.J. Super. 202, 208 (App. Div. 1991), certif. denied, 130 N.J. 8 (1992). In enacting N.J.S.A. 52:25-24.2, the Assembly Municipal Government Committee included a statement with the proposed bill to further explain its intent: "[T]he committee felt that this additional disclosure would facilitate public oversight of governmental deliberations by providing in one statement information which the public or governmental agency might, otherwise, have to go to considerable time and expense to collect." Id. at 208-09 (alteration in original).

Our courts have interpreted the ownership disclosure statute on various occasions. The courts in both Schlumberger, supra, and Stano v. Soldo Constr. Co., 187 N.J. Super. 524 (App. Div. 1983), held that clarifications of ownership were permitted when "the challenged bids were facially valid, with no apparent defects[]" and the bidders "submitted adequate and accurate disclosure forms which were supplemented to reveal additional facts." Muirfield Const. Co., Inc. v. Essex County Imp. Authority, 336 N.J. Super. 126, 137 (App. Div. 2000). Specifically, the Schlumberger court reversed the rejection of a bidder's proposal for failure to comply with the ownership disclosure requirement, finding that the bidder was a wholly-owned public company with the same name in its title, that the municipality soliciting proposals was aware of the bidder's corporate structure, and that the parent company was publicly traded on the New York Stock Exchange. Schlumberger, supra, 252 N.J. Super. at 204-05, 212-13. Under these circumstances, the court held that the acceptance of the bidder's ownership disclosure statement after proposal opening specifying that its parent company was the sole stockholder was a permissible clarification. Id. at 212.

In Stano, the court found that a bidder "had provided an accurate shareholders' statement, but due to the complexity of the facts it was unavoidably confusing," and a "later clarification was simply intended to aid the county in its interpretation of the statement and was permissible." Stano, supra, 187 N.J. Super. at 539. In this instance, the court upheld the trial judge's ruling that the "ambiguity in the shareholder's statement . . . was a defect caused by a confusing set of facts and could be waived if corrected by a later clarification." Ibid.

In the matter at hand, a review of RRD's proposal shows it clearly advised the Bureau in its Additional Information Packet that it has been a publicly held company since 1956 and that its "common stock is listed on the NASDAQ Stock Market under the symbol RRD." Furthermore, a search of the SEC's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR), reveals that RRD has filed numerous SC 13G/A Forms, the form which reports the acquisition of beneficial ownership of 5% or more of a class of equity securities by passive investors and certain institutions: all of RRD's filings are publicly available and downloadable. Through the forms filed in EDGAR, the Division is able to verify that as of January 17, 2014, the date of RRD's Ownership Disclosure Form certification, and April 22,

2014, the date of proposal opening, there were no owners with a beneficial ownership of 10% or more. Rather, the SC 13G/A forms on file in this date range revealed that as of August 30, 2013, Capital Research Global Investors claimed a 6.7% ownership interest, and that as of December 31, 2013, six distinct entities claimed a less than 1% interest in RRD. Therefore, the Ownership Disclosure Form submitted to the Division was accurate at the time of proposal submission.

I note that the first SEC filing included as supporting material to B&C's letter of protest was filed on November 11, 2014, roughly 10 months from the date of RRD's Ownership Disclosure Form certification, or eight months from the date of proposal opening. This form reports that as of October 31, 2014, Capital Research Global Investors claimed a 10.9% ownership interest. On a separate form filed February 13, 2015, RRD reported to the SEC that as of December 31, 2014, Capital Research Global Investors claimed an 11.0% ownership interest.

It is clear from these later filings that as of the date of the Notice of Intent to Award letter, March 18, 2015, RRD's ownership interests had changed to include one owner with a 10% or greater ownership interest in RRD. However, guided by relevant case law, I find that because RRD submitted an accurate Ownership Disclosure Form with its proposal, it notified the State of its status as a publicly traded company, and its ownership interests are disclosed in a publicly accessible database, RRD did not violate the intent of the ownership disclosure requirements. I also note that at any time the State can confirm the current ownership of RRD through the EDGAR system. As RRD is under a "continuing obligation" to inform the Division of any changes in its ownership, I find that RRD is both required and permitted to update its Ownership Disclosure Form to advise the Division of any changes in its ownership.

B&C also notes in footnote number 5 on page 12 of its letter of protest that "it does not appear as though RRD has filed a [Chapter 51 or Executive Order No. 117 disclosure form] in connection with its instant bid[.]" However, as specified in RFP Section 7.1:

Prior to awarding any contract or agreement to any Business Entity, the Business Entity proposed as the intended awardee of the contract shall submit the Certification and Disclosure form, certifying that no contributions prohibited by either Chapter 51 or Executive Order No. 117 have been made by the Business Entity and reporting all contributions the Business Entity made during the preceding four years to any political organization organized under 26 U.S.C. 527 of the Internal Revenue Code that also meets the definition of a "continuing political committee" within the means of N.J.S.A. 19:44A-3(n) and N.J.A.C. 19:25-1.7.

Therefore, this certification was not required at time of proposal submission and will be required prior to award of contract.

B. RRD's Pricing Proposal Did Not Materially Deviate From the RFP

In its second point of protest, B&C asserts that RRD's pricing proposal materially deviated from RFP specifications and RRD should be deemed ineligible for award of contract. B&C notes the RFP requirement that all bidders must submit pricing using the State-supplied Excel Price Sheet(s) and, further, that all submitted prices must be held firm through the issuance of a contract. See RFP Sections 4.4.5 and 6.1. Specifically, B&C points to RRD's inclusion of a *Disaster & Non-Disaster Recovery Usage Rates and Charges* document provided in its "Additional Information Packet," and claims "this pricing information was not presented in the form required by the RFP" and "directly conflicted with the requirement that pricing terms not be subject to increase."

RFP Section 4.4.1.12 *Pricing* provided the following guidance to all bidders: "The Bidder must submit its pricing on the State supplied Excel Price Sheet(s) and supply any additional pricing information as directed in RFP Section 4.4.5." RFP Section 4.4.5 *Price Schedule/Sheet* specified: "The Bidder must submit its pricing using the format set forth in the State-supplied Excel Price Sheet(s) accompanying this

RFP. Failure to submit all information required will result in the proposal being considered non-responsive. Each Bidder is required to hold its prices firm through issuance of contract.”

In addition, RFP Section 4.1, as amended by Part 2 of Addendum #2, provided in relevant part:

4.1 General

Proposals including supplemental terms and conditions may be accepted, but supplemental terms or conditions that conflict with those contained in this RFP or the State's NJ Standard Terms and Conditions (“RFP/SSTC”), as may be amended by addenda, or that diminish the State’s rights under any contract resulting from the RFP will be considered null and void. The State is not responsible for identifying conflicting supplemental terms and conditions before issuing a contract award. In the event that prior to notice of intent to award, the Division notifies the Bidder of any such term or condition and the conflict it poses, **the Division may require the Bidder to either withdraw it or withdraw its proposal. . . .**

[(Emphasis added.)]

A review of RRD’s proposal shows it did submit its pricing utilizing the State-supplied Excel Price Sheets. In addition to the supplied Price Sheet, RRD included a *Disaster & Non-Disaster Recovery Usage Rates and Charges* document in its additional information folder. As a supplement to its pricing proposal, this document provided fees that would only apply in the event of a disaster, thereby including supplemental pricing information. However, in keeping with RFP Section 4.1, the Bureau advised RRD via letter dated July 25, 2014, that it could either withdraw the *Disaster & Non-Disaster Recovery Usage Rates and Charges* or withdraw its entire proposal. RRD responded that it would withdraw the *Disaster & Non-Disaster Recovery Usage Rates and Charges* in its entirety.

The record shows RRD withdrew its supplemental pricing as expressly permitted by RFP Section 4.1, and following this clarification, RRD’s proposal no longer contained any supplemental pricing and it no longer offered pricing subject to price increases, other than what was expressly permitted by the RFP.² Therefore, although B&C contends that RRD’s proposal contained “pricing information that conflicts with the expressed requirements of the RFP,” included pricing not presented in the form required by the RFP, and “directly conflicted with the requirement that pricing terms not be subject to increase,” because RRD did include a properly completed State-supplied Price Sheet, and withdrew its supplemental pricing, RRD’s pricing proposal was responsive to material RFP requirements.

C. RRD Was Not Granted Unfair Opportunities to Increase Its Proposal Score

In its third point of protest, B&C argues that the Bureau granted RRD preferential treatment and granted RRD unequal opportunities to increase its proposal score. Specifically, B&C states RRD was permitted to submit additional materials in support of its technical proposal, to submit a second BAFO, and to clarify its Disaster Recovery Plan. B&C contends it was not afforded these same opportunities and was therefore placed at a disadvantage in the procurement process, the playing field was unlevelled, and the award to RRD must be set aside.

Initially, B&C argues that, although the RFP set a proposal page limit of 25 pages, RRD was permitted to submit a technical proposal 30 pages in length. A review of RRD’s proposal shows that its Technical

² Although B&C argues that “the inclusion of pricing terms that could increase during the term of the contract was prohibited by the RFP,” RFP Section 4.4.5.1 *Paper Price Escalation* states: “Due to the volatility of the paper market, price escalations – for paper only – are allowable under this contract.”

Proposal was presented on pages 8 through 38 of Volume 1 in its proposal. The specifications for proposal content were set forth in RFP Section 4.4 *Proposal Content*, providing:

The proposal **should** be submitted in two volumes with the content of each volume as indicated below.

Volume 1

Section 1 - Forms (Sections 4.4.1 and 4.4.2)

Section 2 - Technical Proposal (Section 4.4.3) – **NOTE: This section of the Bidder’s submission is limited to 25 pages or fewer, with no smaller than a 12 point font.**

Section 3 - Organizational Support and Experience (Section 4.4.4)

Volume 2

Section 4 – Price Schedule (Section 4.4.5)

[(First emphasis added.)]

“Should,” as defined in RFP Section 2.1, “[d]enotes that which is recommended, not mandatory.” Therefore, although it was recommended that bidders follow the specified formatting, it was not mandatory.

In addition, during the Question and Answer period the Bureau clarified the manner in which a bidder could submit additional information. Addendum #2, dated March 12, 2014, supplied the following question and answer:

#	RFP Section Reference	Question	Answer
2	Section 4.0 Date Submitted: 12/19/2013 9:27:50 PM Confirmation Number: 12872	Section 4.0 - May we include material not included in the RFP requirements? For example, an Executive Summary.	This information may be included if it is pertinent to your Technical Proposal. If your response is outside the scope of work then it must be submitted separately in a sealed envelope. An Executive Summary may be submitted with the Technical Proposal.

Therefore, based on the exact language of the RFP and the information listed above, I find RRD’s technical proposal length to be in keeping with RFP requirements. While B&C states that it relied on the page limits set forth in the RFP to its detriment, it too had the same opportunities as RRD to provide more detailed information.

B&C next takes issue that RRD was granted preferential treatment in its ability to increase “both its cost and technical scores after submitting its bid” in two ways: first, the Bureau granted RRD the opportunity to submit a second BAFO, and second, that RRD was allowed to clarify specifications in its proposal. Concerning this first argument, B&C protests that RRD was given the opportunity to submit a second BAFO, while B&C was not, and in making this second BAFO, RRD was aware of B&C’s BAFO.

The RFP specified the manner in which the Bureau could enter into negotiations to obtain a better price for the State:

6.8 NEGOTIATION AND BEST AND FINAL OFFER (BAFO)

After evaluating proposals, the Division may enter into negotiations with one Bidder or multiple Bidders. 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 Bidder or multiple Bidders. Negotiations will be structured by the Division to safeguard information and ensure that all Bidders are treated fairly.

Similarly, the Division may invite one Bidder or multiple 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 Bidder's original proposal will be rejected as non-responsive and the State will revert to consideration and evaluation of the Bidder's original pricing.

If required, after review of the BAFO(s), clarification may be sought from the Bidder. 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 proposals and as applicable, negotiation(s) and/or BAFO(s), the Division will recommend, to the Director, the responsible Bidder whose proposal(s), conforming to the 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 Bidder.

Negotiations will be conducted only in those circumstances where they are deemed by the Division or Director to be in the State's best interests and to maximize the State's ability to get the best value. Therefore, the Bidder is advised to submit its best technical and price proposal in response to this RFP since the State may, after evaluation, make a contract award based on the content of the initial submission, without further negotiation and/or BAFO with any Bidder.

All contacts, records of initial evaluations, any correspondence with Bidders related to any request for clarification, negotiation or BAFO, any revised technical and/or price proposals, the Evaluation Committee Report and the Award Recommendation, will remain confidential until a Notice of Intent to Award a contract is issued.

NOTE: If the Division contemplates negotiation, proposal prices will not be publicly read at proposal opening. Only the name and address of each Bidder will be publicly announced at proposal opening.

[(All emphasis in original.)]

The record reveals that subsequent to the scoring of technical proposals, the Bureau requested a BAFO from both RRD and B&C via email on May 21, 2014. B&C agreed to reduce its price by 2.51% to \$2,890,106.51; RRD declined to reduce its pricing and offered its original price of \$4,744,658.14. Thereafter, the Bureau sent a second request for a BAFO to RRD only on February 27, 2015. Following this second request, RRD agreed to reduce its pricing by 3% and offered a total price of \$4,602,136.41.

As noted above in RFP Section 6.8, the Bureau is permitted to "invite one Bidder or multiple Bidders to submit a best and final offer" and "may conduct more than one round of negotiation and/or BAFO in order to attain the best value for the State." While I regret that the Bureau did not pursue further savings from both bidders, I find that the Bureau acted consistently with the RFP procedures for conducting BAFOs.

Furthermore, although B&C alleges that RRD had knowledge of B&C's BAFO pricing, such information is not available to bidders during the evaluation process. Also as noted above in RFP Section 6.8, "[n]egotiations will be structured by the Division to safeguard information and ensure that all Bidders are treated fairly." RRD reaffirms in its reply letter that it was not aware of B&C's proposal pricing nor BAFO pricing. Most importantly, this had no impact on B&C's ability to receive an award. I note that following RRD's second BAFO, B&C continued to maintain the maximum number of points for its cost proposal and any further reductions B&C may have given could not change its pricing score, as it was

already awarded the maximum pricing score allowed.³ RRD's second BAFO pricing increased its score from 396 to 408, a 12 point increase, however the increase had no impact on the ultimate outcome of the evaluation.

Next, B&C alleges that RRD was granted the opportunity to clarify its Disaster Recovery Plan post-proposal opening and that, on the other hand, B&C was not permitted to make such clarifications, to its detriment.

Bidders were required to provide a draft version of their System Design Document to demonstrate their understanding and ability to comply with RFP Section 3.4.1.2 *Disaster Recovery Plan*:

4.4.3.7 DRAFT SYSTEM DESIGN DOCUMENT

The bidder shall provide in its proposal a draft System Design Document to include a Security Plan, Disaster Recovery Plan and Contingency Plan as per RFP Section 3.4. The draft plans should provide sufficient detail to demonstrate the Bidders understanding of the requirements of RFP Section 3.4 including a description of its technical environment.

The Disaster Recovery Plan, a contractor requirement, was further explained in RFP Section 3.4.1.2:

3.4.1.2 DISASTER RECOVERY PLAN

The Contractor is required to submit its Disaster/Recovery plans and procedures prior to the project's implementation, which are to include timelines for restoration of operations, locations and equipment as to ensure that it shall continue to satisfy all RFP requirements within 24 hours in the event its primary location is rendered unusable. The plan must detail how the Contractor shall ensure that the supply of blank and pre-printed forms destroyed in such a disaster will be replaced so as to meet the 24 hour time frame.

A review of RRD's proposal shows it included a section devoted to the System Design Document, stating, however: "Due to the 25 pages or fewer limitation required for our Technical Proposal response, we have included our Information Security Plan Narrative in a separate sealed envelope entitled 'Additional Information' to be considered part of our draft System Design Document." RRD included three separate Disaster Recovery models, and included its "DR³ Assured Access" option in its RFP proposal pricing.

The Bureau's August 27, 2014 letter to RRD sought to clarify that: 1) RRD's Security Plan met all RFP specifications contained in Sections 4.4.3.1 *Security and Confidentiality*, Section 5.9 *Data Confidentiality and Security*, and Section 3.4.1.1. *Security Plan*; and 2) that RRD's *Draft System Design Document* would allow for annual testing for up to four applications, each with a possibility of multiple print files, totaling less than 2,000 print images per application.

RRD provided a response to the Bureau on September 4, 2014, specifying: "[RRD] is pleased to confirm and clarify our Security and Confidentiality plan will meet the requirements within Section 4.4.3.1 SECURITY AND CONFIDENTIALITY[.]" and "Yes, our response to Section 4.4.3.7 DRAFT SYSTEM DESIGN DOCUMENT will allow for Annual Testing for up to 4 applications, each with a possibility of multiple print files, totaling less than 2,000 print images per application." In addition, RRD attempted to supply additional details and information about its Security Plan that were not contained within its

³ Assuming for the sake of argument that B&C had been permitted to submit a second BAFO and assuming that it reduced its price by an additional 3%, or \$84,529.35, this would have resulted in a BAFO price of \$2,733,115.79. With this reduction in price, B&C would have continued to earn a score of 667 and RRD would have earned a score of 396 points. Using these values, B&C's total score would stay the same, 667 + 433 = 1100, and RRD's total score would decrease by 12 points: 396 + 821 = 1217.

original proposal. Accordingly, the Bureau issued a response advising RRD that it was unable to accept any additional documents provided in the response to the letter of clarification. Thereafter, RRD issued a second response the following day, which omitted the supplemental information and reaffirmed it would meet the required specifications.⁴

Taking into account all information, the Committee made the following findings concerning RRD's Disaster Recovery Plan in its Evaluation Committee Report:

RRD indicated in its proposal that it would offer a Disaster Recovery (DR) model called DR3 Assured Access. This solution includes guaranteed capacity and complete system testing for up to 4 applications (2,000 names each application) using an alternate RRD location. In addition, some of the stock used in the production of the State's work would be stored at the RRD secondary facility located in Allentown, PA. The Committee determined that the DR plan was very specific, detailed and met the requirements of the RFP.

The Bureau engaged in similar communications requesting clarifications from B&C. The record reveals that the Bureau sent a letter of clarification to B&C on August 27, 2014, requesting it: 1) clarify that the proposed security plan shall meet the requirements of RFP Section 4.4.3.1 *Security and Confidentiality*; 2) clarify its proposed Public Tier connection for submitting critical job information; and 3) clarify its description of "meta-data," provide examples of it, and explain how it is associated with the print file. B&C first responded on September 2, 2014, with supporting documents and policies. Just as with RRD, the Bureau responded it was unable to accept certain statements and documents included with the clarification letter as they would "serve to supplement [the] original proposal" and the Bureau afforded B&C a second opportunity to clarify the questions posed on August 27, 2014.

In response, B&C submitted a second clarification, stating: A) "Yes, [B&C]'s plan shall meet all requirements within Section 4.4.3.1. *Security and Confidentiality* along with all applicable certifications and other documentation required under Section 5.9 *Data Confidentiality and Security* and Section 3.4.1.1 *Security Plan*"; B) "[B&C]'s current internet is 30/30 Mbps synchronous. Our interior network is full gigabit"; and C) "by 'meta-data' we're referring to information included somewhere within the print file that can be used to identify the job type. This information can be gleaned from various areas and used to identify critical job information." B&C included additional examples to further explain its description of "meta-data."

Taking into account all this information, the Evaluation Committee found as follows relating to B&C's Disaster Recovery Plan:

B&C referenced an Alternate Data Processing Center and Alternate Print Center in its draft Disaster Recovery Plan but it lacked sufficient detail in its response that would indicate to the Evaluation Committee that they understood the requirements. A statement referencing an Alternate Data Processing Center and Alternate Print Center that gave no details did not satisfy the Evaluation Committee that B&C's Draft Disaster Recovery Plan was viable. The Evaluation Committee had serious reservations as to the capability of an unnamed Disaster Recovery Company Barton & Cooney has "partnered" with, its production facilities and its ability to handle data transmitted within the State's Security and Confidentiality Requirements Due to the concerns of the Committee listed above, the Evaluation Committee was not confident that the B&C Draft Disaster Recovery Plan and Contingency Plan adequately responded to this section.

The Committee's evaluation of B&C's Disaster Recovery Plan was included in the scoring for Technical Evaluation Criteria (C), *Ability of firm to implement and perform the Scope of Work based on the*

⁴ As discussed supra in Section II(B), on a separate occasion RRD agreed to withdraw the portion of its Disaster Recovery Plan relating to price increase only. It did not change any substantive information contained within nor supplement its proposed plan.

presentation in its Technical Proposal, which assessed the overall ability of the bidder to undertake and successfully complete the technical requirements of the contract in a timely manner. Also taking into account contract reporting (RFP Section 4.4.3.3.1) and storage of stock and printed materials (RFP Section 4.4.3.8), B&C earned an average score of 236 out of a possible 550 points, a rating of “fair.”⁵ I also note that RRD scored higher on both of the other Technical Evaluation Criteria (A) and (B).

Based on the foregoing information from the record, I find that RRD was not afforded additional opportunities to clarify its proposal and by operation possibly impact its score. Both bidders were cautioned they could not supplement their proposals with additional information and the Committee relied on the permissible clarifications in making its findings.

D. Evaluation Methodology

Finally, B&C protests the overall Evaluation Methodology, arguing that the Committee’s evaluation created an appearance of impropriety by assigning a higher weight to technical factors than to cost factors. B&C contends that the technical proposal and pricing proposal “should have at least been weighted equally” and it was “arbitrary for the Division to make cost a subordinate factor[.]” B&C also protests the scoring mechanism that “gave considerable and undue power to any [Committee] member who sought to tip the scale[.]”

The Division is granted broad discretion in awarding public contracts. N.J.S.A. 52:34-12(a)(g) specifies that an award of a publicly advertised contract shall be made to “that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price **and other factors considered**[.]” (Emphasis added.) “In making [her] decision the Director necessarily is required to exercise the sound business judgment of an executive based on all available data, expertise and advice which [she] may be able to garner from all available sources.” In re Honeywell Info. Sys., Inc., 145 N.J. Super. 187, 200 (App. Div. 1976), certif. denied, 73 N.J. 53 (1977). “This discretion is contrapuntal to the mandatory award to the lowest responsible bidder required in a local public contracts case.” In re Protest of Award of On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 591 (App. Div. 1995).

As discussed in Section 1, *Background*, *supra*, the Division set forth its Evaluation Methodology in the RFP at Section 6 *Proposal Evaluation*. This section also established the formation of the Committee:

6.5 PROPOSAL EVALUATION COMMITTEE

Proposals may be evaluated by an Evaluation Committee composed of members of affected departments and agencies together with representative(s) from the Division. Representatives from other governmental agencies may also serve on the Evaluation Committee. On occasion, the Evaluation Committee may choose to make use of the expertise of outside consultant(s) in an advisory role.

The RFP also advised all bidders of the evaluation criteria that would be applied to all bids:

6.7 EVALUATION CRITERIA

The following evaluation criteria categories, not necessarily listed in order of significance, 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.

⁵ Each Voting Member assigned a score of 1 – 10 in Technical Evaluation Criterion (C), which was then multiplied by a weight of 55 to achieve a total possible point value of 550. B&C earned an average unweighted score of 4.29 for (C). According to the Technical Score Evaluation Sheet, a score of 3 – 4 is “fair.”

6.7.1 TECHNICAL EVALUATION CRITERIA

Each responsive bid proposal will receive a Technical Evaluation Score which will be the average of each voting member’s Technical Evaluation Score for the proposal. The following evaluation criteria categories, not necessarily listed in order of significance, will be used to evaluate bid 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:

- 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 implement and perform the Scope of Work based on the presentation in its Technical Proposal: The overall ability of the bidder to undertake and successfully perform the technical requirements of the Scope of Work as demonstrated by its presentation in the Technical Proposal.

6.7.2 BIDDER’S PRICE SCHEDULE

For evaluation purposes, Bidders will be ranked according to the evaluated cost bid price located on the Price Sheet accompanying this RFP.

For evaluation purposes, Bidders will be ranked according to the formula:

$$\text{Evaluated Cost Proposal Score} = \text{predetermined points} \times (\text{lowest evaluated cost proposal} / \text{evaluating cost proposal})$$

The proposal with the highest score will be ranked the highest.

The cost proposal ranked will be the lowest acceptable cost proposal between the original cost proposal and the Best and Final Offer proposal.

As outlined in the Evaluation Committee Report and discussed above, the Committee, consisting of 14 members from eight separate Departments or Divisions with various standards and expertise, was assembled prior to the proposal submission date. The Committee included seven voting members and seven non-voting members to act as technical advisors. Prior to proposal opening, the Bureau developed the criterion weights to be assigned to each of the technical criteria categories and time stamped the Technical Score Evaluation Sheet at 11:12 a.m. on April 22, 2014.⁶ The voting members of the Committee each scored the proposals independently based upon the predetermined evaluation criteria categories.

The table below summarizes the weighted scores for RRD and B&C from each Voting Member of the Committee, as well as RRD and B&C’s average total technical score:

Bidder	A	B	C	D	E	F	G	Avg. Total Technical Score
RRD	790	790	855	990	745	740	835	821
B&C	700	275	265	120	510	620	540	433

The following table summarizes the average score by evaluation criterion for RRD and B&C:

⁶ Proposal opening took place at 2:00 p.m. on April 22, 2014.

Average by Evaluation Criterion			
Bidder	Criterion A	Criterion B	Criterion C
RRD	70	295	456
B&C	57	140	236
Possible	100	350	550

B&C states that “had cost and technical factors been weighted equally, [it] would have had the highest score and would have been awarded the contract.” However, the evaluation criteria was set for the benefit of OIT and cannot be revised for the benefit of a particular bidder. I also note that in making this argument, B&C incorrectly calculates scores based on RRD’s original cost proposal. Therefore, this argument is without merit.

Moreover, B&C contends that voting Committee Member D⁷ “tip[ped] the scale” by assigning RRD its highest score of 990 and B&C its lowest score of 120. B&C argues that this great discrepancy in scores creates an appearance of impropriety and should “render the entire evaluation /recommendation process void.” I find this argument to be without merit. As noted in the Evaluation Committee Report, each voting Committee Member assigned scores independently based on “their independent analysis of the proposal, the Bidder facility tours, and Committee discussions and deliberations.” Furthermore, as illustrated below, even if voting Committee Member D’s votes were removed from the technical scoring evaluation, RRD would still receive a significantly higher technical score, and B&C’s average score would increase from 433 to 485:

Bidder	A	B	C	D	E	F	G	Avg. Total Technical Score
RRD	790	790	855	-	745	740	835	792.5
B&C	700	275	265	-	510	620	540	485

Utilizing these technical scores, RRD would also still receive a higher total score:

Bidder	Cost Proposal Score	Avg. Technical Score	Total Proposal Score	Final Rank
RRD	408	792.5	1200.5	1
B&C	667	485	1152	2

In addition, I note that the Evaluation Committee presented the following conclusions as to each bidder:

Conclusion – RRD

It is the consensus of the Evaluation Committee that RRD possesses the ability to

⁷ B&C also requests the Division reveal the identity of Committee Member D to ensure no conflict of interest influenced this member’s votes. However, as B&C has been advised by the Division’s OPRA unit, N.J.S.A. 52:34-10.3(c) states: “When the contract is awarded, the names of the members of any evaluation committee shall be made public[.]” This same statute also clarifies that members of an evaluation committee “shall have no personal interest, financial or familial, in any of the contract vendors, or principals thereof, to be evaluated.” N.J.S.A. 52:34-10.3(a).

undertake and successfully complete the technical requirements of this contract in a timely manner. The Committee was impressed with the overall technical capability as presented in its proposal and demonstrated at the site tour. In the Committee's review and scoring of the Technical Evaluation criteria, all of the Committee Members scored RRD as Very Good or Excellent, with an average technical score of 821.

Conclusion – B&C

The Evaluation Committee agreed that B&C has experience and ability to produce large volume, cut sheet jobs incorporating intelligent inserting and certified mail solutions as evidenced in the case studies provided. The Evaluation Committee questioned B&C's experience in managing contracts of similar size and scope. The Evaluation Committee found that B&C's Draft System Design Document dealing with Disaster Recovery lacked elements of detail that would establish their understanding of the RFP requirements.

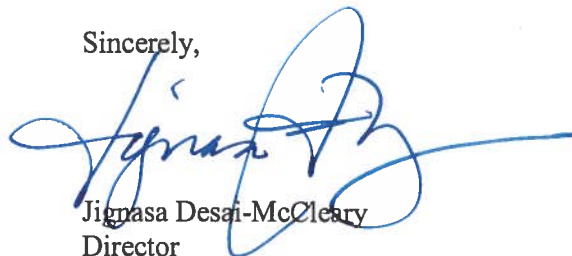
Therefore, although B&C may have presented the lowest cost proposal and was responsive to the elements of the RFP, the Committee questioned B&C's ability to successfully engage in all RFP requirements. The Evaluation Methodology was created to determine the best value for the State, price and other factors considered, and based on the criteria developed prior to proposal opening, the Committee properly determined that awarding this contract to RRD would be in the best interests of the State.

III. Conclusion

Based on the foregoing, I uphold the Bureau's intended award of State Contract #T2836. RRD is also directed to promptly update its Ownership Disclosure Form consistent with its May 15, 2015 letter to the Division and submit same to the Bureau. This is my final agency decision.

The Division looks forward to working with B&C on State Contract #89331, *Printing & Mailing Services: Taxation & Various State Agencies*. The Division also appreciates B&C registering with NJSTART at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: G. Olivera
P. MacMeekin
A. Sydlo
Wayne Tallman, RR Donnelly & Sons Co.