



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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January 29, 2016

Via Electronic [jthomson5@csc.com, astevens7@csc.com] and USPS Regular Mail

John F. Kilgore, Director, Global BPO
CSC Covansys Corporation
10975 Grandview, Suite 500, Box #11
Overland Park, KS 66210

Re: Protest of Notice of Intent to Award
RFP #: 16-X-23577: Early Intervention System (NJEIS), Federal Medicare Part C Management

Dear Mr. Kilgore:

This letter is in response to your correspondence on behalf of CSC Covansys Corporation (CSC) received by the Hearing Unit of the Division of Purchase and Property (Division) on January 15, 2016. In that letter, CSC protests the Notice of Intent to Award (NOI) a contract for Solicitation #16-X-23577: Early Intervention System (NJEIS), Federal Medicare Part C Management. CSC alleges that its proposal was improperly disqualified “because of a serious procedural defect in the procurement process,” that the Division failed to “communicate appropriately” with CSC and that CSC was not afforded an in-person meeting for the purpose of obtaining answers and clarification to its questions as promised by the Division.

By way of background, the Request for Proposal (RFP) was issued by the Division’s Procurement Bureau (Bureau) on March 13, 2015 on behalf of the Department of Health (DOH) to solicit proposals to engage a contractor to design and create a customized, web-based case management information system for the State’s Early Intervention System (NJEIS).¹ (RFP § 1.1 *Purpose and Intent*.) NJEIS administers the State’s implementation of the Federal Individuals with Disabilities Education Act – Part C, which provides early intervention services for infants and toddlers with developmental delays or diagnosed disabilities and their families. (*Ibid.*) The contractor shall implement and use the system to perform the functions of the Central Management Office (CMO). (*Ibid.*) It is the intent of the State to award one contract to the responsible bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered. (*Ibid.*; N.J.S.A. 52:34-12.)

Prior to the proposal due date, during the Question and Answer Period (Q&A Period), the Division entertained all bidder requests for modifications to the State of New Jersey Standard Terms and Conditions (SSTCs) and exceptions to the requirements of the RFP, and allowed bidders an opportunity to suggest alternate terms and conditions for consideration by the Division. RFP § 1.3.1 *Electronic Question and Answer Period* states that “[q]uestions regarding the State of New Jersey Standard Terms

¹ This RFP was to procure similar services to term contract T-2211 which is due to expire on January 28, 2016. (RFP § 1.2 *Background*.)

and Conditions and exceptions to mandatory requirements **must**² be posed during this Electronic Question and Answer Period.” (*Emphasis added.*) This requirement is reiterated in the SSTCs:

In the event that the bidder/offeror would like to present terms and conditions that are in conflict with either these terms and conditions or those set forth in the RFP, the bidder/offeror **must** present those conflicts during the Question and Answer period for the State to consider. Any conflicting terms and conditions that the State is willing to accept will be reflected in an addendum to the RFP. The State’s terms and condition shall prevail over any conflicts set forth in a bidder/offeror’s proposal that were not submitted through the question and answer process and approved by the State.

[SSTC § 1 *Standard Terms and Conditions Applicable to the Contract* (*Emphasis added.*)]

Before the close of the Q&A Period for this solicitation on March 20, 2015, the Bureau received numerous requests to modify the SSTC, including requests to modify the terms regarding indemnification, limitation on liability and confidentiality. At least one potential bidder took advantage of the opportunity to submit alternate language for RFP § 5.17.1 *Indemnification* and RFP § 5.9.1 *Data Confidentiality*. The Bureau reviewed and considered the proposed alternate language and determined that the proposed language was not in the State’s best interest. On April 24, 2015, the Bureau issued Addendum #2 responding to questions posed by potential bidders. With respect to the proposed alternate language for RFP § 5.17.1 *Indemnification* and RFP § 5.9.1 *Data Confidentiality* the Bureau stated “the RFP will not be modified as suggested.” Accordingly, the contract to be awarded “shall consist of this RFP, addenda to this RFP, the Contractor’s proposal, any best and final offer and the Division’s Notice of Award.” (RFP§ 5.1 *Precedence of Special Contractual Terms and Conditions.*)

On May 5, 2015, two proposals received by the submission deadline of 2:00 p.m., were opened by the Proposal Review Unit.³ CSC’s *Signatory Page*, while signed, included significant strikethroughs in the attestation block:

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

² “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.*)

³ On April 16, 2015 the Bureau issued Addendum #1 extending the proposal submission deadline to May 5, 2015.

~~FURTHER STATE BIDDING. A DEFAULTING CONTRACTOR MAY ALSO BE LIABLE, AT THE OPTION OF THE STATE, FOR THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE PRICE BID BY AN ALTERNATE VENDOR OF THE GOODS OR SERVICES IN ADDITION TO OTHER REMEDIES AVAILABLE.~~

Further, in its proposal cover letter, CSC identified two changes to RFP § 5.0 *Special Contractual Terms and Conditions*. First, CSC proposed deleting RFP § 5.17.1 *Indemnification* and replacing it with alternate language stating “CSC cannot accept the carve-out of clause 5.9.1 from the limitation on liability as written. CSC is agreeable to working with the [Division] to reach a mutually acceptable cap for this provision, but CSC cannot accept unlimited liability.” Second, CSC proposed deleting RFP § 5.9.1 *Data Confidentiality* and replacing it with alternate language stating that it “cannot accept the unlimited liability in Clause 4.1.1.ii, CSC has suggested the language change to accommodate a mutually agreeable cap to be referenced in Clause 4.1.1, noted above, and subject clause 5.9.1 to that cap.”

After conducting a preliminary review of CSC’s proposal, consistent with RFP §4.1, the Bureau wrote to CSC on July 22, 2015 stating:

In reviewing your firm’s bid proposal for the aforementioned solicitation, it has been discovered that the submitted Signatory Page has terms and conditions language stricken by CSC. The State will not accept a Signatory Page with these exceptions so please remove all strikethroughs on the Signatory Page or withdraw your proposal.

A response is required no later than July 24, 2015 in order for your firm’s bid proposal to be considered for award. Please send responses via email to the undersigned Procurement Bureau Representative.

On July 22, 2015 CSC responded by email stating:

Thank you for your letter this morning. CSC is grateful for the opportunity to discuss this procurement, 16-X-23577, with New Jersey and we greatly value our longstanding relationship with New Jersey Early Intervention and are eager to explore options to continue it.

In our attached letter, we discussed the challenges associated with several specific elements of the Terms and Conditions outlined in the RFP. Specifically, CSC proposed two key changes for the following reasons:

In Clause 4.1.1.ii, CSC is very concerned about the carve-out of clause 5.9.1 from the limitation on liability as written. CSC is agreeable to working with the Department to reach a mutually acceptable cap for this provision.

In Clause 5.9.1, CSC has suggested a language change to accommodate a mutually agreeable cap to be referenced in Clause 4.1.1, noted above, and subject clause 5.9.1 to that cap.

CSC understands that these contract terms are derived from key state contract language boiler plate. We have experience negotiating mutually acceptable language around these provisions with many state clients; in fact, when afforded the opportunity to negotiate we never failed to successfully negotiate a positive outcome for both the client and CSC.

We would like to initiate a dialogue with New Jersey on the terms in question as presented above and in the cover letter attached below. CSC looks forward to a productive conversation with New Jersey and is prepared to move quickly to reach an agreement in this language. Thank you again for reaching out and we look forward to hearing from you.

In addition, on the same date CSC called the Bureau Representative to request a meeting to negotiate the terms of the contract. The Bureau Representative advised CSC that the Bureau could not comment on an active procurement and that negotiations would only be conducted at the Director's request. If negotiations were desired, the Bureau would contact CSC to confirm a date and time. (See, July 22, 2015 Vendor Communication Record.) The Bureau Representative in a July 24, 2015 email to the CSC addressing extension issues with the current contract, also indicated to CSC that "I will confirm a date/time to discuss CSC's proposal for the re-procurement of the above."

Subsequently, when the Bureau did not receive CSC's withdrawal of the strikethroughs on the *Signatory Page* by July 24, 2015, the Bureau deemed CSC's proposal non-responsive and CSC's proposal was not considered by the Evaluation Committee (Committee).⁴

On January 15, 2016, the Division received CSC's protest letter which states in part:

CSC was surprised to find that an award for the above referenced procurement has been announced, and equally surprised to learn from the Evaluation Committee Report dated December 15, 2015 (Exhibit 1) that its proposal was disqualified. CSC vigorously protests its disqualification, which occurred as a result of a serious procedural defect in the procurement process, and the Division's failure to communicate appropriately with CSC following the Division's letter to CSC dated July 22, 2015. (Exhibit 2.)

That letter asked CSC to withdraw its qualifications to its RFP response proposal and to respond within three days of the date of the letter (3 days including the date of letter, so essentially 2 days). Following CSC's receipt of the letter signed by [the Bureau Representative,] Angela Stevens, contacted [the Bureau Representative] by phone on July 22 and indicated that CSC had questions about the letter and asked for an opportunity to ask and discuss those questions in a phone call. [The Bureau Representative] indicated via email on July 24, 2014 that he would schedule a meeting and that CSC has met its response deadline (of three days) to the letter.

To date, this meeting has *still* not occurred. The Division has not provided the promised opportunity to CSC to discuss its questions, nor has the Division retracted its promise to hold such a meeting. In fact, for nearly three months, the Division failed to respond to numerous attempts

⁴ The other proposal received by the submission deadline was from Public Consulting Group, Inc. (PCG). This proposal was deemed responsive by the Bureau and forwarded to the Committee for evaluation. The Committee performed a technical review of PCG's proposal in accordance with the evaluation criteria set forth in RFP § 6.7.1 *Technical Evaluation Criteria*. The focus of the Committee's technical review was on the strengths and weaknesses of the proposal as it conveyed PCG's ability to undertake and successfully complete the work outlined in the RFP. The Committee completed its evaluation and issued its report on December 15, 2015. On December 31, 2015, the Bureau issued the NOI awarding the contract to PCG.

by CSC to reach the Division to schedule a meeting, or assess the status of the procurement...It is important to note that at no point, did the Division notify CSC that it would not entertain the promised opportunity for CSC to ask questions, and at no point did CSC receive notice that it was on any deadline to withdraw its exceptions/questions. Instead, the Division allowed CSC to believe that the requested meeting would be forthcoming.

...

CSC requests that it be provided with an opportunity to explore its questions with the Division's... representatives, then given the remainder of its initial three (3) day window to consider withdrawing its objections to the contract language. If the Division cannot provide a phone call or in-person meeting to explore CSC's questions, then CSC respectfully requests an opportunity to ask written questions, and receive full, complete, detailed responses. In any case, CSC asserts that it is inappropriate for the Division to disqualify CSC without providing the promised meeting and notifying CSC of a clear deadline to finalize its decision to withdraw its exceptions.

...

...CSC strenuously protests the Division's handling of CSC's initial questions, its proposal, its subsequent questions, its communications and communication attempts, and the Division's lack of response thereto, and requests and in-person meeting providing CSC the opportunity to seek answers and clarifications to its questions, discuss the events leading to the Division's intent to award, and to present a demonstration of CSC's proposal.

In connection with the Division's review of this protest, the Hearing Unit sought clarification regarding the relief sought by CSC through the protest letter. Specifically, on January 28, 2016, the Chief Hearing Officer wrote to CSC asking:

This email seeks clarification of CSC Convassys' (CSC) protest letter received by the Division of Purchase and Property's (Division) Hearing Unit on January 15, 2016. I ask that you clarify whether CSC's protest seeks

1) acceptance of the proposed alternate language for Request for Proposal (RFP) Section 5.9.1 *Data Confidentiality* and RFP Section 5.17.1 *Indemnification*

or

2) that CSC be allowed to withdraw the strikethroughs on the Signatory Page submitted by CSC with its proposal.

Please clarify which of the above is sought by 4 p.m. eastern time on January 29, 2016, by replying to this email.

On January 29, 2016, CSC clarified its protest, based upon the Hearing Unit's inquiry regarding the exact nature of CSC's protest. CSC, in the January 29 letter, stated that "CSC respectfully withdraws

the strikethrough in the *Signatory Page*.” CSC further declared that it “was prepared to make the decision to withdraw its strikethrough earlier in the process, but was never notified of a new deadline to do so.”

I now review both the Bureau’s decision not to negotiate with CSC on the above listed terms and conditions of the RFP and protester’s complaint about the communication of that decision. I find that the Bureau correctly decided against negotiation of these terms during the evaluation phase.

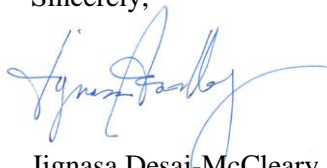
While CSC indicates that it wished to negotiate alternate language related to RFP § 5.17.1 *Indemnification* and RFP § 5.9.1 *Data Confidentiality*, permitting an amendment to RFP language after proposals have been received and opened, would give CSC an advantage over other bidders who either submitted proposals which conformed to the specifications or did not submit proposals because of the terms contained in the RFP. Moreover, the State already announced to all bidders in Addendum #2 following the Q&A Period that it would not alter these important terms and conditions which serve to protect the State. Additionally, the State received a responsive proposal which adhered to all RFP requirements.

My review of the record also indicates that while the Bureau made the right decision and appropriately followed the RFP process by issuing a letter requesting withdrawal of the exceptions there may have been later miscommunication between the Bureau and CSC related to whether a meeting would be afforded CSC, and whether the deadline for CSC to withdraw its strikethroughs on the *Signatory Page* or withdraw its proposal had been extended. Accordingly, as requested in CSC’s January 29, 2016 letter to the Hearing Unit clarifying the nature of its protest, CSC’s strikethroughs on the *Signatory Page* are deemed withdrawn.

In light of the findings set forth above, the NOI is rescinded and this matter is remanded to the Bureau for further consideration. This is my final agency decision with respect to the protest submitted by CSC.

Thank you for your company’s interest in doing business with the State of New Jersey and for registering your company with **NJSTART** at www.njstart.gov, the State of New Jersey’s new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

c: G. Olivera
G. Terwilliger