



## State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY  
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June 10, 2021

*Via Electronic Mail Only* [MECA@stevenslee.com](mailto:MECA@stevenslee.com)

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Re: I/M/O Bid Solicitation #20DPP00553 SHI International Corp.  
Request for Reconsideration  
T3121 Software Reseller Services

Dear Ms. Cannon:

This letter is in response to the June 4, 2021, correspondence from Denise Verdicchio, Senior Vice President, Public Sector, on behalf of SHI International, Corp. (SHI) to the Division of Purchase and Property's (Division) Hearing Unit. In that letter, SHI requests that the Division reconsider the May 25, 2021 final agency decision which upheld the Division's Procurement Bureau's (Bureau) decision that the Quote submitted by SHI was non-responsive; and therefore, SHI was ineligible for a Contract award for Bid Solicitation #20DPP00553 – T3121 Software Reseller Services (Bid Solicitation).

By way of summary, on July 13, 2020, the Bureau issued the Bid Solicitation on behalf of the New Jersey Office of Information Technology (OIT). Bid Solicitation § 1.1 *Purpose and Intent*. The purpose of the Bid Solicitation was to solicit Quotes for software resellers to provide Commercial Off the Shelf Software, including Software as a Service, Software-Related Services (training, pre-sales assistance, documentation, installation, configuration and Limited Customization), maintenance, support, volume license agreement administration, and software packaged with hardware as an appliance. *Ibid*. The intent of the Bid Solicitation was to award up to six Master Blanket Purchase Orders (Blanket P.O.s or Contracts) to those responsible Vendors {Bidders} (Bidders) whose Quotes, conforming to the Bid Solicitation were most advantageous to the State, price and other factors considered. *Ibid*. The Bid Solicitation was designated as a partial Small Business Enterprise (SBE) and it was the State's intent to award up to two (2) of the six (6) Contracts to qualifying SBE Bidders.

On December 8, 2020, the Division's Proposal Review Unit opened fifteen (15) Quotes, which were received by the submission deadline of 2:00 pm eastern time. After conducting an initial review of the Quotes received for the compliance with mandatory Quote submission requirements as set forth in N.J.A.C. 17:12-2.2, the Division's Proposal Review Unit forwarded the Quotes to the Bureau for further review and evaluation. The Bureau conducted an initial review of the Quotes received and after completing that reviewed determined that ten (10) of the Quotes, including that submitted by SHI, were non-responsive to mandatory requirements of the Bid Solicitation.

Specifically, the Bureau found that the Quote submitted by SHI was non-responsive to the requirements of the Bid Solicitation because SHI submitted exceptions to the terms and conditions in the Bid Solicitation in its Quote. Specifically, SHI submitted over seven (7) pages of exceptions to the Terms and Conditions of the Bid Solicitation. With respect to the Quote submitted by SHI, the Evaluation Committee report noted:

Such terms are material because they concern fundamental aspects of the Contract such as indemnity and termination. To the extent that the proposed terms do not conflict with the Terms of the Bid Solicitation, they are hereby rejected pursuant to Section 4.1 of the Bid Solicitation. To waive these exceptions would impact the State's assurance that the Bidder would perform the Contract as required. To waive such conflicts with the Bid Solicitation would be manifestly unfair to those Bidders who chose not to submit a Quote because they disagreed with the terms of the Bid Solicitation. Therefore, SHI's Quote is non-responsive.

[Evaluation Committee Report, pgs. 8-9.]

The remaining five (5) Quotes were forwarded to the Evaluation Committee for further review and evaluation consistent with the requirements of the Bid Solicitation Section 6.7 *Evaluation Criteria*. On March 23, 2021, the Evaluation Committee completed its report, which recommended that Contracts be awarded to CDW-Government, LLC (CDW-G); Dell Marketing L.P. (Dell); Insight Public Sector, Inc. (Insight); Softchoice Corporation (Softchoice); and, York Telecom Corporation (YorkTel). Thereafter, on March 26, 2021, the Bureau prepared the Recommendation Report, which recommended that Contracts be awarded to Dell; CDW-G; Insight; Softchoice; and, YorkTel. On April 5, 2021 the Bureau issued the NOI advising all Bidders that Contract awards would be made to Dell; CDW-G; Insight; Softchoice; and, YorkTel consistent with the March 26, 2021 Recommendation Report.

On April 19, 2021, SHI wrote to the Division's Hearing Unit protesting the Bureau's determination that its Quote was non-responsive and also protesting that other Quotes were accepted. By way of remedy, SHI requested that its Quote be reinstated and that it be awarded a Contract and that the Quotes of CDW-G, Dell, Insight, Softchoice and YorkTel be declared non-responsive. As an alternative, SHI proposed that the Bid Solicitation be cancelled and rebid.

On May 25, 2021, the Division issued its final agency decision which upheld the Bureau's determination that the Quote submitted by SHI was non-responsive and that the proposed contract awards to CDW-G, Dell, Insight and YorkTel be upheld. Reviewing SHI's proposed terms under the factors set forth by the Court in *Twp. of River Vale v. Longo Constr. Co.*, 127 N.J. Super. 207, 222 (Law Div. 1974), the Director agreed that SHI's Quote contained material deviations from the requirements of the Bid Solicitation. SHI reserved for itself, contrary to the requirements of the Bid Solicitation, the right to mandate the terms and conditions of the Bid Solicitation for its own benefit contrary to the Court's holding in *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 566 (App. Div. 2018).

On June 4, 2021, SHI submitted a request for reconsideration to the Division's Hearing Unit. In that letter, SHI states:

SHI remains steadfast in its desire to maintain transparency and to support the State of New Jersey. As both a citizen and advocate of the State, I write this letter: (1) to clarify a vital assertion erroneously made in the final decision and (2) to encourage the Division to consider a rebid of the two remaining awards. First, I am compelled to communicate a fundamental,

clarifying point: On page 24 of 26 of your Decision, you write, "SHI reserved for itself, contrary to the requirements of the Bid Solicitation, the right to negotiate or mandate the terms and conditions of the Bid Solicitation for its own benefit." Please know, it has been a longstanding, standard practice to negotiate terms and conditions, both within the State of New Jersey and nation-wide. Objectively, this bid process was confusing for most respondents, and clear evidence of that confusion is Softchoice's decision to attempt negotiations after their award; a decision which had fateful consequences for them. We did not ask to negotiate after the fact in order to "get an advantage" or benefit unfairly; we did so because it is conventional to do so. To suggest otherwise is not reflective of SHI's intent here and previous experience.

SHI has requested that the Division reconsider the allegations of its protest and the Division's final agency decision. Reconsideration however,

should be utilized only for those cases which fall into that narrow corridor in which either 1) the [tribunal] has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [tribunal] either did not consider, or failed to appreciate the significance of probative, competent evidence. . . .

Alternatively, if a litigant wishes to bring new or additional information to the [tribunal's] attention which it could not have provided on the first application, the [tribunal] should, in the interest of justice (and in the exercise of sound discretion), consider the evidence. Nevertheless, motion practice must come to an end at some point, and if repetitive bites at the apple are allowed, the core will swiftly sour. Thus, the [tribunal] must be sensitive and scrupulous in its analysis of the issues in a motion for reconsideration.

[*Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996), citing, *D'Atria v. D'Atria*, N.J. Super. 392, 402-402 (Ch. Div. 1990).]

In requesting reconsideration, SHI has not brought to light any new or additional information which was not included in its original protest. Rather, SHI simply disagrees with the Division's decision, and asks that the Division reconsider the decision based upon the same information and arguments presented in the original protest. While SHI may not be entitled to reconsideration under the law, for the sake of completeness I will address the request here.<sup>1</sup>

In consideration of SHI's request for reconsideration, I have reviewed the record of this procurement including the Bid Solicitation, the Quotes received and SHI's protest, the Evaluation Committee Report, the Bureau's Recommendation Report, the relevant statutes, regulations, case law. For the reasons set forth herein, I uphold the May 25, 2021, final agency decision do not find reason to issue a supplemental procurement at this time.

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<sup>1</sup> The Division's governing regulations do not contemplate requests for reconsideration. Rather, upon issuance of the final agency decision, the appropriate course of action would be to file an appeal with the Superior Court Appellate Division. N.J.A.C. 17:12-3.1 (b).

First, SHI claims that the May 25, 2021, final agency decision erroneously stated that “SHI reserved for itself, contrary to the requirements of the Bid Solicitation, the right to negotiate or mandate the terms and conditions of the Bid Solicitation for its own benefit, leaving it with “the option, after all bids are opened, to decline the contract.” *In Re Request for Proposals #I7DPP00144*, 454 N.J. Super. 527, 566 (App. Div. 2018).” In support of its position, SHI states that it proposed terms for negotiation within its Quote because “it has been a longstanding, standard practice to negotiate terms and conditions, both within the State of New Jersey and nation-wide.” Unfortunately, SHI has confused the various contracting vehicles that the Division may use.

With respect to those contracts advertised, evaluated and awarded by the New Jersey, the Procurement Bureau must ensure that all Bidders, when creating and submitting Quotes, are aware of the terms and conditions of the contract such that they are all on a level playing field and that no one Bidder is placed in a position of advantage over another. The New Jersey Courts have long recognized that the purpose of the public bidding process is to “secure for the public the benefits of unfettered competition.” *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 313 (1994). To that end, the “public bidding statutes exist for the benefit of the taxpayers, not bidders, and should be construed with sole reference to the public good.” *Borough of Princeton v. Board of Chosen Freeholders*, 169 N.J. 135, 159-60 (1997). The objective of New Jersey’s statutory procurement scheme is “to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition.” *Barrick v. State of New Jersey*, 218 N.J. 247, 258 (2014) (citing, *Keyes Martin & Co. v. Dir. of Div. of Purchase and Prop.*, 99 N.J. 244, 256 (1985)). Further, the Court in *Barrick* held

Although broad, the grant of discretion to the Director to administer the public bidding process is not limitless. In line with the policy goal of thwarting favoritism, improvidence, extravagance, and corruption, the Division may not award a contract to a bidder whose proposal deviates materially from the RFP’s requirements. Deviations from material specifications risk transgressing the duty to avoid favoritism, corruption, and the like. Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract. Thus, requirements that are material to an RFP are non-waivable; the winning bidder’s proposal must comply with all material specifications.

[*Barrick, supra*, 218 N.J. at 258-59, internal citations omitted.]

For that reason, the Division’s governing regulations mandate stringent enforcement to maintain the equal footing of all Bidders and to ensure the integrity of the State’s bidding process. Notably, “a proposal that is not...responsive to the material requirements of the [Bid] shall not be eligible for further consideration for award of contract, and the bidder offering said proposal shall receive notice of the rejection of its proposal.” N.J.A.C. 17:12-2.7(c).

SHI states that standard procurement process discussed above differed from its historical experience with the State where it was able to negotiate terms and condition with the State. I recognize that SHI is a current vendor on the State’s M4002 – NAPSO ValuePoint Cloud Solutions contract and was a vendor on M0003, the prior Software Reseller contract. In both instances, the State joined a cooperative contract which was competitively bid and awarded by the State of Utah or the State of Massachusetts respectively. In joining those State’s contracts, to the extent that the New Jersey’s procurement requirements and contracting needs differed from that of Utah’s or Massachusetts’, New Jersey had the ability to negotiate certain contract terms, in fact the solicitation issued by the State of Utah for the cloud solutions, contemplated negotiations stating:

2.7.3 Participating Addenda Participating Entities, including the State of Utah, may negotiate additional and/or different terms and conditions in a Participating Addendum, which will take precedence over the terms of the Master Agreement in the event of conflict. Participating Entities may not negotiate the addition of services not contemplated by this RFP.

This process of negotiating a Participating Addendum was contemplated by Utah's solicitation and allowed New Jersey and other states joining the cooperative contract, to include the State specific statutory and other requirements into the contract with the vendor to ensure that the State's interests are protected.

By design, the process of joining a cooperative contract is different from the process required by New Jersey's governing laws, when the Bureau advertises, evaluates and awards contracts in accordance with N.J.S.A. 52:34-12; where, the Division must ensure that the terms and conditions of Bid Solicitation are equally applicable to all Bidders who submit Quotes.

Second, as way to remedy the non-responsiveness, SHI asks the State issue a supplemental bid solicitation aimed at awarding two additional Contractors for a total of six (6) Contractors. In response to SHI's request I note that Bid Solicitation stated that it was the "The State intends to award up to six (6) Blanket P.O.s." Bid Solicitation Section 1.1 *Purpose and Intent*, emphasis added. The Bid Solicitation did not mandate that six awards be made. In making the current Contract awards to CDW-G; Dell; Insight; and YorkTel, the Bureau and OIT determined that these four Contractors could meet the needs of the State Using Agencies and cooperative Purchasing Program Participants as those needs have been fully supported by the four vendors under the State's current reseller. Therefore the issuance of a supplemental bid solicitation at this time is not necessary.

Based upon the foregoing, I sustain the May 25, 2021 final agency decision. Thank you for your company's interest in doing business with the State of New Jersey. I encourage you to log into [NJSTART](#) to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities. Please monitor the Division's [NJSTART](#) website for future bidding opportunities for these services.

Sincerely,



Maurice A. Griffin  
Acting Director

MAG: RUD

c: L. Leonardi  
C. Iversen  
A. Morales