



State of New Jersey

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April 7, 2021

Via Electronic Mail mschulien@guidehouse.com

Shamir Patel, Deputy General Counsel
Guidehouse Inc.
1800 Tysons Blvd., 7th Floor
McLean, VA 22102-4257

Re: I/M/O Request for Quotation RFQ1465267S Guidehouse Inc.
Protest of Notice of Intent to Award
G4018 Integrity Oversight Monitoring: Program and Performance Monitoring, Financial Monitoring
and Grant Management and Anti-Fraud Monitoring for COVID-19 Recovery Funds and Programs

Dear Mr. Patel:

This final agency decision is in response to your letter of March 24, 2021, submitted on behalf of Guidehouse Inc. (Guidehouse) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that letter, Guidehouse protests the March 18, 2021, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Request for Quotation RFQ1465267S – G4018 Integrity Oversight Monitoring: Program and Performance Monitoring, Financial Monitoring and Grant Management and Anti-Fraud Monitoring for COVID-19 Recovery Funds and Programs (Request for Quotes or RFQ).

By way of background, on March 9, 2020, Governor Murphy issued Executive Order 103 declaring both a Public Health Emergency and State of Emergency in light of the dangers of the Coronavirus disease 2019 (COVID-19). Request for Quotes § 1.2 *Background*. On March 13, 2020, the President of the United States declared a national emergency and determined that the COVID-19 pandemic was of sufficient severity and magnitude to warrant a nation-wide emergency declaration under Section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121-5207, (Stafford Act) and that declaration was extended to the State of New Jersey on March 25, 2020 pursuant to Section 401 of the Stafford Act. *Ibid*. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act, H.R. 748, (CARES Act) was enacted to provide economic stimulus in response to the global pandemic caused by COVID-19. *Ibid*. The CARES Act, among other things, was enacted to assist State, Local and Tribal governments in navigating the impact of the COVID-19 outbreak and to cover necessary expenditures related to the public health emergency incurred between March 1, 2020 and December 30, 2020. *Ibid*.

On July 17, 2020, Governor Murphy signed Executive Order 166 (EO 166), which, among other things, established the COVID-19 Compliance and Oversight Task Force (Taskforce) and the Governor's Disaster Recovery Office (GDRO). *Ibid*. The purpose of the Taskforce is to advise Using Agencies that receive or administer COVID-19 Recovery Funds regarding compliance with federal and State law and

how to mitigate the risks of waste, fraud, and abuse. *Ibid.* Pursuant to EO 166, the Taskforce issued guidelines regarding the appointment and responsibilities of COVID-19 Oversight Integrity Monitors (Integrity Monitors). *Ibid.* Using Agencies may retain and appoint Integrity Monitors to oversee the disbursement of COVID-19 Recovery Funds and the administration of a COVID-19 Recovery Program. Integrity Monitors are intended to serve as an important part of the State’s accountability infrastructure while working with Using Agencies in developing measures to prevent, detect, and remediate inefficiency and malfeasance in the expenditure of COVID-19 Recovery Funds. *Ibid.* EO 166 requires Using Agencies to identify an Accountability Officer to serve as central point of contact for tracking COVID-19 funds within each agency or authority and is responsible for working with and serving as a direct point of contact for the GDRO and the Taskforce. *Ibid.*

On October 21, 2020, the Department of the Treasury (hereinafter “State”) issued the Request for Quotes to solicit Quotes from qualified firms to provide Program and Process Management Monitoring, Financial Auditing and Grant Management and Integrity Monitoring/Anti-Fraud support services for the disbursement of COVID-19 Recovery Funds. Request for Quotes § 1.1 *Purpose and Intent*. The intent of the Request for Quotes is to award Contracts to those responsible Bidders whose Quotes, conforming to this Request for Quotes are most advantageous to the State, price and other factors considered in the following three areas of expertise: (1) Program and Process Management Monitoring; (2) Financial Auditing and Grant Management; and (3) Integrity Monitoring/Anti-fraud service.¹ *Ibid.* The creation of a pool of qualified Integrity Monitors will support monitoring and oversight and ensure that Using Agencies administer COVID-19 Recovery Funds in compliance with program, financial, and administrative requirements set forth in the federal-state grant agreement, the State-Recovery Program Participant sub-grant agreement, and applicable federal and state laws, regulations, and guidelines.

On December 18, 2020, the State received 15 Quotes in response to the Request for Quotes.² After conducting an initial review of the Quotes received the State determined that five (5) of the submitted Quotes were not responsive to the requirements of the Request for Quotes; and therefore, those five Quotes were not further evaluated.³ The remaining ten (10) Quotes were then forwarded to the Evaluation Committee for review and evaluation consistent with the requirements of the Request for Quotes Section 6.7 *Evaluation Criteria*.

¹ This final agency decision uses the State’s statutory and/or regulatory terminology as used in the Request for Quotes, rather than the terminology employed by the State of New Jersey’s *NJSTART* eProcurement system. For ease of reference, the following is a table which references the *NJSTART* term and the statutory/regulatory term.

<i>NJSTART</i> Term	Statutory / Regulatory
Bid Solicitation	Request For Proposal
Bid Amendment	Addendum
Change Order	Contract Amendment
Master Blanket Purchase Order	Contract
Offer and Acceptance Page	Signatory Page
Quote	Proposal
Vendor {Bidder}	Bidder
Vendor {Contractor}	Contractor

² Quotes were received from the following firms: Acumen, LLC (Acumen); BDO USA, LLP (BDO); CohnReznick, LLP (CohnReznick); Cotton & Company, LLP (Cotton); Crowe LLP (Crowe); Deloitte & Touche LLP (Deloitte); Ernst & Young (EY); Grant Thornton Public Sector, LLC (Grant Thornton); Guidehouse Inc. (Guidehouse); KPMG LLP (KPMG); The North Highland Company (North Highland); Premier Group Services, Inc. (Premier); Regis & Associates, P.C. (Regis); Rumph and Associates, P.C. (Rumph); and Vander Weele Group, LLC (Vander Weele).

³ The Quotes submitted by Acumen, Ernst & Young, Guidehouse, KPMG, and Premier were determined to be non-responsive to the requirements of the Request for Quotes.

On March 12, 2021, the Evaluation Committee issued its report which recommended that Contracts be awarded to BDO; CohnReznick; Cotton; Crowe; Deloitte; Grant Thornton; North Highland; Regis; Rumph; and Vander Weele. Evaluation Committee Report, P. 27. On that date, the Bureau also completed a Recommendation Report, which recommended that Contracts be awarded to BDO; CohnReznick; Cotton; Crowe; Deloitte; Grant Thornton; North Highland; Regis; Rumph; and Vander Weele as the Bidders' contracts represent the most advantageous offer to the State price, and other factors considered. Recommendation Report, p. 1.

On March 18, 2021, the Bureau issued the NOI, indicating that it was the State's intent to make Contract awards consistent with the Bureau's recommendation in the March 12, 2021, Recommendation Report.

On March 24, 2021, Guidehouse submitted a protest to the Division's Hearing Unit challenging the State's determination that its submitted Quote was non-responsive to the requirements of the Request for Quotes. By way of summary, Guidehouse states:

The Division abused its discretion in finding Guidehouse's quote nonresponsive instead of reasonably exercising its discretion and waiving, per its historical practice, the additional terms Guidehouse proposed in its quote. The Division also treated offerors unequally by rejecting Guidehouse's quote, but awarding blanket POs to firms that proposed similar additional terms. For both these reasons, Guidehouse's protests should be sustained and an additional blanket PO should be issued to Guidehouse.

[Guidehouse protest, p. 1.]

In the protest, Guidehouse claims that the Request for Quotes permitted Bidders to submit additional terms and that its request modify Section 4.1.1 of the State's Standard Terms and Conditions was permitted as an "additional term" in accordance with Request for Quotes Section 4.1. Guidehouse further states that the modified term was not material and therefore could have been waived in accordance with the Director's right to waiver minor irregularities pursuant to N.J.A.C. 17:12-2.7(d). Therefore, Guidehouse believes the Division should have waived the modified terms and evaluated Guidehouse's Quote along with the other Quotes received. Additionally, Guidehouse requests the opportunity for an in-person presentation as permitted by N.J.A.C. 17:12-3.3(b)(1)(iii).

With respect to Guidehouse's request for an in-person presentation to challenge the intended Contract award, pursuant to N.J.A.C. 17:12-3.3(e), "[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director." Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). I have reviewed the record of this procurement, including the Request for Quotes, the Quotes received, the Evaluation Committee Report, the Bureau's Recommendation Report, the relevant statutes, regulations, case law, and the protest submitted by Guidehouse. The issues raised in Guidehouse's protest were sufficiently clear such that a review of the record of this procurement has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest submitted by Guidehouse on the written record, as such an in-person hearing is not warranted.

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)). Consistent with this purpose, the New Jersey procurement law provides that “any or all bids may be rejected when the State Treasurer or the Director of the Division of Purchase and Property determines that it is in the public interest so to do.” N.J.S.A. 52:34-12(a).

Here, the State determined that the Quote submitted by Guidehouse contained a material deviation from the requirements of the Request for Quotes rendering the Quote non-responsive. The question before me is whether the Guidehouse’s modified term and the notation that its Quote was subject to negotiation, were material deviations rendering the Quote non-responsive or if the modified term could have been waived. To be deemed non-responsive, Guidehouse’s Quote would have had to materially deviate from the requirements of the Request for Quote such that the State would have no assurances that the Contract would be performed consistent with the requirements of the Request for Quote. In determining whether a material deviation exists, it is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. *Twp. of Hillside v. Sternin*, 25 N.J. 317, 324 (1957).

In *Meadowbrook Carting Co. v. Borough of Island Heights*, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the court in *Twp. of River Vale v. Longo Constr. Co.* for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). “In *River Vale*, Judge Pressler declared that after identifying the existence of a deviation, the issue is whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity.” *In re Protest of Award of On-Line Games Prod. And Operation Servs. Contract*, 279 N.J. Super. 566, 594 (App. Div. 1995), citing *River Vale*, supra, 127 N.J. at 216. The *River Vale* court set forth a two-part test for determining whether a deviation is material:

First, whether the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[*River Vale*, supra, 127 N.J. at 216.]

“If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *River*, supra, 127 N.J. Super. at 222.

Although the State has broad discretion to select among qualified and responsive Bidders in public contracting matters, the discretion afforded to the Director, “is not limitless.” See, *In re Request for Proposals #17DPP00144*, 454 N.J. Super. 527, 559 (App Div. 2018). “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 [RFQ’s] requirements.” *Ibid.*, quoting, *Barrick v. State*, 218 N.J. 247, 258-59 (2014)). 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 [RFQ] 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).

Here, Request for Quotes Section 4.1 *General* stated as follows:

A Bidder may submit additional terms as part of its Quote and Quotes including Bidder proposed terms and conditions may be accepted, but Bidder proposed terms or conditions that conflict with those contained in the RFQ as defined in Section 2.0, or that diminish the State’s rights under any Contract resulting from the RFQ, may render a Quote non-responsive. It is incumbent upon the Bidder to identify and remove its conflicting proposed terms and conditions prior to Quote submission.

After award of the Contract, if a conflict arises between a Bidder’s additional terms included in the Quote and a term or condition of the RFQ, the term or condition of the RFQ will prevail.

Potential Bidders were permitted to submit questions regarding the terms and conditions of the Request for Quotes by October 28, 2020. Sixty-two questions were received. One question was received regarding Request for Quotes Section 4.1. Specifically, the potential Bidder sought a modification to Request for Quote language as noted below in red.

A Bidder may submit additional terms as part of its Quote and Quotes including Bidder proposed terms and conditions may be accepted, but Bidder proposed terms or conditions that conflict with those contained in the RFQ as defined in Section 2.0, or that diminish the State’s rights under any Contract resulting from the RFQ, may render a Quote non-responsive. It is incumbent upon the Bidder to identify and remove its conflicting proposed terms and conditions prior to Quote submission.

After award of the Contract, if a conflict arises between a Bidder’s additional terms included in the Quote and a term or condition of the RFQ, the term or condition of the RFQ will prevail, except as and to the extent the Quote references or modifies any provision of this RFQ by the exceptions taken or assumptions offered therein, which will control to the extent necessary to resolve the conflict.

The forms discussed herein and required for submission of a Quote in response to this RFQ are available on the Division’s website unless noted otherwise.

[RFQ Addenda #3, question 38.]

On December 7, 2020, the State responded stating:

The State does not accept this proposed modification. Terms and conditions on publicly bid procurements must be consistent for all potential Bidders. As such, all requests for changes to the RFQ requirements and terms and conditions must be raised during the Question and Answer (“Q&A”) period as described in Section 1.3. After the Q&A

period, the State will post the Questions and Answers, and, in the event that changes are made in response to Questions, a Revised RFQ and/or Price Sheet. This process ensures a level playing field for all Bidders.

Should the Bidder submit exceptions and/or additional terms with its Quote, the State will review same as described in RFQ Section 4.1. However, this submission of exceptions in the Quote may result in the Quote being deemed nonresponsive.

There will be no negotiation of terms and conditions after the Question and Answer process is complete, after Notice of Intent to Award is issued or after a final award is made. See Section 1.3 and Section 4.1.

[*Ibid.*, emphasis added.]

Additionally, a potential Bidder sought a modification to Request for Quote Section 5.1, the Bidder's proposed language is noted below in red.

This Contract awarded, and the entire agreement between the parties, as a result of this RFQ shall consist of this RFQ, SSTC, Bid Amendment to this RFQ, the Contractor's Quote, any Best and Final Offer, and the Using Agency's Notice of Award.

In the event of a conflict in the terms and conditions among the documents comprising this Contract, in each case as modified by any exceptions taken or assumptions offered by the Contractor, the order of precedence, for purposes of interpretation thereof, listed from highest ranking to lowest ranking, shall be:

- A. Executed Offer and Acceptance Page;
- B. RFQ Section 5, as may be amended by Bid Amendment;
- C. The State of NJ Standard Terms and Conditions (SSTC) accompanying this RFQ;
- D. All remaining sections of the RFQ, as may be amended by Bid Amendment; and
- E. The Contractor's Quote as accepted by the State.

The State similarly rejected this proposed modification, stating "the State does not accept this proposed modification. Please see response to Question 38."

Despite these responses, Guidehouse included the following on the cover page to its Quote:

This proposal does not constitute a contract to perform services and cannot be used to award a unilateral agreement. Final acceptance of this engagement by Guidehouse is contingent upon successful completion of Guidehouse's acceptance procedures. Any engagement arising out of this proposal will be subject to negotiation of a mutually satisfactory engagement contract including modifications to certain RFP terms and conditions and including our standard terms and conditions and fees and billing rates established therein.

Additionally, Guidehouse included the following within its Quote:

Submission of this proposal is not an indication of Guidehouse's willingness to be bound by all of the terms presented in the State of New Jersey Department of the Treasury (the "State") Request for Quotation for Integrity Oversight Monitoring for COVID-19 Recovery Funds and Programs (the "RFQ"). This proposal in response to the State's RFQ does not constitute a contract to perform services and cannot be used to award a unilateral agreement. Final acceptance of this engagement by Guidehouse is contingent upon successful completion of Guidehouse's acceptance procedures. Any engagement arising out of this proposal will be subject to negotiation of a mutually satisfactory vendor contract including modifications to certain RFP terms and conditions and including our standard terms and conditions and fees and billing rates established therein.

Given our past history of successfully negotiating mutually agreeable terms with the State, we do not anticipate any difficulty in reaching a contractual agreement that will enable us to provide the professional services which you are requesting, while protecting the interests of both parties.

Guidehouse respectfully requests the County (sic) consider the following modifications:

4.1.1 LIMITATION OF LIABILITY

The Contractor's liability to the State for actual, direct damages resulting from the Contractor's performance or non-performance, or in any manner related to this Contract, for any and all claims, shall be limited in the aggregate to 200 % of the total value of the specific Engagement giving rise to the claim(s), except that such limitation of liability shall not apply to the following:

- a. The Contractor's obligation to indemnify the State of New Jersey and its employees from and against any third-party claim, demand, loss, damage, or expense relating to bodily injury or the death of any person or damage to real property or tangible personal property, incurred from the work or materials supplied by the Contractor under this Contract caused by negligence or willful misconduct of the Contractor;
- ~~b. The Contractor's breach of its obligations of confidentiality; and~~
- c. The Contractor's liability with respect to copyright indemnification.
- d. The Contractor's indemnification obligation is not limited by but is in addition to the insurance obligations contained in Section 4.2 of the SSTC. The Contractor shall not be liable for special, consequential, or incidental damages.

[Guidehouse's Quote, p. 155, redlines in the original.]

As noted above, in conducting the initial review of the Quotes received, the State determined that the Quote submitted by Guidehouse was non-responsive. Specifically,

The Bureau determined Guidehouse to be non-responsive because Guidehouse stated, on page 1 of its Quote that: “Any engagement arising out of this proposal will be subject to negotiation of a mutually satisfactory engagement contract including modifications to certain RFP terms and conditions and including our standard terms and conditions and fees and billing rates established therein.” Additionally, Guidehouse includes the same statement on page 155 of its Quote, and includes a suggested modification to RFQ Section 9, New Jersey State Standard Terms and Conditions (NJSSTC). This statement by Guidehouse demonstrates to the State that Guidehouse is taking exception to the NJSSTC contrary to RFQ Section 4.1. Further, the issue of exceptions to the SSTC and post-award negotiation of contract terms and conditions was addressed in RFQ Addendum #3 Answers to Electronic Questions, Question 38, where the State explained that “terms and conditions on publicly bid procurements must be consistent for all potential Bidders. As such, all requests for changes to the RFQ requirements and terms and conditions must be raised during the Question and Answer (“Q&A”) period as described in Section 1.3...This process ensures a level playing field for all Bidders...There will be no negotiation of terms and conditions after the Question and Answer process is complete, after Notice of Intent to Award is issued, or after a final award is made.” Guidehouse’s statements and submission of modification requests to the SSTC with its Quote is inconsistent with RFQ Section 4.1, as further explained in the State’s response to Question 38, and therefore Guidehouse was deemed nonresponsive.

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

In the protest, Guidehouse claims that the Request for Quotes permitted Bidders to submit additional terms and that its request modify Section 4.1.1 of the State’s Standard Terms and Conditions was permitted as an “additional term” in accordance with Request for Quotes Section 4.1. Guidehouse further states that the modified term was not material and therefore could have been waived in accordance with the Director’s right to waiver minor irregularities pursuant to N.J.A.C. 17:12-2.7(d). In further support of its position that the State could have waived the modified term, Guidehouse claims that in the recent waived contract the State simply rejected Guidehouse’s modified term; and therefore Guidehouse anticipated that the State would do the same here.

The prior contract with Guidehouse for Integrity Monitoring Services was procured consistent with the Waiver of Advertising process (as a public exigency waiver) in accordance with N.J.S.A. 52:34-10(b). In order for the State to comply with the requirements of EO 166 and the CARES Act, which, at the time, required that all expenditures related the public health emergency be incurred by December 30, 2020, the State needed to get short-term contracts in place while the advertised procurement process was completed.⁴ Despite Guidehouse’s protest statement, in the waiver, the State did not negotiate or accept Guidehouse’s modified term to the State’s terms and conditions. Rather, the modified term was rejected by the State, and Guidehouse was required to withdraw the modified term, which it ultimately did. The emergency waiver process allowed the using agency and the contractor the flexibility to negotiate terms in a different fashion than is permitted in the advertised procurement for Integrity Monitoring Services, where modifications to the State’s terms and conditions can only be proposed by a Bidder during the Electronic Question and Answer Period that is laid out in Request for Quote Section 1.3..

⁴ The public exigency waiver was made effective on August 31, 2020.

Guidehouse's position that the State could have simply rejected or ignored the modified language has been rejected by New Jersey's Courts. In *In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract*, Bid No. 95-X-20175 the Appellate Division held that "in clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there. It is the alteration of the original proposal which was interdicted by the RFP". 279 N.J. Super. 566, 597 (App. Div. 1995), see also, *In re Jasper Seating*, 406 N.J. Super. 213 (App. Div. 2009); *In re Motor Vehicle Comm'n Surcharge Sys. Accounting & Billing Servs.*, 2018 N.J. Super. Unpub. LEXIS 285, *7, 2018 WL 766856 (Division impermissibly allowed the bidder withdraw the non-conforming language resulting in material change to the Quote.). Allowing Guidehouse to modify its Quote after the Quote submission deadline would result in an impermissible change or correction to its Quote, which the Division cannot allow as doing so would be contrary to the Court's holding in *In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract*, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995).

"Requiring adherence to material specifications maintains a level playing field for all bidders competing for a public contract." *Barrick v. State*, 218 N.J. 247, 259 (2014). Guidehouse's modified term was not an additional term, but rather was a change which directly conflicted with the terms and conditions of the Request for Quotes. Because the requirements of Request for Quotes are equally applicable to all Bidders who submitted Quotes, Guidehouse's modified term is a material deviation from the requirements of Request for Quotes because, applying the River Vale materiality test, it deprives the State of assurance that Guidehouse will perform the contract according to its specified requirements. Waiving Guidehouse's modified term would adversely affect competitive bidding by placing Guidehouse in a position of advantage over other bidders, who submitted Quotes without proposed alternate language in conformance with the requirements of the Request for Quotes. Accordingly, the State correctly determined that the Quote submitted by Guidehouse was nonresponsive because the modification which directly conflicted with the terms and conditions of the Request for Quotes.

Further, Guidehouse mistakenly believes that the State treated it differently by accepting Quotes from Deloitte and Grant Thornton as responsive and that the acceptance of these two Quotes was an abuse of discretion. In connection with the protest, the Hearing Unit undertook a review of the Quotes submitted by Grant Thornton and Deloitte.

With respect to the Quote submitted by Deloitte, the following language was included in the submitted Quote:

We have reviewed the contract and RFQ requirements carefully and are in general agreement. We wish to make the following clarifications as part of our proposal. We reference a broad array of Deloitte Intellectual Property that is integral to our proposal, including but not limited to forms, templates, methodologies, training, accelerators, software and solutions, managed service offerings, and grants management and COVID related communications offered to our clients (collectively "materials") throughout our proposal. For the avoidance of confusion, these materials are Deloitte pre-existing intellectual property in accordance with Section 5.7 of the Special Contractual Terms and Conditions Applicable To The Contract. Some of the materials described in our proposal may require additional contract terms and provisions. We substantially agree with the State's insurance requirements and can provide the required coverages. However, we would appreciate the opportunity to discuss certain changes to better align the contractual requirements with the coverages that we maintain for the benefit of our clients.

Contrary to the language contained in the Quote submitted by Guidehouse which sought unilaterally modify the State's terms and conditions of the Request for Quotes, the language included by Deloitte related to the additional terms specifically related to Deloitte's intellectual property. Terms and conditions related to Deloitte's intellectual property would not modify or conflict with the State's terms and conditions of the Request for Quotes; and therefore, would not necessarily render Deloitte's Quote non-responsive. Further, with respect to the insurance requirements, while Deloitte requested the opportunity to discuss changes to the insurance requirements, Deloitte specifically stated that it can provide the required insurance coverages. Therefore, Deloitte's Quote acknowledged and agreed to the insurance requirements. Based upon the language of Deloitte's Quote, the State was assured that the contract would be performed in accordance with requirements of the Request for Quotes.

However, the Hearing Unit's review of the Quote submitted by Grant Thornton reveals that Quote submitted by Grant Thornton may be non-responsive. In its submitted Quote Grant Thornton stated "This proposal is the work of Grant Thornton Public Sector LLC, the U.S. member firm of Grant Thornton International Ltd, and is in all respects subject to negotiation, agreement, and signing of specific contracts." Grant Thornton Quote, p. 88. Potential Bidders were permitted to submit questions regarding the Request for Quotes by October 28, 2020. Sixty-two questions were received. One question was received regarding Request for Quotes Section 5.1. Specifically, the potential Vendor {Bidder} sought a modification to Request for Quote language as noted below in red.

This Contract awarded, and the entire agreement between the parties, as a result of this RFQ shall consist of this RFQ, SSTC, Bid Amendment to this RFQ, the Contractor's Quote, any Best and Final Offer, and the Using Agency's Notice of Award.

In the event of a conflict in the terms and conditions among the documents comprising this Contract, **in each case as modified by any exceptions taken or assumptions offered by the Contractor**, the order of precedence, for purposes of interpretation thereof, listed from highest ranking to lowest ranking, shall be:

- A. Executed Offer and Acceptance Page;
- B. RFQ Section 5, as may be amended by Bid Amendment;
- C. The State of NJ Standard Terms and Conditions (SSTC) accompanying this RFQ;
- D. All remaining sections of the RFQ, as may be amended by Bid Amendment; and
- E. The Contractor's Quote as accepted by the State.

The State rejected this proposed modification stating "the State does not accept this proposed modification. Please see response to Question 38." In response to Question 38, the State noted "There will be no negotiation of terms and conditions after the Question and Answer process is complete, after Notice of Intent to Award is issued or after a final award is made." Contrary to the Appellate Division's decision in *In Re Request for Proposals #17DPP00144*, 454 N.J. Super. 527 (App. Div. 2018), Grant Thornton attempted to reserve for itself the ability to negotiate the terms and conditions of the Contract. As such the State should review the Quote submitted by Grant Thornton to determine whether the submitted Quote is responsive to the requirements of the Request for Quotes.

Though not raised in Guidehouse's protest, I note that even if the State could have waived Guidehouse's proposed modifications to the State's Standard Terms and Conditions Section 4.1.1,

Guidehouse's Quote was nonetheless non-responsive. In the submitted Quote Guidehouse reserved for itself the right to later negotiate the terms and conditions of the Contract, a benefit not afforded to other Bidders. As noted above, in its Quote, Guidehouse included the following statement:

Submission of this proposal is not an indication of Guidehouse's willingness to be bound by all of the terms presented in the State of New Jersey Department of the Treasury (the "State") Request for Quotation for Integrity Oversight Monitoring for COVID-19 Recovery Funds and Programs (the "RFQ"). This proposal in response to the State's RFQ does not constitute a contract to perform services and cannot be used to award a unilateral agreement. Final acceptance of this engagement by Guidehouse is contingent upon successful completion of Guidehouse's acceptance procedures. Any engagement arising out of this proposal will be subject to negotiation of a mutually satisfactory vendor contract including modifications to certain RFP terms and conditions and including our standard terms and conditions and fees and billing rates established therein.


[Guidehouse Quote, p. 155, emphasis added.]

Guidehouse's Quote indicates that it is not willing to be bound by the terms and conditions of the Request for Quotes. Accordingly, the State had no assurance that the Contract would be performed consistent with the requirements of the Request for Quotes. Negotiation of the terms and conditions was specifically rejected in the State's response to Question #38 in Addenda #3. Permitting this deviation places Guidehouse in a position of advantage over other Bidders who, in submitting their Quotes, agreed to abide by the requirements of the request for Quotes, knowing that the terms and conditions could not be modified. Here, Guidehouse reserved for itself the ability to modify the terms and conditions after the Quote opening date, a benefit not afforded to other Bidders. Accordingly, Guidehouse's Quote contains a deviation from the requirements of the Request for Quotes.

Based upon the findings set forth above, I find no reason to disturb the determination that the Quote submitted by Guidehouse was non-responsive to the requirements of the Request for Quotes. However, I remand this matter back for further review of the Quote submitted by Grant Thornton. As the Integrity Monitoring engagements from resulting contract will be on an as needed basis, and given the immediate need for these services, awards can be made to those Vendors deemed responsive, while it re-evaluates the Quote submitted by Grant Thornton based upon the above findings. This is my final agency decision with respect to the protest submitted by Guidehouse.

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

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