



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR

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July 29, 2022

Via Electronic Mail admin@libertyconsultinggroup.com

John Antonuk, President
The Liberty Consulting Group
1451 Quentin Road, Suite 400 #343
Lebanon, PA 17042

Re: I/M/O Bid Solicitation #21DPP00601 The Liberty Consulting Group
Protest of Notice of Intent to Award
T2482 Management/Financial Consulting: Contracted Management & Financial Auditing Firms
NJ Board of Public Utilities

Dear Mr. Antonuk:

This final agency decision is in response to your letter of June 21, 2022, on behalf of The Liberty Consulting Group (Liberty) which was received by the Division of Purchase and Property's (Division) Hearing Unit. In that letter, Liberty protests the Notice of Intent to Award (NOI) sent out by the Division's Procurement Bureau (Bureau) on June 7, 2022, for Bid Solicitation #21DPP00601 – T2482 Management/Financial Consulting: Contracted Management & Financial Auditing Firms NJ Board of Public Utilities (Bid Solicitation). Specifically, Liberty protests the Bureau's determination that Liberty's Quote was non-responsive to the requirements of the Bid Solicitation. The record of this procurement reveals that Liberty's Quote was deemed non-responsive based on Liberty's failure to submit a properly completed the *State of New Jersey Security Due Diligence Third-Party Information Security Questionnaire (Security Questionnaire)* with its Quote.

By way of background, on December 3, 2021, the Bureau issued the Bid Solicitation on behalf of the New Jersey Board of Public Utilities (BPU). The purpose of the Bid Solicitation was to solicit Quotes to establish a pool of prequalified Contractors to provide various types of audits, including, but not limited to, management, regulatory accounting and cost recovery, fiscal accountability (which would include, but not be limited to, an audit of cost recovery rate clauses and riders), financial and operational performance, capital structure, capacity needs, distribution resiliency and reliability, asset management, affiliate transaction, compliance, information systems/technology, cyber security internal control, and programs managed by state utilities. Bid Solicitation § 1.1 *Purpose and Intent*. The audits include the testing and review for accuracy of data, reasonableness of costs and recovery mechanisms, and utility forecast built into rate structures. *Ibid*. It was the State's intent to award Master Blanket Purchase Orders (Blanket P.O.s or Contracts) to those responsible Bidders whose Quotes, conforming to this Bid Solicitation are most advantageous to the State, price and other factors considered. *Ibid*.

Potential Bidders were permitted to submit questions and/or proposed modifications to the Bid Solicitation and State of New Jersey Standard Terms and Conditions through the *NJSTART* eProcurement System by January 5, 2021. Bid Solicitation § 1.3.1 *Electronic Questions and Answer Period*. On March 18, 2021, the Bureau issued Bid Amendment #4 responding to 94 questions received, and which moved the Bid Opening Date to April 29, 2021. The Bureau also issued a revised Bid Solicitation on March 18, 2022.

On April 29, 2021, the Division's Proposal Review Unit opened eleven (11) Quotes received by the submission deadline.¹ After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirements, the Division's Proposal Review Unit forwarded the eleven (11) Quotes to the Bureau for further review. After completing the initial review of the submitted Quotes, the Bureau determined that the Quotes submitted by five (5) of the Bidders were non-responsive to the requirements of the Bid Solicitation. Liberty's Quote was included in this group. The remaining six (6) Quotes were forwarded to the Evaluation Committee for review and evaluation consistent with the requirements of Bid Solicitation Section 6.7 *Evaluation Criteria*.

After completing its evaluation, on April 14, 2022, the Evaluation Committee prepared a report detailing the review of the Quotes submitted by the Bidders and ultimately recommended that Contracts be awarded to Bates White LLC, Daymark Energy Advisors Inc., Mercadien, P.C., Polk & Vine LLC, and Schumaker and Company. With respect to the Quote submitted by Liberty, the April 14, 2022, Evaluation Committee Report noted the following with respect to the determination that Liberty's Quote was non-responsive:

The Liberty Consulting Group – Bid Solicitation Section 4.4.3.3 Overview of Security Plans and Standards requires completion and submission of the State of New Jersey Security Due Diligence Third Party Information Security Questionnaire (Questionnaire). The Vendor {Bidder} provided inadequate information within the Quote concerning information technology security practices. The Quote submission was for the State to determine if it meets the State's information security requirements as outlined in Bid Solicitation Section 3.15. Thus, Liberty is non-responsive for this requirement.

[Evaluation Committee Report, pg. 11.]

Thereafter, the Bureau prepared a Recommendation Report summarizing the procurement, and recommending that a Contract be awarded to same five (5) Bidders based upon the review and evaluation conducted by the Evaluation Committee. See, May 25, 2022, Recommendation Report. With respect to the Quote submitted by Liberty, the Recommendation Report noted:

The Bureau deemed the following Vendors {Bidders} non-responsive due to non-compliance with all the mandatory requirements of the Bid Solicitation...

5. The Liberty Consulting Group (Liberty) – Inadequate response on the State of NJ Third Party Information Security Questionnaire.

[Recommendation Report, pg. 3.]

¹ Quotes were submitted by Bates White LLC, Crowe LLP, Daymark Energy Advisors, Inc., Manpower Group Public Sector, Inc., Mercadien, P.C., Polk & Vine LLC, Raymond Saleeby LLC, Safe Management Consultants, Schumaker and Company, Silverpoint Consulting, and The Liberty Consulting Group.

On June 7, 2022, the Bureau issued the NOI advising all Bidders of the State's intent to award a Contracts to Bates White LLC, Daymark Energy Advisors Inc., Mercadien, P.C., Polk & Vine LLC, and Schumaker and Company.

On June 21, 2022, Liberty submitted a protest letter to the Division. In that protest Liberty: (1) challenged the Bureau's determination that its Quote was non-responsive; and, (2) claimed that, in Liberty's opinion, the Bid Solicitation requirements conflicted with the instructions on the *Security Questionnaire*. By way of remedy Liberty requests that: (1) the Division reverse the determination that Liberty's Quote was non-responsive; or (2) the Division cancel the Bid Solicitation.

In consideration of Liberty's protest, I have reviewed the record of this procurement, including the Bid Solicitation, the submitted Quotes, Liberty's protest, the relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest submitted by Liberty. I set forth herein the Division's final agency decision.

The New Jersey Courts have long recognized that the purpose 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). 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 Division's administrative regulations that govern the advertised procurement process establish certain requirements that must be met in order for a Quote to be accepted. Those regulations provide in relevant part that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal shall² conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:
 - ...
 - 4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), *emphasis added*.]

The subject procurement was comprised of the Bid Solicitation, other documents and mandatory forms which were specifically addressed in Bid Solicitation § 4.0 *Quote Preparation and Submission – Requirements of the Vendor {Bidder}*. With regard to the *Security Questionnaire*, the Bid Solicitation stated in pertinent part:

² "Shall or Must – Denotes that which a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a Quote {Proposal} as non-responsive." Should or May – "Denotes that which is permissible or recommended, not mandatory." Bid Solicitation § 2.2 *General Definitions*.

The Vendor {Bidder} shall complete and submit the State of New Jersey Security Due Diligence Third-Party Information Security Questionnaire (Questionnaire) with its Quote as per Section 4.4. This Questionnaire is designed to provide the State with an overview of the Vendor's {Bidder's} security and privacy controls to meet the State of New Jersey's objectives as outlined and documented in the Statewide Information Security Manual and compliance with the State's security requirements as outlined in Section 3.15.

The State has executed a Confidentiality/Non-Disclosure Agreement which is attached to the Questionnaire. The Vendor {Bidder} must countersign the Confidentiality/Non-Disclosure Agreement and include it with its submitted Questionnaire. No amendments to Confidentiality/Non-Disclosure Agreement are permitted.

To the extent permissible under the New Jersey Open Public Records Act ("OPRA"), N.J.S.A. 47:1A-1.1, the New Jersey common law right to know, and any other lawful document request or subpoena, the completed Questionnaire and supplemental documentation provided by the Vendor {Bidder} will be kept confidential and not shared with the public or other Vendors {Bidders}. Please see Bid Solicitation Section 5.9.

[Bid Solicitation § 4.4.3.3.3 *Overview Of Security Plan And Standards, (emphasis added)*]

The requirements of the Bid Solicitation clearly instructed Bidders that the submission of the completed *Security Questionnaire* was required as part of a Quote. In spite of the mandatory requirement in the Bid Solicitation for a Bidder to complete and submit the *Security Questionnaire* with its Quote, the *Security Questionnaire*, itself, included a conflicting set of instructions. Those instructions read as follows:

All vendors, business partners, and other third-parties, collectively referred to as organizations in this document, are required to implement security and privacy controls that are commensurate with the criticality and sensitivity of the State of New Jersey information systems and information they develop, implement, provide, manage, host, or access. The Third-Party Information Security Questionnaire informs the State as to the degree to which the organization conforms to the State's information security requirements.

Organizations that:

- a) Develop, implement, provide, manage, or host State of New Jersey major systems and applications;
- b) Develop, implement, provide, manage, or host State of New Jersey general support systems; and/or
- c) Have authorized access to State systems production environments, internal networks, and/or sensitive information

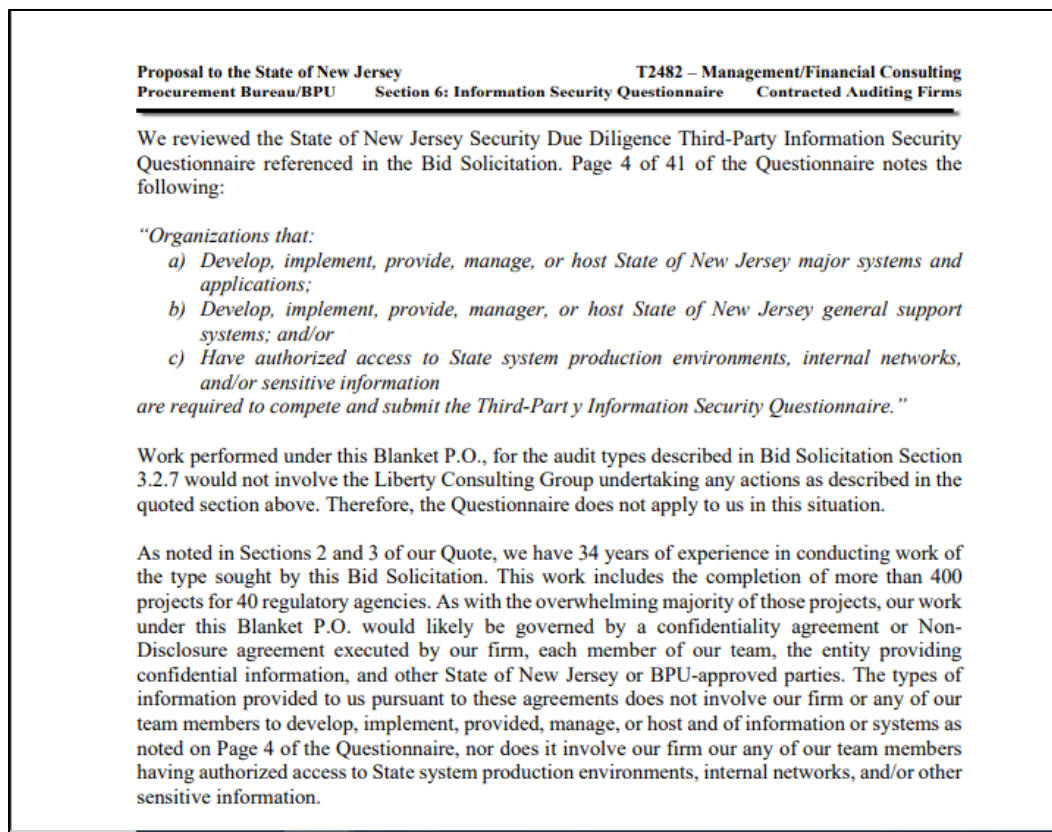
are required to complete and submit the Third-Party Information Security Questionnaire. By submitting a Third-Party Information Security

Questionnaire to the NJCCIC, the submitting individual attests to its truth and accuracy to the best of their knowledge at the time the submission is made.

[Security Questionnaire, pg. 4]

The instructions on the *Security Questionnaire* could reasonably be interpreted in such a way that a Bidder could believe that the *Security Questionnaire* was only required if the scope of work for the Bid Solicitation fell into one of the three groups listed in the instructions above.

Liberty submitted a *Security Questionnaire* as part of its Quote. However, in lieu of providing a complete response to all of the questions and the documentation requested as part of the *Security Questionnaire*, Liberty described why it did not believe the completion of the *Security Questionnaire* was required.³ See screenshot below



As noted above, the Bureau determined that Liberty’s lack of a complete response to the *Security Questionnaire* was a deviation from the requirement in the Bid Solicitation that Bidders complete and submit the *Security Questionnaire* in order to demonstrate that they have security and privacy controls in

³ A review of Bid Solicitation § 3.0 *Scope of Work – Requirements of the Vendor {Contractor}* demonstrates that none of the awarded Vendors pursuant to the Bid Solicitation would be required to do any work that meets the criteria in a), b), or c) on Page 4 of the *Security Questionnaire*. Further, as part of its independent review of this procurement, the Hearing Unit has contacted the BPU, which has confirmed that the work contemplated under this Bid Solicitation does not actually fall into any of those three categories.

place to meet the State of New Jersey's objectives as outlined and documented in the Statewide Information Security Manual.

There was, however, a discrepancy between the instructions in Bid Solicitation § 4.4.3.3 and the instructions on the *Security Questionnaire*. Bid Solicitation § 4.4.3.3 stated that it was mandatory for Bidders to complete and submit the *Security Questionnaire*. At the same time, the instructions on the *Security Questionnaire* appear to be discretionary, in that a reader of the instructions might reasonably believe that the *Security Questionnaire* only applies to Bidders who believe that the work that they will be doing for the State falls into one of the following categories:

- a) Develop, implement, provide, manage, or host State of New Jersey major systems and applications;
- b) Develop, implement, provide, manage, or host State of New Jersey general support systems; and/or
- c) Have authorized access to State systems production environments, internal networks, and/or sensitive information

Liberty makes that argument in its protest; that it reviewed the instructions on the *Security Questionnaire* and determined, that based on the scope of work in the Bid Solicitation, that the type of work contemplated by the State did not meet any of the enumerated items in the *Security Questionnaire*. Thus, Liberty believed, it did not need to complete the *Security Questionnaire* in any greater detail. Liberty stated the same in its protest, specifically that:

The Liberty Consulting Group reviewed the Questionnaire and determined that none of the circumstances applied, thus it was not required to complete and submit the Questionnaire. In its proposal, The Liberty Consulting Group explained that the Questionnaire did not apply and provided its rationale for this conclusion in our proposal submission (See The Liberty Consulting Group – Section 6 Final from that submission).⁴

[Liberty Protest, Pg. 2]

Liberty further wrote in its protest:

The preparation of our proposal understood the need to address the State of New Jersey Security Due Diligence Third Party Information Security Questionnaire (Questionnaire). We examined the form carefully and

⁴ In further support of Liberty's argument that there was a conflict between the Bid Solicitation requirements and the *Security Questionnaire* instructions, it should be noted that two other Vendor(s) {Bidder(s)}, Silverpoint Consulting LLC (Silverpoint) and SAGE Management Consultants, LLC (SAGE), both submitted incomplete versions of the *Security Questionnaire* with their Quotes that contained similar responses to the one that Liberty submitted. Silverpoint stated, "Work anticipated under this procurement does not involve any development, implementation, provision, management, hosting, or access to State of New Jersey information systems or access to any non-public State of New Jersey information." (Silverpoint Security Questionnaire, Pg. 9). Similarly, SAGE wrote, "SAGE does not have access to State systems production environments, internal networks, and/or sensitive information." (SAGE, Security Questionnaire, Pg. 9) The Bureau also determined that, based on Silverpoint and SAGE's submitted *Security Questionnaires*, that both Silverpoint and Sage's Quotes were non-responsive to the requirements of the Bid Solicitation.

completely... We believed in good faith after reviewing the form to which the Bid Solicitation directed us that only organizations engaged in any of the three circumstances “are required to complete and submit the Third Party Information Security Questionnaire.” ...Our proposal made clear (see *The Liberty Consulting Group – Section 6 Final*) that our reasons for not completing the form were that it was not required.

[Liberty Protest, Pg. 4]

The New Jersey Supreme Court has held that in all publicly procured contracts the “conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition.” *Hillside Twp. v. Sternin*, 25 N.J. 317, 32 (1957). The Court further explained: “Every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders.” *Id.* at 322.

Here, the Bid Solicitation instructions and the *Security Questionnaire* instructions conflicted with one another and resulted in conditions and specifications being unclear to interested Bidder(s), which was demonstrated by the Quotes that were submitted by Liberty, as well as Silverpoint and SAGE. Specifically, the instructions in the *Security Questionnaire* could lead a reasonable reader to believe that completion of the *Security Questionnaire*, was up to the discretion of the Bidder, based on the type of work that the Bidder believed that the Bid Solicitation required.

To allow the NOI to be upheld would validate a scenario where Bidder(s) submitted Quotes based on conflicting requirements within the Bid Solicitation documents and forms, contrary to the clear guidance of the Court in *Hillside*. Based upon the foregoing, I have no choice but to rescind the Bureau’s Notice of Intent to Award and remand this back to the Bureau for cancellation. If so desired by BPU, these services may be re-procured. This is my final agency decision.

Thank you for your company’s interest in doing business with the State of New Jersey and for registering your business with [NJSTART](http://www.njstart.gov) at www.njstart.gov, the State of New Jersey’s eProcurement system. I encourage you to log into [NJSTART](http://www.njstart.gov) 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.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD: TCR

c: R. Reagan
K. Popso
R. Pavia