



State of New Jersey

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March 17, 2017

Via Email [dbayha@backthruthefuture.com] and USPS Regular Mail

Daniel F. Bayha, Vice President/CFO
Back Thru the Future
1 Park Drive, Suite 9
Franklin, NJ 07416

Re: Protest of Notice of Intent to Award
RFP# 16-X-23557: Off-Site Media Storage, Handling, Transportation and Destruction

Dear Mr. Bayha:

This letter is in response to your correspondence of November 23, 2016, to the Division of Purchase and Property (Division) on behalf of Back Thru the Future (Back) in which Back protests the November 15, 2016 Notice of Intent to Award (NOI) a contract to Recall Corporation (Recall) for solicitation #16-X-23557: Off-Site Media Storage, Handling, Transportation and Destruction. Back alleges that it should have been awarded the contract because it proposed lower prices for the requested services and because its competitor's proposal did not conform to the bid specifications. Back Protest, p. 2-3.

I have reviewed the record of this procurement, including the Request for Proposals and related documents, the applicable statutes, regulations, and case law and the proposals submitted. 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 Back's protest.

By way of background, the subject Request for Proposal (RFP) was issued on May 28, 2015, by the Procurement Bureau (Bureau) on behalf of various using agencies to solicit proposals to engage a contractor for off-site media storage, handling, transportation and destruction as the need arises. RFP § 1.1 *Purpose and Intent*. It is the intent of the Division to award up to two contracts, one contract for storage, handling and transportation services and one contract for destruction services to the responsible bidder(s) whose proposal(s), conforming to the RFP, is most advantageous to the State, price and other factors considered. On August 25, 2015, two proposals received by the submission deadline were opened by the Proposal Review Unit. Both proposals were forwarded to the Bureau for review and evaluation consistent with the criteria set forth in the RFP § 6.7 *Evaluation Criteria*. Based upon that evaluation, on November 15, 2016, the Bureau issued the NOI advising the bidders that it was the State's intent to award a contract to Recall.

On November 23, 2016, Back submitted its protest to the Division alleging: (1) that it did not receive a clarification request from the Bureau regarding its submitted price sheet; (2) that while it submitted an "outdated" State of New Jersey price sheet, all of the required pricing was provided; (3) it submitted lower pricing than its competitor for the requested services; (4) Recall was not NAID certified at the time of proposal opening; (5) Recall does not have the required NJDEP Class D permit; (6) Recall did not submit a proposal for "Additional Unspecified Services" as required by the RFP; and (7) Recall is not registered

as a small business with the State of New Jersey. Based upon its submission of “better pricing and the failure [of its] competitor to meet all required bid specifications” Back requests that it be awarded the data destruction portion of the contract.

A. Back Thru the Future’s Price Sheet Materially Deviated from the Requirements of the RFP.

First, Back alleges that its proposal should not have been rejected based upon its failure to use the exact format of the State’s pricing sheet. Back states:

Rejection of a proposal for failure to comply with prerequisites i.e. failure to use the required price sheet and failure to promptly respond to a written clarification request.

We attest to never have seen (sic) the specific clarification request and submit evidence of having promptly replied to the only clarification request we received.

We further assert that the pricing form submitted while being out of date is a NJ State procurement price sheet developed for this specific procurement and all required pricing for all price lines were submitted. We understand that it created extra work for a price comparison analysis but it was not a material breach.

[Back Protest, p. 2.]

With respect to Back’s allegation that it did not receive a clarification request related to its submitted price sheet, the Bureau has advised that it did not send Back a clarification related to its price sheet. Rather, as noted in the Committee Report:

Letters were sent to each Bidder for further clarification on their responses to specific RFP requirements. A review of the price proposal from [Back] reveals that it revised the State’s price sheet by adding a column, changing the column headings, changing the price line descriptions and adding prices lines not requested by the State. This deficiency could not be cured through a clarification request. The bid response from [Back] was deemed non-responsive and was subsequently removed [from] further evaluation.

[Committee Report, p. 6, *emphasis added.*]

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 Vale, supra, 127 N.J. at 222.

Here, the RFP and price sheet required that a bidder submitting a proposal for destruction services submit pricing for the services listed in the Column A of the table below. Back however submitted a pricing proposal for the services listed in Column B of the table below:

Column A RFP Requirements	Column B Back's Proposal
Destruction Services for Cell Phone/Media Devices/Tablets – All inclusive price for the pickup tracking, destruction and certification	Destruction Services for Cell Phone/Media Devices/PDAs – All inclusive price of the pickup, tracking, secure containers, destruction and certification
Destruction Services for Cartridge Tapes, Audio and Video Tapes– All inclusive price for the pickup, tracking, destruction and certification	Destruction Services for Data Storage Media (not including hard drives) – All inclusive price of the pickup, tracking, secure containers, destruction and certification
Destruction Services for CD's and DVD's – All inclusive price for the pickup, tracking, destruction and certification	
Destruction Services for Computer Hard Drives and Solid State Hard Drives already removed from devices – All inclusive price for the pickup, tracking, destruction and certification	Destruction Services for Computer Hard Drives, Hard Drives already removed from multi-function print/copy/scan/fax devices and solid state storage devices – All inclusive price for the pickup, tracking, secure containers, destruction and certification
Percentage Discount from cited price list for all other goods and services not listed	Percentage Discount from cited price list for all services not listed
	Removal of Hard Drives from Computers with S/N inventory and secure contained manifest
	Misc E-waste removal and DEP compliant recycling
	Transport of Computer Equipment to Boss Warehouse in conjunction with destruction event
	Annual Scheduled Destruction Events

RFP § 4.4.1.6 *Pricing* states “the Bidder must submit its pricing on the State supplied Price Sheet/ Schedule and supply any additional pricing information as directed in RFP Section 4.4.5.” *Emphasis added.* RFP § 4.4.5 *Price Schedule/Sheet* states in pertinent part that “the Bidder must submit its pricing using the format set forth in the State-supplied price sheet/schedule(s) accompanying this RFP. Failure to submit all

information required will result in the proposal being considered non-responsive.” *Emphasis added.* Further, with respect to the evaluation of the proposals received, RFP § 6.7.2 *Bidder’s Price Schedule* states “for evaluation purposes, Bidders will be ranked according to the total proposal price located on the Price Sheet/Schedule accompanying this RFP.”

In response to the protest, the Bureau noted that Back’s submitted price sheet deviated from the requested price sheet such that its proposal did not constitute a full bid and therefore its proposal was deemed non-responsive. Moreover, the Bureau advises that Back did not submit an “out dated” State price sheet; rather, Back altered the State’s price sheet in such a manner that the Bureau could not compare Back’s pricing proposal to that submitted by the other bidder and what was required by the RFP.¹

The Hearing Unit’s review of Back’s proposal confirms the Bureau’s conclusion. Back’s submitted price sheet deviated from the requested price sheet such that its proposal did not offer the categories/description of services sought by the RFP. While the services listed in Column B above (Back’s proposal) are similar to those listed in Column A above (RFP requirements), they are not identical. For example, the RFP required destruction Services for CD’s and DVD’s, Back did not submit a proposal for this service.

Back’s failure to submit pricing for the services sought by the RFP results in a material deviation from the requirements of the RFP, rendering its proposal non-responsive. While a bidder could submit its pricing using a different format for the price sheet than the one supplied by the State, the price proposal must conform to requirements of the RFP such that the Bureau would be in a position to evaluate the proposal against the requirements of the RFP in the same manner that all other proposals received would be evaluated. Back’s proposal submission did not include the same requested categories/description of services sought by the RFP, but rather included other categories/description of services not sought by the RFP. If the State were to allow this deviation in the pricing proposal, the State would have no assurance that that contract would be entered into, performed and guaranteed according to its specified requirements. Moreover, allowing the deviation places Back in a position of advantage over other bidders who may not have submitted a proposal because they could not offer the categories/description of services sought by the RFP. Because Back’s deviation is material, its proposal is non-conforming and a non-conforming bid is no bid at all. River Vale, supra, 127 N.J. at 222. Back is therefore ineligible for a contract award.

B. Recall was Not Certified by the National Association of Information Destruction at the time of Proposal Opening.

Second, Back alleges that the intended awardee, Recall, is not National Association of Information Destruction (NAID) certified as required by the RFP. RFP § 3.21 *Destruction Services*, requires, among other things, that “The Contractor shall be National Association of Information Destruction (NAID) certified.” RFP § 4.4.3 *Technical Proposal* make this a bidder requirement by stating that “the Bidder must provide proof of a National Association of Information Destruction (NAID) certification.” *Emphasis added.*

NAID is an “international trade association for companies providing information destruction services...NAID’s mission is promote the information destruction industry and the standards and ethics of its member companies.” See, <http://www.naidonline.org/nitf/en/about/mission.html>. Membership in NAID is open “those providing information destruction services to consumers.” See, <http://www.naidonline.org/nitf/en/pmem/membership/providers.html>.

To become a member, a company must complete a 2 page application identifying the company’s physical location, the type of information destruction services performed, whether other not the company

¹ In connection with the Hearing Unit’s review of this protest, a review of the price sheets associated with this procurement, as well as prior procurements for the Off-Site Media Storage, Handling, Transportation and Destruction contract did not reveal the price sheet submitted by Back.

owns/leases its equipment, and indicate its agreement with the membership terms. See, <http://www.naidonline.org/nitl/en/potential-members.html>. The completed form is submitted to NAID with the membership fee.

NAID certification however, “establishes standards for secure destruction process including areas in security, employee screening, operational destruction process and insurance.” See, http://www.naidonline.org/forms/cert/28_cert-program-us.pdf.

The NAID AAA Certification program is a voluntary program for NAID member companies providing information destruction services. Through the program, NAID members will be audited for mobile and/or plant-based operations in paper or printed media, micromedia, computer hard drive destruction, and or computer hard drive sanitization. Under this program, the certification application and associated fees cover only individual locations. If a NAID member operated in multiple locations, each location must pass the audit to be certified. NAID members who received certification must specify the location certified in the company literature when referencing the NAID certification program.

[See, <http://www.naidonline.org/nitl/en/cert/history-purpose.html>, *emphasis added.*]

The certification program “verifies the qualifications of certified information destruction providers through a comprehensive scheduled and unannounced audit program.” Ibid. The application for certification is 14 pages and requires in part that the company (1) identify its physical location; (2) describe its operations; (3) describe employee access to records; (4) perform criminal records searches; (5) perform employee drug screening; (6) have written policies and procedures for drivers and employees performing destruction services; (7) have a written incident response plan; (8) employees are trained annually to comply with the NAID certification requirements; (9) have liability insurance; (10) identify the owners/partners/officers and employees of the company indicating who among them has access to documents; and, (11) list destruction vehicles and equipment. The cost for certification ranges from \$775-\$1075 depending on the type of certification sought. See, http://www.naidonline.org/forms/cert/28_cert-program-us.pdf. “Once a completed application is received an auditor is assigned to perform an initial audit. All audits are performed by security professionals with the Certified Protection Professional (CPP) accreditation issued by the American Society for Industrial Security.” See, http://www.naidonline.org/forms/cert/28_cert-program-us.pdf.

Recall’s proposal stated that it “holds numerous professional memberships and partnerships, including: Member of the National Association for Information Destruction (NAID).” See, Recall’s Proposal, p. 13, *emphasis added*. Nowhere in the proposal did Recall indicate that it was certified by NAID to perform destruction services, nor did it submit a copy of its NAID certification. In its proposal, Recall stated that “[o]ur data protection facility is located in New Brunswick, New Jersey, and meets all requirements in accordance with N.J.A.C. 15:3-6, Storage of Public Records.” See, Recall’s Proposal, p. 2. Recall further provided detailed information regarding the size, storage capacity, number of employees and the safety and security measures of the building.² See, Recall’s Proposal, p. 2-3.

In order to ascertain the intent of Recall’s proposal response with respect to NAID certification, on February 3, 2017, the Hearing Unit wrote to Recall providing it with the opportunity to address the protest points raised by Back. Specifically, the Hearing Unit requested that Recall address of the issues of NAID certification. A response was requested by February 8, 2017. On February 10, 2017, the Hearing Unit

² Recall’s New Brunswick facility is located at 24 Van Dyke Avenue, New Brunswick, NJ 08901. Recall Proposal, p. 17.

contacted Recall to determine whether or not Recall intended to respond to the protest. To date, no response has been received from Recall.

On February 10, 2017, the Hearing Unit also contacted NAID to inquire whether Recall was certified, at the time of proposal opening, to provide information destruction services. On February 13, 2017, NAID advised that Recall's facility located in Norcross, GA was NAID certified to provide document and media destruction on the proposal opening date of August 25, 2015.³ On February 15, 2017, NAID indicated that Recall's facility in New Brunswick was not NAID certified to provide document and media destruction services as of the proposal opening date.

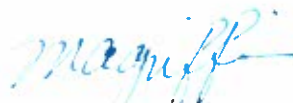
As noted above, NAID certification is granted to a specific location. See, <http://www.naidonline.org/nit/en/cert/history-purpose.html>. Recall's New Brunswick facility, where Recall's proposal indicates that the documents destruction services would take place, was not NAID certified at the time of proposal opening.

Here, the first prong of materiality under the River Vale test is met because Recall's failure to be NAID certified deprives the State of assurance that the contract will be entered into, performed and guaranteed in accordance with the RFP requirements. River Vale, supra, 127 N.J. at 216. Specifically there is no assurance that the information destruction services would be performed by a facility certified as performing the information destruction in accordance with established standards for secure destruction processes in the areas of security, employee screening, operational destruction process and insurance as required by the RFP. River Vale, supra, 127 N.J. at 216. Moreover, allowing the deviation places Recall in a position of advantage over other bidders who might have submitted a proposal for the project had they known they could avoid the time an expense of becoming NAID certified, and therefore undermines the common standard of competition. Ibid. Because Recall's deviation is material, its proposal is non-conforming and a non-conforming bid is no bid at all. River Vale, supra, 127 N.J. at 222. Recall is therefore ineligible for a contract award. I need not reach the second prong of River Vale.

In light of the finding set forth above I need not address the remaining protest issues raised by Back. Based upon the foregoing related to the proposals submitted by Back and Recall, I direct the Bureau to rescind the November 15, 2016 NOI and cancel this procurement. The Bureau should reprocur the services as appropriate. This is my final agency decision with respect to the protest submitted by Back.

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

Sincerely,



Maurice A. Griffin
Chief Hearing Officer

MAG: RUD

c: P. MacMeekin
J. McGowan
G. Buddie

³ Recall's Signatory Pages identifies a facility located at 180 Technology Parkway, Norcross, GA.