State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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March 14, 2016

Via Email [xtown10@aol.com] and Regular Mail

Leonard Misuraca, President
Crosstown Plumbing Supply, Inc.
196 South Grove Street
East Orange, NJ 07018

RE: Protest of Award of Contract
Solicitation # 15-X-23874/T3027
Plumbing and Hearing Supplies/Equipment – Statewide

Dear Mr. Misuraca:

This letter is in response to your correspondence dated December 10, 2015, on behalf of Crosstown Plumbing Supply, Inc. (Crosstown) to the Hearing Unit of the Division of Purchase Property (Division). In that letter, Crosstown protests the award of certain line items for Solicitation #15-X-23874/T3027: Plumbing & Heating Supplies/Equipment – Statewide.

By way of background, on February 17, 2015 the Division's Procurement Bureau (Bureau) issued a Request for Proposals (RFP) on behalf of statewide using agencies to solicit proposals for plumbing and heating equipment and supplies. Thirteen proposals were received by the proposal opening date of March 27, 2015 at 2:00 p.m. Crosstown submitted a proposal for the following line items for the Central Region which encompasses Hunterdon, Mercer, Middlesex, Monmouth and Ocean Counties. (RFP § 3.12 *Regional Breakdown*).

PRICE LINES	COMMODITY DESCRIPTION	BRAND	DISCOUNT
00001-00006	Vitreous China Toilet/Bidet/Urinal	Gerber	40%
00007-00012	Vitreous China Tank/Tank Lid	Gerber	42%
00013-00018	Acrylic/Vitreous China Bowl	Kohler	41%
00013-00018	Acrylic/Vitreous China Bowl	Gerber	41%
00019-00025	Shwr Drs/Misc Tlt, Tnk, Bwl, Bdt & Urnl	Gerber	41%
00036-00040	Acrylic/Plastic Kitchen Sink	Swan	40%
00044-00049	Mop Sinks & Laundry Sinks	Swan	40%
00081-00087	Ball Cocks	Fluidmaster	42%
00097-00101	Faucet Parts-Lvrs, Hdls, Stms, Dvrtr, Aeratr	Delta	42%
00097-00101	Faucet Parts-Lvrs, Hdls, Stms, Dvrtr, Aeratr	Moen	40%
00102-00105	Plbg Brass-Fcts, Accy trim, Flgs, Fillers	Delta	40%
00102-00105	Plbg Brass-Fcts, Accy trim, Flgs, Fillers	Moen	35%

00106-00109	Specialties- Faucets	Delta	40%
00106-00109	Specialties- Faucets	Moen	35%
00113-00120	Tubular Plastic-Waste, Overflows, Stops	Gerber	42%
00130-00132	Hot Water Dispensers & Parts	Watts	35%
00136-00138	Accessories – Storage Tanks	Amtrol	45%
00143-00147	Electrical/Residential Water Heaters	Slate/State[1]	20%
00169-00172	Radiation/Baseboard & Accessories	Hydrotherm	45%
00193-00201	Hydronic Specialties, Backflow Preventers	Watts	25%
00202-00205	Switches, Gauges, Regulators, Thermometers	Conbraco	30%
00278-00280	Steel Pipe – Domestic	Steel Pipe Continuous Weld	50%
00278-00280	Steel Pipe – Domestic	Steel Pipe Seamless	50%
00281-00282	Steel Pipe – Import	Steel Pipe Seamless	50%
00281-00282	Steel Pipe – Import	Steel Pipe Elect Rst Weld	50%
00290-00292	Copper TTubing (DWV)	Cerro	45%
00293-00295	Copper Tubing (Pressure)	Cerro	45%
00296-00298	Copper Refrig Tubing, ACR, OXY-MED	Cambridge	45%
00363-00364	Copper Fittings (Pressure/Wrot)	Elkhart Products/Jangwoo[1]	60%
00509-00510	Ice Maker Valves, Saddle Valves	Watts	25%
00523-00525	Bronze Bf Prvntr, dbl/Dual Chk Vlv Assy	Watts	25%
00531-00533	Bfp & Dbl/Du Ck Vlv Assy Parts & Accy	Watts	25%
00534-00538	Valve: Ctrl/Circ/Bl/Flck/Blrfd/Purge/Sht/O	B & G	30%
00539-00541	Air Valves	Watts	30%
00542-00544	T&P Valves	Conbraco	30%
00542-00544	T&P Valves	Watts	25%
00545-00546	Vlv: Presrlf/Prv/Prdv/Sftyrlf/Tempering	Conbraco	25%
00556-00560	Heating/Hyrdronic Valve Parts & Accy	Watts	25%
00571-00574	Circulating Pumps & Parts & Accessories	Armstrong	25%
00571-00574	Circulating Pumps & Parts & Accessories	B&G	25%
00585-00588	Hoses	Watts	25%
00603-00605	Solder/Fluxes	Utility	40%

After conducting its intake review of the proposals submitted, the Proposal Review Unit issued two Notices of Proposal Rejection. The Notice of Proposal Rejection issued to Crosstown stated "[r]ejection of the proposal was caused by non-compliance with the following requirement(s): … 9. Price alteration not initialed for line number(s): 7, 13, 19, 97, 113." RFP Section 1.46 *Price Alteration In Hard Copy Proposals* states "[p]roposal prices must be typed or written in ink. Any price change (including "white-outs") must be initialed. Failure to initial price changes **shall** preclude a contract award from being made to the bidder." (Emphasis added.)[2] The Notice of Proposal Rejection advised that a protest could be filed in accordance with the Division's administrative regulations available at N.J.A.C. 17:12-3.3. Crosstown did not file a protest based upon the rejected price lines.

[1] Crosstown proposed a brand not specified in the RFP or the price sheet.

[2] **Shall or Must** – Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive. (RFP § 2.1 *General Definitions*)

The Bureau thereafter conducted its evaluation of 11 proposals but did not include Crosstown's remaining price lines in that evaluation. During the evaluation the Bureau determined that five additional proposals were non-responsive because those companies were not registered as small businesses with the New Jersey Division of Revenue and Enterprise Services as required by RFP Section 4.4.1.4 *Small Business Registration for Set-Aside Contracts.*[3] On May 11, 2015 after completing the review of the remaining six proposals, the Bureau issued a request for a Best and Final Offer pursuant to RFP Section 6.7 *Negotiation and Best and Final Offer (BAFO).*

On June 22, 2015 the Bureau issued the NOI. On June 25, 2015 the Bureau issued a supplemental NOI clarifying the lines to be awarded in the Southern Region. The June 25, 2015 NOI specified that the protest period was extended to July 9, 2015. While both NOI's were sent to Crosstown, neither the June 22, 2015 nor the June 25, 2015 NOI listed Crosstown as an intended awardee[4]. After the issuance of the Division's final agency decisions on the protests received, the contract awards were made.[5]

On November 4, 2015 Crosstown contacted the Bureau to dispute the contract award. The Bureau, thereafter, notified the Division's Hearing Unit of Crosstown's dispute of the contract award. Crosstown was then contacted by the Hearing Unit to determine the intent of Crosstown's communication to the Bureau regarding the award. In response to the Hearing Unit's inquiry, on December 10, 2015 Crosstown submitted a formal protest to the Hearing Unit. In its protest letter, Crosstown states in part:

> We submitted our bid on March 24, 2015. We were never informed that our bid was eliminated from the bidding process. The only correspondence we received was an email (copy enclosed-2) from [the Procurement Specialist], on August 28, 2015 stating that the DPP was invoking a transition extension through October 30, 2015. [the Procurement Specialist] also sent a letter (copy enclosed-3) regarding the same. In addition, she stated that new bids were still being evaluated. There was no reason for us to believe that my bid was invalid.
>
> On or about November 6, 2015, we were informed by one of our customers that our contract was no longer active. We called [the Procurement Specialist] who stated that our bid was determined to be invalid for not having initials on some changes to the proposal. She stated that a letter was sent in June, 2015 (copy enclosed-4) confirming to whom the contract was awarded and that we had an opportunity to protest this decision. We never received that letter, therefore, did not have the opportunity to protest. Had we received the letter, we would have corrected this simple error and resubmitted our proposal.

In consideration of this protest, I have reviewed the record of this procurement, along with 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 Crosstown.

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[3] In connection with the review of this protest, the Hearing Unit verified that Crosstown is registered as a Small Business with the State of New Jersey and was so registered at the time of its proposal submission.

[4] The Bureau's records reveal that both the June 22, 2015 and June 25, 2015 NOIs were delivered to the email address provided by Crosstown with its proposal - xtown10@aol.com.

[5] The Contract effective date is October 31, 2015 through October 30, 2018.

At the outset, I note that Crosstown's protest was filed out of time. The Division's Administrative regulations provide:

> [a] bidder, having submitted a proposal in response to an advertised RFP and finding cause to protest the award decision. . . shall make written request to the Director, setting forth, in detail, the specific grounds for challenging the rejection of its proposal or for challenging the scheduled contract award, as applicable. The protest shall be filed within 10 business days following the bidder's receipt of written notification that its proposal is non-responsive or of notice of the intent to award, as applicable, or, pursuant to (e) below, prior to the deadline specified in the Division's notice of intent to award communication to the bidder, whichever date is earlier.
>
> [N.J.A.C. 17:12-3.3(b) (emphasis added).]

As noted above, the Bureau issued the NOI related to this RFP on June 22, 2015; and on June 25, 2015 issued a supplemental NOI clarifying the lines to be awarded in the Southern Region. The June 25, 2015 NOI advised that the protest period ended on July 9, 2015. Crosstown did not contact the Division until November 2015 and did not file a protest until December 2015. The Division is not compelled to accept or consider Crosstown's untimely protest as "[t]he Director may disregard any protest of award filed after the 10 day protest period and proceed with the award of contract(s)." N.J.A.C. 17:12-3.3(b)(3). However, for the reasons set forth below, I will address the merits of the protest here.

In connection with the Hearing Unit's consideration of this protest, a review of the Proposal Review Unit's Notice of Proposal Rejection was made. During that review it was determined that Crosstown's proposal should not have been rejected in its entirety, rather only those price lines which contained price alterations which had not been initialed should have been rejected. The remainder of Crosstown's proposal should have been evaluated with the other proposals received in response to the subject RFP.

In its protest, Crosstown disputes the contract award for all 42 price lines for which it submitted a proposal. With respect to price lines 7, 13, 19, 97 and 113 for which the Proposal Review Unit issued a Notice of Proposal Rejection, RFP Section 1.46 *Price Alteration in Hard Copy Proposals* states "[p]roposal prices must be typed or written in ink. Any price change (including "white-outs") **must** be initialed. Failure to initial price changes **shall** preclude a contract award from being made to the bidder." (Emphasis added.) Specifically, the following price lines proposed by Crosstown were rejected by the Proposal Review Unit for containing price alterations that were not initialed:

Plumbing and Heating Supplies/Equipment - Statewide Price Lines CENTRAL REGION

Company Name:_____
Solicitation #: 15-X-23874

PRICE LINES	TRA-SER PRO #	COMMODITY DESCRIPTION	BRAND	DISCOUNT
00007-00012	007P	Vitreous China Tank/Tank Lid	Gerber	42%
00013-00018	008P	Acrylic/Vitreous China Bowl	Gerber	41%
00019-00025	018P	Shwr Drs/Misc Tlt, Tnk, Bwl, Bdt & Urnl	Gerber	41%
00097-00101	054P	Faucet Parts-Lvrs, Hdls, Stms, Dvrtr, Aeratr	Delta	42%
00097-00101	054P	Faucet Parts-Lvrs, Hdls, Stms, Dvrtr, Aeratr	Moen	40%
00113-00120	058P	Tubular Plastic-Waste, Overflows, Stops	Gerber	42%

I concur with the Proposal Review Unit's rejection of these price lines and conclude that Crosstown is precluded from a contract award for these price lines. In addition, I note that price line 00539-00541 (see image below) contained a similar price alteration which was not initialed.

Plumbing and Heating Supplies/Equipment - Statewide Price Lines CENTRAL REGION

Company Name:_____
Solicitation #: 15-X-23874

PRICE LINES	TRA-SER PRO #	COMMODITY DESCRIPTION	BRAND	DISCOUNT
00539-00541	692P	Air Valves	Watts	30%

As previously noted, RFP Section 1.46 *Price Alteration in Hard Copy Proposals* precludes a contract award to Crosstown for this price line as Crosstown similarly did not initial this price line alteration.

With respect to the remaining price lines for which Crosstown submitted a proposal, as to price lines 00143-00147 and 00363-00364, Crosstown did not submit a proposal for any of the brand names specified for these line items. For price line 00143-00147, the brands listed for which a proposal could be submitted were American, Amtrol, A.O. Smith, Bradford-White and Slate; Crosstown proposed "State" in place of Slate. For price line 00363-00364, the brands listed for which a proposal could be submitted were Elkhart Products and Muller; Crosstown proposed "Jangwoo Equal" in place of Elkhart Products.

Plumbing and Heating Supplies/Equipment - Statewide Price Lines CENTRAL REGION

Company Name:_____
Solicitation #: 15-X-23874

PRICE LINES	TRA-SER PRO #	COMMODITY DESCRIPTION	BRAND	DISCOUNT
00143-00147	123P	Electrical/Residential Water Heaters	State	20%
00363-00364	544P	Copper Fittings (Pressure/Wrot): Jangwoo Equal	Elkhart Products	60%

All products sought by the RFP are listed on the TRA-SER Pro Plumbing & Mechanical database (TRA-SER), meet the Energy Star specifications for energy efficiency and must be domestically produced. (RFP § 3.1 *Energy Star Requirements*, RFP § 3.3 *TRA-SER Pro*, RFP § 3.4.1 *Domestic Products*.) While this RFP did not specifically seek proposals for equivalent or alternative products, Crosstown did not submit any information with its proposal demonstrating that its proposed alternate brand products were equivalent to the brand name products specified in the price lines. Allowing Crosstown to submit a proposal for products not sought by the RFP would place it in a position of advantage over other bidders who submitted proposals that conformed to the RFP requirements. Accordingly, Crosstown's proposal for price lines 00143-00147 and 00363-00364 is non-responsive.

As to the remaining price lines for which Crosstown submitted a proposal for the specific products sought by the RFP, for 18 of those price lines Crosstown would have been eligible for a contract award based upon its original proposal pricing. For the other 16 price lines, based upon its original proposal pricing, Crosstown would not have been eligible for consideration for a contract award; however, because Crosstown's proposal was not evaluated, it was not afforded an opportunity to submit a BAFO as the other responsive bidders were permitted to do.

Additionally, I note that on January 11, 2016 Crosstown wrote the Hearing Unit stating "[m]y protest should be for northern, and central jersey if at all possible, but at worst I prefer northern because that's where we are located." As noted above, Crosstown's proposal was limited to the Central Region. Crosstown did not submit a proposal for the Northern Region. Permitting Crosstown to change its proposal to include the Northern Region, after the bid opening and after contracts have already been awarded would place it in a position of advantage over other bidders and would be contrary to the Appellate Division's reasoning in In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175 where the court held that "[i]n 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).

Accordingly, I direct the Bureau to review Crosstown's proposal for the Central Region, to request a BAFO response, and to award price lines as appropriate. This is my final agency decision with respect to the protest submitted by Crosstown.

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

Sincerely,

Jignasa Desai-McCleary
Director

JDM: RUD

c: G. Olivera
J. Signoretta
W. Higgins