



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. BOX 039

TRENTON, NEW JERSEY 08625-0039
<https://www.njstart.gov>
Telephone (609) 292-4886 / Facsimile (609) 984-2575

ELIZABETH MAHER MUOIO
State Treasurer

MAURICE A. GRIFFIN
Acting Director

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

January 5, 2022

Via Electronic Mail Only mmooney@fastenterprises.com, businessteam@fastenterprises.com

Megan Mooney, Esq.
James Harrison
FAST Enterprises, LLC
7229 South Alton Way
Centennial, CO 80112

Re: I/M/O Bid Solicitation 20DPP00441 FAST Enterprises, LLC
Protest of Notice of Intent to Award
T3078 Integrated Tax System

Dear Ms. Mooney and Mr. Harrison:

This final agency decision is in response to your letter dated September 24, 2021, on behalf of FAST Enterprises, LLC (FAST) to the Division of Purchase and Property (Division). In that letter, FAST protests the September 21, 2021, Notice of Intent to Award (NOI) issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation 20DPP00441 – T3078 Integrated Tax System (Bid Solicitation). Specifically, FAST protests the Bureau's determination that its submitted Quote was non-responsive to the requirements of the Bid Solicitation. FAST requests that the NOI be rescinded, and that its Quote be evaluated along with the other Quotes received.

BACKGROUND

By way of background, on November 19, 2019, the Bureau issued the Bid Solicitation on behalf of Department of the Treasury, Division of Taxation (Taxation), Division of Revenue and Enterprise Services (DORES), and the Office of Information Technology (OIT). The purpose of the Bid Solicitation was to solicit Quotes from qualified Bidders to install a Commercial Off-The-Shelf (COTS) Integrated Tax System (ITS) to replace the outdated information technology tax system and infrastructure. The Bid Solicitation directed that the COTS solution should be flexible and allow for: (1) configuration of base COTS software; (2) integration with other COTS products via modular design; and (3) integration with custom components via application software extensions. See Bid Solicitation Section 1.1 *Purpose and Intent*. The State intends to award one Master Blanket Purchase Order (Blanket P.O. or Contract) to that responsible Bidder whose Quote, conforming to the Bid Solicitation is most advantageous to the State, price and other factors considered. *Ibid*.

During the procurement process, prior to the Quote opening date, potential Bidders were permitted to submit questions to the Bureau requesting clarification of, or modification to, the scope of work and/or the terms and conditions of the Bid Solicitation. See Bid Solicitation Section 1.3.1 *Electronic Question*

and Answer Period. Any amendments to the Bid Solicitation resulting from the questions posed would be identified through the posting of a Bid Amendment. Approximately 140 Questions were posed, many of which were submitted by FAST. The Bureau posted Bid Amendment #5 on October 27, 2020 and Bid Amendment #8 on March 5, 2021 each of which responded to questions posed by potential Bidders and each of which was accompanied by posting of a revised Bid Solicitation.

On April 6, 2021, the Division's Proposal Review Unit opened three (3) Quotes received by the submission deadline. After conducting the review of the Quotes received for compliance with mandatory submission requirements set forth in N.J.A.C. 17:12-2.2, the Division's Proposal Review Unit forwarded the Quotes to the Bureau for further review. After completing the initial review of the submitted Quotes, the Bureau determined that the Quotes submitted by ASR Analytics, LLC and FAST were non-responsive to the requirements of the Bid Solicitation. The remaining Quote submitted by Revenue Solutions, Inc. (Revenue Solutions or RSI) was then forwarded to the Evaluation Committee for evaluation consistent with the requirements of the Bid Solicitation Section 6.7 *Evaluation Criteria*. After completing its evaluation, the Evaluation Committee prepared a report detailing the review of the Quote submitted by Revenue Solutions and ultimately recommended that a Contract be awarded to Revenue Solutions. In summary, the Evaluation Committee noted:

[Revenue Solutions] is technically responsive, understood the Bid Solicitation requirements, and its Quote demonstrated that they accurately and efficiently understood the requirements of the Bid Solicitation and are capable of providing the services required. As a result, RSI satisfied all the requirements of the Bid Solicitation and an advantageous offer to the State, price and other factors considered.

[See Evaluation Committee Report, p. 13.]

With respect to the Quote submitted by FAST, the Evaluation Committee Report noted that the Bureau found that the Quote submitted by FAST was non-responsive to the requirements of the Bid Solicitation for the following reasons: (1) FAST submitted additional terms which conflicted with the requirements of the Bid Solicitation; (2) FAST submitted notes with respect to its proposed pricing; (3) FAST impermissibly changed the payment schedule; and (4) FAST stated it wanted to negotiate the Contract terms and conditions. See Evaluation Committee Report, pgs. 4-5.

Thereafter, the Bureau prepared a Recommendation Report summarizing the procurement, and recommending that a Contract be awarded to Revenue Solutions based upon the review and evaluation conducted by the Evaluation Committee. See September 15, 2021, Recommendation Report. On September 21, 2021, the Bureau issued the NOI advising all Bidders of the State's intent to award a Contract to Revenue Solutions.

On September 24, 2021, FAST submitted a protest letter to the Division challenging the Bureau's determination that its Quote was non-responsive. By way of summary, FAST states "[a]ll Bidders were subject to the same terms, conditions, and requirements. FAST agreed to all terms, conditions, and requirements by signing the Offer and Acceptance Page included below. FAST did not include any deviations and was in no way afforded any advantage." More specifically, FAST states that it disagrees that there was any deviation from the requirements of the Bid Solicitation; that its pricing notes were ancillary material and not a deviation; that its submitted payment schedule conformed to the requirements

of the Bid Solicitation; that its sample documents and ancillary terms cannot override any terms of the Bid Solicitation; and, that it did not seek to negotiate the terms and conditions of the Bid Solicitation.¹

On October 14, 2021, counsel for Revenue Solutions wrote to the Division requesting a copy of all Quotes received in response to the Bid Solicitation, the Evaluation Committee Report, and the protest submitted by FAST. With that correspondence, Revenue Solutions stated “RSI has a compelling interest in receiving the above-referenced materials so that it may also evaluate the protest and defend the propriety of its bid and the Notice of Intent to award.” Thereafter, on October 22, 2021, Revenue Solutions submitted a response to the protest requesting that the FAST’s protest be rejected and that the award to Revenue Solutions be affirmed.

In consideration of FAST’s protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quote and protest submitted by FAST, the relevant statutes, regulations, and case law. This review of the record 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.

DISCUSSION

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). .

When evaluating Quotes received, the Division is charged with ensuring that the Contract is awarded to that responsible Bidder whose Quote, conforming to the Bid Solicitation, is most advantageous to the State, price and other factors considered. Bid Solicitation Section 1.1 *Purpose and Intent*. A responsive Quote is a Quote that is deemed by the Division and/or evaluation committee to have adequately addressed all material provisions of a Bid Solicitation’s terms and conditions, specifications, and other requirements. N.J.A.C. 17:12-1.3. A Quote that is not complaint or responsive to the material requirements of the Bid Solicitation shall not be eligible for further consideration for award of a Contract and the bidder offering said Quote shall receive notice of the rejection of its Quote. N.J.A.C. 17:12-2.7(e).

When evaluating a Quote received, if a deviation is found, the question is whether the deviation is material. It is firmly established in New Jersey that material deviations may not be waived. *Twp. of Hillside v. Sternin*, 25 N.J. 317, 324 (1957). In *Meadowbrook Carting Co.*, 138 N.J. at 315, 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*, the court 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*, 127 N.J. Super. at 216. The *River Vale* court set forth a two-part test for determining whether a deviation is material:

¹ The protest submitted did not allege that the Quote submitted by Revenue Solutions or the Evaluation Committee’s review and evaluation of that Quote was in any way flawed or deficient.

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*, 127 N.J. Super. 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.” *On-Line Games*, 279 N.J. Super. at 595 (citing *River Vale*, 127 N.J. Super. at 222).

As noted above, in conducting the initial review of FAST’s Quote, the Bureau determined that the “Additional Terms” submitted by FAST, as shown in the screenshot below, conflicted with the requirements of the Bid Solicitation rendering the Quote non-responsive.

Additional Terms	
GenTax License	FAST has included its standard GenTax License Agreement after this table for the State’s review.
Confidentiality	FAST requests an additional term protecting FAST confidential information and requiring third parties (non-State employees) who need access to FAST’s confidential information to sign a FAST provided NDA.
Limit on Liability	FAST requests an additional term or a clarification to the current limit on liability that the aggregate annual limit includes all actual direct damages caused to the State.
Additional Limit on Damages Related to Data Breaches	FAST requests an additional term or a clarification that damages related to FAST caused data breaches are limited in accordance with the State’s provisions as well as to the extent covered and paid by FAST’s cyber liability insurance policies.
Implementation of Business Requirements	FAST requests a term clarifying the State and FAST’s obligations with respect to the definition of business requirements. FAST proposes the following: Interpretation of Requirements for Implementation into the System. Contractor is not permitted to interpret how any law, legal requirement, ordinance, statute, regulation or business process (“Business Requirements”) is or should be implemented into the System. The State is solely responsible for any damages (problems, issues, costs, loss of goodwill, lost time, etc.) resulting from the System performing in accordance with Business Requirements or other instructions from the State.
Price Notes	FAST has included additional assumptions in its Price Notes that may need to be discussed and incorporated as Additional Terms into any final contract.

[See FAST Quote p. 04.25.]

The Evaluation Committee Report noted that the Bureau concluded,

FAST included several terms in its Quote, that conflict with the Bid Solicitation. Pursuant to Bid Solicitation Section 4.1, conflicting terms are required to be submitted during eQ&A. In addition, in fact, many of the terms at issue were raised during eQ&A and addressed by the State. Further, Bid Solicitation Section 4.1 requires Vendors {Bidders} to “identify and remove its conflicting proposed terms and conditions prior to Quote submission.” (Also, see Bid Amendment 5 dated October 27, 2020, Question # 62). Many of the conflicting terms are material, including but not limited to: limitation of liability, indemnification, warranty, termination, use of Jurisdiction name, entire agreement, precedence, and force majeure. See FAST Quote pp 4.25 – 4.31. Each of the deviations are material and, if accepted by the State, would give FAST an unfair advantage over the other Vendors {Bidders}. As such, this deviation renders FAST’s Quote non-responsive.

[See Evaluation Committee Report, pg. 4.]

With respect to the specific terms listed in FAST’s Additional Terms chart, in the protest FAST asserts that it “submitted all deviations through the electronic question and answer process.” See FAST Protest, p. 3. As shown below, during the Question and Answer period, potential Bidders, including FAST, submitted questions regarding indemnification, limitation of liability and insurance requirements.

BID AMENDMENT #5		
#	Bid Solicitation Section Reference	Question (Bolded) and Answer
79	Section 5.17.1	<p>Vendor is concerned about the limit on liability provision. We cannot put all of our clients at risk by accepting an unusually high limit on liability in one contract. Will the State consider modifying the current limit as proposed below “5.17.1 LIMITATION OF LIABILITY a. The Vendor {Contractor}’s liability to the State for actual, direct damages resulting from the Vendor {Contractor}’s performance or non-performance of, or in any manner related to, this Blanket P.O. for any and all claims that arise during the implementation project, shall be limited in the aggregate to 100% of the fees paid to Vendor {Contractor} during that time period. For any claim that arises during a maintenance and support year, the Vendor (Contractor)’s liability shall be limited to the annual value of the contract during the year the claim arose, except that such limitation of liability shall not apply to the following: i. The Vendor {Contractor}’s indemnification obligations as described in the SSTC Section 4.1; and ii. The Vendor {Contractor}’s breach of its obligations of confidentiality described in Bid Solicitation Section 5.9.1 which are limited separately; and b. The Vendor {Contractor} shall not be liable for consequential or incidental damages. c. The Vendor’s (Contractor) liability for damages related to any data breach or security incident shall be limited to the extent Vendor (Contractor) caused the data breach or security incident up to the amount covered by Vendor’s (Contractor) insurance subject to the limit required herein.”</p> <p>The State does not accept the proposed modification. The State believes that the current figure of 150% is not excessive or unusually high.</p>

BID AMENDMENT #5		
#	Bid Solicitation Section Reference	Question (Bolded) and Answer
80	Section 5.17.1 C	<p>Vendor is concerned that the indemnification obligations related to intellectual property infringement impose too much of a burden on Vendor. Will the State consider modifying the language as follows?</p> <p>“c. Notwithstanding the foregoing, Vendor {Contractor} has no obligation or liability for any claim or suit concerning third party Intellectual Property Rights arising from: (1) the State’s unauthorized combination, operation, or use of a product supplied under this Blanket P.O. with any product, device, or Software not supplied by Vendor {Contractor}; (2) the State’s unauthorized alteration or modification of any product supplied under this Blanket P.O.; (3) the Vendor’s {Contractor’s} compliance with the State’s designs, specifications, requests, or instructions ; or (4) the State’s failure to promptly implement a required update or modification to the product provided by Vendor {Contractor}”;</p> <p>The State does not accept the proposed modification. The language omitted is necessary and appropriate, since the Vendor {Contractor}, upon being informed of the State’s designs or specifications, should have a duty to warn the State if the Vendor {Contractor} knows that following the State’s designs or specifications will result in infringement.</p>

BID AMENDMENT #8		
#	Bid Solicitation Section Reference	Question (Bolded) and Answer
31	Section 5.17.1 Indemnification	<p>We are still concerned that the limit on liability places too much risk on the vendor. Is the State willing to negotiate the limitation on liability after a response is submitted?</p> <p>Under the relevant laws of the State of New Jersey, the State is unable to negotiate material terms of the Blanket P.O. following submittal of the Quotes. Limitation of Liability is a material term.</p>
35	Section 5.17.1 Indemnification (to replace Section 4.1 of the SSTC) (p 148) 4.1.1.ii Limitation of Liability	<p>We request that the State establish a super cap on liability in the event of a breach of confidentiality, so that Vendors are not exposed to unlimited liability, consistent with several recent solicitations from the State in which the State has been agreeable to doing so. The State could set a dollar minimum, such as \$2M, in order to protect itself while still affording Vendors certainty about their liability. The suggested language revision to item iii, consistent with past terms agreed to and accepted by the State in recent similar solicitations, is as follows: The Vendor {Contractor}'s liability for breach of its obligations of confidentiality described in Bid Solicitation Section 5.9.1, shall be limited, in the aggregate, to (i) 200% of the fees paid to Vendor in the 12 months preceding the breach of confidentiality or data breach notification and remediation event, or (ii) \$2,000,000.00, whichever is greater.; and We are open to alternatives that the State believes reasonable along the lines shown here.</p> <p>Please see Bid Solicitation Section 5.17.1 of the T3078 Revised Bid Solicitation 03.05.21.</p>

The majority of the proposed modifications to the terms and conditions of the Bid Solicitation were not accepted. However, where accepted, the revised Bid Solicitation reflected the change. Specifically, the Limitation of Liability provision was amended in response to questions posed by a potential Bidder, and

Bid Solicitation Section 5.17 *Modifications and Changes to the State of NJ Standard Terms and Conditions (SSTCs)* was modified to include the following language:

2. **LIMITATION OF LIABILITY** –Section 4.11 below is hereby added to the State Standard Terms:

4.1.1 LIMITATION OF LIABILITY

a. The Vendor’s {Contractor’s} liability for actual, direct damages resulting from the Vendor’s {Contractor’s} performance or non-performance of, or in any manner related to, the Blanket P.O. for any and all third party claims, shall be limited in the aggregate to 150% of the fees paid by the State during the previous twelve months to Vendor {Contractor} for the products or services giving rise to such damages. Notwithstanding the preceding sentence, in no event shall the limit of liability be less than \$1,000,000. This limitation of liability shall not apply to the following:

- i. The Vendor’s {Contractor’s} indemnification obligations as described in Section 4.1; and
- ii. The Vendor {Contractor’s} breach of its obligations of confidentiality described in Section 5.9 of this Bid Solicitation.

b. Notwithstanding the foregoing exclusions, where a Breach of Security is a direct result of Vendor’s {Contractor’s} breach of its contractual obligation to encrypt Personal Data pursuant to Bid Solicitation Section 3.6.5 (C) or otherwise prevent its release as reasonably determined by the State, the Vendor {Contractor} shall bear the costs associated with (1) the investigation and resolution of the Breach of Security; (2) notifications to individuals, regulators, or others required by federal and state laws or as otherwise agreed to; (3) a credit monitoring service required by state or federal law or as otherwise agreed to; (4) a website or a toll-free number and call center for affected individuals required by federal and state laws — all not to exceed the average per record, per person cost calculated for data breaches in the United States in the most recent Cost of Data Breach Study: Global Analysis published by the Ponemon Institute for the public sector at the time of the Breach of Security; and (5) completing all corrective actions as reasonably determined by Vendor {Contractor} based on root cause of the Breach of Security.

c. The Vendor {Contractor} shall not be liable for punitive, special, indirect, incidental, or consequential damages.

Despite the Bureau’s responses and the changes made to the Bid Solicitation regarding limitation of liability, FAST opted to submit additional / modified terms with its Quote.

Additional Terms	
Additional Limit on Damages Related to Data Breaches	FAST requests an additional term or a clarification that damages related to FAST caused data breaches are limited in accordance with the State’s provisions as well as to the extent covered and paid by FAST’s cyber liability insurance policies.

[See FAST’s Quote, p. 04.25.]

The question here is whether the additional term proposed by FAST was a material deviation which could not be waived, resulting in the Quote being non-responsive.

Looking at FAST's request to limit damages related to data breaches, the Bid Solicitation required that the Contractor fully indemnify the State for damages related to data breaches. The indemnification requested by the State was not limited by the value of the Contractor's insurance policy. Again, FAST's proposed language sought to limit its potential monetary exposure to and the State's ability to be fully indemnified for the performance or non-performance of the Contractor to amount of its cyber breach insurance policy, not the full indemnification sought by the State for damages related to data breaches caused by the Contractor. FAST's proposed modification removes the assurance that the Contract will be performed in accordance with the terms and conditions set forth in the Bid Solicitation. Additionally, allowing FAST to propose alternate terms in its Quote, would place it in a position of advantage over other Bidders who submitted conforming Quotes. Applying the court's analysis set forth in *River Vale*, FAST's proposed term render the Quote non-responsive.

Turning now to FAST's price proposal notes, in the submitted Quote, FAST included a list of statements related to the creation of the proposal pricing. See FAST's Quote pages 04a.1 through 04a.14. In conducting its review of FAST's Quote, the Bureau concluded that:

FAST also included Price Proposal Notes (see Quote pp. 4a.1 – 4a.14.) despite the notice in Bid Solicitation Section 4.4.5.2 State Supplied Price Sheet instructions and on the State Supplied Price Sheet Tab E that such additional information could make its Quote non-responsive. (Also see Bid Amendment 5 dated October 27, 2020, Question #58). Some of the proposal notes conflict and/or raise ambiguities with requirements of the Bid Solicitation. The Bureau noted the following:

FAST Quote, Price Proposal Notes, page 04a.12 states "To the extent that taxpayer data needs to reside in non-production environment, such data (names, addresses, etc.) will not be scrambled." This statement conflicts with Bid Solicitation Section 3.6.5-C - Security:, which states: "Vendor {Contractor} agrees to take appropriate administrative, technical and physical safeguards reasonably designed to protect the security, privacy, confidentiality, and integrity of user information. Vendor {Contractor} shall ensure that Personal Data is secured and encrypted during transmission or at rest." This requirement does not allow for different security standards for different environments. This requirement is material and if accepted by the State, would give FAST an unfair advantage over other Vendors {Bidders}. As such, this deviation renders FAST's Quote non-responsive.

[Evaluation Committee Report, pg. 5.]

In the protest, FAST states that the:

Price Notes were submitted as ancillary material in the Additional Vendor Documents section of its Quote and are not deviations. The Price Notes section provides high level informational and reference material that FAST has accumulated from its experience engaging in similar projects. It is not intended to contain any additional terms or conditions. If a statement was interpreted as an additional term or condition, as with the

first issue, Vendor Sample documents and ancillary material cannot take precedence over any term, condition or requirement of the Bid Solicitation.

By adding this “ancillary material” FAST gave itself the ability to later utilize these terms potentially to the State’s detriment in conflict with the Bid Solicitation requirements. A review of FAST’s Price Proposal Notes reveals several statements, any one of which would render the Quote non-responsive.

With respect to the security required for Personal Data², Bid Solicitation Section 3.6.5 *Privacy* required the following:

Security: Vendor {Contractor} agrees to take appropriate administrative, technical and physical safeguards reasonably designed to protect the security, privacy, confidentiality, and integrity of user information. Vendor {Contractor} shall ensure that Personal Data is secured and encrypted during transmission or at rest.

Further, Bid Solicitation Section 3.3.9.3 *Training Environment* stated in part:

- A. The Vendor {Contractor} shall create a training environment for hands-on use by trainees to become familiar with the ITS. This environment shall contain sufficient software and data to exercise the functional and technical components of the ITS. The Vendor {Contractor} shall refresh the environment as needed to keep it current

² Bid Solicitation Section 2.2 General Definitions defines Personal Data as follows:

The term Personal Data includes (i) “Personal Information” as defined in N.J.S.A. 56:8-161, means an individual’s first name or first initial and last name linked with any one or more of the following data elements: (1) Social Security number, (2) driver’s license number or State identification card number or (3) account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual’s financial account. Dissociated data that, if linked would constitute Personal Information is Personal Information if the means to link the dissociated were accessed in connection with access to the dissociated data. Personal Information shall not include publicly available information that is lawfully made available to the general public from federal, state or local government records, or widely distributed media; and (ii) Data, either alone or in combination with other data, that includes information relating to an individual that identifies the person or entity by name, identifying number, mark or description that can be readily associated with a particular individual and which is not a public record, including but not limited to, Personally Identifiable Information (PII); government-issued identification numbers (e.g., Social Security, driver’s license, passport); Protected Health Information (PHI) as that term is defined in the regulations adopted pursuant to the Health Insurance Portability and Accountability Act of 1996, P.L. No. 104-191 (1996) and found in 45 CFR Parts 160 to 164 and defined below; and Education Records, as that term is defined in the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g.

as project phases are tested and implemented. Any non-production data extracted from production data shall employ masking or other de-identification techniques to protect sensitive data.

And Bid Solicitation Section 3.3.10.11 *Test Data and Other Testing Materials* stated:

- A. The Vendor {Contractor} with assistance from the State shall prepare and load test data to support application software testing. Any non-production data extracted from production data shall employ masking or other de-identification techniques to protect sensitive data. The Vendor {Contractor} shall ensure compliance with Federal and State security requirements for all test data in all environments.

However, in the Price Proposal Notes section of the Quote, FAST stated:

10. To the extent that taxpayer data needs to reside in a non-production environment, *such data (names, addresses, etc.) will not be scrambled.*

[FAST Quote p. 04a.12, *emphasis added.*]

The Bid Solicitation did not make any distinction regarding the security requirements for Personal Data residing in a production versus a non-production environment. In fact, the State requires that all Personal Data be encrypted/scrambled at all times. FAST's Price Proposal Note is a deviation from the requirements of the Bid Solicitation. The Question is whether it is a material deviation. The answer is yes. Allowing FAST to not encrypt/scramble Personal Data in a non-production environment deprives the State of the assurance that the contract will be performed according to the specified requirements and places FAST in position of advantage over other Bidders who submitted Quotes conforming to the requirement that Personal Data be encrypted/scrambled in production and non-production environments and over those potential Bidders who did not submit a Quote because they could not conform to the requirements. *River Vale*, 127 N.J. at 216.

In support of its protest, FAST contends that there were no deviations/conflicting terms contained within its submitted Quote. Rather, FAST states that it signed the *Offer and Acceptance Page* agreeing to all terms, conditions and requirements in the Bid Solicitation, followed the process and "submitted all deviations through the electronic question and answer process." FAST Protest, pg. 3. However, a Bidder which states it agrees to all the terms and conditions of the Bid Solicitation while at the same time proposing terms that deviate from the conditions in the Bid Solicitation has the potential to deprive the State of the assurance that the contract will be performed according to its specified requirements as it is unclear which terms apply. Moreover, this reservation of rights places the Bidder in a position of advantage over other Bidders, as the Bidder could choose to withdraw its Quote, if it cannot agree to terms with the State after award.

In further support of its protest, FAST states that the "Bid Solicitation allowed FAST to submit sample license agreements or other ancillary material and clearly established that these items could not modify the terms of the Bid Solicitation as per the Order of Precedence in Section 5.0." *Ibid.* In *In re Request for Proposals #17DPP00144*, the Appellate Division reviewed a similar scenario and determined that the Division could not rely upon the Order of Precedence contained in Bid Solicitation to knock out non-conforming terms. 454 N.J. Super 527, 561-62, (App. Div. 2018). Specifically, the Appellate Division stated:

The Acting Director concluded that language, which he characterized as a "proposed reservation in response to RFP § 5.18" "was addressed and rejected during the Question and Answer period" and, in any event, could not have provided Optum an advantage over other bidders because it was "not entitled to any effect" under Sections 4.1 and 5.1 of the Bid Solicitation. In other words, because Section 4.1 advised bidders that "proposed terms or conditions that conflict with those contained in the Bid Solicitation...or that diminish the State's rights" under the Contract "will be considered null and void," and Section 5.1 ranks the Bid Solicitation higher than a bidder's quote in "the order of precedence for...interpretation" of the Contract, the Acting Director determined he could simply dismiss Optum's express reservation as meaningless, thereby obviating any analysis under *River Vale*.

That was clear error. The Director is never free to accept a bid containing a material deviation from the terms of the solicitation for bids. Section 6.1 of the Bid Solicitation, "Right to Waive," acknowledges that rule. Nor is he free to sidestep a bid conformity analysis by simply declaring the alleged nonconformity to be of no effect under the terms of the RFP. He must evaluate the claimed deviation under a River Vale analysis. (explaining in the context of a municipal bid that "[d]espite the RFP's invitation to make changes to the Agreement, it remains incumbent upon the contracting entity to determine if those modifications render the proposal nonconforming").

[In re Request for Proposals #17DPP00144, 454 N.J. Super at 561-62, internal citations omitted, emphasis added.]

Again, as noted above, a Bidder stating agreement to all the terms and conditions of the Bid Solicitation while at the same time proposing terms that deviate from the mandatory terms and conditions in the Bid Solicitation has the potential deprive the State of the assurance that the contract will be performed according to its specified requirements as the State would not know which terms would apply and govern the work to be performed under the Contract. The submission of non-conforming terms adversely affects competitive bidding by placing the Bidder in a position of advantage over other Bidders in that a Bidder may presume that its alternate proposed terms will be accepted, and then if not, reserve for itself the right to withdraw a submitted Quote to the detriment of the State. See *Ibid.* at 567, citing *Meadowbrook Carting Co.*, 138 N.J. at 315.

The additional terms proposed by FAST speak directly to limited liability, damages and pricing which are clearly material terms to the underlying contract. As to FAST's argument that any conflicting terms are automatically kicked out or voided by of the Order of Precedence in Bid Section 5.1, the Court has previously stated that such an interpretation is impermissible. The Order of Precedence applies to the awarded Contract and guides any future issues of interpretation that may arise. The Order of Precedence plays no part in the review of non-conforming or conflicting terms contained within a submitted Quote. *In re Request for Proposals #17DPP00144, 454 N.J. Super at 561-62.*

Here, FAST submitted additional /modifications to the terms and conditions of the Bid Solicitation with its Quote. Any one of the three proposed modifications discussed above would render the Quote non-responsive. As noted in *River Vale*, 127 N.J. Super. at 222, "[i]f 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.” Though the Bureau identified several other items which rendered FAST’s Quote non-responsive, those items need not be addressed here as FAST’s Quote is clearly non-responsive for the items discussed above.

Based upon the foregoing, I find no reason to disturb the Bureau’s recommendation that the Contract be awarded to Revenue Solutions. Accordingly, I sustain the September 21, 2021, Notice of Intent to Award. This is my final agency decision.

Thank you for your company’s interest in doing business with the State of New Jersey. I encourage you to log into [NJSTART](#) to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD/TCR/DK

cc: M. Dunn
J. Pastuzyn
Revenue Solutions, Inc.