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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3136-16T2

IN THE MATTER OF MOTOR VEHICLE
COMMISSION SURCHARGE SYSTEM
ACCOUNTING AND BILLING SERVICES.

Argued January 22, 2018 — Decided February 8, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from the New Jersey Department of
the Treasury, Division of Purchase and
Property, RFP No. 16-X-23676.

Paul P. Josephson argued the cause for
appellant Xerox State & Local Solutions, Inc.
(Duane Morris LLP, attorneys; Paul P.
Josephson and Trevor Taniguchi, on the
briefs).

Daniel J. Kelly, Assistant Attorney General,
argued the cause for respondent State of New
Jersey, Department of Treasury (Gurbir S.
Grewal, Attorney General, attorney; Beth Leigh
Mitchell, Assistant Attorney General, of
counsel; Diana Reynolds, Deputy Attorney
General, on the brief).

Walter F. Kawalec, III, argued the cause for
respondent Gila, LLC, d/b/a Municipal Services
Bureau (Marshall Dennehey Warner Coleman &
Goggin, attorneys; Howard B. Mankoff and
Walter F. Kawalec, III, on the brief).

PER CURIAM

In this public bidding case, Xerox State & Local Solutions, Inc. ("Xerox"), the former incumbent provider of services to the New Jersey Motor Vehicle Commission ("MVC"), appeals an award of a successor contract by the Division of Purchase and Property ("the Division"). The Division awarded the new contract to the only other bidder, Gila, LLC, doing business as Municipal Services Bureau ("MSB"). Xerox appeals from both the contract award to MSB and the Division's February 17, 2017 final agency decision denying its bid protest.

For the compelling reasons that follow, we conclude that MSB's bid, which included a lengthy footnote on its pricing sheet seeking "necessary" additional compensation, was materially non-conforming. The Division strayed from well-established legal principles in unfairly allowing MSB to modify its quote and withdraw that pricing caveat after the bids were opened. Consequently, we reverse the Division's ruling, and remand with instructions for the agency to re-bid this contract on an expedited basis.

I.

The RFP

In June 2015, the Division issued a Request for Proposals ("RFP") on behalf of the MVC and the Division of Revenue and Enterprise Services ("DORES") within the Department of the

Treasury. The RFP solicited bids from contractors to develop and implement a new billing and collection system for obtaining and processing MVC surcharge payments owed by motorists under the motor vehicle laws. Among other things, the scope of the contract included surcharge billings, collections, disbursement and reconciliation of payments, handling correspondence, and fielding telephone inquiries.

At the time the RFP was issued, Xerox was the vendor providing collection services to the MVC under the then-existing system.¹ Xerox provides similar services to other governmental agencies outside of New Jersey. The impetus of the RFP was to phase out the then-existing system and replace it with an improved one. MSB likewise has provided collection services to other jurisdictions, including the State of Texas.

Under the applicable procurement statute, N.J.S.A. 52:34-12(a)(g), and an associated regulation, N.J.A.C. 17:12-2.2, the Division was obligated to award the new contract to "that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the State, price and other factors considered." The RFP incorporated this standard.

¹ Xerox's contract, which had been extended, expired in October 2017.

The RFP contemplated that the successful bidder would not be paid a monetary contract price by the State. Rather, it contemplated that the vendor would be compensated mainly or entirely by receiving an agreed-upon percentage commission out of the surcharge receipts collected from motorists.

Bidders were presented with an opportunity to submit questions about the RFP. After that period ended, the bidder proposals were initially due on August 13, 2015. The Bureau ultimately postponed that deadline to October 15, 2015.

The Parties' Bids and Pricing Sheets

On October 15, 2015, two proposals were received by the 2:00 p.m. submission deadline: one from Xerox and one from MSB. They were opened that day and were forwarded to the Division's Procurement Bureau. Both proposals were sent to an Evaluation Committee for review.

The Evaluation Committee was comprised of six voting members, including representatives from the New Jersey Office of Information Technology ("OIT"), MVC, the Division, and DORES. Twelve subject matter experts served as technical advisors to the Committee. They included representatives from DORES, MVC, the Division, and OIT. In addition, four external consultants served as advisors to the Committee. The Committee performed a technical review of the two submitted proposals, examining criteria relating

to such subjects as personnel, firm experience, and the vendor's ability to complete the work under the new contract.

Sections 4.4.1.8 and 4.4.5 of the RFP required bidders to submit their price quotes using the format of a "State-supplied price sheet/schedule(s)" accompanying the RFP. RFP § 4.4.5 specifically instructed bidders that a "[f]ailure to submit all information required will result in the proposal being considered non-responsive." The required format consisted of a multi-column "All-inclusive Pricing Sheet."

The pricing sheet's first column, which was pre-printed, designated nine separate cost categories: "Transition, Non-recurring/One-time Costs;" "Customer Service, Support and Primary Collections;" "Printing and Mailing Notices and Correspondence;" "Returned Mail Processing;" "Accepting and Processing Payments;" "Document & Image Management;" "Collections-Litigation Services;" "Systems and Technology;" and "Option-Maintenance and Support of STARS."²

The second column, which was also pre-printed in the RFP, described the "Unit of Measure," such as the "Contingency Fee as

² STARS referred to the existing collections system, which the MVC was seeking to replace through this procurement. It was contemplated that the selected bidder would operate STARS for a temporary start-up period, but then discontinue doing so within a specified timeframe.

a Percentage of Revenue Collected," the Cost-Per-Piece for printing, mailing or document imaging, and the Cost-Per-Transaction-Type for various kinds of mailed, manual, and electronic payment processing.

The pricing sheet's third column — which is the one most significant to the present appeal — required each bidder to specify the contingency fee percentage or cost-per-unit that it proposed to be paid over the seven-year contract period. With respect to printing and mailing costs, RFP § 3.3.4 instructed that bidders "shall include all costs associated with printing and mailing notices"

The pricing sheet Xerox submitted with its bid proposal included a contingency fee for customer service, support and primary collections of 3.79%, and a separate contingency fee of 14.90% for collections relating to litigation services. Xerox further proposed per-unit costs of \$0.79 for printing and mailing notices and correspondence; \$0.60 for processing non-electronic payments; and \$2.50 for processing electronic payments. Xerox also quoted transition costs of \$699,426. For the seven-year duration of the contract, the collection of nearly \$789 million in total surcharge revenue was projected, and nearly \$47 million in revenue from collections litigation.

Xerox's pricing sheet contained no footnotes, disclaimers, or conditional language. Xerox did omit cost entries for returned mail processing and document and image management, filling in those two boxes on the spreadsheet with dashes ("-"). Xerox provided no optional monthly contract cost for operating STARS, consistent with its role as the incumbent vendor already using STARS.

MSB's pricing sheet included quotes for only three items in the spreadsheet's third column. Specifically, MSB proposed a 4.35% contingency fee percentage for customer service, support and primary collections (as compared with Xerox's lower quote of 3.79%), a 10.00% contingency fee percentage for litigation collections (as compared with Xerox's higher quote of 14.90%), and a monthly contract cost of \$28,500 for maintaining and supporting STARS (as compared with Xerox's omission of that optional charge).

MSB's Pricing Footnote

Critically relevant to the present appeal, MSB's pricing sheet contained the following caveat in a footnote preceded by double³ asterisks ("**"):

Price does not include a surcharge partial
payment processing fee per payment processed
and electronic payment (ACH and credit card)

³ There was no single-asterisked footnote (*), nor any other footnotes.

convenience fee which is paid by constituent
at time payment is tendered.

Both the installment payment fee and
convenience fee can be negotiated with the
State and are necessary components to maintain
the pricing shown in cell C7[.]

[(Emphasis added).]

The footnote appears in space on the right side of the pricing
spreadsheet. There is no corresponding double asterisk (**) within
the spreadsheet itself.

Events After the Bids Were Opened

After the bids of Xerox and MSB were opened, they were
referred to the Evaluation Committee for review. Meanwhile, the
Bureau identified several aspects of MSB's bid as to which it
requested "clarification."⁴ The Bureau detailed these items in a
November 16, 2015 letter to MSB's Chief Executive Officer. Of
special pertinence here are the items concerning (1) printing and
mailing costs and (2) transactional costs,⁵ the latter of which

⁴ We discuss the appropriate scope of a bidder's clarification,
infra.

⁵ MSB's footnote refers to two categories of fees: (1) "partial
payment processing fee[s]," also referred to by MSB as "installment
payment fee[s];" and (2) "electronic payment (ACH and credit card)
convenience fee[s]," also described by MSB as "convenience
fee[s.]" The second category appears to encompass fees charged
by credit card companies for transactions, as well as fees incurred
when payments are made using a bank account routing number. For
purposes of simplicity and brevity, we shall refer to the two
categories collectively as "transactional" costs.

were the subject of the aforementioned footnote on MSB's pricing sheet.

With respect to printing and mailing costs for notices, the Bureau pointed out to MSB in the November 16 letter that its price sheet had omitted pricing for those items, despite the instruction in RFP § 3.3.4 to include such costs. The Bureau further pointed out to MSB that its narrative proposal (termed the "Mobilization and Implementation Plan") recited that "Unlike Texas's Surcharge Program [operated by MSB], mailing costs are entirely pass-through for the NJMVC Surcharge Program, for which the State compensates MSB for printing and postage expenses." (Emphasis added). Given this apparent ambiguity and lack of clarity, the Bureau requested MSB to "confirm that [its] price sheet as submitted incorporates all costs associated with printing and mailing."

Further, the Bureau's November 16 letter pointed out MSB had stated in its narrative that "unlike Texas'[s] Surcharge Program, all credit card fees are pass-through and likewise paid by the State of New Jersey." (Emphasis added). In addition, the Bureau quoted MSB's aforementioned footnote on its pricing sheet, which had stated that the transactional costs (i.e., the "installment payment fees" and the "convenience fees") "can be negotiated with the State and are necessary components to maintain the pricing shown in [spreadsheet] cell C7." (Emphasis added).

The Bureau's letter treated MSB's assertions in this regard relating to the transactional costs as inconsistent with Section 3.3.6 of the RFP, which called for the bidders to "accept and process credit card payments" and "handle payment of all costs associated with these services including discount fees" Rather than asking MSB to "clarify" or "confirm" its position on this discrete subject of transactional costs, the Bureau notably advised MSB in the November 16 letter to "[p]lease withdraw these statements above or withdraw your firm's proposal." (Emphasis added).

Also of relevance here, the Bureau's November 16 letter pointed out that MSB's pricing sheet had omitted pricing for Accepting and Processing Payments, Transition, Non-recurring/One-time Costs, and for Systems and Technology, as called for under the RFP. As to these items, the Bureau requested MSB to "confirm" that its price sheet, as submitted, incorporated these specific costs.

MSB responded to the Bureau's November 16 letter on November 23, attempting to address the items of concern. The Bureau was satisfied with respect to several of those responses. However, the Bureau remained dissatisfied with MSB's responses concerning (1) its pricing for printing and mailing costs, (2) credit card payments, and (3) the costs of accepting and processing payments.

The Bureau was particularly dissatisfied with MSB's insistence on adhering to an undefined (or poorly-defined) "supporting fee structure" for the contract, as well as MSB's position that if the State did not maintain the so-called "supporting fee structure," MSB's pricing for the printing and mailing costs and transactional costs would need to be modified.

The Bureau expressed its dissatisfaction in a November 24, 2015 letter to MSB, demanding that MSB either acknowledge it was not seeking payment for these additional items or, alternatively, withdraw its bid proposal. The Bureau's letter firmly stated in this regard:

MSB's response to Clarification Request #2 states that "The State has asked MSB to withdraw its recommendation of this supporting fee structure in the State's Clarification Request #3a. Absent utilization of this supporting fee structure, the price listed for 'Customer Service, Support and Primary Collections' needs to be modified accordingly."

Further, MSB's response to Clarification Request #3b states that "The State has asked MSB to withdraw its recommendation of this supporting fee structure in the State's Clarification Request #3a. Absent utilization of this supporting fee structure, the price listed for 'Customer Service, Support and Primary Collections' needs to be modified accordingly."

The RFP makes no mention of a "supporting fee structure." In addition, RFP Section 4.4.5 requires the Bidder to "submit its

pricing using the format set forth in the State-supplied price sheet/schedule(s) accompanying this RFP," and "Failure to submit all information required will result in the proposal being considered non-responsive."

The State requires that MSB **confirm** that the pricing submitted is inclusive of all costs and addresses all requirements of the RFP or it must withdraw its proposal.

Your firm's response must be received no later than 5:00 p.m. on Friday, November 27, 2015. Failure to respond may result in your firm's proposal being considered non-responsive.

[(Original emphasis in BOLD face; underlined emphasis added).]

Having been pressed by the Bureau on these pricing issues a second time, MSB relented. In a November 27, 2015 letter, MSB confirmed to the Bureau that "the pricing submitted is inclusive of all costs and addresses all requirements of the RFP." There was no further discussion thereafter of MSB's pricing sheet footnote.

The Bureau also exchanged correspondence with Xerox, seeking and obtaining clarification as to various topics. None of those clarifications, however, involved payment for printing or postage costs, or for transactional costs.

In December 2015, the Bureau requested that MSB and Xerox each submit a Best and Final Offer ("BAFO"). MSB declined to reduce its pricing in a BAFO. Xerox, meanwhile, submitted a BAFO

that slightly reduced its quoted contingency fee for non-litigation collections from 3.79% to 3.74%, and its litigation contingency fee rate from 14.90% to 14.69%. Xerox also slightly adjusted downward several of its previously quoted per-unit costs.

The Award to MSB

On March 8, 2016, the Evaluation Committee submitted its report to the Bureau after completing its review of the bids. The Committee recommended that the agency award the contract to MSB.

The following comparative table shows the Committee's final technical scores, pricing, and ranks for both MSB and Xerox:

Bidder	Average Technical Score	Total Cost of Proposal	Final Rank
Gila LLC d/b/a Municipal Services Bureau (MSB)	795	\$38,164,000	1
Xerox State & Local Solutions, Inc. (Xerox)	512	\$62,129,022	2

The Committee's report concluded that MSB "presented the most advantageous proposal to the State, price and other factors considered[,]" and respectively recommended "that MSB be awarded the contract for the development of a new Surcharge Billing and Collection System and provide surcharge services"

The Division followed the Evaluation Committee's recommendation. On March 15, 2016, the Division accordingly issued a notice advising both bidders that it was the State's intention to award the contract to MSB.

Xerox's Bid Protest

Xerox protested the contract award. In March 2016, Xerox sent the Division a request for extension of time and notice of its intention to protest the award. In that initial protest letter, Xerox focused upon MSB's alleged non-compliance with the pricing requirements of the RFP. Xerox thereafter obtained additional documents about this matter, pursuant to a request it had made under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13.

In May 2016, Xerox sent the Division a supplemental protest letter. That letter encompassed the various arguments that Xerox now raises on appeal, including contentions going beyond the pricing concerns raised in Xerox's initial protest.

The Division Director declined Xerox's request for an in-person hearing. She confined her consideration of the bid protest to the items within the written record, as permitted by N.J.A.C. 17:12-3.3(d)(1).

The Director's Decision

On February 17, 2017, the Director issued a written final agency decision denying Xerox's bid protest and upholding the award of the contract to MSB. The Director rejected each of the arguments Xerox raised in challenging the award.

Most of the Director's analysis addressed issues unrelated to the propriety of MSB's pricing. As to the pricing issue, the Director concluded that MSB's price quote did not materially deviate from the RFP. The Director acknowledged that, with respect to printing and postage costs, a "discrepancy" had existed between MSB's narrative proposal stating that the State would compensate MSB for those costs, and MSB's price sheet, which had not listed "any per unit or percentage costs associated with the printing and mailing of notices" The Director found it permissible for MSB to "clarify" its position concerning those printing and mailing costs in its correspondence with the Bureau after the bids had been opened. As a result of that clarification process, MSB stated that the price as originally submitted on its price sheet was

inclusive of those particular costs. Hence, the Director concluded that MSB's pricing proposal had been responsive.

Notably, the Director's final agency decision did not specifically analyze the separate transactional costs that were also the subject of Xerox's bid protest. The decision mentioned, but did not analyze, the footnote in MSB's pricing sheet. Nor did the decision analyze the significance of MSB's assertion that the transactional costs "can be negotiated with the State and are necessary components to maintain the pricing shown in cell C7." Nor did it explain why MSB's original position concerning the transactional costs, as had been expressed in the footnote and in MSB's narrative proposal, did not comprise a material deviation from the RFP's criteria.

Xerox promptly requested that the Division reconsider the denial of the bid protest. Xerox also sought an administrative stay of the contract award. On March 28, 2017, the Acting Division Director⁶ denied reconsideration and the request for a stay. He found "no reason to disturb" his predecessor's decision, and, moreover, that Xerox had not demonstrated the factors under Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982), for obtaining a stay or injunctive relief.

⁶ By that point, the Director who had issued the final agency decision the previous month was no longer in office.

Xerox's Appeal and Requests for a Stay

Xerox appealed the contract award to this court. It moved, initially on an emergent basis, for a stay of the contract award to MSB pending appeal. Xerox raised, among other things, concerns about the appeal becoming moot if a stay were denied.

In opposing the stay request, the Division and MSB asserted that it was in the public interest for the contract award to MSB to go forward because MSB was receiving a comparatively much-lower payment for its services than the rates Xerox had quoted, and also because the prompt implementation of a new surcharge payment processing system would be beneficial.

In May 2017, a panel of this court denied Xerox's motion for a stay pending appeal, but ordered that the appeal be accelerated. Xerox then moved for relief before the Supreme Court, which the Court denied in June 2017.

In September 2017, Xerox moved a second time for a stay pending appeal. Xerox expressed concerns that its contract was about to expire in October 2017, and that MSB apparently was poised to begin the successor contract.⁷ Another panel of this court

⁷ Notably, MSB stated in its September 19, 2017 letter brief opposing Xerox's second stay motion that, if a stay were denied, the appeal would not be moot because the awarded contract has a term of seven years. In particular, MSB asserted at that time that "even if Xerox were somehow able to demonstrate error, the

denied this second stay motion in October 2017. After the accelerated briefing of this matter was completed in the fall of 2017, the appeal was placed on this court's oral argument calendar on a preferential basis. Prior to oral argument, we requested additional documents, including a full copy of the RFP, which counsel kindly furnished.

II.

Xerox's main argument on appeal is that MSB's pricing bid materially deviated from the RFP and that the Division erred in awarding it the contract. Xerox submits that MSB's retrenchment from the position it took in its pricing form, including the footnote concerning transactional costs, cannot legitimately be treated as a permissible "clarification."⁸ Xerox urges that the award to MSB be reversed, and that it either be awarded the contract immediately or, alternatively, that the contract be re-bid on an expedited basis.

appeal would not be moot nor would the contract be substantially complete." MSB noted in this regard the possibility that this court might reverse the award and "somehow return[] Xerox as the vend[o]r." That would potentially impose "start-up costs which Xerox does not wish to pay," but such a concern, MSB asserted, "does not mean that the appeal would be moot, nor does it justify granting a stay."

⁸ Xerox advances several alternative arguments to set aside the award, none of which are persuasive. We touch upon them briefly, infra, in Part III of this opinion.

The Division and MSB counter that MSB's bid was not materially defective, that the clarification process used here was appropriate, and that there is no basis to set aside the award. They also continue to oppose any injunctive or other judicial relief.

A.

In considering the merits of the appeal, we are acutely mindful that generally the State Treasurer and the Division are afforded "great flexibility in awarding a contract to the bidder whose proposal will be most advantageous to the State, taking into consideration all factors." In re Honeywell Information Sys., Inc., 145 N.J. Super. 187, 200 (App. Div. 1976). When choosing between or among responsive bids, the Treasurer or Director "necessarily is required to exercise the sound business judgment of an executive based on all available data, expertise and advice which he may be able to garner from all available sources." Ibid. (citations omitted). Hence, the scope of judicial review of the agency's ultimate selection among responsive bidders normally is very limited. Commercial Cleaning Corp. v. Sullivan, 47 N.J. 539, 549 (1966). Even so, it is also well established that such wide deference to procurement officials does not extend to questions of bid conformity, or the legal requirements of the bidding process. As this court observed when invalidating a State

Treasurer's award of a contract to a non-responsive bidder in In re the Protest of Award of On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175 ("On-Line Games"), 279 N.J. Super. 566, 592-93 (App. Div. 1995), agency decisions "as to the responsibility of the bidder and bid conformity are to be tested by the ordinary standards governing administrative action[,]" rather than the "gross abuse of discretion standard"

As (then-Judge) Long noted in On-Line Games, an increased level of appellate oversight is justified in such a context because "strict rules as to bid conformity are critically important . . . because of the broad discretion available to the Treasurer in actually awarding the contract." Id. at 593. Hence, the scope of appellate review of bid conformity issues, such as the main challenge that Xerox mounts here, focuses upon:

(1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings . . . ; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Ibid. (quoting George Harms Constr. Co. v. N.J. Turnpike Auth., 137 N.J. 8, 27 (1994) (internal citations omitted)). See also In re Jasper Seating Co., 406 N.J. Super. 213, 222-23 (App. Div. 2009) (applying that standard of review); State v. Ernst & Young,

L.L.P., 386 N.J. Super. 600, 619 (App. Div. 2006) (reaffirming the less deferential standard for the review of decisions on bid conformity).]

The governing law is also well settled concerning the materiality of bid provisions. "It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived." Terminal Constr. Corp. v. Atlantic Cty. Sewerage Auth., 67 N.J. 403, 411 (1975) (citing Township of Hillside v. Sternin, 25 N.J. 317, 324 (1957)). "This rule, however, does not apply to minor or inconsequential conditions." Ibid.

As we explained in On-Line Games, the two-prong test for materiality is as follows: (1) "whether the effect of a waiver would be to deprive the [contracting agency] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements;" and (2) "whether [a deviation] 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." On-Line Games, 279 N.J. Super. at 594-95 (quoting Township of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974)).

Essentially, the materiality test "is nothing more than an enunciation of what has always been the only relevant matter in a bid conformity inquiry: whether waiver of the deviation would thwart the aims of the public bidding laws." Id. at 596. Those aims fundamentally are to "guard against favoritism, improvidence, extravagance and corruption" ⁹ Barrick v. State, 218 N.J. 247, 258 (2014) (quoting Keyes Martin & Co. v. Dir., Div. of Purchase & Prop., 99 N.J. 244, 256 (1985)). This is a largely prophylactic approach. L. Pucillo & Sons, Inc. v. New Milford, 73 N.J. 349, 356 (1977). As Justice Francis observed in Hillside, 25 N.J. at 326, "In this field it is better to leave the door tightly closed than to permit it to be ajar, thus necessitating forevermore in such cases speculation as to whether or not it was purposely left that way." Public bidding laws were adopted "to secure for the taxpayers the benefits of competition and to promote the honesty and integrity of the bidders and the system." On-Line Games, 279 N.J. Super. at 589. These laws must be "construed as

⁹ We pause to note that we have been presented with no proof of any "corruption" in this matter. Our ultimate determination to set aside the contract award to MSB rests upon the importance of maintaining fair competition in the procurement process, as well as assuring that material deviations in critical pricing terms are not tolerated to the disadvantage of other bidders and to the potential detriment of the public.

nearly as possible with sole reference to the public good." Ibid. (quoting Keyes, 99 N.J. at 256).

The price-related facets that led to this court's invalidation of the contract award in On-Line Games, the key case relied upon by Xerox, are instructive for the present case. For that reason, we describe those circumstances in detail for comparative purposes.

On-Line Games involved the State Treasurer's award of a contract for lottery services. Id. at 574. The award similarly occurred after the Division of Purchase and Property's issuance of an RFP. Ibid. The RFP included a provision stating that "[f]ailure to furnish all required information or to follow the proposal format specified in this RFP may disqualify a proposal." Id. at 577. The RFP advised that the Director of the Division "may waive any nonmaterial deviation in a proposal." Ibid. Furthermore, the RFP stated that "[b]idders are given wide latitude in the degree of detail they offer or the extent to which they reveal plans, designs, systems, processes and procedures. At a minimum, proposals must be fully responsive to the specific requirements stated in this RFP." Ibid.

Following the Division's award of the contract in On-Line Games, two unsuccessful bidders filed protests. Id. at 585. The appointed hearing officer concluded from the record and testimony

that the successful bidder had not clearly provided in its initial bid for a visual display visible from fifteen feet, as was required in the RFP. Id. at 586. Nevertheless, the hearing officer further concluded that, because the successful bidder clarified after the opening of the bids "that it would provide such a unit to fulfill its commitment to meet all RFP requirements[,]" the contract award could be made to that bidder. Ibid. The hearing examiner concluded this was a permissible "clarification," rather than an impermissible "supplement." Ibid.

Alternatively, the hearing examiner in On-Line Games reasoned that, even if the failure to include mention of the display in the selected bidder's original bid, followed by the bidder's later promise or commitment to include such a display, comprised an alteration, it was not a material one. Ibid. The hearing examiner reached this conclusion, despite the fact that the RFP had expressly stated that proposals "could not be supplemented, changed or corrected, and that bidders had to comply with all of the requirements." Id. at 587. The contract was thereafter awarded to the same bidder. Ibid.

The Treasurer in On-Line Games agreed with the hearing officer that the selected bidder's post-opening commitment in its clarification letter to provide the required displays as part of its base price did not represent an impermissible alteration. Id.

at 588. The Treasurer further agreed with the hearing officer's alternative finding that any deviation that may have occurred was not material. Ibid.

After granting the unsuccessful bidders' request for a stay of the award pending appeal and their request for acceleration, this court in On-Line Games considered their plenary appeal and reversed the award. We concluded that the selected bidder's post-opening letter committing to meet all requirements of the RFP was not a permissible clarification, but rather "an impermissible modification of a materially deficient bid." Id. at 596. Although the RFP had specifically allowed bidders to provide post-bid clarifications, it prohibited modifications. Id. at 596-97. We noted that "[i]n clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there." Ibid. (emphasis added). By contrast, in "supplementing, changing or correcting a proposal, the bidder alters what is there." Ibid. (emphasis added).

We applied these same principles in In re Jasper Seating, 406 N.J. Super. at 225-26, in concluding that a bidder's price quotation was materially defective and thus unresponsive. In that case, we evaluated under the materiality test "a deviation in [the] plaintiff's bids due to its inclusion of price escalation stickers" Id. at 225. The plaintiff argued that the

deviation allegedly caused by the price stickers displayed on its catalog should have been waived. Ibid. The Acting Division Director disagreed, and determined that the plaintiff's bids were non-conforming. Id. at 220. We upheld that finding, concluding that a waiver of such a deviation would fail the materiality test. Id. at 225.

Addressing the first prong of the materiality test, we observed in In re Jasper Seating that a "waiver would deprive the State of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements." Id. at 225-26. Moreover, with respect to the second prong of the materiality test, we concluded that "a 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." Id. at 226. We further reasoned that if we were to allow a bidder "to choose one of the two interpretations of its pricing, one with the price increase and one without, after all of the bids are opened, would give it an unfair advantage over the other bidders." Ibid.

We underscored in In re Jasper Seating that prior case law had declared unlawful the waivers of material RFP deviations that would, in effect, tolerate post-bid manipulation of the bidding results. Ibid.; see Suburban Disposal, Inc. v. Twp. of Fairfield,

383 N.J. Super. 484, 494 (App. Div. 2006). "Such post-bid manipulations are repugnant to our public bidding laws." Ibid.

B.

Here, even affording all due deference to the expertise and discretionary judgment of the Division and the Office of the State Treasurer, we concur with Xerox that MSB's original pricing submission materially deviated from the requirements of this RFP. For one thing, MSB's pricing sheet failed to specify that printing and postage costs were to be absorbed by MSB within its contingency fee compensation, and that MSB was not expecting to be paid for those extra costs, either by the motorists remitting the surcharges or by the State.¹⁰

More critically, the lengthy footnote on MSB's pricing sheet was clearly a material deviation from the RFP's requirement for bids to set forth the full price to be charged by the contract recipient. Undoubtedly, in declaring on the pricing sheet that the transactional costs were subject to future "negotiations" with the State and are "necessary" components to the pricing, MSB was looking to be paid more for its services than only the respective

¹⁰ We offer no opinion, as a public policy or regulatory matter under the motor vehicle surcharge laws, whether it is appropriate to require payors to remit credit card or other transactional fees, in addition to the surcharges due from them.

4.35% and 10.0% contingent fee percentages reflected on the spreadsheet.

Although the word "necessary" can be susceptible of various meanings, see In re Taylor, 196 N.J. 162, 172-73 (2008), the term has been defined in a prominent legal dictionary to connote "[t]hat [which] is needed for some purpose or reason; essential" or as "[t]hat [which] must exist or happen and cannot be avoided; inevitable" Black's Law Dictionary 1192 (10th ed. 2014). It is reasonable to construe the term "necessary" within MSB's pricing footnote to signify that MSB reserved the right to withdraw its bid if it were unable to persuade the State to allow it to recover the identified transactional costs from either the surcharge payors, or by reducing the State's yield from the surcharge revenue collections, or both.¹¹

In essence, MSB "hedged its bets" concerning this key pricing element. The Division impermissibly allowed MSB to do so without affording the same flexibility to the other bidder, Xerox, concerning the recovery of the transactional costs. "The conditions and specifications of . . . [a] bid must apply equally

¹¹ We are unpersuaded by MSB's contention that the footnote signified MSB's potential willingness to reduce its contingency fee percentage. That interpretation is inconsistent with MSB's assertion within the footnote of its objective to "maintain" the pricing set forth on the spreadsheet.

to all prospective bidders; the individual bidder cannot decide to follow or to ignore these conditions" Hall Constr. Co. v. N.J. Sports & Exposition Auth., 295 N.J. Super. 629, 635 (App. Div. 1996).

We reject the Division's treatment of the post-opening discussions it had with MSB on this subject as mere "clarification." The applicable regulation on the subject, N.J.A.C. 17:12-2.11(d), allows a post-opening clarification from a bidder to address a disparity between a unit price and an extended price when the bidder's true intention is not readily discernable from other parts of the proposal. Ibid. A clarification also is permitted under N.J.A.C. 17:12-2.11(c) if the bid contains an "obvious pricing error" that is noticed by the Division's reviewers. Neither of those situations pertains here.

Unlike the "discrepancy" between MSB's narrative proposal and its price sheet as to printing and postage costs noted in the Director's final agency decision, the Director identified no such discrepancy between MSB's narrative proposal and the pricing sheet and footnote concerning transactional costs. Both MSB's narrative and footnote consistently signify that MSB was expecting or hoping to receive additional compensation for those costs, either from surcharge payors or from State taxpayers through a reduction in the net collections. At the very least, MSB's submissions on this

component of the transaction were crafted to keep the door open to receive such additional monies. But as Justice Francis noted in Hillside, the proverbial door cannot be left "ajar." 25 N.J. at 326.

Just as the bidder's purported post-bid "clarification" in On-Line Games was disallowed by this court, so too must MSB's "clarification" in this case relating to the transactional costs pricing fail. As the RFP instructed in Section 6.6, "[C]larifications cannot correct any deficiencies or material omissions or revise or modify a proposal, except to the extent that correction of apparent clerical mistakes results in a modification." (Emphasis added). The lengthy footnote in MSB's pricing sheet manifestly was not an "apparent clerical mistake." It was not a typo of a pricing figure within the spreadsheet or an arithmetic error. Instead, the footnote conveyed a purposeful message that MSB regarded obtaining additional revenue for transactional costs as "necessary" to the deal.

Although not mentioned in the Director's final agency decision, the Attorney General alternatively argues in its appellate brief¹² that even if the post-opening withdrawal of MSB's footnote had the effect of reducing MSB's overall price, the agency

¹² MSB does not make this particular argument or rely on these codified provisions in its own brief.

had the authority to negotiate price reductions under N.J.S.A. 52:34-12(a)(f) and N.J.A.C. 17:12-2.7(j). We do not believe those provisions affect the circumstances here. For one thing, the Division did not invoke this authority in its contract award or in its bid protest ruling. Moreover, MSB never quantified a "price" for the transactional costs in its pricing sheet, but instead asserted that it would be "necessary" to be paid sums of unspecified magnitude. In addition, Xerox was not afforded an equivalent opportunity to submit such a "hedged" bid.

The Attorney General's argument also fails because the Director's authority to negotiate price reductions under N.J.S.A. 52:34-12(a)(f) "must be expressly set forth in the applicable invitation to bid," i.e., the RFP. Here, the RFP in Sections 6.8 and 6.9 advised prospective bidders that the Director reserved the right to negotiate price reductions "with the selected Bidder(s)." (Emphasis added). The Division's post-opening communications with MSB in November 2015 that resulted in MSB withdrawing its pricing footnote and its expressed desire to receive extra compensation for transactional costs occurred before, not after, MSB was selected as the contract recipient in March 2016.¹³

¹³ Although we need not elaborate on the subject, we also reject the Attorney General's reliance on N.J.A.C. 17:12-2.7(j). The record does not establish, as that regulation requires, that all

Further, we respectfully disagree with the Attorney General's statement in its brief that "the Division did not allow MSB to change or add anything to its bid" To the contrary, the agency demanded such a change by insisting — twice — that MSB withdraw its claim for additional compensation for handling credit card payments and other transactional costs. MSB's original bid was non-conforming, but the Division impermissibly allowed the bid thereafter to be materially altered.

In reaching these legal conclusions, we ascribe no ill-founded motives or any dereliction of duty on the part of the agency's officials or employees. Indeed, MSB's ultimate relinquishment of its position after the Division's prodding appears to have resulted in an overall contract award that is far less expensive than the one Xerox had quoted and which assigned this important MVC project to a bidder that the Evaluation Committee qualitatively ranked considerably higher. The "bottom line" outcome seems to be in the public's financial interest. Unfortunately, as On-Line Games and other case law teaches, we cannot ignore the deficiencies in the bidding process that produced

bidders deemed to be in the "competitive range" were given notice and an equal chance to take part in negotiations. See N.J.A.C. 17:12-2.7(j)(2) and (3). Xerox was only allowed to provide a Best and Final Offer, a process distinct from direct negotiations. See N.J.A.C. 17:12-2.7(j)(6) and (7).

that outcome. "[T]he integrity of the bidding process is more important than any isolated savings the State may obtain through an irregular proceeding." On-Line Games, 279 N.J. Super. at 603.

III.

Unlike Xerox's pricing arguments, its other challenges to the contract award to MSB are unpersuasive. Specifically, Xerox maintains that: (1) the Division's extension of the bid deadline was improper; (2) the Division improperly excluded from the Evaluation Committee two State officials, whom Xerox had identified as references, and gave insufficient weight to positive comments they made about Xerox when they were interviewed; (3) the Evaluation Committee failed to contact some of Xerox's other customers as positive references; (4) the Evaluation Committee scored MSB higher after initially favoring Xerox; (5) the evaluations disproportionately criticized Xerox's staffing; and (6) the Division failed to conduct an adequate financial analysis. We reject all of these claims, substantially for the reasons expressed in the Director's final agency decision.

Our sole comment concerns Xerox's argument respecting the exclusion of two State officials, whom Xerox had named as references, from the Evaluation Committee. Although their removal may not have been required by laws or ethical mandates, we endorse the Division's decision to recuse those officials from the

Evaluation Committee, so as to assure that the Committee could more freely undertake its internal discussions. N.J.A.C. 17:12-2.7(a)(1) confers upon the Director the discretion to reject proposed members or remove sitting members from an Evaluation Committee in order to promote objectivity and guard against a potential appearance of impropriety. That discretion was not abused here. In any event, factual information from the two officials about Xerox's performance under the prior contract was conveyed to the Committee through interviews.

IV.

We conclude by addressing the thorny question of remedy. We reject Xerox's request that the contract be awarded to it outright rather than re-bid. We are unpersuaded that such a remedy would be in the public interest, especially given the apparent multi-million dollar pricing gap currently between the proposals of Xerox and MSB, and the higher technical scores accorded to MSB by the Evaluation Committee.

We instead conclude that the appropriate remedy here is to re-bid the contract, in an expedited manner and with particular (if not exclusive) focus on the pricing aspect of the project. We presume MSB and Xerox will accordingly submit new bids, along with any third parties who may choose to bid. We instruct the Division to conduct such re-bidding on an expeditious basis and, if

feasible, to consider utilizing a hearing officer to preside over any fact-finding disputes.

An obvious practical concern stems from the fact that this contract – in the absence of a stay – has been implemented by MSB since October 2017 and continues to be carried out on an ongoing basis. We were advised at the recent oral argument on the appeal that the implementation of the new billing and collection system is already substantially complete. Even if that is true, as MSB correctly pointed out in opposing a stay in the fall of 2017, there are over six more years of operation and revenue collection to occur under the contract. The appeal has not become moot in the interim.¹⁴

¹⁴ Following oral argument on the appeal, MSB, with the support of the Attorney General, moved to supplement the record to address remedial issues. Over the objection of Xerox, we granted that motion, but limited our review to the motion submissions and did not invite further certifications offered by counsel. MSB and the State represent that the replacement of the STARS system is substantially complete and that MSB's new billing system has been deployed, although other steps under the contract have yet to be completed. Even if, for the sake of argument, we accept at face value these disputed representations about the extent to which the contract has been implemented since last October, we are not persuaded by MSB's argument that (1) Xerox's appeal is now moot; and (2) it would disserve the public interest to re-bid because MSB would be entitled to quantum meruit payments. First, unlike a bidding appeal involving a completed highway construction project, see Statewide Hi-Way Safety, Inc. v. N.J. Dep't of Transp., 283 N.J. Super. 223, 225-26 (App. Div. 1995), this case involves a service contract that has over six years remaining, notwithstanding the systems development element which MSB claims

We reject Xerox's suggestion that it immediately resume its former incumbent role and step in in lieu of MSB in operating the system during the interim while the contract is being re-bid. We discern no reason to order such a disruptive (and, depending on the outcome of the rebidding, potentially short-term) changeover. Instead, MSB shall continue to carry out its duties as vendor while the rebidding process is underway.¹⁵ Again, we stress that the rebidding shall be performed expeditiously. More specifically, we order that the rebidding and any new award be completed no later than June 15, 2018, unless extraordinary circumstances are demonstrated on motion to justify extending that deadline.

Finally, we are cognizant that one or both respondents may wish to pursue emergent review of our decision by the Supreme

to have largely completed. Thus, rebidding would not merely be a hypothetical exercise. Cf. Redd v. Bowman, 223 N.J. 87, 104 (2015) (stating that an issue is moot when the court's decision will have no practical effect on the controversy). Secondly, without deciding whether MSB would be entitled to any quantum meruit payments if it is ultimately dislodged upon rebidding, we are confident that the public interest in vindicating the competitive bidding process justifies rebidding here.

¹⁵ We decline to resolve the parties' disagreement in their post-argument motion submissions as to whether any factual disputes should be referred to the Law Division pursuant to Rule 2:5-5(b), or whether MSB would have a viable claim for quantum meruit compensation in the hypothetical event that MSB failed to be selected again as vendor after rebidding.

Court before undertaking the rebidding process. Accordingly, we stay our decision, sua sponte, for seven days to enable the filing of such an emergent application with the Court. If such an application is filed, the interim stay shall remain in effect (but shall not affect the June 15 deadline) unless and until the Court otherwise directs.

Affirmed in part, reversed in part, and remanded for rebidding. We do not retain jurisdiction.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION