



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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March 20, 2017

Via Electronic Mail [jfehr@pjmvolvo.com] and USPS Regular Mail

James Fehr
Government Sales Director
Penn Jersey Machinery, LLC
120 Gordon Drive
Lionville, PA 19341

RE: Protest of Notice of Proposal Rejection
Bid Solicitation {Request for Proposal} #17DPP00032 – T3057- Wheel Loader with Quick-Detachable Minimum 3 Cu. Yd. Bucket, Diesel Engine, Forklift Attachment & Accessories

Dear Mr. Fehr:

This letter is in response to your letter of protest dated March 6, 2017, on behalf of Penn Jersey Machinery, LLC (Penn Jersey), acknowledging receipt of a Notice of Proposal Rejection (Rejection Notice) sent by the Division of Purchase and Property's (Division) Proposal Review Unit. The Rejection Notice indicated that Penn Jersey failed to include a signed/completed *Ownership Disclosure Form* with its Quote {Proposal} (proposal) submitted in response to the subject Bid Solicitation ({Request for Proposal} (RFP)).¹ In your letter of protest, you state that Penn Jersey included a Shareholder Disclosure Letter with its proposal that provided the required information and request that Penn Jersey's proposal be considered for an award of contract.

I have reviewed the record of this procurement, including the RFP, Penn Jersey's proposal, and 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 determination on the merits of Penn Jersey's protest.

By way of background, the subject RFP was issued by the Division's Procurement Bureau (Bureau) on behalf of the New Jersey Department of Transportation (NJDOT), Using Agencies and Cooperative Purchasing Partners for wheel loaders with quick-detachable minimum 3 cu. yd. bucket, diesel engine, forklift attachment and accessories. RFP § 1.1 *Purpose and Intent*. The intent of the RFP is "to award one (1) Master Blanket Purchase Order (Blanket P.O.) {Contract} [(hereinafter contract)] for each Make/Model that meets the specifications. Awards shall be made to those responsible Vendors {Bidders} [(hereinafter bidder)] whose [proposals], conforming to this [RFP] are most advantageous to the State, price and other factors considered." Ibid. The RFP includes seven price lines, grouped to create a single award. Ibid.

¹ The Notice of Proposal Rejection erroneously misstated the Solicitation #; however, it provided the correct Solicitation Title. Therefore, Penn Jersey's letter of protest is accepted as protesting the rejection of its proposal in reference to RFP #17DPP00032.

On February 28, 2017, the Proposal Review Unit opened the proposals received by the submission deadline of 2:00 p.m. After conducting a review of the proposals submitted, the Proposal Review Unit found that Penn Jersey failed to submit an *Ownership Disclosure Form* with its proposal. Accordingly, the Proposal Review Unit issued a Rejection Notice.

The above-referenced procurement was comprised of the RFP and other documents, one of which was the *Ownership Disclosure Form*. This form is addressed in RFP Section 4.0, *Quote {Proposal} Preparation and Submission*. The relevant text of the RFP reads as follows:

4.4.1.2 NJ STANDARD BID SOLICITATION {RFP} FORMS REQUIRED WITH THE QUOTE {PROPOSAL}

Vendor's {Bidder's} failure to complete, sign and submit the forms in Section 4.4.1.2 shall be cause to reject its Quote {Proposal} as non-responsive.

4.4.1.2.1 OWNERSHIP DISCLOSURE FORM

Pursuant to N.J.S.A. 52:25-24.2, in the event the Vendor {Bidder} is a corporation, partnership or sole proprietorship, the Vendor {Bidder} must complete an Ownership Disclosure Form.

A current completed Ownership Disclosure Form must be received prior to or accompany the submitted Quote {Proposal}. A Vendor's {Bidder's} failure to submit the completed and signed form with its Quote {Proposal} will result in the rejection of the Quote {Proposal} as non-responsive and preclude the award of a Blanket PO {Contract} to said Vendor {Bidder} unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six (6) months prior to the Quote {Proposal} submission deadline for this procurement. If any ownership change has occurred within the last six (6) months, a new Ownership Disclosure Form must be completed, signed and submitted with the Quote {Proposal}.

Vendors {Bidders} using NJSTART to submit a Quote {Proposal} shall make the appropriate certification on the "Maintain Terms and Categories" Tab within its profile by checking the box applicable to it and completing the shortened NJSTART form if necessary. Vendors {Bidders} not using NJSTART to submit a Quote {Proposal} must complete the full version of the form located on the Division's website. The full version of the form is also available in NJSTART (www.njstart.gov).

Vendors {Bidders} may refer to the QRGs "Vendor Forms" and "Attaching Files" for instructions on submitting the forms required by this section of the Bid Solicitation {RFP} through NJSTART. Vendors {Bidders} may also refer to the QRG "Vendor Categories and Certifications" for additional instructions on completing shortened versions of required forms by completing certifications on the "Maintain Terms and Categories" Tab within its profile in NJSTART. QRGs are located on the NJSTART Vendor Support Page.

Additionally, pursuant to N.J.A.C. 17:12-2.2,² a bidder's proposal must "[c]ontain all RFP-required certifications, forms, and attachments, completed and signed as required" or "be subject to automatic rejection." As set forth in RFP §§ 4.4.1.2 and 4.4.1.2.1, and as noted above, the submission of a completed *Ownership Disclosure Form* as part of a bidder's proposal was required.

In this case, the record indicates that Penn Jersey did not include the State-supplied *Ownership Disclosure Form* in its proposal submission, nor was a signed Form contained within Penn Jersey's NJSTART Vendor Profile. However, a review of Penn Jersey's proposal shows it did include a "Shareholder (Member) Disclosure" letter that lists FlagerCE Holdings, LLC as the parent company and majority shareholder of Penn Jersey. The letter also lists three individual shareholders and their addresses that hold a 10% or greater interest. Penn Jersey submits in its letter of protest that by including this "Shareholder (Member) Disclosure" letter it provided all the required information related to its ownership interests and therefore request that its proposal be considered responsive.

The requirement to disclose ownership information with a proposal is dictated by statute. As provided by N.J.S.A. 52:25-24.2:

No corporation, partnership, or limited liability company shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, . . . unless prior to the receipt of the bid or accompanying the bid, of said corporation, said partnership, or said limited liability company there is submitted a statement setting forth the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be. If one or more such stockholder or partner or member is itself a corporation or partnership or limited liability company, the stockholders holding 10 percent or more of that corporation's stock, or the individual partners owning 10 percent or greater interest in that partnership, or the members owning 10 percent or greater interest in that limited liability company, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, and member, exceeding the 10 percent ownership criteria established in this act, has been listed.

....

As interpreted by our courts, "[t]he obvious purpose of the statute is to prevent favoritism by denying an individual the use of a corporate or partnership name to hide his or her true identity, when knowledge of this identity could affect public bidding." Schlumberger Industries, Inc. v. Borough of Avalon, 252 N.J. Super. 202, 208 (App. Div. 1991).

In order for Penn Jersey's proposal to be considered responsive, the inclusion of the "Shareholder (Member) Disclosure" letter in the place of the State-supplied *Ownership Disclosure Form* would have to be deemed as a minor irregularity. Minor irregularities can be waived pursuant to the authority vested in N.J.A.C. 17:12-2.7(d) and RFP Section 1.4.10, *Proposal Acceptances and Rejections*. The New Jersey courts have developed a two-prong test to consider the materiality of a deviation and whether the deviation can be waived. In In re Protest of the Award of the On-Line Games Prod. & Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), the Appellate Division affirmed the criteria used by the Law

² The Division's administrative rules governing its procurement programs are set forth in N.J.A.C. 17:12. These rules can be accessed at <http://www.state.nj.us/treasury/purchase/AdminCode.shtml>.

Division in Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). In River Vale, the Court ruled that in considering the materiality of a deviation or exception and whether it can be waived, one must determine

. . . first, whether the effect of a waiver would be to deprive the [State] 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 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.

[Ibid.]

I have considered Penn Jersey's position through the lens of the River Vale criteria, and concur with Penn Jersey that its submission of an alternate Ownership Disclosure form does not rise to the level of a material deviation. First, because Penn Jersey provided its ownership information, although in a different format than requested by the Division, it fulfilled the purpose of the statute and was in compliance with specified requirements. Second, because all bidders were required to provide ownership disclosure information, Penn Jersey will not be placed in a position of advantage.

Therefore, I am overturning the decision of the Proposal Review Unit to reject Penn Jersey's proposal for the above-referenced RFP. However, Penn Jersey may be asked to submit the State-supplied *Ownership Disclosure Form* as a clarification. I must note that if the information provided on the State-supplied form does not match the information provided on Penn Jersey's Shareholder (Member) Disclosure letter, the clarification would be unacceptable, consistent with the Appellate Court's reasoning in On-Line Games.³ This is my final agency decision on this matter.

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

Sincerely,



Maurice Griffin
Chief Hearing Officer

MAG:DF

c: J. Kerchner
K. Thomas
M. Gilbert
A. Nelson

³ The court stated that “[i]n clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In 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.” On-Line Games, *supra*, 279 N.J. Super. at 597.