



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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June 14, 2017

Via Electronic Mail [kelseyboltz@brownsfeeds.com] and USPS Regular Mail

Thomas Brown
F.M. Brown's Sons, Inc.
P.O. Box 67
Birdsboro, PA 19508-0067

Re: Protest of Notice of Proposal Rejection
Solicitation #17DPP00128: T-2909 Dairy Cow Feed for NJDOC Agri-Industries

Dear Mr. Brown:

This letter is in response to your correspondence of June 1, 2017, on behalf of F.M. Brown's Sons, Inc. (hereinafter "Brown's") which was received by the Hearing Unit of the Division of Purchase and Property (hereinafter "Division"). In that letter, Brown's protests the Notice of Proposal Rejection issued by the Division's Proposal Review Unit for Solicitation #17DPP00128: T-2909 Dairy Cow Feed for NJDOC Agri-Industries. The record of this procurement reveals that Brown's Quote {Proposal} (hereinafter "Proposal") was rejected for failing to submit pricing information.

In consideration of Brown's protest, I have reviewed the record of this procurement, including the Bid Solicitation {Request for Proposal} (hereinafter "RFP"), Brown's Proposal, 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. I set forth herein the Division's Final Agency Decision.

By way of background, on May 1, 2017, the Division's Procurement Bureau (hereinafter "Bureau") issued the above referenced RFP on behalf of the New Jersey Department of Corrections Agri-Industries, Farm Operations, to solicit Proposals for feed for lactating dairy cows. RFP § 1.1 *Purpose and Intent*. The intent of the RFP is to award one Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter "Contract") to that responsive Vendor {Bidder} (hereinafter "Bidder") whose Proposal is most advantageous to the State, price and other factors considered. Ibid.

On June 1, 2017, the Proposal Review Unit opened the Proposals received by the submission deadline of 2:00 p.m. After conducting an initial review of the Proposals submitted, the Proposal Review Unit found that Brown's Proposal did not include a completed price sheet. Accordingly, the Proposal Review Unit issued a Notice of Proposal Rejection. On June 1, 2017, Brown's submitted a protest to the Division stating:

Our bid was e-mailed on 5.31.17 @ 3:54:39 pm EDT

We have your confirmation that it was received by NJ. Start. (sic) Your confirmation is attached.

Also attached is out (sic) bid price sheet which contains the prices for Mountain View, Jones and Bayside farms.

With the protest, Brown's included a copy of the following document as evidence of having submitted the price sheet:

Quantity	UOM	Unit Cost	Discount %	Tax Rate	Freight	Estimated Amount	No Bid	No Change
1.0	TON	\$313.00	0.0%	0.0%	\$0.00	\$313.00	No	No

Print Sequence # 2.0 : (325 - 05) Dairy Cow Feed, Unit Price Per Ton The Vendor (Bidder) must submit its pricing as an attachment using the State-supplied price sheet/schedule accompanying this Bid Solicitation (RFP) and located on the Attachments Tab. Please refer to Bid Solicitation (RFP) Section 4.4.5 for more information. Approximate Delivery: Every 3-5 Weeks Ship To: Bureau of State Farm Operations Jones Farm 721 Bear Tavern Rd. Trenton, NJ 08628

Quantity	UOM	Unit Cost	Discount %	Tax Rate	Freight	Estimated Amount	No Bid	No Change
1.0	TON	\$313.00	0.0%	0.0%	\$0.00	\$313.00	No	No

Print Sequence # 3.0 : (325 - 05) Dairy Cow Feed, Unit Price Per Ton Approximate Delivery: Every 3-5 Weeks The Vendor (Bidder) must submit its pricing as an attachment using the State-supplied price sheet/schedule accompanying this Bid Solicitation (RFP) and located on the Attachments Tab. Please refer to Bid Solicitation (RFP) Section 4.4.5 for more information. Ship To: Bureau of State Farm Operations Bayside State Prison Rt. 47 Delsea Drive Leesburg, NJ 08327

Quantity	UOM	Unit Cost	Discount %	Tax Rate	Freight	Estimated Amount	No Bid	No Change
1.0	TON	\$317.00	0.0%	0.0%	\$0.00	\$317.00	No	No

Print Withdraw Quote

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A review of the record of this procurement reveals that on May 1, 2017, the Bureau issued an RFP to solicit Proposals for feed for lactating dairy cows. The RFP was comprised of the following documents, all of which were available for download on the Division's **NJSTART** website:

- Procurement Checklist T-2909 Dairy Cow Feed for NJDOC Agri-Industries
- Bidder Data Sheet T-2909 Dairy Cow Feed for NJDOC Agri-Industries
- Price Sheet T-2909 Dairy Cow Feed for NJDOC Agri-Industries
- Offer and Acceptance T-2909 Dairy Cow Feed for NJDOC Agri-Industries
- Bid Solicitation T-2909 Dairy Cow Feed for NJDOC Agri-Industries

On May 3, 2017, the Bureau posted an amendment to the RFP along with a revised solicitation document. These documents were also available for download on the Division's **NJSTART** website:

- Amendment 01 T-2909 Dairy Cow Feed for NJDOC Agri-Industries
- Revised Bid Solicitation T-2909 Dairy Cow Feed for NJDOC Agri-Industries

Both the original and the amended RFP required that a Bidder submit its Proposal pricing using the State-supplied prices sheet. Specifically, RFP § 4.4 *Quote {Proposal} Content* states in pertinent part:

A Vendor {Bidder} submitting a Quote {Proposal} through **NJSTART** must complete its Price Schedule as an attachment using the State-supplied price sheet/schedule(s) accompanying this Bid Solicitation {RFP} and located on the "Attachments" Tab (See Section 4.4.5 of this Bid Solicitation {RFP}). The Vendor {Bidder} must enter a Unit Cost of \$1.00 for each price line item on the "Items" Tab in NJSTART. The Vendor {Bidder} is instructed to do so only as a mechanism to comply with Bid Solicitation {RFP} Section 6.8 and prevent all pricing from being publicly displayed in **NJSTART**.

[Emphasis added.]

Further, RFP § 4.4.5 *Price Schedule/Sheet* advises that "[t]he Vendor {Bidder} must submit its pricing using the State-supplied price sheet/schedule(s) accompanying this Bid Solicitation {RFP} and located on the "Attachments" Tab." *Emphasis added.* A copy of the State-supplied price sheet is shown below.

17DPP00128 T-2909 Dairy Cow Feed for NJDOC Agri-Industries PRICE SHEET						
Vendor's (Bidder's) Name: _____				Cash Discount Terms Per Section 4.4.5.6 of the Bid Solicitation (RFP): _____		Delivery Days ARO (Not to Exceed three (3) Business Days): _____
Price Line Number	Item Description	Quantity	Unit of Measure	Unit Price Per Ton	Maximum Weight Capacity in Tons per TRKLD	
1	Item Description Dairy Cow Feed - Approximate Delivery Every 3-5 Weeks - Ship To Bureau Of State Farm Operations Mountainview Farm Youth Correctional Center US Route 22 Annandale NJ 08801	1	TON			
2	Item Description Dairy Cow Feed - Approximate Delivery Every 3-5 Weeks - Ship To Bureau Of State Farm Operations Jones Farm 721 Bear Tavern Rd Trenton NJ 08628	1	TON			
3	Item Description Dairy Cow Feed - Approximate Delivery Every 3-5 Weeks - Ship To Bureau of State Farm Operations Bayside State Prison Rt 47 Delsea Drive Leesburg NJ 08327	1	TON			

As shown in the screenshot above, the price sheet includes cells for the following information to be completed by the Bidder: Unit Price per Ton; Maximum Weight Capacity in Tons per TRKLD; Cash Discount; and Delivery Days. RFP § 4.4.5.2 *Price Sheet/Schedule Attachment Instructions* provided Bidders with specific instructions for completing the State-supplied price sheet:

Vendors {Bidders} must complete all fields on Price Lines 1 through 3 on the price sheet. Price Lines 1 through 3 are grouped as all or none. As such, a Vendor {Bidder} must provide firm fixed pricing per ton for all price lines (price lines 1 through 3) in order to be considered a responsive Vendor {Bidder}. Failure to submit all information required for all three (3) Price Lines may result in the Quote {Proposal} being considered non-responsive.

- Step 1 - The Vendor {Bidder} must insert a firm, fixed price per ton in US dollars in the “Unit Price per Ton” column on the Price Sheet.
- Step 2 – The Vendor {Bidder} should enter the cash discount for expedited payments in the “Cash Discount” field of the Price Sheet. If the Vendor {Bidder} leaves the “Cash Discount” field blank, it shall indicate that the Vendor {Bidder} is not offering a cash discount.
- Step 3 - The Vendor {Bidder} must enter the number of days required to make a delivery upon receipt of an order in the Delivery Days ARO field on the price sheet. If the “Delivery Days ARO” field is left blank, then the delivery days shall default to the delivery days set forth in Section 4.4.5.4.
- Step 4 – The Vendor {Bidder} must enter the maximum weight capacity per truckload, in tons, in the “Maximum Weight Capacity in Tons per TRKLD” column.¹

In connection with its review of this protest, the Division’s Hearing Unit reviewed all documents attached and submitted as part of Brown’s Proposal. In creating and submitting its Proposal, Brown’s did not submit the State supplied price sheet as required; rather, Brown’s submitted its pricing on the “Items Tab”, shown below, within *NJSTART*.

Quote 00001042 - F. M. Browns Sons Inc.											
General Items Questions Subcontractors Terms & Conditions Attachments(1) Evaluations Preferences Reminders Summary											
Sort By: Column Item Sequence Set Descending On											
Item #	Print Sequence	Questions Exist	Description								
			Quantity	UOM	Unit Cost	Discount %	Tax Rate	Freight	Extended Amount	No Bid	No Charge
1	10	Yes	Daily Coal Feed Unit Price Per Ton The vendor (Bidder) must submit its pricing as an attachment using the State-supplied Price Sheet								
			10	TON	\$313.00	0.0%		\$0.00	\$3130.00		
Alternate Description											
2	20	Yes	Daily Coal Feed Unit Price Per Ton The vendor (Bidder) must submit its pricing as an attachment using the State-supplied Price Sheet								
			10	TON	\$313.00	0.0%		\$0.00	\$3130.00		
Alternate Description											
3	30	Yes	Daily Coal Feed Unit Price Per Ton Approximate Delivery Every 3-5 Weeks The vendor (Bidder) must submit its pricing YES/NO								
			10	TON	\$317.00	0.0%		\$0.00	\$3170.00		
Alternate Description											
										Quote Response Total	\$943.00

As previously noted, with respect to the submission of pricing the RFP instructed Bidders that they were not to submit pricing on the “Items Tab” within *NJSTART*; rather, the RFP instructed Bidders to enter a Unit cost of \$1.00 for each price line on the “Items Tab”.

4.4 Quote Proposal Content

...

A Vendor {Bidder} submitting a Quote {Proposal} through *NJSTART* must complete its Price Schedule as an attachment using the State-supplied price sheet/schedule(s) accompanying this Bid Solicitation {RFP} and located on the “Attachments” Tab (See Section 4.4.5 of this Bid

¹ Shall or Must – Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a Quote {Proposal} as non-responsive. RFP § 2.2 *General Definitions*.

Solicitation {RFP}). The Vendor {Bidder} must enter a Unit Cost of \$1.00 for each price line item on the "Items" Tab in *NJSTART*. The Vendor {Bidder} is instructed to do so only as a mechanism to comply with Bid Solicitation {RFP} Section 6.8 and prevent all pricing from being publicly displayed in *NJSTART*. In the event that a Vendor {Bidder} using *NJSTART* to submit a Quote {Proposal} uploads a price sheet/schedule attachment and completes the Items Tab in *NJSTART* (instead of entering a Unit Cost of \$1.00 as instructed), the price sheet/schedule attachment will govern.

4.4.5.1 *NJSTART* PRICING SUBMISSION INSTRUCTIONS

If the Vendor {Bidder} is submitting a *NJSTART* Quote {Proposal}, the Vendor {Bidder} must enter a Unit Cost of \$1.00 for each price line item on the "Items" Tab in *NJSTART*. The Vendor {Bidder} is instructed to do so only as a mechanism to comply with Bid Solicitation {RFP} Section 6.8 and prevent all pricing from being publicly displayed in *NJSTART*.

In order for Brown's Proposal to be considered responsive, Brown's submission of pricing in a format other than on the State-supplied price sheet, 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*. It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Twp. of Hillside v. Sternin, 25 N.J. 317, 324 (1957). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the court in Twp. of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). "In River Vale, Judge Pressler declared that after identifying the existence of a deviation, the issue is whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity." On-Line Games, *supra*, 279 N.J. Super. at 594 (citing River Vale, *supra*, 127 N.J. at 216.) The River Vale court set forth a two-part test for determining whether a deviation is material:

First, whether the effect of a waiver would be to deprive the [government entity] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

[River Vale, *supra*, 127 N.J. at 216.]

"If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all." *Id.* at 222.

Submission of the required information on the State-supplied price sheet is solely for the convenience of the Bureau in evaluating the Proposals received. Therefore, the question is whether Brown's failure to submit required information results in a material deviation.

First, Brown's did supply a Unit Price per Ton by completing the field on the "Items Tab". Therefore, with respect to this item, there is no deviation.

Second, while the price sheet included a field for the Bidder to enter a cash discount, providing a cash discount was not a mandatory requirement; rather, Bidders were “encouraged” to offer a cash discount. RFP § 4.4.5.6 *Cash Discounts* and RFP § 4.4.5.2 – Step 2. Brown’s failure to provide the information does not result in the State being deprived of the assurance that the Contract will be entered into, performed and guaranteed according to the specified requirements or place the Bidder in the position of advantage over other Bidders, as cash “discounts will not be considered in determining the price rankings of Quotes {Proposals}.” RFP § 4.4.5.6 *Cash Discounts*.

Third, with respect to the requirement that the Bidder enter the delivery days onto the price sheet, the RFP advised Bidders that “[i]f the “Delivery Days ARO” field is left blank, then the delivery days shall default to the delivery days set forth in Section 4.4.5.4;” here three (3) business days. RFP § 4.4.5.2 – Step 3 and RFP § 4.4.5.4 *Delivery Time and Costs*. Brown’s failure to provide the information does not result in the State being deprived of the assurance that the Contract will be entered into, performed and guaranteed according to the specified requirements or place the Bidder in the position of advantage over other Bidders as Brown’s will be required to comply with the delivery days set forth in the RFP. RFP § 4.4.5.4 *Delivery Time and Costs*.

Fourth, the RFP required that Bidders enter the Maximum Weight Capacity in Tons per Truckload on the price sheet stating “The Vendor {Bidder} must enter the maximum weight capacity per truckload, in tons, in the “Maximum Weight Capacity in Tons per TRKLD” column.” RFP § 4.4.5.2 – Step 4, *emphasis added*. Because the “Items Tab” was not to be used by Bidders to submit Proposal pricing, the “Items Tab” did not contain a cell for Bidders to enter Maximum Weight Capacity in Tons per Truckload. Brown’s did not provide the information elsewhere in its Proposal; therefore, Brown’s Proposal contains a deviation.

In the process of reviewing this protest, the Bureau advised that consistent with RFP § 6.6 *Evaluation Criteria*, the Proposals received will be evaluated based upon the total group price per ton. Specifically, RFP § 6.6 *Evaluation Criteria* states:

The following criteria will be used to evaluate Quotes {Proposals} received in response to this Bid Solicitation {RFP}. The criteria are not necessarily listed in order of importance:

- A. Group Price (Sum of the total prices on price lines 1 through 3)
- B. Experience of the Vendor {Bidder}
- C. The Vendor’s {Bidder’s} documented past performance under similar Blanket P.O.’s {Contracts}, including, but not limited to, the Division’s Vendor {Contractor} performance database.

The Maximum Weight Capacity in Tons per Truckload is not part of the evaluation criteria, but is solely for informational and convenience purposes to aid Using Agencies in preparing purchase orders.

I have considered Brown’s deviation through the lens of the River Vale criteria, and find that Brown’s submission of pricing on the “Items Tab” rather than on the price sheet, does not rise to the level of a material deviation. Brown’s failure to provide the information does not result in the State being deprived of the assurance that the Contract will be entered into, performed and guaranteed according to the specified requirements or place Brown’s in the position of advantage over other Bidders as the Maximum Weight Capacity in Tons per Truckload is not part of the evaluation criteria and was only requested for information purposes.

Therefore, I am overturning the decision of the Proposal Review Unit to reject Brown’s Proposal for the above referenced RFP. I further note that the Bureau should seek a clarification from Brown’s with

respect to its Proposal pricing. However, consistent with the Court's holding in In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566 (App. Div. 1995), Brown's should not be permitted supply that information which it should have supplied with its Proposal. Specifically, Brown's is not permitted to supply a Cash Discount, Delivery Days or Maximum Weight Capacity in Tons per TRKLD, as providing different information in these fields post Proposal opening could result in an impermissible supplementation.²

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 [NJSTART](http://NJSTART.com) at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas
A. Miller
A. Nelson
D. Rodriguez

² In On-Line Games the Appellate Division held that “[t]he RFP specifically approved of bidders’ clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. In 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.