



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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June 11, 2015

Via Electronic [bhb@ksbblaw.com] and USPS Regular Mail

Bruce H. Bergen, Esq.
Krevsky Silber & Bergen
123 N Union Avenue, Suite 202
Cranford, NJ 07016-2198

Re: Protest of Notice of Proposal Rejection
RFP #15-X-23841 OEM and Non-OEM Maintenance and Repair Services for Light/Medium
Duty Vehicles, 15,000 lb. GVWR or Less (T-0126)

Dear Mr. Bergen:

This letter is in response to your email dated May 6, 2015, on behalf of Engine Land, Inc. ("Engine Land"), by which you express interest in competing for the award of the subject term contract, notwithstanding Engine Land's receipt of a Notice of Proposal Rejection from the Proposal Review Unit of the Division of Purchase and Property ("Division"). This notice indicates that Engine Land submitted an incomplete, yet signed, *Disclosure of Investment Activities in Iran* form. You contend that Engine Land's omission was inadvertent and that Engine Land intended to check the first box on the form, indicating that neither Engine Land nor its parents, subsidiaries or affiliates is listed or being considered for listing on the Department of the Treasury's list of entities determined to be engaged in prohibited activities in Iran pursuant to P.L. 2012, c. 25 ("Chapter 25 List").

I have reviewed the record of this procurement, including the RFP, Engine Land's proposal, and 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 submitted by Engine Land. I set forth herein my final agency decision.

A review of the facts of this procurement shows that Engine Land submitted an electronic proposal through the Division's eBid system by the proposal submission date of April 17, 2015. Engine Land included the three-part Standard RFP Forms packet with its electronic submission, which contained the *Disclosure of Investment Activities in Iran* form. While Engine Land completed the necessary certification on this form, it failed to check one of the two boxes. Acknowledging "an inadvertent typing error," Engine Land included a properly completed form with its letter of protest in which it indicated that neither it nor any of its parents, subsidiaries, or affiliated "is listed on the N.J. Department of Treasury's list of entities determined to be engaged in prohibited activities in Iran pursuant to P.L. 2012, c. 25 ('Chapter 25 List').")"

In order for Engine Land's proposal to be considered, the omission on the *Disclosure of Investment Activities in Iran* form would have to be deemed as a minor irregularity. Minor irregularities can be waived by the Director 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*. New Jersey courts have developed a two-prong test to consider "whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity." Twp. of River Vale v. R. J. Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). The two-prong test requires a determination of

first, whether the effect of a waiver would be to deprive the municipality 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.

[Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 315 (1994) (internal quotations omitted) (affirming the two-prong test established in River Vale, *supra*, 127 N.J. Super. at 216).]

I have considered Engine Land's position through the lens of the River Vale criteria, and concur with Engine Land that its submission of a signed but incomplete *Disclosure of Investment Activities in Iran* form does not rise to the level of a material deviation. I note that, consistent with your position, a permissible inference regarding Engine Land's intent can be made due to its non-inclusion of a description of investment activities in Iran for itself or its parents, subsidiaries or affiliates, as required if the second box was checked. I have also reviewed the Department of the Treasury's Chapter 25 List and there is no evidence that either Engine Land, or one of its parents, subsidiaries or affiliates, is on the list or engaged in investment activities in Iran that would qualify for Chapter 25 listing. As a result, I find that a clarification would be appropriate to remedy the ambiguity in Engine Land's *Disclosure of Investment Activities in Iran* form. Therefore, I accept the May 5, 2015 revised form, which affirmed that neither Engine Land nor any of its parents, subsidiaries or affiliates is on the Department's Chapter 25 List. This statement clarifies Engine Land's intent to check the first box on the *Disclosure of Investment Activities in Iran* form, which remedies the ambiguity at issue. However, I must also note that if the statement of clarification expressed Engine Land's intent to check the second box on the form and provided information to that end, the clarification would be unacceptable. See In re Protest of the Award of the On-Line Games Prod. & Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995) (holding 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.").

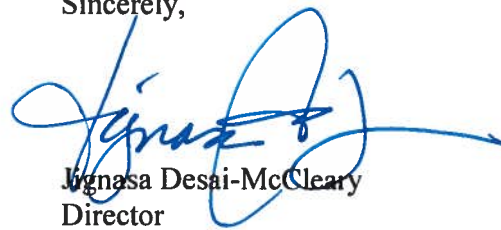
Therefore, I am overturning the decision of the Proposal Review Unit to reject Engine Land's proposal for the above-referenced RFP. This is my final agency decision on this matter.

I hereby direct the Procurement Bureau to proceed accordingly with evaluation of the proposals, inclusive of Engine Land, received for this procurement.

Thank you for your interest in doing business with the State of New Jersey. I invite you to take this opportunity to register your business at www.njstart.gov, the State of New Jersey's new eProcurement system, which is scheduled to go live soon and will provide a "one-stop shop" for

vendors to submit proposals, maintain required forms and certifications, and present purchase orders and invoices for payment.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF

c: M. Griffin
K. Thomas
V. Bequer
D. Rodriguez
A. Nelson