



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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February 22, 2019

Via Electronic Mail [peacock@tspsupply.com] and USPS Regular Mail

Chris Peacock, President
TSP Maintenance Supply, LLC
52 East Drive
Livingston, NJ 07039

Re: I/M/O Bid Solicitation #18DPP00259 TSP Maintenance Supply, LLC
Protest of Notice of Proposal Rejection
T0374 Bar Soap, Individually Wrapped for Distribution and Support Services (DSS)

Dear Mr. Peacock:

This letter is in response to your emails of February 5, 2019, February 7, 2019 and February 8, 2019, on behalf of TSP Maintenance Supply, LLC (TSP) which were received by the Division of Purchase and Property's (Division) Hearing Unit. In those emails, TSP requests that the Division reconsider the February 5, 2019, final agency decision which sustained the Notice of Proposal Rejection issued by the Division's Proposal Review Unit for Bid Solicitation #18DPP00259 – T0374 Bar Soap, Individually Wrapped for Distribution and Support Services (Bid Solicitation).

By way of background, on December 5, 2018, the Division's Procurement Bureau ("Bureau") issued the Bid Solicitation on behalf of the New Jersey Department of the Treasury, Distribution and Support Services (DSS). The purpose of the Bid Solicitation was to solicit Quotes for bar soap, individually wrapped, for DSS. Bid Solicitation § 1.1 *Purpose and Intent*. It is the State's intent to award a Master Blanket Purchase Order (Blanket P.O.) to the responsible Vendor {Bidder} whose Quote, conforming to this Bid Solicitation is most advantageous to the State, price and other factors considered. *Ibid*. On January 29, 2019, the Division's Proposal Review Unit opened the Quotes received by the submission deadline of 2:00 pm eastern time. After conducting a review of the Quotes received, the Division's Proposal Review Unit issued a Notice of Proposal Rejection to TSP for failure to submit the *Disclosure of Investment Activities in Iran Form* with its Quote.

In response to the Notice of Proposal Rejection, on January 31, 2019, TSP sent an email to the Division's Hearing Unit stating:

We would like to protest our notice of proposal rejection for 18DPP00259. The proposed rejection states that we are missing disclosure of investment activities in Iran. The form is attached with our bid that was submitted.

We are currently unsure why we were rejected for this form missing. We triple checked and its (sic) included with attachments that are required. Please review and confirm that our bid will be accepted.

On February 5, 2019, the Division issued its final agency decision sustaining the Notice of Proposal Rejection. In part, the final agency decision stated:

With respect to the submission of the *Disclosure of Investment Activities in Iran Form*, the New Jersey Legislature has mandated that “[a] State agency shall require a person or entity that submits a bid or Quote or otherwise proposes to enter into or renew a [Blanket P.O.] to certify, at the time the bid is submitted or the [Blanket P.O.] is renewed, that the person or entity is not identified on a list created pursuant to subsection b. of section 3 [C.52:32-57] of this act as a person or entity engaging in investment activities in Iran described in subsection f. of section 2 [C.52:32-56] of this act.” N.J.S.A. 52:32-58(a).¹

...

Notwithstanding TSP’s interest in competing for this procurement, the Division does not have the power to waive the legislative requirement that a Vendor {Bidder} certify with its Quote that it is not engaged in investment activities in Iran. Only the New Jersey Legislature can change a requirement it has mandated. Accordingly, TSP’s Quote was properly rejected by the Division’s Proposal Review Unit for failure to submit the mandatory *Disclosure of Investment Activities in Iran Form* with its Quote.

On February 5, 2019, TSP responded to the final agency decision stating:

I finally see that we submitted the wrong form and understand now the reason for the automatic rejection.
Question for you (sic) unit. There’s nothing in any of rules and regulations for a clerical mistake?
The submission form for Iran Disclosure was made in good faith and the wrong form was submitted.
We have no business or have ever done any business with Iran. We will provide the correct form if allowed.
This was 100% a human error.
Also if TSP’s price is the lowest and the product is already approved and this is clearly a clerical mistake doesn’t the state want to rectify so it there's no extra money spent on a more expensive product?
If seems the punishment of a rejected bid for clearly a clerical error hurts the State of NJ harshly if we are the best option and price for this product.
Please let me know if we have another alternatives to protest the rejection and also the answer to the questions.

TSP additionally emailed the Division on February 7, 2019 and February 8, 2019. On February 8, 2019, the Hearing Unit advised TSP that it would accept its emails as a request for reconsideration.

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.” Should or May – “Denotes that which is permissible or recommended, not mandatory.” Bid Solicitation § 2.2 *General Definitions*.

In consideration of TSP's request for reconsideration, I have reviewed the record of this procurement, including the Bid Solicitation, TSP's Quote and protest, 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 decision on the merits of the request for reconsideration submitted by TSP.

In the request for reconsideration, TSP asks whether any of the Division's rules or regulations permit a Vendor {Bidder} to correct a clerical mistake. None of the Division's governing statutes, regulations or the subject Bid Solicitation permit a Vendor {Bidder} to correct a clerical error. While the Division's regulations permit the Director to "waive a minor irregularities or omissions," the omission of a statutorily mandated form cannot be considered a minor irregularity. N.J.S.A. 17:12-2.7(d).

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). "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 the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), citing, Twp. of River Vale v. Longo Constr. Co., 27 N.J. Super. 207, 216 (Law Div. 1974).

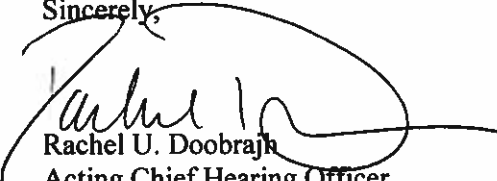
As noted in the Division's February 5, 2019, final agency decision, the New Jersey Legislature, in enacting the law, mandated that "[a] State agency shall require a person or entity that submits a bid or Quote or otherwise proposes to enter into or renew a [Blanket P.O.] to certify, at the time the bid is submitted or the [Blanket P.O.] is renewed, that the person or entity is not identified on a list created pursuant to subsection b. of section 3 [C.52:32-57] of this act as a person or entity engaging in investment activities in Iran described in subsection f. of section 2 [C.52:32-56] of this act." N.J.S.A. 52:32-58(a), emphasis added. If the Division were to waive a legislatively mandated bid submission requirement, it would un-level the playing field giving TSP the opportunity to cure a deficiency in its submitted Quote, an opportunity not afforded to other Vendors {Bidders}. Allowing TSP to cure the deficiency would place it "in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition." River Vale, supra, 27 N.J. Super. at 216.

Further, with respect to TSP's assertion that the State could potentially pay more for the product sought, I note that the legislative history reveals that in reviewing the bill prior to enactment, the Office of Legislative Services (OLS) recognized that the law could result in fewer bidders and increased costs to the State. Specifically, OLS stated "that to the extent that this bill reduces the number of persons or entities eligible to hold public contracts, the costs of such contracts could, perhaps, increase due to a fewer number of suppliers bidding." See, Senate Budget and Appropriates Committee, Statement to Senate, No. 1304. Despite the recognition that law could result in few bids and increased costs, it was enacted without amendment, requiring that the certification be made at the time the Quote is submitted.

Finally, TSP notes that as the current vendor, it had previously submitted an Iran form to the State. Unfortunately, as noted above, the law mandates that a Vendor {Bidder} certify with its Quote that it is not engaged in investment activities in Iran. The Division does not dispute TSP's statement that it is not engaged in prohibited activities, but nonetheless, the Division is not authorized to waive the legislative requirement that a Vendor {Bidder} certify with its Quote that it is not engaged in investment activities in Iran. Therefore, I sustain the February 5, 2019, final agency decision.

In accordance with the Division's governing regulations, final agency determinations by the Director on matters of protest are appealable to the Appellate Division of the Superior Court of New Jersey.² N.J.A.C. 17:12-3.1(b).

Sincerely,



Rachel U. Doobraj
Acting Chief Hearing Officer

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

² The Division is unable to provide legal guidance, instruction or information regarding a Vendor right to appeal or how to file an appeal of a final agency decision.