



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 2, 2016

Via Electronic Mail [kim.sholette@cibinc.com] and USPS Regular Mail

Kim Sholette, Sales Administrator
Becker's School Supplies
1500 Melrose Highway
Pennsauken, NJ 08110-1410

RE: Protest of Notice of Proposal Rejection
Bid Solicitation {Request for Proposal} # 16DPP00019 – Parks and Playground Equipment

Dear Ms. Sholette:

This letter is in response to your email of August 4, 2016 and your protest letter of the same date, signed by Robert F. Becker of Becker's School Supplies (Becker), in response to a Notice of Proposal Rejection (Notice) sent by the Division of Purchase and Property's (Division) Proposal Review Unit, and in which you included a signed and completed *Disclosure of Investment Activities in Iran* Form. The Notice indicated that Becker failed to include a signed/completed *Disclosure of Investment Activities in Iran* Form with its proposal.

I have reviewed the record of this procurement, including the Bid Solicitation {Request for Proposal} (hereinafter RFP), Becker's proposal, the Notice, relevant statutes, regulations, and case law, as well as Becker's letter of protest. 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 Becker's protest.

By way of background, the subject RFP was issued by the Division's Procurement Bureau (Bureau) on behalf of New Jersey Agencies and State Cooperative Purchasing Program Participants for various types of park and playground equipment. RFP § 1.1 *Purpose and Intent*. The intent of the RFP is "to award multiple Master Blanket Purchase Orders (Blanket POs) {Contracts} [(hereinafter contract)] 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 State intends to make one award per brand per region for each of the categories listed in the RFP. *Ibid.* Regions are broken into North, Central, and South, serving the 21 New Jersey counties. RFP § 3.3 *Regional Jurisdiction*. This is a reprocurement of services similar to those offered by term contract T-0103. RFP § 1.2 *Background*.

On July 29, 2016, the Division's 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 Becker failed to submit the *Disclosure of Investment Activities in Iran* Form. Accordingly, the Proposal Review Unit issued the Notice resulting in Becker's proposal being considered non-responsive to the RFP. In response to the Notice, on August 4, 2016, via email and an accompanying letter, Becker protested its proposal rejection.

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

**4.4.1.2.2 DISCLOSURE OF INVESTMENT ACTIVITIES IN IRAN
FORM**

Pursuant to N.J.S.A. 52:32-58, the Vendor {Bidder} must utilize this Disclosure of Investment Activities in Iran form to certify that neither the Vendor {Bidder}, nor one of its parents, subsidiaries, and/or affiliates (as defined in N.J.S.A. 52:32-56(e)(3)), is listed on the Department of the Treasury's List of Persons or Entities Engaging in Prohibited Investment Activities in Iran and that neither the Vendor {Bidder}, nor one of its parents, subsidiaries, and/or affiliates, is involved in any of the investment activities set forth in N.J.S.A. 52:32-56(f). If the Vendor {Bidder} is unable to so certify, the Vendor {Bidder} shall provide a detailed and precise description of such activities as directed on the form. **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}.**

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 its firm's situation 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.

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.

[(Emphasis added.)]

Further, pursuant to N.J.A.C. 17:12-2.2,¹ 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 4.4.1.2.2, and as noted above, the submission of a completed and signed *Disclosure of Investment Activities in Iran* Form as part of a bidder’s proposal was required. Additionally, as a courtesy to all bidders, the Bureau provided a Proposal Checklist as an accompaniment to the RFP. The Checklist indicated which forms, certifications, etc., were required to be submitted with a bidder’s proposal.

A review of the Division’s NJSTART eProcurement system (NJSTART) shows that for this procurement, despite the indication on the Notice, Becker did in fact submit a *Disclosure of Investment Activities in Iran* Form with its electronic proposal through NJSTART by the proposal submission date of July 29, 2016. However, while Becker completed the necessary certification on this form, it failed to check one of the two boxes as required. With its letter of protest, Becker included a letter indicating that it has “never conducted business or had any activities with or within Iran” and also included a properly completed form in which it indicated that neither it nor any of its parents, subsidiaries, or affiliates is engaged in prohibited activities in Iran pursuant to P.L. 2012, c. 25 (Chapter 25 List).

In order for Becker’s proposal to be considered for an award, 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 by N.J.A.C. 17:12-2.7(d) and outlined in RFP Section 1.4.10, *Quote {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 Becker’s position through the lens of the River Vale criteria and determined that Becker’s submission of a signed but incomplete *Disclosure of Investment Activities*

¹ 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>.

in Iran Form does not rise to the level of a material deviation. I note that a permissible inference regarding Becker's intent can be made due to its non-inclusion of a description of investment activities in Iran for itself or any parents, subsidiaries, or affiliates, as required if the second box were checked. The Hearing Unit has also reviewed the Department of the Treasury's Chapter 25 List and there is no evidence that Becker, or any 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 Becker's *Disclosure of Investment Activities in Iran* Form. Therefore, I accept the statement in Becker's August 4, 2016 letter that it has "never conducted business or had any activities with or within Iran" and the submission of a clarified form with the corresponding box checked, which affirmed that neither Becker nor any of its parents, subsidiaries, or affiliates is on the Department's Chapter 25 List. These documents clarify Becker's intent to check the first box on the submitted version of 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 Becker's intent to check the second box on the form and had 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 overturn the decision of the Proposal Review Unit to reject Becker's proposal for the above-referenced RFP. Note that in the future Becker must be mindful to complete and submit the current versions of all RFP-required forms and documents and to ensure proper compliance with RFP requirements. This is my final agency decision on this matter.

I hereby direct the Bureau to proceed accordingly with evaluation for this procurement, inclusive of Becker's proposal.

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

Sincerely,



Maurice Griffin
Chief Hearing Officer

c: J. Kercher
K. Thomas
A. Nelson