



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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June 27, 2014

Via Electronic (noor.majid@daxwell.com) and USPS Regular Mail

Noor Majid
Daxwell
2825 Wilcrest Drive, #500
Houston, TX 77042

**Re: *Reconsideration of Proposal Rejection*
*RFP # 15-X-23476: Food Service Items: Disposable, Paper & Plastic – DSS***

Dear Mr. Majid:

This letter is in response to your letter dated June 19, 2014, on behalf of Daxwell, by which you express interest in competing for the award of the subject term contract, notwithstanding Daxwell's receipt of a Notice of Proposal Rejection from the Division of Purchase and Property's Proposal Review Unit. This notice indicates that Daxwell submitted an incomplete, yet signed, *Disclosure of Investment Activities in Iran* form. You contend that Daxwell's omission was inadvertent, Daxwell intended to check the first box on the form and that neither Daxwell, 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, Daxwell'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 Daxwell. I set forth herein my Final Agency Determination.

In order for Daxwell'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*. 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 re Protest of the Award of the On-Line Games Production & Services 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 Division in Township 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 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 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.

I have considered Daxwell's position through the lens of the River Vale criteria, and concur with Daxwell 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 Daxwell'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 Daxwell, 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 Daxwell's *Disclosure of Investment Activities in Iran* form. I accept the June 19, 2014 revised form, which affirmed that neither Daxwell nor any of its parents, subsidiaries or affiliates is on the Department's Chapter 25 List. This statement clarifies Daxwell'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 Daxwell's intent to check the second box on the form and provided information to that end, the clarification would be unacceptable, consistent with the Appellate Court's reasoning in Online Games¹.

Therefore, I am overturning the decision of the Proposal Review Unit to reject Daxwell'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 Daxwell, 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 this fall 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,



Ronald G. Wengerd
Chief Hearing Officer

RGW:KW

c: G. Gerstenacker
J. Signoretta
R. Sharbaugh
A. Nelson

¹ 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, 279 N.J. Super. 566, 597 (App. Div. 1995)