



## State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PURCHASE AND PROPERTY  
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September 22, 2015

Via Electronic [Ken.Ditzel@fticonsulting.com] and USPS Regular Mail

Ken Ditzel  
FTI Consulting  
1101 K. Street NW, Suite B100  
Washington, DC 20005

Re: Protest of Notice of Proposal Rejection  
RFP 15-X-23601: Off Shore Wind Economic Analysis & Assistance with Evaluation

Dear Mr. Ditzel:

This letter is in response to your September 4, 2015, email to Hearing Unit of the Division of Purchase and Property (Division) on behalf of FTI Consulting (FTI), in which you protest the Notice of Proposal Rejection issued by the Proposal Review Unit for Solicitation # 15-X-23601. The record of this procurement reveals that FTI's proposal was rejected because the submitted *Ownership Disclosure Form* and *Disclosure of Investment Activities in Iran* form were more than 6 months old at the time the proposal was submitted. With the protest email, FTI submitted updated forms and requests that the Division accept these forms as a complement to its proposal.

In consideration of this protest, I have reviewed the record of this procurement, including the RFP, FTI'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 FTI. I set forth herein the Division's Final Agency Decision.

By way of background, this Request for Proposal (RFP) was issued by the Division's Procurement Bureau (Bureau) on behalf of the Board of Public Utilities (BPU) to solicit proposals from qualified firms to provide expertise on offshore wind economic analysis and to assist in evaluating the economic, financing and engineering feasibility of offshore wind projects and to provide general consulting services related to off shore wind. (RFP § 1.1 *Purpose and Intent*). The RFP was advertised on October 8, 2014, with an original proposal opening deadline of December 3, 2014. Ultimately, after several addenda, the proposal opening deadline was extended to August 14, 2015. The Proposal Review Unit opened proposals following the submission deadline of August 14, 2015, at 2:00 p.m. After completing its intake review, the Proposal Review Unit issued a Notice of Proposal Rejection to FTI because the submitted *Ownership Disclosure Form* and *Disclosure of Investment Activities in Iran* form were dated more than 6 months prior to the proposal submission date.

This solicitation was comprised of the RFP and other documents, one of which was the three-part document entitled *NJ Standard RFP Forms* which includes the *Ownership Disclosure Form* and a

*Disclosure of Investment Activities in Iran* form. These forms are specifically addressed in RFP Section 4.0, *Proposal Preparation and Submission*. The relevant text reads as follows:

#### **4.4.1.2.1 OWNERSHIP DISCLOSURE FORM**

Pursuant to N.J.S.A. 52:25-24.2, in the event the bidder is a corporation, partnership or sole proprietorship, the bidder must complete and sign the attached Ownership Disclosure Form. **A current completed Ownership Disclosure Form must be received prior to or accompany the submitted proposal.** A bidder's failure to submit the completed and signed form with its proposal will result in the rejection of the proposal as non-responsive and preclude the award of a contract to said bidder unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six months prior to the proposal submission deadline for this procurement. **If any ownership change has occurred within the last six months, a new Ownership Disclosure Form must be completed, signed and submitted with the proposal.**

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

Pursuant to N.J.S.A. 52:32-58, the bidder must utilize this Disclosure of Investment Activities in Iran form to certify that neither the 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 Person or Entities Engaging in Prohibited Investment Activities in Iran and that neither the 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 bidder is unable to so certify, the bidder shall provide a detailed and precise description of such activities as directed in the form. A bidder's failure to submit the completed and signed form with its proposal will result in the rejection of the proposal as non-responsive and preclude the award of a contract to said bidder.

*[Emphasis in the original.]*

Pursuant to N.J.A.C. 17:12-2.2, a bidder's proposal must "contain all RFP-required certifications, forms, and attachments, completed and signed as required" or "be subject to automatic rejection." As set forth in RFP Sections 4.4.1.2.1 and 4.4.1.2.2, the submission of a completed and signed *Ownership Disclosure Form* prior to or as part of the proposal and a completed and signed *Disclosure of Investment Activities in Iran* form as part of a bidder's proposal was required.

The record of this procurement reveals that FTI uploaded the *NJ Standard RFP Forms* along with other forms to eBid on January 5, 2015. Those forms were dated November 25, 2014. FTI subsequently uploaded documents to eBid on July 28, 2015, July 29, 2015 and August 13, 2015. At no time prior to the submission of proposal did FTI amend or upload new *NJ Standard RFP Forms*.

Regarding the *Disclosure of Investment Activities in Iran* form, the RFP specifications and the statute require that a bidder certify "that neither the bidder, nor one of its parents, subsidiaries, and/or affiliates [ ] is listed on the Department of the Treasury's List of Persons or Entities Engaging in Prohibited Investment Activities in Iran". (RFP § 4.4.1.2.2 *Disclosure of Investment Activities in Iran Form*). A bidder is required to submit this form with its proposal. (*Ibid.*) Here, FTI submitted a completed and signed *Disclosure of Investment Activities in Iran* form with its proposal. This form

indicates that neither the bidder, nor one of its parents, subsidiaries or affiliates is engaged in prohibited activities in Iran. Therefore, the Proposal Review Unit should have accepted FTI's *Disclosure of Investment Activities in Iran* form as responsive to the RFP.

With respect to the *Ownership Disclosure Form* submitted with the proposal, the document uploaded to eBid on January 5, 2015, was dated November 25, 2015, more than eight (8) months prior the proposal submission deadline of August 14, 2015. If the "Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six months prior to the proposal submission deadline for this procurement" then a bidder's failure to submit a completed and signed form with its current proposal will not result in a rejection of the proposal as non-responsive. (RFP § 4.4.1.2.1 *Ownership Disclosure Form*). In order to rely upon an *Ownership Disclosure Form* which is on file with the Division, the RFP requires that *Ownership Disclosure Form* be dated and received no more than six months prior to the current proposal deadline. Despite the fact that FTI uploaded the *Ownership Disclosure Form* in January 2015, the proposals were not opened until August 14, 2015. At any time prior to the proposal submission deadline, FTI could have uploaded a new *Ownership Disclosure Form*. However, it did not. The responsibility for the contents of the proposal and required forms necessarily and appropriately rests with the bidder. FTI's *Ownership Disclosure Form* submitted in response to the subject RFP was dated more than 6 months before the proposal deadline. There were no other *Ownership Disclosure Forms* submitted by FTI in the previous six months.<sup>1</sup> Therefore, FTI's proposal was properly rejected by the Proposal Review Unit.

Moreover, FTI failed to accurately complete the *Ownership Disclosure Form* it did submit as required by the specifications. N.J.S.A. 52:25-24.2 addresses when ownership must be disclosed and states in pertinent part that:

No corporation or partnership shall be awarded any contract nor shall any agreement be entered into for the performance of any work or the furnishing of any materials or supplies, the cost of which is to be paid with or out of any public funds, by the State, or any county, municipality or school district, or any subsidiary or agency of the State, or of any county, municipality or school district, or by any authority, board, or commission which exercises governmental functions, unless prior to the receipt of the bid or accompanying the bid, of said corporation or said partnership, there is submitted a statement setting forth the names and addresses of all stockholders in the corporation or partnership who own 10% or more of its stock, of any class or of all individual partners in the partnership who own a 10% or greater interest therein, as the case may be. If one or more such stockholder or partner is itself a corporation or partnership, the stockholders holding 10% or more of that corporation's stock, or the individual partners owning 10% or greater interest in that partnership, as the case may be, shall also be listed. The disclosure shall be continued until names and addresses of every noncorporate stockholder, and individual partner, exceeding the 10% ownership criteria established in this act, has been listed.

With this backdrop, New Jersey Courts have consistently held that strict compliance with the ownership disclosure requirements of N.J.S.A. 52:25-24.2 is necessary. As such, a proposal is properly rejected where it contains inaccurate ownership information. See, Impac, Inc. v. City of Paterson, 178 N.J. Super. 195, 200-01 (App. Div. 1981); Muirfield Const. Co., Inc. v. Essex County Imp. Authority, 336 N.J. Super. 126 (App. Div. 2000).

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<sup>1</sup> The only other *Ownership Disclosure Form* on file with the Division from FTI was dated April 2, 2013 and therefore could not be relied upon in connection with the FTI's proposal to the subject RFP.

By requiring the identity disclosure statement to be submitted with the bid (or prior thereto) the Legislature evinced an intention that any bid not containing such a statement would not be a valid bid. No bidder submitting such an invalid bid is eligible to be awarded the public contract. Any other interpretation of the statute would render nugatory the meaning of the clear language used. The character of the legislation and a reading thereof in context justifies a mandatory, imperative construction.

...

There is no provision in the statute permitting a [government entity] to waive the requirement of disclosure or to allow a bidder additional time following the acceptance of bids to cure an invalid bid. . .The policy of the State is to guard against favoritism and unfair competition by demanding integrity of the bidding process through strict construction of bidding standards...The policy of the State is to guard against favoritism and unfair competition by demanding integrity of the bidding process through strict construction of bidding standards...

Strict construction is essential if integrity of bidding is to be achieved. The action by the [government entity] in waiving noncompliance with the identity disclosure state has created precisely the type of result which the Legislature sought to avoid in enacting a statute designed to preserve fair competition through conformance with an established framework for public contract bidding.

[George Harms Constr. Co. v. Lincoln Park, 161 N.J. Super. 367, 372-74 (Law Div. 1978); citing *Assembly Bill 22* (1976), "Statement of Assembly Municipal Government Committee"; *Assembly Bill 22* (1976), "Statement of Senate State Government, Federal and Interstate Relations and Veterans Affairs Committee."]

With its proposal, FTI submitted an *Ownership Disclosure Form* which was filled out and signed. However, the form was not accurately completed. In response to Question 1 of Part 1 of the form, which asks "Are there any individuals, corporations or partnerships owning a 10% or greater interest in the bidder/offeree?" FTI responded "YES." In response to Question 3 of Part 1, which asks "of those parties owning a 10% or greater interest in the bidder/offeree, are any of those parties corporations or partnerships?" FTI also responded "YES." As such, FTI was required to provide a response to Part 2 of the form specifically providing detailed information regarding those corporations or partnerships owning a 10% or greater interest in FTI. However, FTI did not provide a response to Part 2 of the form. Providing this information is required.<sup>2</sup> Because strict compliance with the ownership disclosure statute is required, the Proposal Review Unit properly rejected FTI's proposal.

Notwithstanding FTI's interest in competing for this procurement, it would not be in the State's best interest to allow a bidder who did not provide the required information to be eligible to participate in the procurement process. Such acceptance would un-level the bidders' playing field as the State received responsive proposals in which all necessary documents and information were provide as required. The deficiency at issue cannot be remedied after the proposal submission deadline as acceptance of FTI's proposal under these circumstances would be contrary to the provisions of the governing statute and provide FTI with disclamation options not available to those bidders whose proposals where fully

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<sup>2</sup> I note that with its protest, FTI submitted a new *Ownership Disclosure Form* dated September 4, 2015. On that form, FTI responded "NO" to all of the questions on Part 1 of the form. This submission does not cure FTI's failure submit a properly completed form with its proposal.

responsive. In light of the finding set forth above, I must deny your request for eligibility to participate in the competition for the subject contract. This is the Division's final agency decision on this matter.

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 with **NJ START** at [www.njstart.gov](http://www.njstart.gov), the State of New Jersey's new eProcurement system.

Sincerely,

A handwritten signature in blue ink, appearing to read "MAGriffin", with a long horizontal flourish extending to the right.

Maurice A. Griffin  
Acting Chief Hearing Officer

MAG: RUD

c: P. Slack  
J. Signortetta  
G. Olivera  
A. Nelson  
D. Rodriguez