



State of New Jersey

DEPARTMENT OF THE TREASURY
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September 25, 2015

Via Electronic [swami@mclsystems.com] and USPS Regular Mail

Swami Muthuvelu, President
MCL Systems Limited
10550 Linden Lake Plaza, Suite 301
Manassas, VA 20109

Re: Reconsideration of Proposal Rejection
RFP# 16-X-23864: Telecommunications Expense System (TEMS) Hosted

Dear Mr. Muthuvelu:

This letter is in response to your email dated September 8, 2015, to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of MCL Systems Limited (MCL), in which you protest the Proposal Review Unit's Notice of Proposal Rejection for Solicitation# 16-X-23864: Telecommunications Expense System. The record of this procurement reveals that MCL's proposal was rejected for failing to include a properly completed *Disclosure of Investment Activities in Iran* form. MCL requests that the Division reconsider the rejection of its proposal.

I have reviewed the record of this procurement, including the Request for Proposal (RFP), MCL's proposal, the 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 MCL. I set forth herein the Division's final agency decision.

By way of background, this RFP was issued by the Division's Procurement Bureau (Bureau) on behalf of the Office of Information Technology (OIT) to solicit proposals for a Telecommunications Expense Management System that will support OIT's wireline and wireless telecommunications billing responsibilities. (RFP § 1.1 *Purpose and Intent*.) In accordance with the RFP, contracts are to be awarded to "the responsible bidder whose proposal conforming to this RFP is most advantageous to the State, price and other factors considered." (*Ibid.*)

On August 28, 2015, proposals received by the submission deadline were opened by the Proposal Review Unit. After conducting the intake review, the Proposal Review Unit issued a Notice of Proposal Rejection to MCL pursuant to N.J.A.C. 17:2-2.2 for failing to submit a completed *Disclosure of Investment Activities in Iran* Form. While MCL did sign the form, it failed to check either box in Part 1 of the form certifying whether or not the bidder or any of the bidder's parents, subsidiaries, or affiliates is engaged in prohibited activities in Iran. In response to the Notice of Proposal Rejection, MCL states:

It just reviewed [the form], and it appears that [n]either one of the check box[es] in Page 5 is missing in the form we submitted. However we had

[] checked the first box (that we don't have activity in Iran) in our original document. It appears that there is a[n] accidental click on the document that removed the check box.

We request that we be forgiven for the accidental mouse click error and be allowed to re-submit just this form.

[MCL's September 8, 2015, protest email.]

In order for MCL's proposal to be considered, the omission of a completed *Disclosure of Investment Activities in Iran* form would have to be deemed a nonmaterial deviation. Nonmaterial deviations can be waived by the Director pursuant to the authority vested by 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 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), the Appellate Division affirmed the criteria used by the Law Division in Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207 (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 [governmental entity] 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.

[River Vale, *supra*, 127 N.J. Super. at 216.]

I have considered MCL's position through the lens of the River Vale criteria and find that MCL's 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 a permissible inference regarding MCL'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 would be required pursuant to Part 2 of the form if such activities existed. This inference is bolstered by MCL's statement in the protest email that it does not have any activity in Iran. Moreover, on September 10, 2015, MCL submitted a letter to the Division in which it states that neither it, nor its parent company has any "investment or trading or other activity of any kind directly or indirectly with Iran." (MCL's September 10, 2015, letter). With the September 10, 2015, letter, MCL also included a *Disclosure of Investment Activities in Iran* Form on which the first box in Part 1 of the form is checked indicating that neither the bidder, nor its parents, subsidiaries, or affiliates is engaged in prohibited activities with Iran. These statements act as a permitted clarification and are appropriate to remedy the ambiguity in MCL's proposal submission. See On-Line Games, *supra*, 279 N.J. Super. at 597 (stating "[i]n clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there.") In addition, I have reviewed the Department of the Treasury's Chapter 25 List and find no evidence that either MCL, or one of its parents, subsidiaries or affiliates, is on the list or engaged in investment activities in Iran that would qualify it for inclusion on the Chapter 25 list.

Therefore, I overturn the decision of the Proposal Review Unit to reject MCL's proposal for the above-referenced RFP for failing to include a properly completed *Disclosure of Investment Activities in Iran* form. I hereby direct the Bureau to proceed accordingly with evaluation of the proposals, inclusive of the proposal submitted by MCL, received for this procurement.

Further, I note that in connection with this protest a review of the proposal submitted by MCL was completed by the Hearing Unit. That review revealed that the *Ownership Disclosure Form* submitted by MCL contained information which needs clarification. RFP Section 6.6 *Oral Presentation and/or Clarification of Proposal* states that “[a] request for clarification may be made in order to resolve minor ambiguities, irregularities, informalities or clerical errors.” Such a request is consistent with the Appellate Division’s reasoning in On-Line Games, where the court held that

[t]he RFP specifically approved of bidders’ clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. **In 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, *supra*, 279 N.J. Super. at 597, *emphasis added*.]

Accordingly, consistent with the Appellate Division’s holding in On-Line Games, the Bureau is directed to seek a clarification from MCL regarding its ownership structure. Upon receipt of the clarifying information, a determination will be made whether or not MCL’s *Ownership Disclosure Form* is responsive. This is the Division’s final agency decision with respect to the protest submitted by MCL.

Thank you for your interest in doing business with the State of New Jersey. I further invite you to take this opportunity to register your business with **NJ START** at www.njstart.gov, the State of New Jersey’s new eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Chief Hearing Officer

MAG: RUD

c: J. Strype
G. Olivera
A. Nelson
D. Rodriguez