



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 28, 2015

Via Fax 215.322.8838 and USPS Regular Mail

Ann Marie Harris, Director of Administration
CM3 Building Solutions, Inc.
185 Commerce Drive
Fort Washington, PA 19034

Re: Reconsideration of Proposal Rejection
RFP# 16-X-24043: Heating Ventilation & Air Conditioning Repair Parts

Dear Ms. Harris:

This correspondence is in response to your letter dated September 24, 2015, to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of CM3 Building Solutions, Inc. (CM3). In that letter, CM3 protests the Proposal Review Unit's Notice of Proposal Rejection for Solicitation# 16-X-24043. The record of this procurement reveals that CM3's proposal was rejected for failing to include a *Disclosure of Investment Activities in Iran Form*. In the protest letter, CM3 states that it included the form with its proposal. CM3 requests that the Division review its proposal and reconsider the rejection of the proposal.

I have reviewed the record of this procurement, including the Request for Proposal (RFP), CM3'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 CM3. 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 various State agencies to solicit proposals for repair parts to be used in the maintenance of the heating, ventilation and air conditioning systems. (RFP § 1.1 *Purpose and Intent*.) In accordance with the RFP, contracts are to be awarded on a per brand, per region basis to those responsible bidders whose proposals, conforming to this RFP, are most advantageous to the State, price and other factors considered. (ibid.)

On September 22, 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 CM3 pursuant to N.J.A.C. 17:2-2.2 for failing to include the *Disclosure of Investment Activities in Iran Form* with its proposal submission.

In response to the Notice of Proposal Rejection, CM3 states that:

the Disclosure of Investment Activities in Iran form from our company was uploaded and submitted with Solicitation#: 16-X-24043. I have attached a copy of what was originally submitted. I was having some difficulty uploading the files and wonder if this form got missed.

[CM3's September 24, 2015, protest letter.]

The above referenced 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 *Disclosure of Investment Activities in Iran Form*. This form is addressed in RFP Section 4.0 *Proposal Preparation and Submission*, which provides in pertinent part:

4.4.1.2 NJ STANDARD RFP FORMS

One of the downloadable RFP documents is titled NJ STANDARD RFP FORMS. It is comprised of three separate forms, two of which (Ownership Disclosure and Disclosure of Investment Activities in Iran) discussed below, must be completed, signed and submitted with the bidder's proposal. **The bidder is cautioned that failure to complete, sign and submit either of these two forms will be cause to reject its proposal as non-responsive as noted below.**

....

[*Emphasis in the original.*]

Moreover, 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 a courtesy to all bidders, the Division provided a *Proposal Checklist* as an accompaniment to the RFP. The relevant portion of the checklist includes the following:

**N.J. Department of the Treasury
Division of Purchase and Property
PROPOSAL CHECKLIST**

Solicitation Number: 16-X-24043 **Solicitation Title:** Heating, Ventilation and Air Condition Repair Parts

This checklist was created as a guide to assist bidders in preparing a complete and responsive proposal. It is only advisory in nature. It is the bidder's responsibility to ensure that all requirements of the RFP have been met.

FORMS THAT MUST BE SUBMITTED WITH YOUR PROPOSAL:	
<input type="checkbox"/>	RFP Signatory Page with physical signature or PIN (PIN is for eBid submission ONLY)
<input type="checkbox"/>	Completed Price Sheets as instructed in Section 4.4.5 of the RFP
<input type="checkbox"/>	Completed and signed Ownership Disclosure Form*
<input type="checkbox"/>	Completed and signed Disclosure of Investments in Iran Form*

* The Ownership Disclosure, Disclosure of Investigations and Other Actions Involving Bidder, and the Disclosure of Investments in Iran forms MUST each contain either a physical or typed signature (typed signatures are only acceptable for eBid submissions). The forms are found in the Standard RFP Forms Packet, which can be downloaded at: <http://www.state.nj.us/treasury/purchase/forms/StandardRFPForms.pdf>

As set forth in RFP Section 4.0, the submission of 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 indicates that CM3 submitted a proposal through eBid by the proposal submission deadline. CM3 contends that it uploaded the *Disclosure of Investment Activities in Iran* Form to eBid. In connection with the Hearing Unit's review of this protest, the Department of the Treasury, Division of Revenue and Enterprise Services' (DORES), which maintains eBid, was contacted. DORES verified that the eBid was fully functional at the time of the CM3's eBid submission. All documents uploaded by CM3 to eBid were received by the Division.

Further, a review of the eBid submission reveals that CM3 did not upload the *Disclosure of Investment Activities in Iran* Form. As part of the Hearing Unit's evaluation of this protest, a review of each document uploaded to eBid by CM3 was made. That review confirmed that in the space provided for uploading the *NJ Standard RFP Forms*, CM3 uploaded its *Ownership Disclosure Form* and the *Disclosure of Investigations and Other Actions Involving the Bidder Form*, there was no *Disclosure of Investment Activities in Iran* Form uploaded with these documents. Moreover, a review of all other documents uploaded by CM3 to eBid reveals that the *Disclosure of Investment Activities in Iran* Form was not included with any other document uploaded. RFP Section 1.3.3 *Electronic Bidding (eBid)* clearly states that "[i]t will be the bidder's responsibility to ensure that the eBid has been properly submitted."

Based upon CM3's failure to include the *Disclosure of Investment Activities in Iran* Form with its proposal, the proposal must be deemed non-responsive. It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Township of Hillside v. Sternin, 25 N.J. 317, 324 (1957). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the Court in Township of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). "In River Vale, Judge Pressler declared that 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 (App. Div. 1995), citing, River Vale, supra, 127 N.J. at 216.

First, whether the effect of a waiver would be to deprive the [government 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 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.

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

"If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all." *Id.* at 222. Here, the failure to provide a mandatory document is a material deviation from the RFP requirements.

I note that CM3 did submit a copy of the *Disclosure of Investment Activities in Iran* Form with its protest. However, permitting CM3 to provide this mandatory document after the proposal opening is contrary to the Appellate Division's reasoning in On-Line Games where the court held 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, supra, 279 N.J. Super. at 597. Therefore, the Division cannot permit CM3 to supplement its proposal after the proposal submission deadline.

Notwithstanding CM3's interest in competing for this procurement, it would not be in the State's best interest to allow a bidder who did not appropriately complete and submit all of the required forms with its proposal as required by the RFP to be eligible to participate in the procurement process. Such

acceptance would unlevel 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 CM3's proposal under these circumstances would be contrary to the provisions of the governing statute and would provide CM3 with disclamation options not available to those bidders whose proposals where fully 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 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: V. Klawitter
J. Kemery
D. Reinert
A. Nelson
D. Rodriguez