



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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Director

February 12, 2016

Via Electronic [waynesody@comcast.net] and USPS Regular Mail

Wayne Allen Sody, Owner
Sody Enterprises, Inc.
11116 Bird River Grove Road
White Marsh, MD 21162

Re: Protest of Notice of Proposal Rejection
RFP # 16-X-24114 Foods: Meat – Cured, Fresh, Chilled, & Frozen – DSS

Dear Mr. Sody:

This correspondence is in response to your letter of protest dated and received February 3, 2016, on behalf of Sody Enterprises, Inc. (Sody), by which you express interest in competing for the award of the subject term contract, notwithstanding Sody's receipt of a Notice of Proposal Rejection from the Proposal Review Unit of the Division of Purchase and Property (Division). The record of this procurement notes that Sody submitted an incomplete,

I have reviewed the record of this procurement, including the RFP, Sody'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 Sody. I set forth herein my final agency decision.

By way of the background, the subject RFP was issued by the Bureau to solicit proposals for meats, cured, fresh, chilled and frozen, which will be made available and delivered to Distribution and Support Services (DSS). RFP § 1.1 *Purpose and Intent*. The intent of the RFP is "to award (a) contract(s) to that (those) responsible Bidder(s) whose proposal(s), conforming to this RFP is (are) most advantageous to the State, price and other factors considered." Ibid. This is a procurement of term contract #T1105.

A review of this procurement shows that Sody submitted an electronic proposal through the Division's eBid system by the proposal submission date of January 29, 2016. Sody included the three-part Standard RFP Forms packet with its electronic submission, which contained the *Disclosure of Investment Activities in Iran* Form. While Sody completed the necessary certification on this form, it failed to check one of the two boxes. Stating that the "box had a very faint check mark," Sody included a properly completed form with its letter of protest 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'). I note that Sody submitted an older version of the Division's *Disclosure of Investment*

Activities in Iran Form with its letter of protest, rather than the current version included as an RFP-required document. While the language of the older form differs from the current, Sody's submission is a sufficient certification under the governing statute.

In order for Sody'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 in N.J.A.C. 17:12-2.7(d) and RFP Section 1.4.10, *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 Sody's position through the lens of the River Vale criteria and concur with Sody 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 Sody'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 were checked. The Hearing Unit has also reviewed the Department of the Treasury's Chapter 25 List and there is no evidence that either Sody, 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 Sody's *Disclosure of Investment Activities in Iran* Form. Therefore, I accept the revised form included with Sody's February 3, 2016 letter of protest, which affirmed that neither Sody nor any of its parents, subsidiaries, or affiliates is on the Department's Chapter 25 List. This statement clarifies Sody's intent to check the first box on the current version of *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 Sody's intent to check the second box on the form and 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 Sody's proposal for the above-referenced RFP. Note that in the future Sody 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 Procurement Bureau to proceed accordingly with evaluation of the proposals, inclusive of Sody, received for this procurement.

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

Sincerely,



Maurice Griffin
Chief Hearing Officer

MG:DF

c: P. Michaels
G. Gerstenacker
A. Nelson