



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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October 15, 2020

Via Electronic Mail Only mmfrankel@verizon.net

Jacob Frankel
M&M Frankel Disposables
5303 18th Avenue
Brooklyn, NY 11204

Re: I/M/O Bid Solicitation #19DPP00421 M&M Frankel Disposables Reconsideration
Protest of Notice of Intent to Award – Request for Reconsideration
T0012 Food Service Items: Disposable, Paper and Plastic for Distribution and Support Services

Dear Mr. Frankel,

This letter is in response to your emails of October 5, 2020, on behalf of M&M Frankel Disposables (M&M) to the Division of Purchase and Property (Division). In those emails, M&M requests that the Division reconsider the September 30, 2020 final agency decision issued in response to M&M's September 18, 2020, protest.

By way of background, on August 28, 2019, the Division's Procurement Bureau (Bureau) issued the Bid Solicitation #19DPP00421 T0012 Food Service Items: Disposable, Paper and Plastic for Distribution and Support Services (Bid Solicitation) on behalf of the Department of the Treasury, Distribution and Support Services (DSS), to solicit Quotes for disposable food service items. See Bid Solicitation Section 1.1 *Purpose and Intent*. The intent of the Bid Solicitation was to award Master Blanket Purchase Orders (Blanket P.O.s) to those responsible Vendors {Bidders} whose Quotes, conforming to the Bid Solicitation, are most advantageous to the State, price and other factors considered. Ibid.

On September 26, 2019, the Division's Proposal Review Unit opened eleven (11) Quotes received by the submission deadline of 2:00 pm EST. After conducting a preliminary review of the Quotes received, the Proposal Review Unit forwarded the Quotes to the Bureau for review and evaluation consistent with the requirements of Bid Solicitation Section 6.6 *Evaluation Criteria*.

On August 26, 2020, the Bureau completed the Recommendation Report that recommended Blanket P.O. awards to M&M, Imperial Bag & Paper Co, LLC (Imperial), WB Mason Co. Inc., PJP Co. Penn Jersey Paper, and South Jersey Paper Products. Accordingly, on September 11, 2020, the Bureau issued the NOI advising all Vendors {Bidders} that it was the State's intent to award the Blanket P.O.s consistent with the Recommendation Report.

On September 18, 2020, M&M submitted a protest to the Division challenging the award of price line 7 to Imperial. By way of summary, M&M alleged that Imperial's Quote for price line 7 was fraudulent

stating that Imperial does not sell the Penny Plate brand. See M&M's September 18, 2020, email. In support of its statement M&M states that it contacted the manufacturer who stated that it does not sell its products to Imperial and that it contacted Imperial who stated that it does not sell the Penny Plate brand. Ibid. M&M did not provide any documentary support for its allegation.

Imperial was given an opportunity to respond to the allegations raised in M&M's protest and on September 18, 2020 responded stating that it "stocks and actively purchases" the Penny Plate brand. In support of its position Imperial provided a screenshot of its inventory system and a recent invoice from Penny Plate demonstrating that it does purchase products from Penny Plate.

Thereafter, on September 29, 2020, M&M wrote to the Division's Hearing Unit stating that "that there is no production date available for the item. If the item will not be on the market for an unspecified amount of time, this brand should be removed from the bid." In support of this statement, M&M included an excerpt of an email correspondence with its supplier regarding the product sought. A review of that email correspondence reveals that M&M's supplier advised that "[t]here is an issue with production... [p]lease note Penny Plate does not have a sample of below item at this time. This item is currently on backorder. They will let us know when it is back in production."

After review and consideration of M&M's protest and Imperial's response, on September 30, 2020, the Division issued its final agency decision finding that

the information provided by M&M in support of the protest indicates that the product is on back order because of the manufacturer's production issue. The manufacturer's production issue does not render Imperial's submitted Quote as fraudulent and does not require the removal of the product from among those items awarded to Imperial. Should the manufacturer's production issues persist, then the Bureau is free to revisit the issue of this item's availability in accordance with the Bid Solicitation's requirements.

Accordingly, the Bureau's September 11, 2020, Notice of Intent to Award was sustained.

On October 5, 2020, M&M wrote to the Bureau raising new protest issues. Specifically, M&M stated "We would (sic) to protest the award for this item just checked with our vendor Our product we offered Does meet the requirements from State of NJ Our information by email we provided was wrong while bid was processed Our product weight is 1.088oz There is no point for the State to pay 22.00 More per case." As noted on the Bureau's September 11, 2020 Notice of Intent to Award, the protest period ended at 2:00 pm on September 25, 2020. On October 5, 2020, the Hearing Unit wrote to Penny Plate advising that "the opportunity for M&M to protest the Procurement Bureau's Notice of Intent to Award has passed. In fact, M&M did file a protest, and the Division has already issued the final agency decision with respect to M&M Frankel's protest." In response to that email, M&M stated that it was "appealing the state of NJ decision."

First, with respect to the M&M's appeal / request for reconsideration, the record reflects that M&M has not presented any new or additional information that was not previously considered by the Division. See *Cummings v. Bahr*, 295 N.J. Super. 374, 384 (App. Div. 1996), quoting, *D'Atria v. D'Atria*, N.J. Super. 392, 401-02 (Ch. Div. 1990) (explaining reconsideration should only be utilized where new information not available on the first application must be considered in the interest of justice, or where "'1) the [tribunal] has expressed its decision based upon a palpably incorrect or irrational basis, or 2) it is obvious that the [tribunal] either did not consider, or failed to appreciate the significance of probative, competent evidence'"). Additionally, I note that the Division's governing regulations advise that "final agency

determinations by the Director on matters of protest are appealable to the Appellate Division of the Superior Court of New Jersey.” N.J.A.C. 17:12-3.1. Further, “appeals from final decisions or actions of state administrative agencies or officers...shall be taken within 45 days from the date of service of the decision or notice of the action taken.” New Jersey Court Rule 2.4-1(b). As such, M&M should have submitted its appeal of the Division’s September 30, 2020, final agency decision to the Appellate Division.

Second, M&M’s new protest point is out of time and may be disregarded as permitted by the Division’s governing regulation which state “The Director may disregard any protest filed after the 10-day-protest period and proceed with the award of contract(s).” N.J.A.C. 17:12-3.3(b)(3). However, for the sake of completeness, I briefly note the following.

Bid Solicitation Section 3.1 *Product Specifications* set forth detailed requirements for the disposable products sought. As to price line 7, the Bid Solicitation specified as follows:

Price Line	Item Description	Specifications	Packaging	Approved Products
7	Aluminum Trays, Carry-Out, Three (3) Compartments with Semi Heat Resistant cover, 250 per Case	<p>Tray Material: The material shall be aluminum</p> <p>Capacity: Aluminum Trays shall have a minimum capacity of 20 fluid ounces and maximum capacity of 25 fluid ounces</p> <p>Cover Material: The lid cover material shall be comprised of foil board</p> <p>Dimensions: The dimensions shall be a minimum length of 8 inches to maximum of 9 inches; minimum width of 5.85 inches; minimum depth of 1.4 inches to maximum of 2 inches</p> <p>Weight: The weight shall be a minimum of 1.05 ounces (29.76 grams) to maximum of 1.75 ounces (49.60 grams)</p>	250 trays per Case	<p>D&W Wilkinson C26</p> <p>Durable #210-35-L250</p> <p>Handi- Foil #210L</p> <p>Penny Plate #0739-030NC-C002</p> <p>Penny Plate #0739-035NC-C001</p> <p>Penny Plate #7139-035NC-C001</p>

With the submitted Quote, M&M proposed an equivalent brand, KCH 739CP, in response to Price Line 7. M&M did not include the specification data sheets with its submitted Quote. Therefore, on October 15, 2019, in accordance with Bid Solicitation Section 4.4.3.3, the Bureau wrote to M&M requesting the specification data sheet. On October 25, 2019, M&M responded providing the following data sheet:

	4111 18th Avenue Brooklyn, NY 11218 Tel: 718.435.6311 Fax: 718.851-3231 E-mail: sales@kchcorp.net
August 8, 2019	
Spec Sheet <u>3 Compartment Aluminum Tray With lids</u>	
<ul style="list-style-type: none">• Tray outer Length – 8.78 inches• Tray outer Width – 6.38 inches• Tray outer Height – 1.7 inches• Tray Thickness - .003 inches• Tray Weight - 0.6 oz.• Cover Thickness – 0.014 inches• Cover Weight – 0.42 ounces	
<u>Compartment Capacity</u>	
<ul style="list-style-type: none">• Main Entire Compartment – 12.17 fluid oz.• Side Compartments – 5.25 fluid oz.• Total Capacity – 22.67 fluid ounces	

As shown in the product specification sheet provided by M&M, the total weight for the product proposed is 1.02 ounces, less than the minimum weight of 1.05 ounces required by product specification identified in the Bid Solicitation. Because M&M's proposed product did not meet the specifications identified in Bid Solicitation Section 3.1 *Product Specifications*, M&M was not eligible for an award of price line 7. M&M cannot now amend its Quote submission, changing the product weight for its proposed brand, as doing so would be contrary to the Court's holding in *In re Protest of Award of On-Line Games Prod. & Operation Servs. Contract*, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995). In *On-Line Games* the Appellate Division held that "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". Here, the Division cannot accept M&M's revised product weight after the Quote submission deadline, as doing so would result in an impermissible change to the submitted Quote.

Based upon the foregoing, I find no reason to disturb the Bureau's September 11, 2020, Notice of Intent to Award or the September 30, 2020 final agency decision entitled I/M/O Bid Solicitation #19DPP00421 M&M Frankel Disposables.

Sincerely,

Maurice A. Griffin
Acting Director

MAG: RD

c: J. Kerchner
K. Thomas
G. Gerstenacker
S. Brandbergh