



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
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State Treasurer

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MAURICE A. GRIFFIN
Acting Director

January 29, 2021

Via Electronic Mail Only frank.defina@vaisala.com

Frank DeFina, Sales Manager – Meteorology
Vaisala, Inc.
10-D Gill Street
Worburn, MA 01801

Re: I/M/O Bid Solicitation #20DPP00589 Vaisala, Inc.
Protest of Notice of Proposal Rejection – Request for Reconsideration
T0983 Environmental Testing Instruments, Equipment and Supplies for Air and Water Quality
Testing and Monitoring

Dear Mr. DeFina:

This letter is in response to your emails of December 24, 2020, on behalf of Vaisala, Inc. (Vaisala) which were received by the Division of Purchase and Property's (Division) Hearing Unit. In those emails, Vaisala requests that the Division reconsider the rejection of the submitted Quote. As noted in the Division's December 24, 2020, final agency decision, Vaisala's Quote was rejected by the Proposal Review Unit for failing to comply with the mandatory requirements for Quote submission. Specifically N.J.A.C. 17:12-2.2 mandates that:

- (a) In order to be eligible for consideration for award of contract, the bidder's proposal shall¹ conform to the following requirements or be subject to designation as a non-responsive proposal for non-compliance:

...

4. Contain all RFP-required certifications, forms, and attachments, completed and signed as required. An RFP may designate certain forms and/or certifications that need not be included in the bidder's proposal but that must be provided by a successful bidder upon request prior to an award of contract;

[N.J.A.C. 17:12-2.2(a), emphasis added.]

Vaisala's Quote was rejected for failing to submit a completed *Ownership Disclosure Form*.

By way of background, on October 30, 2020, the Division's Procurement Bureau (Bureau) issued the Bid Solicitation #20DPP00589 - T0983 Environmental Testing Instruments, Equipment and Supplies

¹ "Shall - Denotes that which is a mandatory requirement." Bid Solicitation Section 2.2 *General Definitions*.

for Air and Water Quality Testing and Monitoring (Bid Solicitation) on behalf of State Using Agencies and Cooperative Purchasing Program participates. Bid Solicitation §1.1 *Purpose and Intent*. The purpose of the Bid Solicitation was to solicit Quotes for Environmental Testing Instruments, Equipment and Supplies for Air and Water Quality Testing and Monitoring. *Ibid*. On December 18, 2020, the Division's Proposal Review Unit opened fifteen Quotes which were received by the submission deadline of 2:00 pm eastern time. After conducting a review of the Quotes received, the Division's Proposal Review Unit issued a Notice of Proposal Rejection to Vaisala for failing to submit a completed *Ownership Disclosure Form* with its Quote. In response to the Notice of Proposal Rejection, on December 22, 2020, Vaisala wrote the Division's Hearing Unit protesting the Notice of Proposal Rejection. In part, Vaisala stated

...we recently held a similar contract with the state for over five years prior to this. If I understand this correctly, we were rejected because we forgot to properly fill out the ownership form. Given the nature of our environmental sensors, for use with the state of New Jersey, and the NJ DEP, I kindly ask that you reconsider your decision and allow us to move forward with the state contract...This oversight was my fault and the corrected form is above.

With the protest, Vaisala included a completed *Ownership Disclosure Form*.

The Division's December 24, 2020, final agency decision sustained the Proposal Review Unit's Notice of Proposal Rejection stating in part:

In reviewing a Quote submitted in response to a Bid Solicitation, the Division does not have the power to waive the legislative requirement that a Vendor {Bidder} provide its ownership information prior to or accompanying the Quote submission. Only the New Jersey Legislature can change a requirement it has mandated. Unfortunately, Vaisala did not comply with any of the options available to it for the submission of ownership information. Accordingly, Vaisala's Quote was properly rejected by the Division's Proposal Review Unit for failure to submit the mandatory *Ownership Disclosure Form* with its Quote.

On December 24, 2020, Vaisala submitted a request for reconsideration to the Division's Hearing Unit. In the request for reconsideration Vaisala disputes the finding that the submitted *Ownership Disclosure Form* was blank stating that the form was partially completed and therefore should have been accepted. Additionally, Vaisala states that it has a current contract with the State, which was recently extended. In connection with the extension, Vaisala states that it affirmed that its previously made disclosures had not changed; and therefore, it has already made the required ownership disclosure to the State. With the request for reconsideration, Vaisala included a copy of its March 2020 extension letter. Finally, Vaisala requests an in-person meeting.

With respect to Vaisala's request for an in-person presentation as permitted by N.J.A.C. 17:12-3.3(b)(1)(iii), pursuant to N.J.A.C. 17:12-3.3(e), "[t]he Director has sole discretion to determine if an in-person presentation by the protester is necessary to reach an informed decision on the matter(s) of the protest. In-person presentations are fact-finding for the benefit of the Director." Further, "[i]n cases where no in-person presentation is held, such review of the written record shall, in and of itself, constitute an informal hearing." N.J.A.C. 17:12-3.3(d). I have reviewed the record of this procurement, including the Bid Solicitation, Vaisala's Quote and protest, the prior contract, the relevant statutes, regulations and case law. The issues raised in Vaisala's request for reconsideration are sufficiently clear such that a review of

the record of this procurement has provided me with the information necessary to determine the facts of this matter and to render an informed decision, as such an in-person hearing is not warranted.

Turning next to Vaisala's request for reconsideration, in the December 24, 2020, final agency decision, the Division stated that the *Ownership Disclosure Form* uploaded by Vaisala was blank. Vaisala disputes this statement noting that the form was partially completed. See screenshot below.

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
33 WEST STATE STREET, P.O. BOX 230
TRENTON, NEW JERSEY 08625-0230

OWNERSHIP DISCLOSURE FORM

BID SOLICITATION #: 21DPP00589 **VENDOR {BIDDER}:** Vaisala Inc.

ALL PARTIES ENTERING INTO A CONTRACT WITH THE STATE ARE REQUIRED TO PROVIDE THE INFORMATION REQUESTED PURSUANT TO N.J.S.A. 52:25-24.2.
PLEASE NOTE THAT IF THE VENDOR/BIDDER IS A NON-PROFIT ENTITY, THIS FORM IS NOT REQUIRED.

PART 1

	YES	NO
Are there any individuals, partners, members, stockholders, corporations, partnerships, or limited liability companies owning a 10% or greater interest in the Vendor {Bidder}?	<input type="checkbox"/>	<input type="checkbox"/>

If you answered, "YES" above, you must disclose the following: (a) the names and addresses of all stockholders in the corporation who own 10 percent or more of its stock, of any class; (b) all individual partners in the partnership who own a 10 percent or greater interest therein; or, (c) all members in the limited liability company who own a 10 percent or greater interest therein.

NAME			
ADDRESS 1			
ADDRESS 2			
CITY	STATE	ZIP	

Specifically, Vaisala states:

by reviewing the top of the form both the bid solicitation number and vendor bidder are both completed. Therefore the form was actually partially completed and not blank. I would therefore like to make the case that the form did indeed have a certain level of completeness to it and to some degree it does indeed meet the requirements (sic) as specified in § 17:12-2.2.

The Division acknowledges that there was some information on the submitted form. However, I note that the Bid Solicitation number was pre-filled on the form by the Bureau prior to the form being uploaded to *NJSTART* with the other Bid Solicitation documents. Vaisala inserted its company name on the form. Unfortunately, the Bid Solicitation number and Vendor's {Bidder's} company name do not meet the requirement mandated by the New Jersey Legislature that a Vendor {Bidder} must supply its ownership information. N.J.S.A. 52:25-24.2. A Vendor's {Bidder's} notation of its company name does not provide any information regarding a company's ownership structure to satisfy the requirements of the law. As such a deviation from the mandatory bidding requirements existed and the Division's Proposal Review Unit properly rejected Vaisala's submitted Quote for failure to comply with the submission requirements of

N.J.A.C. 17:12-2.2; specifically for a failing to comply with the disclosure requirements of N.J.S.A. 52:25-24.2 as mandated by the New Jersey Legislature.

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. *Twp. of Hillside v. Sternin*, 25 N.J. 317, 324 (1957). “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.” *Twp. of River Vale v. Longo Constr. Co.*, 127 N.J. Super. 207, 222 (Law Div. 1974). The question to be answered is whether or not a bidder’s failure to comply completely with the statutory ownership disclosure requirement is a material deviation which would render a bid nonresponsive. *C&H Industrial Services, Inc. v. City of Vineland*, 2014 N.J. Super Unpub. Lexis 1187, at *13 (App. Div. May 23, 2014). The 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 Quote is properly rejected where it contains inaccurate or incomplete 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); *In the Matter of Protest of Scheduled Award of Term Contract T2813 RFP 12-X-22361 Laboratory Testing Service, Equine Drug Testing*, Lexis 1698, at *25 (App. Div. July 10, 2013).

In *Muirfield* the Appellate Division concluded that Vendor’s {Bidder’s} failure to submit its ownership information as required was an incurable defect leading to the rejection of a submitted Quote. *Muirfield, supra*, 336 N.J. Super. at 128. The *Muirfield* Court noted that their analysis was guided by the basic principles governing the public bidding process which “is to promote competitive bids, to secure for the public the benefits of unfettered competition... a public contract award is not determined simply by the lowest bid, but rather by the lowest bid that complies with the substantive and procedural requirements in the bid advertisements and specifications.” *Id.* at 132. The *Muirfield* Court further recognized that there would be instances arise where a Quote would be non-conforming, but observed that the Supreme Court has stressed that “strict compliance with the [contracts law] is required, and a [government entity] generally is without discretion to accept a defective bid. As a result, all bids must comply with the statute’s terms, and any material departure invalidates a nonconforming bid as well as any contract based upon it.” *Id.* at 132-33, citing, *Gaglioti Contracting, Inc., v. City of Hoboken*, 307 N.J. Super. 421, 431 (App.Div.1997).

Reviewing the historical case law, the *Muirfield* Court noted that in *George Harms Construction Co., Inc. v. Borough of Lincoln Park*, 161 N.J. Super. 367 (Law Div. 1978), the Law Division concluded that a Vendor’s {Bidder’s} failure to submit a list of all owners as mandated by *N.J.S.A. 52:25-24.2* was neither waivable nor curable, even if it was inadvertent and even though the list of owners was provided shortly after the bid opening. In *George Harms Construction* the Law Division noted:

In furtherance of the public policy of open competition on common terms, the courts of New Jersey have consistently held that where an error is deemed material, it cannot be cured after bids are opened, even where, as defendant here asserts, the error results from simple negligence. Indeed, to permit correction of material deficiencies after bid opening would open the door to fraud and favoritism and defeat the statutory purpose of protection of the public.

[*George Harms Construction, supra*, 161 N.J. Super. at 376.]

However, the *Muirfield* Court also noted the distinguishing facts in *Schlumberger Industries, Inc. v. Borough of Avalon*, 252 N.J. Super. 202 (App. Div. 1991). The Appellate Division recognized that a post-bid clarification could be permitted in limited circumstances. In *Schlumberger*, the bidder failed to list its

full ownership structure with its submitted Quote. The court concluded that the bidder was wholly-owned by a public company with the same name in its title, a fact which was evidently known by the municipality that solicited the bids. *Id.* at 212-13. In *Schlumberger*, the municipality had engaged in negotiations with the bidder on a previous contract and the information regarding the bidder's ownership had been supplied to the municipality in connection with the earlier contract. Therefore, the municipality was aware of the bidder's ownership structure prior to the bid opening date. *Id.* at 207. Therefore, the Appellate Division concluded that Schlumberger's statement, after the bid opening, that its parent company of the same name was the sole stockholder was a permissible clarification. *Id.* at 212-13, citing, T2813 RRFP 12-X-22361, supra, LEXIS 1698 *15. However, in *Schlumberger* the Court noted that "if there had been undisclosed shareholders holding 10% or more of the stock...the bid might be properly rejected." *Id.* at 212.

Here, the facts before me are akin to those before the Court in *Schlumberger Industries*. A review of the Division's records reveals that in 2013 Vaisala submitted a Quote in response to the precursor if this Bid Solicitation. In that Quote, Vaisala stated that it was wholly owned by Vaisala, Oyj, a publicly traded company headquartered in Finland. In October 2013, Vaisala was awarded a contract. In March 2020 the Bureau wrote to Vaisala inquiring whether Vaisala would agree to extend its then current contract which was due to expire on May 31, 2020. On March 17, 2020, Vaisala responded to the Bureau's inquiry agreeing to extend its current contract. With the March 17, 2020 correspondence, Vaisala included the signed extension letter indicating that there was "no change to the information originally reported in the Disclosure Forms submitted by my Company." See screenshot below.

VAISALA INC 194 SOUTH TAYLOR AVENUE LOUISVILLE, CO 80027 Via Email: frank.defina@vaisala.com Leon.schmeider@vaisala.com	
Re: T-0983, Contract #85085 Bid Solicitation: Environmental Testing Instruments Extension period: commencing on June 1, 2020 and expiring on March 31, 2021 or until a new contra is awarded, whichever comes first.	
Should the State decide to extend this contract:	
<input checked="" type="checkbox"/> I agree to extend the contract under Section 5.3 of the State of New Jersey Standard Terms and Conditions and in accordance with the terms and conditions of the current contract, including price.	
<input type="checkbox"/> I agree to extend the current contract under Section 5.3 of the State of New Jersey Standard Terms and Conditions and in accordance with the terms and conditions of the current contract with the exception of price. During the term of the extension, I agree to reduce the price(s) as follows: _____ _____	
<input type="checkbox"/> I do not agree to extend the current contract.	
<input checked="" type="checkbox"/> I certify that there has been no change to the information originally reported in the Disclosure Forms submitted by my Company.	
<input type="checkbox"/> There have been changes in the information originally reported in the Disclosure Forms. Updated Disclosure Forms, as applicable, are attached.	
<u>Sarah Davis</u> Signature	17 March 2020 Date
Sarah Davis Contract Administrator Print Name and Title	

While Vaisala's submission of this ownership statement was more than 6 months prior to the instant Quote submission due date, I do not find that that noncompliance with N.J.S.A. 52:25-24.2 and the applicable case law would deprive the State of the assurance that the contract will be entered in to performed and guaranteed according to its specified requirements. Similar to the situation before the Court in *Schlumberger*, Vaisala is wholly owned by Vaisala, Oyj, a publicly traded company headquartered in Finland. Vaisala's failure to

fully disclose the 10% owners at the time of Quote opening, or within 6 months prior to the Quote opening date does not deprive the State and the public of the information with which it can be made aware of the real parties in interest, identify conflicts of interest, and the information necessary to assess the capability, financial stability and moral integrity of the bidder. I note that if Vaisala had not previously submitted an ownership statement to the Division indicating that it was 100% owned by a publicly traded company of the same name, information which could be verified independently, that the Division could not rely upon Vaisala's extension letter alone as a statement of ownership as required by N.J.S.A. 52:25-24.2.

Accordingly, I overturn the Proposal Review Unit's Notice of Proposal Rejection. Vaisala's Quote will be forwarded to the Bureau for review and evaluation along with all other Quote submitted. In the future, Vaisala should be mindful to ensure that all documents submitted are completed and uploaded as required by the terms of the Bid Solicitation. Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your business with **NJSTART** at www.njstart.gov.

Sincerely,

Rachel Doobrajh

Rachel Doobrajh
Acting Chief Hearing Officer

- c. J. Kerchner
- K. Thomas
- S. Ghorbani
- A. Miller
- A. Nelson
- D. Rodriguez