



State of New Jersey

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March 17, 2017

Via Electronic Mail [jjfink@keyportarmynavy.com] and USPS Regular Mail

Jeff Fink
Keyport Army & Navy
P.O. Box 985
Brick, NJ 08723

RE: Protest of Notice of Intent to Award
Bid Solicitation {Request for Proposal} #16DPP00020 – Protective Clothing and Footwear

Dear Mr. Fink:

This correspondence is in response to your three letters of protest submitted via email on November 14, 2016,¹ on behalf of Keyport Army & Navy (Keyport), referencing the subject Bid Solicitation {Request for Proposal} (hereinafter “RFP”) and regarding the proposal submitted by Keyport in response to the RFP. In those letters, you protest the Notice of Intent to Award (NOI) issued by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division) for Price Lines 5, 6, and 11, contending that Keyport should be considered the lowest responsive bidder on these lines.²

I have reviewed the record of this procurement, including Keyport’s protests, the submitted proposals, the RFP, relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of Keyport’s protests.

By way of background, the subject RFP was issued by the Bureau on behalf of various New Jersey Agencies and Cooperative Purchasing Program Participants for Protective Clothing and Footwear. RFP § 1.1 *Purpose and Intent*. The intent of the RFP is “to award Master Blanket Purchase Orders (Blanket POs) {Contracts} to those responsible Vendors {Bidders} whose proposals, conforming to this Bid Solicitation {RFP} are most advantageous to the State, price and other factors considered.” *Ibid*. Awards were to be made by line item. *Ibid*.

The RFP was divided into five categories: Category 1- Clothing, Category 2- Shoes/Footwear, Category 3- Gloves, Category 4- Head Protection, and Category 5- Rainwear. RFP § 3.1. Each category included a separate price line for each known qualified manufacturer brand and bidders had the option to

¹ For efficiency, all three protest letters will be addressed in this final agency decision.

² Keyport was the intended awardee on Price Lines 1, 7, 9, and 16 in Category 1 (Clothing); Price Lines 18 and 19 in Category 2 (Footwear); Price Line 21 in Category 3 (Gloves); Price Line 23 in Category 4 (Head Protection); and Price Lines 26 and 33 in Category 5 (Rainwear).

“write-in” a brand not already included. RFP § 3.1. Bidders were permitted to bid on one or more price lines/categories. RFP § 4.4.7.

The Bureau received 11 proposals by the proposal submission deadline of July 28, 2016. One proposal was administratively rejected in accordance with N.J.A.C. 17:22-2.2(a). Following an evaluation of the remaining 10 proposals, the Bureau issued the NOI on November 7, 2016.³ In total, seven bidders were recommended for an award.

Keyport presents two points of protest in its first letter. First, Keyport protests the lack of intended award of Category 1- Clothing, Price Line 5, Danner.⁴ Although the Bureau received proposals for this price line, the proposals did not include price lists for Danner clothing; rather, the price lists included footwear. Keyport asserts that it offered a 25% discount on Price Line 5, and, although the price line was listed in the clothing category, it proffers that Danner is primarily a footwear company. Keyport also asserts that Keystone Cap, a headwear company, was listed under the clothing category and was awarded to the responsive low bidder. Notwithstanding the type of price list it submitted, Keystone requests that it be considered the responsive low bidder for this price line.

When bidding on a price line, bidders were required to submit “the most current dated manufacturer’s retail price list” or, if the manufacturer did not have a preprinted price list, an “Official State of New Jersey Price List.” RFP § 4.4.3 *Submittals*. Bidders were responsible for redacting “all lines from [the] price list that are not applicable to the specific category bid.” *Ibid.* RFP Section 3.1, also clarified:

Vendors {Contractors} are restricted to sell only brand items awarded to them under each Category. For example, if the Vendor {Contractor} is awarded the "Blauer" brand for Category 1 - Clothing, it can only sell clothing from its catalog and no other items such as shoes, gloves, rainwear etc. which may be include in the same catalog.

A review of Keyport’s proposal shows it submitted the following for Price Line 5:

Price Line	Brand	Price List Date	Price List Page Numbers	Catalog Date	Catalog Page Numbers	Quantity	Unit of Measure	% Discount
5	Danner	7/1/2016	ALL PAGES	FALL 2016	ALL PAGES	1	Each	25.00%

Keyport included a Danner price list, with prices effective on orders received July 1, 2016 through December 31, 2016. As confirmed by the product listing in the accompanying catalog, Keyport’s Danner price list included footwear—not clothing. Because Keyport offered footwear in the clothing category, the Bureau found Keyport’s proposal to be non-responsive in accordance with RFP Section 3.1.

Although the State-supplied price sheet provided a separate price line for all previously approved brands, it also included “write-in” lines in each category to permit a bidder to write-in a brand that was not already listed on a price line. See RFP §§ 3.1, 4.4.7. Bidders were advised that in the event of a write-in line, “[o]ne award shall be made per brand in each category.” RFP § 4.4.7. In this case, Category 2- Footwear did not include the Danner brand; however, in keeping with RFP Section 4.4.7, Keyport was permitted to write-in

³ The Bureau issued a previous NOI on August 31, 2016. A&A Safety Glove (A&A) submitted a protest on September 8, 2016. The Hearing Unit’s review of A&A’s protest revealed that A&A’s proposal was improperly excluded from evaluation. Subsequently, the Bureau withdrew the August 31, 2016 NOI and A&A’s proposal was evaluated and considered for award of contract.

⁴ Keyport is the intended awardee for Price Lines 1 (Carhart), 7 (Plastex), 9 (Hartwell), and 16 (Sanmar) in Category 1- Clothing.

Danner on Price Line 19.⁵ While Keyport did not write in Danner on Price Line 19, I will consider whether its proposal renders it eligible for consideration in this category regardless.

“It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived.” Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 314 (1994) (quoting Terminal Constr. Corp. v. Atlantic Cnty. Sewage Auth. 67 N.J. 403, 411 (1975)). “This rule, however, does not apply to minor or inconsequential conditions. Public contracting units may resolve problems arising from such conditions in a sensible or practical way.” Terminal Constr. Corp., *supra*, 67 N.J. at 411. “Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding.” *Id.* at 412. As reiterated by our Supreme Court, “[t]he public interest underlies the public-bidding process in this State.” Barrick v. State, Dep’t of Treasury, 218 N.J. 247, 258 (2014).

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, *supra*, 138 N.J. at 315 (internal quotations omitted) (affirming the two-prong test established in River Vale, *supra*, 127 N.J. Super. at 216).]

Applying this test, because Keyport indicated within the four corners of its proposal that it would provide only Danner footwear, not clothing, included on the July 1, 2016 retail price list at a 25% discount, and there is no alternative interpretation as to what products it would be providing, I find that Keyport’s inclusion of Danner footwear on Price Line 5, rather than as a write-in on Price Line 19, to be a minor deviation. Based on the procurement record, the State will not be deprived of the assurance that Keyport could enter into the contract and perform all specified requirements. Under the second prong, Keyport was not placed in a position of advantage over other bidders, as all bidders were held to the same standards when submitting proposals.

Based on the foregoing, I remand the evaluation of Price Line 5 to the Bureau for further evaluation of Keyport’s proposal, and any other proposals affected by the above-determination, consistent with this opinion.

Next, Keyport asserts in its first letter of protest that Keystone Cap, a headwear company, was also listed in Category 1- Clothing on Price Line 15, but was nonetheless awarded to a responsive low bidder. I find this statement to be misplaced. Category 1 - Clothing was inclusive of “soft hats (fitted caps/adjustable caps).” RFP § 3.1. Conversely, Category 4- Head Protection included hard hats, helmets, visors, painting/blasting head protection, and industrial head protection. *Ibid.* The products available from Keystone Cap included soft hats, rather than protective headwear. Therefore, Keystone Cap was properly categorized.

Keyport’s second letter protests the intent to award Category 1- Clothing, Price Line 6, Red Kap, to A&A Glove Safety Company (A&A), stating that both Keyport and Specialty Graphics offered a 30% discount, while A&A only offered a 22% discount. Keyport contends that A&A did not submit the most

⁵ Upon review of this protest, the Bureau acknowledged that the Danner brand should have been listed in Category 2- Footwear, rather than Category 1- Clothing.

current manufacturer’s retail price list for Red Kap, but rather submitted a Plan 0064 price list in violation of the terms of the RFP. Keyport also included a letter from a sales representative of VF Imagewear, Inc., (the parent company of Red Kap), stating, “MSRP US is Red Kap suggested retail price file. The Plan 0064 is not the Red Kap suggested retail price file.”

As noted above, bidders were required to submit the “most current dated manufacturer’s retail price list for each brand line offered on CD in a machine readable, searchable format such as Excel or PDF format.” RFP § 4.4.3, *Submittals*. In the event a manufacturer did not have a preprinted price list, the State would accept an “Official State of New Jersey Price List.” *Ibid.* In the latter case, a bidder was required to also submit a “letter from the manufacturer stating that they do not have a preprinted price list.” *Ibid.*

A review of the record shows that A&A, the intended awardee, submitted the following on Price Line 6:

Price Line	Brand	Price List Date	Price List Page Numbers	Catalog Date	Catalog Page Numbers	Quantity	Unit of Measure	% Discount
6	Red Kap	2/1/2016		2/1/2016		1	Each	22.00%

A&A included a price list entitled “PLAN0064 2016 VF Imagewear LOT Listing” with prices as of February 1, 2016, as an accompaniment to Price Line 6, Red Kap clothing. The price list included two prices for each product: a “Base Net Price” and a “List Price.”

In response to the Bureau’s request, A&A provided a letter from VF Imagewear, Inc. dated September 22, 2016, stating, “[T]he pricing submitted for items on the State of NJ bid by [A&A] does represent their current pricing for Red Kap items.” The Bureau also requested A&A clarify whether the proposed 22% discount applied to the prices in the “Base Net Price” column or the “List Price” column. On October 21, 2016, A&A responded that its quoted discount applied to the List Price.

Also in response to Price Line 6, Keyport provided the following in its proposal:

Price Line	Brand	Price List Date	Price List Page Numbers	Catalog Date	Catalog Page Numbers	Quantity	Unit of Measure	% Discount
6	Red Kap	2/22/2016	ALL PAGES	2016	ALL PAGES	1	Each	30.00%

Keyport included a price list entitled “MSRPUS 2016 VF Imagewear LOT Listing” with prices as of February 22, 2016. This price list only included a “Base Net Price.” Specialty Graphics submitted the same percentage discount and price list.

The Bureau conducted a price analysis of the Price Line 6 proposals offered by A&A, Keyport, and Specialty Graphics, and determined that A&A’s prices were consistently lower than those offered by Keyport and Specialty Graphics. Although Keyport and Specialty Graphics offered a 30% discount, A&A’s list prices were significantly lower than the base net prices offered by Keyport and Specialty Graphics. Therefore, the actual price charged to the State by A&A was lower than would be charged by Keyport and Specialty Graphics.

In response to Keyport’s protest that A&A submitted the incorrect price list, I note that, referring to Keyport’s price list, VF Imagewear, Inc.’s letter stated: “MSRP US is [a] Red Kap suggested retail price file.” (Emphasis added.) However, bidders were not asked to submit a suggested retail price file; rather, bidders were required to submit a manufacturer’s retail price list. Furthermore, Imagewear confirmed the prices

offered by A&A on the PLAN0064 2016 VF Imagewear LOT Listing were the “current pricing for Red Kap items.”

Based on the foregoing, I uphold the intended award of Price Line 6 to A&A.

In its third and final letter, Keyport protests the intent to award Category 1- Clothing, Price Line 11, Williamson-Dickie, to A&A, stating that A&A failed to submit the most current manufacturer’s retail price list and catalog. Keyport also notes that Anchortex failed to submit the proper price list, and that, because Keyport did submit the proper retail price list and catalog, it should be considered the responsive low bidder for this line. In support of its position, Keyport included a letter from a Williamson-Dickie account executive stating, “Dickies retail buyers guide and price list is for retail. Our occupational Catalog and price list is not for retail.”

A review of the record shows that A&A submitted the following on Price Line 11:

Price Line	Brand	Price List Date	Price List Page Numbers	Catalog Date	Catalog Page Numbers	Quantity	Unit of Measure	% Discount	
11	Williamson-Dickie	1/1/2016		1/1/2016		1	Each	23.00%	Discount is from MAP ⁶ Price column

A&A included a price list entitled “Occupational Wear- Buying Group Price Sheet” effective January 1, 2016, as an accompaniment to its proposal on Price Line 11. Upon request by the Bureau, A&A submitted a letter dated September 22, 2016, from Williamson-Dickies, stating, “[T]he Williamson-Dickies price list (Dickies Occupational Wear Price Sheet) submitted by [A&A] is Dickies current pricelist and is available for use by the State of New Jersey.”

Anchortex submitted the same price list as A&A, but offered a 55% discount:

Price Line	Brand	Price List Date	Price List Page Numbers	Catalog Date	Catalog Page Numbers	Quantity	Unit of Measure	% Discount
11	Williamson-Dickie	1/1/2016			1-78, 81-92, 97-141	1	Each	55.00%

In response to the Bureau’s request for clarification, Anchortex clarified that its offered discount applies to the column marked “MSRP” on the Occupational Wear- Buying Group Price Sheet. Anchortex also submitted a letter from Williamson-Dickies stating that the Dickies Occupational Wear Price Sheet is the current pricelist and is available for use by the State of New Jersey.

Keyport submitted the following for Price Line 11:

Price Line	Brand	Price List Date	Price List Page Numbers	Catalog Date	Catalog Page Numbers	Quantity	Unit of Measure	% Discount
11	Williamson-Dickie	1/1/2016	ALL PAGES	FALL 2016	ALL PAGES	1	Each	52.00%

Keyport included a price list entitled Dickies 2016 Retail Price Sheet, effective January 1, 2016.

⁶ MAP stands for “minimum advertised price.”

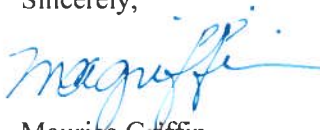
As noted previously, bidders were required to submit the “most current dated manufacturer’s retail price list for each brand line offered on CD in a machine readable, searchable format such as Excel or PDF format.” RFP § 4.4.3, *Submittals*. Both A&A and Keyport submitted price lists dated January 1, 2016, which Williamson-Dickie confirmed was the “current pricelist and is available for use by the State of New Jersey.” The Bureau conducted a price analysis of all responsive proposals received for this line item, including A&A’s 23% off the MAP price column, Anchortex’s 55% discount off the MSRP price column, and Keyport’s 52% discount off the MSRP price column and determined A&A’s proposed pricing to be the most advantageous to the State.

I find this evaluation to be consistent with the terms of the RFP and therefore uphold the intended award of Price Line 11.

Based on the foregoing, I remand the evaluation of Price Line 5 to the Bureau and uphold the intended awards of Price Lines 6 and 11. This is my final agency decision.

Thank you for your company’s continuing interest in doing business with the State of New Jersey and for registering your business with **NJ START** at www.njstart.gov, the State of New Jersey’s new eProcurement system.

Sincerely,



Maurice Griffin
Chief Hearing Officer

MAG:DF

c: J. Kerchner
K. Thomas
K. Popso
Edwin Fisher, A&A Safety Glove