



State of New Jersey

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DIVISION OF PURCHASE AND PROPERTY
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August 28, 2015

Via Electronic [Marc.Greenberg@nebraskaland.com] and USPS Regular Mail

Marc S. Greenberg, Sales Manager
Nebraskaland
355 Food Center Drive, Building G-2
Bronx, NY 10474

Re: Reconsideration of Proposal Rejection
RFP 16-X-23697: Perishable, Poultry, Various Distribution & Support Services

Dear Mr. Greenberg:

This letter is in response to your email dated May 21, 2015, to the Division of Purchase and Property (Division) on behalf of Nebraskaland, in which you protest the Proposal Review Unit's Notice of Proposal Rejection for Request for Proposal 16-X-23697: Perishable, Poultry, Various Distribution & Support Services (RFP). The record of this procurement reveals that Nebraskaland's proposal was rejected for failing to include a properly completed *Disclosure of Investment Activities in Iran* form. Nebraskaland requests that the Division reconsider the rejection of its proposal.

I have reviewed the record of this procurement, including the RFP, Nebraskaland'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 Nebraskaland. I set forth herein my Final Agency Decision.

By way of background, this RFP was issued by the Division's Procurement Bureau (Bureau) to solicit proposals for various poultry products for Distribution and Support Services (DSS). (RFP § 1.1 *Purpose and Intent*). In accordance with the RFP, contracts are to be awarded to "those responsible bidders whose bid proposals, conforming to this RFP are most advantageous to the State, price and other factors considered." (*Ibid.*) On May 14, 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 Nebraskaland pursuant to N.J.A.C. 17:2-2.2 for failing to submit a completed/signed *Disclosure of Investment Activities in Iran* form. Specifically, Nebraskaland failed to check the box in Part 1 of the form "certifying that the bidder listed above nor any of the bidder's parents, subsidiaries, or affiliates is engaged in prohibited activities in Iran."

In response to the Notice of Proposal Rejection, Nebraskaland states:

the "Disclosure of Investment Activities in Iran" was properly signed, dated and included with the entire bid package, however the box "certifying that the bidder listed above nor any of the bidder's parents,

subsidiaries, or affiliates is engaged in prohibited activities in Iran” was not indicated.

We submitted a bid for RFP#16-X-23857 Foods: Meat-cured, Fish, Chilled & Frozen-DSS on Tuesday May 5, 2015. This form was part of the bid package and indicated that we do not participate in any prohibited activities and was dated only a week earlier.”

[Nebraskaland May 21, 2015, protest email.]

In order for Nebraskaland’s proposal to be considered, the omission of the *Disclosure of Investment Activities in Iran* form would have to be deemed a nonmaterial deviation. Nonmaterial deviations can be waived by the Director pursuant to the authority vested by N.J.A.C. 17:12-2.7(d) and RFP Section 1.4.10 *Proposal Acceptances and Rejections*. The New Jersey courts have developed a two-prong test to consider the materiality of a deviation and whether the deviation can be waived. In In the Matter of the Protest of the Award of the On-Line Games Production and Operation Services Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), the Appellate Division affirmed the criteria used by the Law Division in Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207 (Law Div. 1974). In River Vale, the Court ruled that in considering the materiality of a deviation or exception and whether it can be waived, one must determine

. . . first, whether the effect of a waiver would be to deprive the [governmental 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 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.

[Id. at 216.]

I have considered Nebraskaland’s position through the lens of the River Vale criteria and find that Nebraskaland’s 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 a permissible inference regarding Nebraskaland’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 would be required if the second box in Part 1 had been checked. In addition, I have reviewed the Department of the Treasury’s Chapter 25 List and find no evidence that either Nebraskaland, or one of its parents, subsidiaries or affiliates, is on the list or engaged in investment activities in Iran that would qualify it for the Chapter 25 list. Moreover, I have reviewed Nebraskaland’s proposal submission in response to RFP#16-X-23857 Foods: Meat-cured, Fish, Chilled & Frozen-DSS which was submitted on May 5, 2015. As indicated in the May 21, 2015, protest email, Nebraskaland did submit a completed and signed *Disclosure of Investment Activities in Iran* form at that time “certifying that the bidder listed above nor any of the bidder’s parents, subsidiaries, or affiliates is engaged in prohibited activities in Iran.” While the submission of the previous *Disclosure of Investment Activities in Iran* form is not entitled to any deference, I do find that Nebraskaland’s reference to that the previous submission acts as a permitted clarification statement and is appropriate to remedy the ambiguity in Nebraskaland’s current submission. See, On-Line Games, supra, 279 N.J. Super. at 597 (stating, “[i]n clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there.”). Therefore, I overturn the Proposal Review Unit’s decision rejecting Nebraskaland’s proposal for the above-referenced RFP.

While Nebraskaland’s proposal rejection was pending before the Hearing Unit, the Bureau evaluated the remaining proposals to this RFP which had been deemed responsive by the Proposal

Review Unit. Accordingly, in connection with this protest, the Hearing Unit has conducted a full review of Nebraskaland's proposal.

Nebraskaland submitted a proposal for eleven (11) of the thirteen (13) price lines sought in the RFP¹. With respect to its proposal for price lines 1 and 8, Nebraskaland proposed products on the Qualified Product List (QPL); therefore its proposal should have been evaluated by the Bureau along with the other proposals submitted for these price lines.² Accordingly, the contract awards for these price lines must be rescinded.

With respect to price lines 2, 3, 4, 9, 10, 11, and 12, Nebraskaland proposed products which were not on the QPL. On August 18, 2015, the Division's Hearing Unit wrote to Nebraskaland requesting that it provide data sheets for the products proposed in response to these price lines. Specifically,

. . . consistent with the requirements of RFP Section 3.6.7 *Bidders Submission*, the Hearing Unit requests that Nebraskaland submit the product data sheets for those line items where Nebraskaland submitted a proposal, but did not propose a product identified on the qualified product list. Specifically, Nebraskaland should submit product data sheets for the following line items: 00002, 00003, 00004, 00009, 00010, 00011, and 00012. The product data sheets should list nutrient profiles including, but not limited to, fat content, sodium content, calories, and chemical analysis.

Nebraskaland's response to this request will become part of the record of this procurement and will be considered in making a final agency decision on this matter. If you choose to provide a response, please submit the response in pdf format as an email attachment to dpp.protest@treas.nj.gov.

The Hearing Unit appreciates your prompt attention to this matter and requests that the response be submitted no later than 4:00 pm on Wednesday, August 26, 2015.

RFP Section 3.6.7 *Bidder Submission*, requires that "[u]pon request, bidders must submit product data sheets for items which do not have a qualified product list (QPL) in the item description within five (5) working days." Nebraskaland did not submit any data sheets to the Hearing Unit in response to the request, either by the due date or the date of this decision. Because Nebraskaland did not submit the data sheets, the Division is unable to conduct an evaluation of the products proposed to determine whether or not the non-QPL products proposed conform to the RFP requirements. Accordingly, the contract awards for price lines 2, 3, 4, 9, 10, 11, and 12 are sustained.

With respect to price lines 5 and 13, Nebraskaland proposed products which were not on the QPL. In addition, Nebraskaland's proposals for these price lines did not conform to the packages size requirements set forth in the RFP/Price Sheet. The RFP requires that "[a]ll products are to be packaged in sizes as specified in this RFP". (RFP § 5.8 *Manufacturing/Packaging Requirements*). Moreover, DSS advises that because it supplies both small and large state facilities, the package sizes selected for each price line have been selected to meet the needs of all agencies served; therefore, DSS would not accept

¹ Nebraskaland submitted a proposal for price lines 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13; but not 6 and 7.

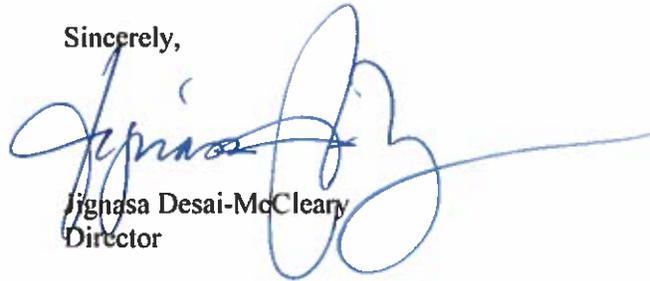
² The Bureau conducted negotiations with bidders pursuant to RFP Section 6.7 *Negotiation and Best and Final Offer (BAFO)*. Because Nebraskaland's proposal had been rejected by the Proposal Review Unit, Nebraskaland was not afforded an opportunity to submit a BAFO.

package sizes different than those identified in the RFP/Price Sheet. Nebraskaland's non-compliance with the RFP specification is a material deviation. 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. Therefore, the contract awards for price lines 5 and 13 are sustained.

Based upon the foregoing, the Bureau's contract awards for price lines 2, 3, 4, 5, 9, 10, 11, 12 and 13 are sustained. However, the Bureau's contract awards for price lines 1 and 8 must be rescinded and I regret the Bureau's errors in this regard. This is my final agency decision with respect to the protest submitted by Nebraskaland.

Thank you for your company's continuing interest in doing business with the State of New Jersey. The State looks forward to doing business with Nebraskaland on the contract issued for RFP#16-X-23857 Foods: Meat-cured, Fish, Chilled & Frozen-DSS. 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,



Jignasa Desai-McCleary
Director

JD-M: RUD

c: D. Reinert
J. Kemery