



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
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September 25, 2015

Via Electronic [folivo@atlanticsweetner.com] and USPS Regular Mail

Frank Olivo
Atlantic Sweetner Company, Inc.
1228 Mays Landing Road
Folson, NJ 08037

Re: Protest of Notice of Proposal Rejection
RFP # 16-X-23859: Food/Non-Food: Bulk Food Items, etc. – DOC

Dear Mr. Olivo:

This letter is in response to your email of September 10, 2015, to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of Atlantic Sweetner Company, Inc. (Atlantic). In that correspondence, Atlantic protests the Notice of Proposal Rejection issued by Division's Proposal Review Unit regarding Solicitation # 16-X-23859. The record of this procurement reveals that Atlantic's proposal was rejected for failing to include a signed *Ownership Disclosure Form* and *Disclosure of Investment Activities in Iran* form. With the protest email, Atlantic submitted copies of the signed *Ownership Disclosure Form* and *Disclosure of Investment Activities in Iran* form.

By way of background, the Division's Procurement Bureau (Bureau) issued the subject Request for Proposal (RFP) on behalf of Distribution and Support Services (DSS) to solicit proposals for various bulk food and non-food items. The Proposal Review Unit opened proposals following the submission deadline of September 3, 2015 at 2:00 p.m.

In consideration of Atlantic's protest, I have reviewed the record of this procurement, including the RFP, Atlantic'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. I set forth herein the Division's Final Agency Decision.

The above referenced solicitation was comprised of the RFP and other documents, one of which was the three-part document entitled *NJ Standard RFP Forms* which includes the *Ownership Disclosure Form* and *Disclosure of Investment Activities in Iran* form. These forms are addressed in RFP Section 4.0, *Proposal Preparation and Submission*, which provides in pertinent part:

4.4.1.2 NJ STANDARD RFP FORMS

One of the downloadable RFP documents is titled NJ STANDARD RFP FORMS. It is comprised of three separate forms, two of which (*Ownership Disclosure* and *Disclosure of Investment Activities in Iran*) discussed below, must be completed, signed and submitted with the

bidder's proposal. **The bidder is cautioned that failure to complete, sign and submit either of these two forms will be cause to reject its proposal as non-responsive as noted below.** If the bidder submits a hard copy proposal, each of the two forms must be physically signed.

If the bidder is submitting an electronic proposal through the Division's eBid system, there are only two acceptable forms of signature for the two forms:

1. The bidder must download the document, physically complete and sign each form, scan the completed document and then upload it, or
2. The bidder may download the document, type the name of the signatory in the space designated for certification signature in each of the forms and the upload the document.

Note: A bidder's entry of a Personal Identification Number (PIN) shall not suffice as a certifying signature on the forms comprising the NJ STANDARD RFP FORMS document.

4.4.1.2.1 OWNERSHIP DISCLOSURE FORM

Pursuant to N.J.S.A. 52:25-24.2, in the event the bidder is a corporation, partnership or sole proprietorship, the bidder must complete and sign the attached Ownership Disclosure Form. A current completed Ownership Disclosure Form must be received prior to or accompany the submitted proposal. A bidder's failure to submit the completed and signed form with its proposal will result in the rejection of the proposal as non-responsive and preclude the award of a contract to said bidder unless the Division has on file a signed and accurate Ownership Disclosure Form dated and received no more than six months prior to the proposal submission deadline for this procurement. If any ownership change has occurred within the last six months, a new Ownership Disclosure Form must be completed, signed and submitted with the proposal.

4.4.1.2.2 DISCLOSURE OF INVESTMENT ACTIVITIES IN IRAN FORM

Pursuant to N.J.S.A. 52:32-58, the bidder must utilize this Disclosure of Investment Activities in Iran form to certify that neither the bidder, nor one of its parents, subsidiaries, and/or affiliates (as defined in N.J.S.A. 52:32-56(c)(3)), is listed on the Department of the Treasury's List of Person or Entities Engaging in Prohibited Investment Activities in Iran and that neither the bidder, nor one of its parents, subsidiaries, and/or affiliates, is involved in any of the investment activities set forth in N.J.S.A. 52:32-56(f). If the bidder is unable to so certify, the bidder shall provide a detailed and precise description of such activities as directed in the form. A bidder's failure to submit the completed and signed form with its proposal will result in the rejection of the proposal as non-responsive and preclude the award of a contract to said bidder.

[Emphasis in the original.]

Moreover, pursuant to N.J.A.C. 17:12-2.2, a bidder's proposal must "contain all RFP-required certifications, forms, and attachments, completed and signed as required" or "be subject to automatic rejection." As a courtesy to all bidders, the Division provided a *Proposal Checklist* as an accompaniment to the RFP. The relevant portion of the checklist includes the following:

**N.J. Department of the Treasury
Division of Purchase and Property
PROPOSAL CHECKLIST**

Solicitation Number: 16-X-23859 **Solicitation Title:** Food/Non Food Bulk Food Items, including Cook/Chef

This checklist was created as a guide to assist bidders in preparing a complete and responsive proposal. It is only advisory in nature. It is the bidder's responsibility to ensure that all requirements of the RFP have been met.

FORMS THAT MUST BE SUBMITTED WITH YOUR PROPOSAL:

<input type="checkbox"/>	RFP Signatory Page with physical signature or PIN (PIN is for eBid submission ONLY)
<input type="checkbox"/>	Completed Price Sheets as instructed in Section 4.4.5 of the RFP
<input type="checkbox"/>	Completed and signed Ownership Disclosure Form*
<input type="checkbox"/>	Completed and signed Disclosure of Investments in Iran Form*

* The Ownership Disclosure, Disclosure of Investigations and Other Actions Involving Bidder, and the Disclosure of Investments in Iran forms MUST each contain either a physical or typed signature (typed signatures are only acceptable for eBid submissions). The forms are found in the Standard RFP Forms Packet, which can be downloaded at <http://www.state.nj.us/treasury/purchase/forms/StandardRFPForms.pdf>

The record of this procurement reveals that Atlantic submitted its proposal by the proposal submission deadline of September 3, 2015. With its submission, Atlantic did include a copy of the *Ownership Disclosure Form* and a copy of the *Disclosure of Investment Activities in Iran* form. However, neither document contained a physical or typed signature. As noted above, the only permissible ways to sign the forms is: 1) downloading the document, physically signing the form, scanning the completed document and then uploading it; or 2) typing the name of the signatory in the space designated for the certification signature and uploading the document. (RFP § 4.4.1.2 *N.J. Standard RFP Forms*). Based upon Atlantic's failure to sign the *Ownership Disclosure Form* and the *Disclosure of Investment Activities in Iran* form submitted with the proposal, the proposal must be deemed non-responsive.

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Township of Hillside v. Sternin, 25 N.J. 317, 324 (1957). In Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 315 (1994), the New Jersey Supreme Court adopted the test set forth by the Court in Township of River Vale v. Longo Constr. Co. for determining materiality. 127 N.J. Super. 207 (Law Div. 1974). "In River Vale, Judge Pressler declared that after identifying the existence of a deviation, the issue is whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity." In re Protest of the Award of the On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566 (App. Div. 1995), citing, River Vale, supra, 127 N.J. at 216.

First, whether the effect of a waiver would be to deprive the [government 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 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.

[River Vale, *supra*, 127 N.J. at 216.]

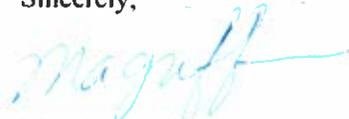
“If the non-compliance is substantial and thus non-waivable, the inquiry is over because the bid is non-conforming and a non-conforming bid is no bid at all.” *Id.* at 222. Here, the failure to provide the mandatory documents is a material deviation from the RFP requirements.

I note that Atlantic did submit copies of the signed *Ownership Disclosure Form* and the *Disclosure of Investment Activities in Iran* form with its protest. Permitting Atlantic to provide these mandatory documents after the proposal opening is contrary to the Appellate Division’s reasoning in On-Line Games where the court held 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.” On-Line Games, *supra*, 279 N.J. Super. at 597.

Notwithstanding Atlantic’s interest in competing for this procurement, it would not be in the State’s best interest to allow a bidder who did not appropriately complete and submit all of the required forms with its proposal as required by the RFP to be eligible to participate in the procurement process. Such acceptance would unlevel the bidder’s playing field as the State received responsive proposals in which all necessary documents and information were provide as required. The deficiency at issue cannot be remedied after the proposal submission deadline as acceptance of Atlantic’s proposal under these circumstances would be contrary to the provisions of the governing statute and provide Atlantic with disclamation options not available to those bidders whose proposals where fully responsive. In light of the finding set forth above, I must deny your request for eligibility to participate in the competition for the subject contract. This is my final agency decision on this matter.

Thank you for your interest in doing business with the State of New Jersey. I 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,



Maurice A. Griffin
Acting Chief Hearing Officer

MAG: RUD

c: G. Gerstenacker
J. Kemery
D. Reinert
A. Nelson
D. Rodriguez