



## State of New Jersey

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September 25, 2015

Via Electronic Mail [vote@honestballot.com] and USPS Regular Mail

Linda Gibbs, President  
Honest Ballot Association  
27246 Grand Central Parkway  
Floral Park, NY 11005

RE: Protest of Notice of Intent to Award  
RFP #16-X-23946 PERS & PFRS Election Processing

Dear Ms. Gibbs:

This correspondence is in response to your August 31, 2015, letter on behalf of Honest Ballot Association ("HBA"). By way of this letter, HBA protests the Division of Purchase and Property's ("Division"), Procurement Bureau's ("Bureau") Notice of Intent to Award ("NOI") a contract to Election America, Inc. ("EAI") for Request for Proposal ("RFP") 16-X-23946: PERS & PFRS Election Processing. Specifically, HBA protests the Bureau's determination that HBA's proposal was non-responsive for indicating that portions of HBA's solution are processed in Canada.

I have reviewed the record of this procurement, including the RFP, HBA's and EAI's proposals and related documents, 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 HBA's protest.

By way of background, on May 12, 2015, the RFP was issued by the Bureau on behalf of the Division of Pensions and Benefits to solicit proposals for PERS & PFRS Elections Processing. It is the intent of the Bureau to "award a contract to that responsible bidder whose [ ] proposal, conforming to this RFP is most advantageous to the State, price and other factors considered." (RFP § 1.1 *Purpose and Intent*.) On June 30, 2015, two (2) proposals were received and opened in response to the RFP. The Bureau deemed HBA's proposal as non-responsive based upon HBA's "Source Disclosure Certification Form stating that portions of its solution that are subcontracted to Simply Voting are processed in Canada." (August 18, 2015 Recommendation Report.) On August 18, 2015, the Bureau issued its NOI.

By letter dated August 31, 2015, HBA protests the NOI alleging two points. In its first point of protest HBA states that it is in compliance with N.J.S.A. 52:34-13.2, that none of the work will be done in or data housed in Canada, but rather in the United States. In its second point of protest HBA states that Simply Voting is a technology provider and not really a subcontractor.

In addressing HBA's first protest point, that all work will be done in and data stored within the United States in compliance with statute, I find that this statement is contrary to what is indicated in HBA's proposal and the accompanying Source Disclosure Certification Form.

Although the Source Disclosure Certification Form is not required until prior to the award of contract, RFP Section 4.4.2.3 advises bidders to submit the form with its proposal. Further, RFP Section 7.1.2 *Source Disclosure Requirements* states:

Pursuant to N.J.S.A. 52:34-13.2, all contracts primarily for services awarded by the Director shall be performed within the United States, except when the Director certifies in writing a finding that a required service cannot be provided by a Contractor or subContractor (sic) within the United States and the certification is approved by the State Treasurer. Also refer to Section 3.6 Service Performance within U.S. of the State of NJ Standard Terms and Conditions.

Pursuant to the statutory requirements, the intended awardee of a contract primarily for services with the State of New Jersey must disclose the location by country where services under the contract, including subcontracted services, will be performed. The Source Disclosure Certification form accompanies the subject RFP. **FAILURE TO SUBMIT SOURCING INFORMATION WHEN REQUESTED BY THE STATE SHALL PRECLUDE AWARD OF A CONTRACT TO THE BIDDER.**

If any of the services cannot be performed within the United States, the bidder shall state with specificity the reasons why the services cannot be so performed. The Director shall determine whether sufficient justification has been provided by the bidder to form the basis of his or her certification that the services cannot be performed in the United States and whether to seek the approval of the Treasurer.

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These RFP provisions are based upon N.J.S.A. 52:34-13.2(a), which requires that "[e]very State contract primarily for the performance of services shall include provisions which specify that all services performed under the contract or performed under any subcontract awarded under the contract shall be performed within the United States." The statute further states that an exception may be granted in instances when those same services cannot be performed or provided within the United States. N.J.S.A. 52:34-13.2(b).

Similarly, Executive Order 129 (McGreevey 2004) provides that:

The State of New Jersey shall not award a contract to a vendor that submits a bid proposal to perform services or have a subcontractor perform services, pursuant to the contract at a site outside of the United States, unless one of the following conditions is met:

a) The vendor or its subcontractor provides a unique service, and no comparable domestically-provided service can adequately duplicate the unique features of the service provided by the vendor or its subcontractor; or

- b) A significant and substantial economic cost factor exists such that a failure to use the vendors or subcontractor's services would result in economic hardship to the State of New Jersey; or
- c) The Treasurer determines that a failure to use the vendor's or subcontractor's services would be inconsistent with the public interest. (Emphasis added)

Here, as suggested in the RFP, HBA submitted its Source Disclosure Certification Form with its proposal. As illustrated in the table below, that form listed Simply Voting as a subcontractor providing electronic vote processing, with offices located in the "USA and Canada."

Contractor and/or Subcontractor	Description of Services	Performance Location(s) by Country	Reasons why services cannot be performed in the US
Honest Ballot Association	Election management, nominations	USA	
Automatic Mail Services	Printing, mailing and packaging	USA	
Simply Voting	Electronic Voting processing	USA and Canada	Data to be housed on servers in the [redacted]

Additionally, in its proposal, HBA indicates that "[a]ll Voting System servers must be hosted at a SSAE 16 Type 2 certified data centre located in Canada. Simply Voting shall document the security policies of the data centre and periodically review them to ensure that there are appropriate controls and measures in place to provide maximum security at these levels . . . ." (HBA Proposal, page 18.) HBA's proposal does not take exception to the service in the United States requirement or seek an exemption from this requirement.

"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

<sup>1</sup> The "[redacted]" typically indicates additional information as a drop-down document which expands when clicked on. A review of all copies (both hard copy and DVDs) of the HBA's proposal show the same [redacted] with no ability to determine what additional information, if any, existed at the time of proposal submission.

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).]

HBA indicated within the four corners of its proposal that all “[v]oting [s]ystem servers must be hosted at a SSAE 16 Type 2 certified data centre located in Canada and indicated in its Source Disclosure Certification Form that locations would include the USA and Canada.” Using the first prong of River Vale, I find that the performance of this service outside of the United States as an indicated facet of HBA’s proposed solution would be in contravention of the requirements of N.J.S.A. 52:34-13.2 and would thus deprive the State of the assurance that the contract performance would be based upon specified requirements of the RFP. As to the second prong, HBA did not suggest that these services could not be performed within the United States. Indeed, all information in the intended awardee, EAI’s proposal, indicates EAI will perform all services required by the RFP within the United States. Because the Bureau received a proposal for a bidder complying with the requirement to perform all services within the United States, acceptance of HBA’s proposal would place HBA in a position of advantage over the compliant bidder. Therefore, even had HBA requested an exception to the requirements of the statute, it would have been denied.<sup>2</sup>

Notwithstanding HBA’s interest in competing for this procurement, it would not be in the State’s best interest to allow a bidder who indicated that portions of its services would be performed outside of the United States to participate in the procurement process, when another bidder indicated, pursuant to RFP and statutory requirements, that all services would be performed within the United States. Such acceptance would unlevel the bidders’ playing field as the State received responsive proposals in which all necessary requirements were met. To allow the deficiency to be remedied at this stage would contravene the governing statute.

As to HBA’s second point of protest that Simply Voting is not a subcontractor, I note that HBA identified Simply Voting as a subcontractor on its Subcontractor Utilization Plan. However, this statement in HBA’s protest letter is a wholesale change in what is stated in its proposal and accompanying documents. ~~I cannot accept this change as it is in contravention of established law.~~

In I/M/O Protest of the Award of the On-Line Games Production and Operation Services Contract, Bid No. 95-X-20175, 279 N.J. Super. 566 (App. Div. 1995), the court held that

[t]he RFP specifically approved of bidders’ clarifying or elaborating in their proposals in post-opening proceedings but prohibited supplementation, change or correction. 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.

<sup>2</sup> As iterated supra, both the statute and Executive Order place explicit restrictions on the use of non-domestic resources in State contracting. HBA has provided no information showing its storage of data in Canada, as an indicated requirement in its proposal, satisfies exceptions within N.J.S.A. 52:34-13.2 and Executive Order 129 (McGreevey 2004), which provide non-domestic resources are permitted in circumstances where the vendor is providing a unique service without adequate U.S.-based duplication; where failure to award would cause the State economic hardship; or where failure to award would be inconsistent with the public interest.

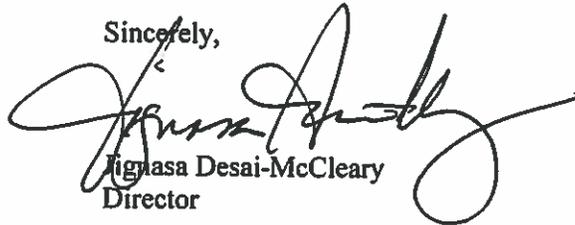
[Id. at 597, *emphasis added.*]

The protest letter's indication that Simply Voting is not a subcontractor is in conflict with the information contained in the Subcontractor Utilization Plan. I must find this to be a prohibited supplementation, change or correction.

Based upon the foregoing, I find that the indication in HBA's proposal that some facet of its services would be performed outside of the United States is a material deviation from the RFP and statutory requirements and that HBA cannot chance the statements made in those documents by way of additional information in its protest letter. I therefore uphold the Bureau's determination that HBA's proposal is non-responsive. This is my final agency decision.

Thank you for your continued interest in doing business with the State of New Jersey. I invite to you to take this opportunity to register your business with NJSTART at [www.njstart.gov](http://www.njstart.gov), the State of New Jersey's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary  
Director

JD-M:MG

c: G. Olivera  
B. Gallagher  
G. Terwilliger  
D. Rodriguez  
A. Nelson

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