



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. BOX 039
TRENTON, NEW JERSEY 08625-0039

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

ANDREW P. SIDAMON-ERISTOFF
State Treasurer

JIGNASA DESAI-MCCLEARY
Director

Telephone (609) 292-4886 / Facsimile (609) 984-2575

March 26, 2014

Via Electronic Mail [holmdelfootwear@optimum.net] and USPS Regular Mail

Wendy Zamkoff, President
Holmdel Footwear, LLC
4 Timber Lane, Unit C
Marlboro, NJ 07746

RE: Protest of Notice of Intent to Award Term Contract 1781
RFP #14-X-22943 Various Men & Women Clothing Items For Use in DOC
Canteen/Commissary

Dear Ms. Zamkoff:

This letter is in response to your facsimile letter of protest received March 11, 2014, referencing the subject Request for Proposal ("RFP") and regarding the award of the subject contract by the Division of Purchase and Property ("the Division"). In your letter, you protest the award of the subject contract and the rejection of the proposal submitted by Holmdel Footwear, LLC ("Holmdel Footwear"). You also request that, as the incumbent vendor with an excellent customer service record, the Division enter into negotiations with Holmdel Footwear to reinstate its proposal and waive any minor irregularities in its proposal.

I have reviewed the record of this procurement, including the RFP, Holmdel Footwear's proposal, and relevant statutes, regulations, and case law. Pursuant to N.J.A.C. 17:12-3.3(d)(1), "[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." 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 Holmdel Footwear's protest without an in-person presentation. I set forth herein my Final Agency Decision.

The subject RFP was issued by the Procurement Bureau on behalf of the New Jersey Department of Corrections (DOC) and the Division's Distribution and Support Services (DSS) to solicit proposals for "various men and women clothing for stock replenishment at thirteen (13) Department of Corrections (DOC) prison canteen/commissary locations located through the State of New Jersey." The RFP provided in relevant part:

3.2 METHOD OF OPERATION/DELIVERY

3.2.1 Each individual prison canteen will place all clothing orders with the DSS Customer Service Unit. DSS will create purchase orders and fax advance copies to

each contractor. Delivery will be required within fourteen (14) calendar days after fax receipt of purchase order by the contractor.

The record of this procurement reveals that Holmdel Footwear submitted a timely proposal in response to the subject RFP by the proposal submission due date of October 16, 2013. Its proposal included bids on price line numbers 30 through 96, 132 through 218, and 228 through 270. The Signatory Page of the proposal included the following information provided by Holmdel Footwear:

- (15) Delivery can be made 30 days or __ weeks after receipt of order.
- (16) Requested delivery: see details elsewhere in RFP.
- (17) Cash discount terms (see RFP) 0 %, __ days: net 30 days.

Following a review of received proposals, the Procurement Bureau issued a Recommendation Report on February 25, 2014, rejecting Holmdel Footwear's proposal. The Recommendation Report noted:

Holmdel Footwear – Holmdel Footwear indicated 30 day delivery ARO on the Signatory Page. Section 3.2.1 of the RFP requires delivery within 14 calendar days; therefore its bid cannot be considered in its entirety.

The Procurement Bureau issued a Notice of Intent to Award on or about February 25, 2014, awarding the 12 price line groupings to a total of four responsible bidders that submitted responsive proposals. Holmdel Footwear's appeal was received by the completion of the protest period, and raised four arguments: (1) Holmdel Footwear should be allowed the opportunity to give an oral presentation or clarify its proposal to resolve the clerical error; (2) As it is Holmdel Footwear's intention to deliver within 14 days, the Director may waive the irregularity in its proposal; (3) It is in the State's best interest and the right of the Director to reject all proposals received; and (4) Holmdel Footwear's past performance be a contributing factor in awarding it the subject contract. I address each argument below.

In its first argument, Holmdel Footwear relies on RFP Section 6.5 in its request to "provide insight and justification" to the Division in an oral presentation. Holmdel Footwear maintains it was "confused by the front page of the RFP, and put 30 days in both the Delivery and Payment term lines[.]" but "fully expected when [it] bid to continue the 14 day delivery and unfortunately a simple clerical error" created a "stumbling block[.]" The relevant text of the RFP states:

6.5 ORAL PRESENTATION AND/OR CLARIFICATION OF PROPOSAL

After the submission of proposals, unless requested by the State as noted below, vendor contact with the State is still not permitted.

After the proposals are reviewed, one, some or all of the bidders may be asked to clarify certain aspects of their proposals. A request for clarification may be made in order to resolve minor ambiguities, irregularities, informalities or clerical errors. **Clarifications cannot correct any deficiencies or material omissions or revise or modify a proposal, except to the extent that correction of apparent clerical mistakes results in a modification.**

The bidder may be required to give an oral presentation to the State concerning its proposal.

Bidders may not attend the oral presentations of their competitors.

It is within the State's discretion whether to require the bidder to give an oral presentation or require the bidder to submit written responses to questions regarding its proposal. Action by the State in this regard should not be construed to imply acceptance or rejection of a proposal. The Division will be the sole point of contact regarding any request for an oral presentation or clarification.

[(Emphasis added.)]

As emphasized above, such an oral presentation cannot be used to "correct any deficiencies or material omissions or revise or modify a proposal." This RFP provision is in keeping with In re Protest of the Award of the On-Line Games Production & Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566 (App. Div. 1995), in which the court stated, "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." Id. at 597. The court held that the former action is permissible after proposals are submitted and opened, but the latter is "impermissible" and "flies in the face of our public bidding scheme." Id. at 598.

In this case, Holmdel Footwear's adjustment of the proposal concerning the number of days for delivery, a price-relevant and therefore material factor, would result in a material alteration, and is thus not permitted. The request for an in-person presentation is denied.

In regard to Holmdel Footwear's second argument, although the Director has the right to waive "minor irregularities" pursuant to RFP Section 6.1 *Right to Waive*, this section cannot be used to permit consideration of Holmdel Footwear for contract award. The requirement for bidders to provide delivery within 14 days after receipt of order as set forth in Section 3.2 was a mandatory, material requirement of the RFP and thus cannot be waived.

To determine whether a requirement is material and can be waived, we must follow the two-prong test first developed in Twp. of River Vale v. R.J. Longo Constr. Co., 127 N.J. Super. 207 (Law Div. 1974), and upheld by the New Jersey Supreme Court, Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307 (1994). In River Vale, the court ruled that in considering the materiality of a deviation or exception and whether it can be waived, it must be determined:

[F]irst, 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.

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

I reviewed this issue through the lens of the River Vale criteria to determine the appropriateness of allowing Holmdel Footwear to be considered for contract award, notwithstanding the fact that its proposal did not include the delivery time frame as required by the RFP.

Applying these criteria to this case, I note RFP Section 3.2.1 states “[d]elivery will be required within fourteen (14) calendar days after fax receipt of purchase order by the contractor.” Therefore, under the first prong, the State would be deprived of the assurance that the contract will be entered into, performed and guaranteed according to its specified requirements if the delivery schedule intended to serve as the very basis of the contract to using agencies was not in conformance with the RFP specifications.

With respect to the second prong of the River Vale test, it would not be in the State’s best interest to allow a bidder to be considered for an award without knowledge of the bidder’s underlying delivery structure. This later delivery date may affect pricing and, furthermore, allowing a bidder to receive consideration for a Statewide contract award without submission of the required delivery schedule would unlevel the bidders’ playing field. This issue cannot be remedied after the proposal submission deadline as allowing Holmdel Footwear to alter its delivery schedule under these circumstances would provide it with options unavailable to other bidders.

As noted by the Supreme Court, in all publicly procured contracts the “conditions and specifications must apply equally to all prospective bidders. Otherwise, there is no common standard of competition.” Hillside Twp. v. Sternin, 25 N.J. 317, 32 (1957). The Court further explained: “Every element which enters into the competitive scheme should be required equally for all and should not be left to the volition of the individual aspirant to follow or to disregard and thus to estimate his bid on a basis different from that afforded the other contenders.” Ibid.

Holmdel Footwear’s third argument cites RFP Section 6.2, *Director’s Right of Final Proposal Acceptance*, which provides in relevant part: “The Director reserves the right to reject any or all proposals, or to award in whole or in part if deemed to be in the best interest of the State to do so.” Holmdel Footwear argues that its history of “excellent customer service and adherence to all deadlines” and its proposal amounting to \$65,000 less than the intended vendor is persuasive to provide the Director ample reason to reject all proposals received in compliance with the RFP. Pursuant to N.J.A.C. 17:12-2.7(2)(g), “[t]he Director retains the discretion to issue a notice of intent to award to a responsible bidder whose conforming proposal is most advantageous to the State, price and other factors considered, or to reject all proposals when the Director determines it is in the public interest or the State’s interest to do so.” The courts have reiterated the “clear legislative purpose to grant [the Division] broad discretion” in determining “whose bid, considering price and ‘other factors,’ will be ‘most advantageous to the state.’” In re Protest of Award of On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 591 (App. Div. 1995). In this case, I have considered price and other factors in my determination not to reject conforming proposals.

Finally, Holmdel Footwear argues that its past performance and experience should be a contributing factor in its award of the subject contract. RFP Section 6.6 *Evaluation Criteria* states:

The following criteria will be used to evaluate all bid proposals that meet the requirements of this RFP. The criteria are not necessarily listed in order of importance:

- a) Price
- b) Experience of the bidder
- c) The bidder's past performance under similar contracts, including if applicable, the Division's vendor performance database.

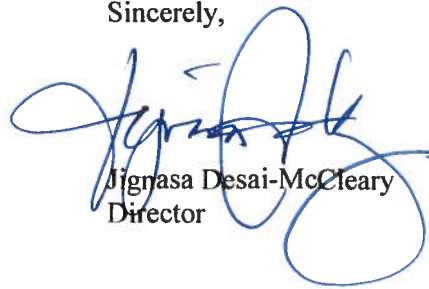
[(Emphasis added.)]

Because Holmdel Footwear's proposal did not comply with the mandatory requirements of the RFP, it was not evaluated under this section. It is true that Holmdel Footwear's positive past performance may have weighed in its favor during an evaluation, but this is a moot point, as its proposal did not satisfy the specifications of the RFP.

In light of the findings set forth above, I must deny Holmdel Footwear's request for eligibility to participate in the competition of the subject contract. This is my final agency decision on this matter.

This is an unfortunate situation for the State as we encourage competition. Thank you for your interest in doing business with the State of New Jersey and I look forward to Holmdel Footwear's participation in future procurement conducted by the Division.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jignasa Desai-McCleary", is written over the typed name and title. The signature is stylized and cursive.

Jignasa Desai-McCleary
Director

JD-M:DF

c: L. DuBois
R. Sharbaugh
J. Signoretta