



State of New Jersey

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August 18, 2015

Via Email shaith@Centricgroup.com and USPS Regular Mail

Scott Haith, Account Manager
Centric Group
301 Mill Road
Edison, New Jersey 08837

Re: Protest of Notice of Intent to Award
RFP# 15-X-23463: Foods/Nonfoods: DOC Canteen/Commissary through DSS

Dear Mr. Haith:

This letter is in response to your letter dated June 25, 2015, on behalf of the Centric Group (Centric), in which you protest the June 18, 2015, Notice of Intent to Award (NOI) for Solicitation #15-X-23463 issued by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division). In the protest letter, Centric contends that certain line items were incorrectly awarded to Union Supply (Union), specifically Line 247¹, 253, 256 and 260². Centric requested that a further review of these line items be conducted.

In consideration of this protest, I have reviewed the record of this procurement, including the Request for Proposal (RFP), the proposals, the protest, 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 submitted by Centric. I set forth herein my Final Agency Decision.

By way of background, the subject RFP was issued by the Bureau on behalf of the Department of Corrections (DOC) and Distribution and Support Services (DSS) to solicit proposals for the delivery and supply of various food and non-food items for the 14 DOC canteen/commissaries located in New Jersey's 13 prisons. (RFP § 1.1 *Purpose and Intent*). This RFP is a re-procurement of the DOC Canteen/Commissary contract which expired in May 2015. (RFP § 1.2 *Background*). "It is the intent of the Bureau to award contracts to those responsible bidders whose proposals, conforming to this RFP, are most advantageous to the State, price and other factors considered." (RFP § 1.1 *Purpose and Intent*). The Proposal Review Unit opened proposals following the proposal submission deadline of April 8, 2015 at 2:00 p.m. On June 18, 2015, the Bureau issued the NOI. This protest followed.

¹ The June 25, 2015 protest letter lists the line items to be reevaluated as 244, 253, 256 and 260; however, in a subsequent conversation between Centric and the Bureau, it was clarified that the line under protest was 247 rather than 244.

² Of the 14 proposals evaluated, only Centric and Union submitted proposals for price lines as 247, 253, 256 and 260.

Centric's protest points, with respect to Union's proposal, are summarized as follows:

- Line 247 required Fish Steaks in Spicy Mustard. Union proposed Fisherman's Paradise Fish Steaks in Louisiana Hot. Centric contends that Union's proposal did not conform to the RFP requirement.
- Line 253 required Sloppy Joe Sauce and Ground Beef. Union proposed a Back Country Sloppy Joe. Centric contends that Union's proposal did not meet the RFP requirement as its proposed product is Sloppy Joe Sauce with chicken rather than ground beef.
- Line 256 required Blackbeans. Union proposed San Miguel "Refried Black Beans". Centric states that Union's proposed product does not conform with the RFP requirements as "refried beans are a different item than "Black Beans", more of a "paste" than whole black means...also, the size is 15.1-oz, which is more than 50% larger than the spec size of 10 oz."
- Line 260 required Pouched Individually Wrapped Spam Slices. Union proposed a Hormel Spam Classic Single Pouch in a 3 oz. size. Centric alleges that the 3 oz. package no longer exists as the product size has been reduced to a 2.5 oz. In support of its position, Centric provided a letter from Hormel dated January 16, 2015, which states "[p]lease be advised that Hormel Foods has decided to resize their line of Spam single serve items from the current 3 oz. package to a 2.5 oz. size."

On June 25, 2015, the Bureau wrote to Union requesting that it provide clarification as to the products proposed for line items 253 and 260. The Bureau requested that Union provide its response by June 29, 2015. Such a request is consistent with the Appellate Division's reasoning in J/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), wherein 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.

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

Union did not respond to the Bureau's June 25, 2015, letter.

With respect to price line 247, Union proposed Fish Steaks in Louisiana Hot Sauce. The Bureau was able to confirm that Louisiana Hot does not make spicy mustard.³ 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). This rule, however, does not apply to minor or inconsequential conditions and public contracting units should resolve problems arising from such conditions in a sensible or practical way. 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 Presser declared that after identifying the existence of a deviation, the issue is

³ See, <http://www.louisianapepper.com/>

whether a specific non-compliance constitutes a substantial [material] and hence non-waivable irregularity.” On-Line Games, supra, 279 N.J. Super. at 594, 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.]

The DOC confirms that fish steaks in mustard were the desired product, not a spicy sauce. As such, the Bureau and DOC indicate that Union’s proposal does not conform to the RFP requirements. Union’s deviation removes the possibility that the contract will be entered into and performed in conformance with the RFP requirements. In addition, the deviation potentially places Union in a position of advantage over other bidders who may have submitted a proposal for this line item if the RFP had required a spicy sauce rather than mustard. “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.” Meadowbrook, supra, 138 N.J. at 222. I find that Union’s proposal of Fish Steaks in Louisiana Hot does not conform to the RFP requirements and is a material deviation; therefore, Union’s proposal is non-responsive.

Regarding price line 253, which required Sloppy Joe Sauce and Ground Beef, Union proposed Back Country Sloppy Joe. Union did not submit any additional information with its proposal regarding the product ingredients and Union did not respond to the Bureau’s request for clarification of the ingredients in the product proposed. Centric claims that the product proposed by Union contains chicken and not beef. Based upon the information provided in the proposal, the Bureau cannot be assured that the product proposed conforms to the RFP requirements. Therefore, I find Union’s proposal as to this line item to be non-responsive to the RFP requirements.

As to price line 256, Union proposed re-fried black beans in a package that exceeded the RFP requirements. First, the RFP required black beans; DOC advises that the product sought was whole beans, not re-fried beans. As noted above, Union’s deviation removes the possibility that the contract will be entered into and performed in conformance with the RFP requirements. In addition, the deviation potentially places Union in a position of advantage over other bidders who may have submitted a proposal for this line item if the RFP had required refried beans. See, River Vale, supra, 127 N.J. at 216. Second, the RFP requires that:

[t]he bidder must bid according to the units of measure indicated on the price sheets. Estimated quantities are compiled based upon the indicated units of measure and the package size(s) denoted on each price line. Bidders should submit packaging sizes that are not more than 20% greater than the packaging size specified in the line item specification.

...

Proposals offering 20% greater than the package size requested (multiply the requested size or quantity by 1.20) may result in rejection of the affected line item. The State, however, reserves the right to accept or reject any offering of packaging size, individual quantity, or weight that does not fall within this variance, dependent upon product availability, commissary display space and prison safety/control protocols.

[RFP Section 4.4.7.2, *emphasis added.*]

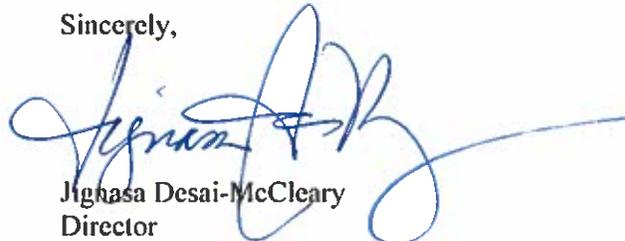
Here, Union's proposed packaging exceeded the RFP requirements by 50%. Based upon these deviations, I find that Union's proposal materially deviates from the RFP requirements, and is therefore non-responsive.

With respect to price line 260, which required 3 oz. pouches of individually wrapped spam slices, Union proposed Hormel Spam Classic Single Pouch in a 3 oz. size package. The 3 oz. packaging is consistent with the RFP requirement; however, the Bureau was provided with a letter from Hormel indicating that the 3 oz. package size was discontinued. Based upon that information, the Bureau contacted Union to determine if Union was providing the 3 oz. package size as requested by the RFP specifications. Union did not respond to the Bureau's letter. Centric proposed a 2.5 ounce pouch which deviates from the RFP requirements. Based upon the flawed specification, the intended award of this line item to either bidder should be rescinded.

I note that on July 10, 2015, the Bureau issued an Amended Notice of Intent to Award which rescinded the award of line items 247, 253, 256 and 260 to Union and awarded those four line items to Centric. That NOI advised all bidders that the protest period for the amended NOI closed on July 24, 2015; no protests have been received by the Hearing Unit. In connection with Centric's protest, I have reviewed the Bureau's amended NOI. The intended award of line item 260 to Centric is rescinded as noted herein. This is my final agency decision with respect to the protest submitted by Centric Group.

The State of New Jersey looks forward to doing business with Centric on this contract and thanks you for registering your company with **NJ START** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jignasa Desai-McCleary", with a long horizontal flourish extending to the right.

Jignasa Desai-McCleary
Director

JD-M: RUD

c: D. Reinert
J. Kemery