



State of New Jersey

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July 22, 2016

Via Electronic Mail [major@oxfordengineering.com] and USPS Regular Mail

Julian T. Canuso, Jr., President
Oxford Engineering Company
336 Point Street
Camden, NJ 08102

RE: Protest of Notice of Intent to Award
RFP #15-X-22978 Aboveground Storage Tanks: Installation, Removal, Repair and Related
Equipment

Dear Mr. Canuso:

This correspondence is in response to your letter of protest, received April 17, 2015, referencing the subject Request for Proposal (RFP) and regarding the Notice of Intent to Award issued by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division). In your letter, you protest the Bureau's determination that the proposal submitted by Oxford Engineering Company (Oxford) is non-responsive due to missing service region identification on Oxford's submitted *Price Sheet*. You contend that because Oxford included a *Source Disclosure Certification Form* that listed "South Region," this clerical error was in effect cured and that Oxford's proposal should have been evaluated for pricing in Category III services.

I have reviewed the record of this procurement, including the RFP, Oxford's proposal, and 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 Oxford's protest.

By way of background, on December 2, 2014, the Bureau publicly released and advertised the subject RFP to solicit proposals for Aboveground Fuel Storage Tanks: Installation, Repair, Removal, and Accessory Equipment. While the RFP included three categories of work, as described in RFP Section 3.0 *Commodity Description/Scope of Work*, bidders were not required to bid on all three categories. Regarding Category III, *Installation and Tank Removal Services*, the State services were divided into a north region and a south region for bidding, and RFP Section 3.7 specified that for Category III, "Contracts will be awarded to multiple vendors per region to establish a qualified pool of contracts."

The Bureau received 18 proposals by the deadline of February 10, 2015. A number of proposals were rejected for failure to provide mandatory documents, signatures, or pricing information. The Bureau deemed Oxford's proposal to be non-responsive for failure to indicate on its *Price Sheet* the region or regions it would service and its proposal was not evaluated further for pricing.

Upon completing a review of the responsive proposals, the Bureau recommended 13 companies receive the Category III award (price lines 15 through 32) and issued a Notice of Intent to Award. Of these companies, one was awarded Category III pertaining to the south region of the State only.

A review of Oxford's proposal shows that it submitted the State-supplied *Price Sheet* with pricing indicated on Category III Price Lines 15 through 32. However, as conceded by Oxford, its *Price Sheet* did not indicate whether Oxford would service the north or south region of the State.

Concerning the need to indicate the appropriate region on Category III price lines, the RFP stipulated:

4.4.7.1 CATEGORY III

NOTE: Bidders do not have to bid on "Category I" or Category II in order to submit a proposal or "Category III" requirements of this RFP.

- A. Bidders submitting a proposal for "Category III, Installation and Tank Removal Services", shall provide a hourly rate for those respective price lines of this RFP. An all-inclusive fully loaded hourly rate is required. Failure to do so will result in being non-responsive to the proposal for Category III only.
- B. Hourly labor rates will be used as part of the evaluation criteria. Contracts will be awarded to multiple vendors per region to establish a qualified pool of contractors. Using agencies shall have the option of contacting all contractors awarded in that region to schedule a site visit and consultation for a tank install/removal fixed cost quote for that location. Where upon, the contractor(s) shall submit a written cost quote based on proposal pricing to the using agency for approval prior to commencement of services for that location.

Bidder(s) are required to indicate on the respective Category III price lines, which region(s) they will provide service in Category III. Failure to do so, will render the bidder's proposal nonresponsive.

[(Emphasis added.)]

Acknowledging this provision, Oxford points out that its proposal included a *Source Disclosure Certification Form* that instructed bidders to "[l]ist every location where services will be performed by the Contractor and all Subcontractors. If any of the services cannot be performed within the United States, the Contractor shall state, with specificity the reasons why the services cannot be so performed." In response, Oxford provided the following information:

Contractor and/or Subcontractor	Description of Services	Performance Location(s) by Country	Reasons why services cannot be performed in the US
Oxford Engineering Company	Category III	South Region	

Although the *Source Disclosure Certification Form* is not required to be submitted with a proposal, Oxford included this form with its proposal. See RFP § 4.4.2.3. Therefore, it was available to the Bureau during its evaluation of proposals and shows that Oxford intended to provide services in the southern region only.

"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 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.

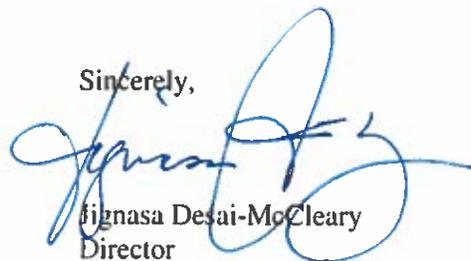
[Meadowbrook, supra, 138 N.J. at 315 (internal quotations omitted) (affirming the two-prong test established in River Vale, supra, 127 N.J. Super. at 216).]

Applying this test, because Oxford indicated within the four corners of its proposal that it would only perform Category III services in the South Region, and because there is no alternative interpretation as to where it will be performing services, I find that Oxford’s indication that it would perform services in the “South Region” on the *Source Disclosure Form* (rather than on the *Price Sheet*) was a minor deviation and that the State will not be deprived of the assurance that Oxford will enter into the contract and perform the requirements. I therefore need not reach the second prong.

As Oxford’s lack of region identification on the submitted price sheet is immaterial in this case, I find the Bureau should have clarified that Oxford’s submitted Category III pricing pertains to the South region only, as indicated on the *Source Disclosure Form*. Therefore, the Bureau’s finding of Oxford’s proposal to be non-responsive is overturned. The Bureau is instructed to seek clarification and evaluate Oxford’s proposal as necessary. The Bureau should award all other price lines as applicable. 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, the State of New Jersey’s new eProcurement system.

Sincerely,



Jignasa Desai-MoCleary
Director

JD-M:DF

c: G. Olivera
K. Woolford
R. Regan