



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR

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January 5, 2024

Via Electronic Mail Only to lynn.noel@makrgroup.com

Lynn Noel, Executive Assistant
Waterplay Solutions Corp
805 Crowley Avenue
Kelowna, BC V1Y 7G6

Re: I/M/O Bid Solicitation #23DPP00902 Waterplay Solutions Corp
Protest of Notice of Proposal Rejection
T0103 Park and Playground Equipment

Dear Ms. Noel:

This final agency decision is in response to the letter dated December 4, 2023, submitted by Waterplay Solutions Corp (Waterplay). That Protest Letter was received by the Division of Purchase and Property's (Division) Hearing Unit on December 5, 2023. In that correspondence, Waterplay protests the Notice of Proposal Rejection issued by the Division's Procurement Bureau (Bureau) for Bid Solicitation #23DPP00902 – T0103 Park and Playground Equipment (Bid Solicitation). The record of this procurement reveals that the Quote submitted by Waterplay was deemed non-responsive on the grounds of "[m]issing price information" and "[r]equired certification(s), form(s), or attachment(s) are not signed or completed" pursuant to Bid Solicitation Sections 3.13.13, *Business Registration*, and 3.36, *State-Supplied Price Sheet Instructions*. Along with its letter, Waterplay submitted a Certificate of Authority from the Division of Revenue and Enterprise Services (DORES) dated December 5, 2023, as well as a completed State-Supplied Price Sheet as attachments to their protest letter, arguing that these submissions resolved the above-mentioned non-compliance.

By way of background, on October 23, 2023, the Procurement Bureau issued the Bid Solicitation on behalf of Statewide Using Agencies and Cooperative Purchasing Participants. The purpose of the Bid Solicitation was to solicit "Quotes for various types of Park and Playground Equipment." Bid Solicitation Sec. 1.1, *Purpose and Intent*. It is the intent of the State to award a Contract to that responsible Bidder whose Quote, conforming to this Bid Solicitation is most advantageous to the State, price and other factors considered. The State may award any or all price lines.

On November 15, 2023, the Division's Proposal Review Unit opened forty-one (41) Quotes which were received by the submission deadline of 2:00 pm eastern time. After conducting an initial review of the Quotes received for compliance with mandatory Quote submission requirements, it was determined that Waterplay's Quote was non responsive for failing to submit a State Supplied Price Sheet as required in Bid Solicitation Section 3.36, *State-Supplied Price Sheet Instructions*. Initially, Waterplay had also failed to file a Business Registration Certificate with the initial Quote. Waterplay did submit a Certificate of Authority filed with the Division of Revenue and Enterprise Services with the December 5, 2023 protest letter.

In consideration of the Waterplay protest, I have reviewed the record of this procurement, including the Bid Solicitation, the Quotes received, the 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.

Section 3.36 of the Revised Bid Solicitation states that "The Bidder must submit its pricing using the State-Supplied Price Sheet accompanying this Bid Solicitation and located on the "Attachments" Tab," and that "[a] Bidder's failure to provide, within its Quote, the information deemed by the State to be essential for product identification or price determination shall result in rejection of that Bidder's Quote."

The term "must" denotes a mandatory requirement as further set forth in the Bid Solicitation's glossary:

Must – Denotes that which is a mandatory requirement.

[Bid Solicitation Section 9. *GLOSSARY*]

The term "shall" also denotes that which is a mandatory requirement as further set forth in the Bid Solicitation's glossary:

Shall – Denotes that which is a mandatory requirement.



[Bid Solicitation Section 9. *GLOSSARY*]

Waterplay failed to submit a State-Supplied Price Sheet with their initial Quote, and instead submitted a Waterplay price list. Bid Solicitation Section 3.36, *State-Supplied Price Sheet Instructions*, requires that Bidders submit a completed Price Sheet with the initial Quote and that the failure to submit the same shall result in the rejection of a Bidder's Quote. The failure to submit pricing in the State-Supplied Price Sheet results in the rejection of a Bidder's Quote. The submission of this information after the initial Quote has been submitted is not sufficient to satisfy the requirement of Bid Solicitation Section 3.36.

In their December 5, 2023 protest letter, Waterplay submitted a State-Supplied Price Sheet with the pricing information included. While Waterplay submitted its price list with the initial Quote, and later provided a completed State-Supplied Price Sheet, the language of Bid Solicitation Section 3.36 unambiguously requires the rejection of a Quote if the pricing information is not

contained within the State-Supplied Price Sheet in the initial Quote. By failing to submit a completed price sheet, Waterplay did not comply with a mandatory condition of the Bid Solicitation because its Quote did not contain all of the information required on the State-Supplied Price Sheet. The instructions in Bid Solicitation Section 3.36 were unambiguous, stating that failing to submit a completed and sufficiently detailed Price Sheet shall result in the rejection of the Bidder's Quote. Even though Waterplay rectified their prior non-compliance with the terms of Bid Solicitation Section 3.13.13 in submitting a Certificate of Authority from DORES, Waterplay was still non-compliant with the terms in Bid Solicitation Section 3.36. As such, Waterplay's Quote contained a non-waivable deviation rendering the Quote non-responsive. Twp. of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 222 (Law Div. 1974).

Bid Solicitation Section 3.13.13, *Business Registration*, states that “[i]n accordance with N.J.S.A. 52:32-44(b), a Bidder and its named Subcontractors must have a valid Business Registration Certificate (“BRC”) issued by the Department of the Treasury, Division of Revenue and Enterprise Services prior to the award of a Contract.” Waterplay did not submit a Business Registration Certification with the initial bid, but submitted a Certificate of Authority issued by the Division of Revenue and Enterprise Services (DORES) on December 5, 2023 in the protest letter. The Certificate of Authority registered Waterplay, through its Registered Agent Paracorp, Incorporated, as a company permitted to conducted general business activities in the State of New Jersey. *See following Certificate of Authority dated December 5, 2023.*

| NEW JERSEY DEPARTMENT OF THE TREASURY DIVISION OF REVENUE AND ENTERPRISE SERVICES | |
|---|--|
| CERTIFICATE OF AUTHORITY WATERPLAY SOLUTIONS CORP. 0451055873 | |
| The above-named FOREIGN FOR-PROFIT CORPORATION was duly filed in accordance with New Jersey State Law on 12/05/2023 and was assigned identification number 0451055873. Following are the articles that constitute its original certificate. | |
| 1. Name: | WATERPLAY SOLUTIONS CORP. |
| 2. Registered Agent: | PARACORP INCORPORATED |
| 3. Registered Office: | 208 WEST STATE STREET TRENTON, NEW JERSEY 08608 |
| 4. Business Purpose: | GENERAL |
| 5. Incorporated Under the Laws of: | OUTSIDE OF THE USA ON 02/18/2009 |
| 6. Effective Date of this filing is: | 12/05/2023 |
| 7. Main Business Address: | 805 CROWLEY AVENUE KELOWNNA, BC - BRITISH COLUMBIA V1Y 7G6 Canada |
| Signatures: NADINE PRETORIUS VICE-PRESIDENT | |
|  | IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal 5th day of December, 2023  Elizabeth Maher Muolo State Treasurer |
| Certificate Number: 4227422140 Verify this certificate online at https://www.treasury.nj.gov/7178_JoiningCert23P1enrj_Cert.jsp | |
| Continued on next page ... | |
| Page 1 of 2 | |

As per N.J.S.A. 14A:13-3(1), “no foreign corporation shall have the right to transact business within the State until it shall have procured a certificate of authority from the Secretary of State.” At the time of the bid submission, Waterplay had not procured a certificate of authority, but did later receive one from DORES on December 5, 2023. There is no deadline contained within the provisions of Bid Solicitation Section 3.13.13 for the document to be provided by the time of Quote opening, nor is there language indicating that the failure to provide such information with an initial Quote constitutes a non-waivable deviation. As such, Waterplay’s bid cannot be rejected on the grounds of initial non-compliance with the terms of Bid Solicitation Section 3.13.13 because the document, according to the statute, only need be provided by time of award.

In light of the findings set forth above, I sustain the conclusions in the Bureau’s November 28, 2023 Proposal Rejection Letter, that the Waterplay Quote was non-responsive for failing to submit a State-Supplied Price Sheet as required by the Bid Solicitation and uphold the November 28, 2023, Notice of Proposal Rejection.

Thank you for your company’s continuing interest in doing business with the State of New Jersey, I encourage you to log into [NJSTART](#) to select any and all commodity codes for procurements you may be interested in submitting a Quote for so that you may receive notification of future bidding opportunities.

This is the Division’s final agency decision. Pursuant to N.J.A.C. 17:12-3.1, this determination is appealable to the Appellate Division of the Superior Court in accordance with the New Jersey Court Rules (R. 2:4-1) which provide a party 45 days to appeal this final agency decision.

Sincerely,



Cory K. Kestner, Esq.
Acting Chief Hearing Officer

CKK: PCV

- c. K. Thomas
- C. Murphy
- E. Flynn