



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
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September 15, 2017

Via Electronic Mail [jmerle@foleyinc.com] and USPS Regular Mail

Jeff Merle, Vice President of Sales
Foley, Incorporated
855 Centennial Avenue
Piscataway, NJ 08855-1555

Re: Protest of Notice of Proposal Rejection
Solicitation #18DPP00160: T3060 Crawler/Dozer, Screened Cab Enclosure, Low Ground Pressure,
Diesel, with Min. 2 Cu. Yd. Blade

Dear Mr. Merle:

This letter is in response to your email of September 14, 2017, on behalf of Foley, Inc. (hereinafter "Foley") which was received by the Division of Purchase and Property's (hereinafter "Division") Hearing Unit. In that letter, Foley protests the Notice of Proposal Rejection issued by the Division's Proposal Review Unit for the above referenced solicitation. The record of this procurement reveals that Foley's Quote {Proposal} (hereinafter "Proposal") was rejected for failing to submit the *Disclosure of Investment Activities in Iran Form* with its Proposal.

In consideration of Foley's protest, I have reviewed the record of this procurement, including the Bid Solicitation {Request for Proposal} (hereinafter "RFP") #18DPP00160: T3060 Crawler/Dozer, Screened Cab Enclosure, Low Ground Pressure, Diesel, with Min. 2 Cu. Yd. Blade, Foley's Proposal, 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. I set forth herein the Division's Final Agency Decision.

By way of background, on July 31, 2017 the Division's Procurement Bureau (hereinafter "Bureau") issued the above referenced RFP on behalf of the New Jersey Department of Environmental Protection (hereinafter "NJDEP") to solicit Proposals for a Crawler/Dozer with a Screened Cab Enclosure, Low Ground Pressure, Diesel Engine, Minimum 2 Cu. Yd. Capacity Blade and Hydraulic System for Rear Mounted Attachments. RFP § 1.1 *Purpose and Intent*. The intent of the Bureau was to award one (1) Statewide Master Blanket Purchase Order (Blanket P.O.) {Contract} (hereinafter "Contract") to that Vendor {Bidder} (hereinafter "Bidder") whose Proposal is most advantageous to the State, price and other factors considered. *Ibid.* The State intends to extend the Contract awarded to Cooperative Purchasing Program Participants. *Ibid.* This solicitation was a re-procurement of RFP #17DPP00123 which was cancelled on June 9, 2017, due to no responsive Proposal being received. RFP § 1.2 *Background*.

On August 25, 2017, the Proposal Review Unit opened the Proposals received by the submission deadline of 2:00 p.m. After conducting a review of the Proposals submitted, the Proposal Review Unit found that Foley's Proposal did not include the completed and signed *Disclosure of Investment Activities in Iran Form* as required by the RFP. Accordingly, the Proposal Review Unit issued a Notice of Proposal Rejection.

On September 14, 2017, Foley wrote to the Division stating in part:

We have (sic) received a rejection notice on September 6th for our recent bid on August 25th. The purpose of this communication is to protest the rejection pursuant to the rules outlined in [N.J.A.C.] 17:12-3.3:

I: Division's solicitation number for this procurement: 18DPP00160

II: Grounds for challenging the intended contract award: We were notified that our proposal was rejected (attached- page 3) because we did not include the form disclosing our investments in Iran. This was a clerical error, our company and owners have no investments in Iran. The completed form is attached (page 2) to this communication. We hope you will consider our proposal for this bid with our submission of this form.

With the protest, Foley submitted a copy of the completed *Disclosure of Investment Activities in Iran Form* for itself and its joint venture partner Giles & Ransome, Inc. (hereinafter "Giles").

Pursuant to N.J.A.C. 17:12-2.2¹, a bidder's Proposal must "[c]ontain all RFP-required certifications, forms, and attachments, completed and signed as required" or "be subject to automatic rejection." The subject solicitation was comprised of the RFP, other documents and mandatory forms which were specifically addressed in RFP § 4.0 *Quote {Proposal} Preparation and Submission* which states in pertinent part:

4.4.1.2.1 NJ STANDARD BID SOLICITATION {RFP}
FORMS REQUIRED WITH THE QUOTE
{PROPOSAL}

Vendor's {Bidder's} failure to complete, sign and submit the forms in Section 4.4.1.2 shall be cause to reject its Quote {Proposal} as non-responsive.

...

4.4.1.2.2 DISCLOSURE OF INVESTMENT ACTIVITIES IN
IRAN FORM

Pursuant to N.J.S.A. 52:32-58², the Vendor {Bidder} must utilize this Disclosure of Investment Activities in Iran form to certify that neither the

¹ The Division's administrative rules governing its procurement process are set forth in N.J.A.C. 17:12. These rules can be accessed at <http://www.state.nj.us/treasury/purchase/AdminCode.shtml>.

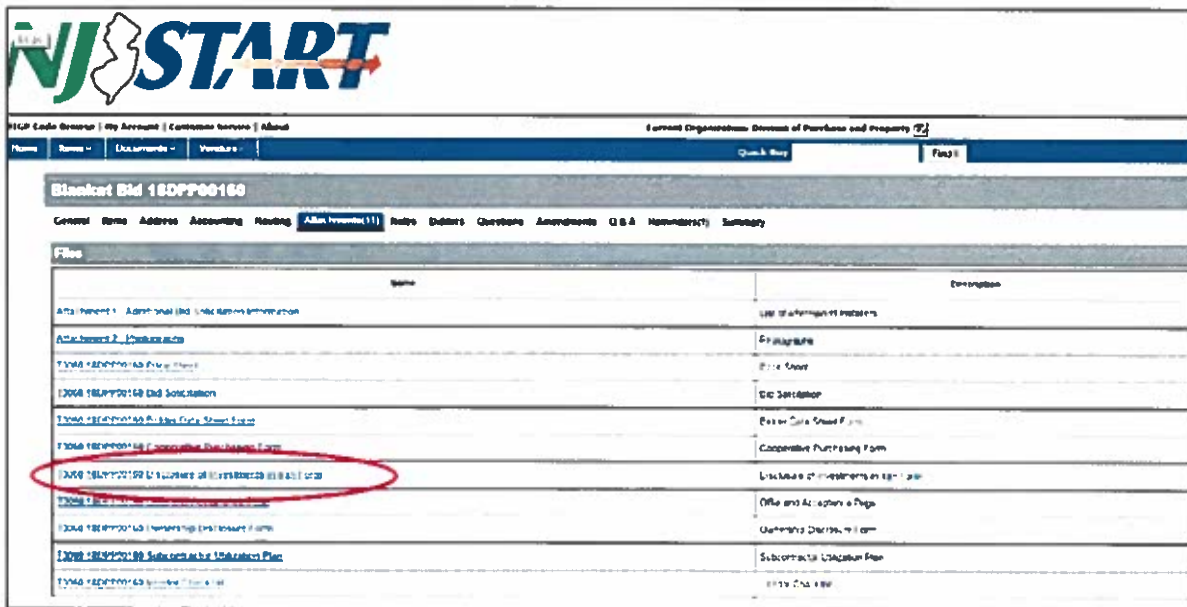
² N.J.S.A. 52:32-58(a) states "[a] State agency shall require a person or entity that submits a bid or proposal or otherwise proposes to enter into or renew a contract to certify, at the time the bid is submitted or the

Vendor {Bidder}, nor one of its parents, subsidiaries, and/or affiliates (as defined in N.J.S.A. 52:32-56(e)(3)), is listed on the Department of the Treasury’s List of Persons or Entities Engaging in Prohibited Investment Activities in Iran and that neither the Vendor {Bidder}, nor one of its parents, subsidiaries, and/or affiliates, is involved in any of the investment activities set forth in N.J.S.A. 52:32-56(f). If the Vendor {Bidder} is unable to so certify, the Vendor {Bidder} shall provide a detailed and precise description of such activities as directed on the form. A Vendor’s {Bidder’s} failure to submit the completed and signed form with its Quote {Proposal} will result in the rejection of the Quote {Proposal} as non-responsive and preclude the award of a Blanket P.O. {Contract} to said Vendor {Bidder}.

Vendors {Bidders} using **NJSTART** to submit a Quote {Proposal} shall make the appropriate certification on the “Maintain Terms and Categories” Tab within its profile by checking the applicable box and, if required, completing and attaching the shortened Disclosure of Investment Activities in Iran form. Vendors {Bidders} not using **NJSTART** to submit a Quote {Proposal} must complete the full Disclosure of Investment Activities in Iran form located on the Division’s website. **The full version of the form is also available in NJSTART (www.njstart.gov).**

[*Emphasis added.*]

With the solicitation, a copy of the *Disclosure of Investment Activities in Iran Form* was uploaded to **NJSTART** for use by Bidders.



contract is renewed, that the person or entity is not identified on a list created pursuant to subsection b. of section 3 [C.52:32-57] of this act as a person or entity engaging in investment activities in Iran described in subsection f. of section 2 [C.52:32-56] of this act.”

Furthermore, as a courtesy to all bidders, the Division provided a Proposal Checklist with the solicitation which in pertinent part states the following:

**New Jersey Department of the Treasury
Division of Purchase and Property**




NJSTART PROCUREMENT PROGRAM CHECKLIST

Solicitation (RFP) Number: 18DPP00160 Solicitation (RFP) Title: T3060 Rebid: Crawler/Dozer with Screened Cab

This checklist was created as a guide to assist Vendors (Bidders) in preparing a complete and responsive Quote (Proposal) as part of the NJSTART Procurement Program. It is only advisory in nature.

It is the Vendor's (Bidder's) responsibility to ensure that all requirements of the Bid Solicitation (RFP) have been met.

Forms with an NJSTART icon can be accessed through the Maintain General Information section of the Vendor Profile. Forms that have a PDF icon next to them can be accessed on the Division website or by clicking on the icon.

FORMS, REGISTRATIONS AND CERTIFICATIONS REQUIRED BY SECTION 4.4.1 THAT MUST BE SUBMITTED WITH THE VENDOR (BIDDER) QUOTE (PROPOSAL)		
Offer and Acceptance – MUST BE PHYSICALLY OR ELECTRONICALLY SIGNED AND COMPLETED. SEE RFP SECTIONS 1.3.4 AND 4.4.1.1		
Disclosure of Investment Activities in Iran - Full Version - SEE SECTION 4.4.1.2.2	NJ START	
Disclosure of Investment Activities in Iran - Use with completed NJSTART Category ONLY SEE SECTION 4.4.1.2.2	NJ START	
Ownership Disclosure - Full Version – SEE SECTION 4.4.1.2.1	NJ START	
Ownership Disclosure - Use with completed NJSTART Category ONLY - SEE SECTION 4.4.1.2.1	NJ START	

In this case, the record indicates that Foley’s Proposal did not include a completed and signed *Disclosure of Investment Activities in Iran Form* for either it or its joint venture partner Giles, as evidenced by a review of the documents submitted by Foley through the Division’s NJSTART eProcurement system, nor were the forms contained within either Foley’s or Giles’ NJSTART Vendor Profiles. In the protest, Foley admits that the *Disclosure of Investment Activities in Iran Form* was not included with the Proposal submission, stating that the omission of the *Disclosure of Investment Activities in Iran Form* from the Proposal submission “was a clerical error.” The NJSTART system does not prevent a bidder from submitting a Proposal without all required forms and documentation. The responsibility for the contents of the Proposal, forms, or submittals necessarily and appropriately rests solely with the bidder. Here, unfortunately, Foley submitted the Proposal without the completed *Disclosure of Investment Activities in Iran Form* or other form of certification.

The Division does not have the power to waive the legislative requirement that a Bidder certify with its Proposal submission that it is not engaged in investment activities in Iran. N.J.S.A. 52:32-58. Only the New Jersey Legislature can change a requirement it has mandated. Accordingly, in order to make this process of complying with the legislative requirement easier, the Division provides to the bidding community a *Disclosure of Investment Activities in Iran Form* to be completed and submitted with the Proposal. As set forth in N.J.S.A. 52:32-58, RFP §§ 4.4.1.2 and 4.4.1.2.2, and as noted in the checklist above, the submission of a completed and signed *Disclosure of Investment Activities in Iran Form* as part of a Bidder’s Proposal was required.

Notwithstanding Foley’s interest in competing for this procurement, to allow Foley to submit a completed and signed *Disclosure of Investment Activities in Iran Form* after bid opening would violate the Legislative requirement outlined in N.J.S.A. 52:32-58, a requirement that this Division is not authorized to waive. This is an unfortunate situation for the State as the Division encourages competition and appreciates the time and effort put forth in preparing and submitting the Proposal. However, in light of the findings set

forth above, I have no choice but to deny your request for eligibility to participate in the competition for the subject contract. This is my final agency decision on this matter.

Thank you for your company's continuing interest in doing business with the State of New Jersey and for registering your business with **NJSTART** at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Maurice A. Griffin
Acting Director

MAG: RUD

c: J. Kerchner
K. Thomas
A. Nelson
D. Rodriguez