



State of New Jersey

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December 19, 2016

Via Electronic Mail [greg@genelsafety.com] and USPS Regular Mail

Gregory Krannich, President
Gen-El Safety & Industrial Products, LLC
Occupational Health & Safety Equipment
961 Route 10 East, Suite 2M
Randolph, New Jersey 07869

RE: Second Request for Reconsideration: Protest of Notice of Proposal Rejection
Bid Solicitation {Request for Proposal} #16DPP00020 – Protective Clothing and Footwear

Dear Mr. Krannich:

This letter is in response to your email dated November 15, 2016, on behalf of Gen-El Safety & Industrial Products, LLC (Gen-El), referencing the subject Bid Solicitation {Request for Proposal} (hereinafter “RFP”). In that email, you request that I reconsider the August 15, 2016 and August 30, 2016 final agency decisions (FAD) issued by the Division of Purchase and Property (Division) regarding Gen-El’s proposal submitted in response to subject RFP. In those FADs, I upheld the Division’s Proposal Review Unit’s rejection of Gen-El’s proposal for failing to include a signed and completed *Disclosure of Investment Activities in Iran* Form. Your letter requests that Gen-El’s proposal be reinstated and evaluated for an award of contract.

I have reviewed the record of this procurement, including Gen-EL’s current reconsideration request, Gen-El’s original protest, first request for reconsideration, proposal, the RFP, 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 Gen-El’s reconsideration request.

By way of background, the subject RFP was issued by the Division’s Procurement Bureau (Bureau) on behalf of various New Jersey Agencies and Cooperative Purchasing Program Participants for Protective Clothing and Footwear. RFP § 1.1 *Purpose and Intent*. This is a procurement of services similar to those offered by term contract T0046. RFP § 1.2 *Background*.

As noted in my August 30, 2016 decision, proposals were due by June 28, 2016, at 2:00 p.m. On June 28, 2016, the Proposal Review Unit opened the proposals received by the submission deadline of 2:00 p.m. The Proposal Review Unit’s review found that Gen-El failed to submit a signed/completed *Disclosure of Investment Activities in Iran* Form and it subsequently issued a Notice of Proposal Rejection. In response to the Notice of Proposal Rejection, Gen-El submitted an email protest on July 13, 2016, and included a

completed *Disclosure of Investment Activities in Iran* Form dated May 23, 2016.¹ The Division issued a FAD on August 15, 2016, upholding the rejection of Gen-El's proposal for failing to submit the form. In response to the FAD, Gen-El submitted a request for reconsideration via email to the Division's Chief Hearing Officer, stating:

I have received your letter and decision regarding the protest I submitted with respect to RFP #16DPP00020. I am in total disagreement with your decision. I respect the Division encourages competition and required that the bidder's playing field be fair and level, but I would like to propose a question. How does the late submission of the "Disclosure of Investigation of Iran" place my company in a more advantageous situation? It is beyond my comprehension that the State would even entertain the thought that we do business with Iran, especially since we have been doing business with the State of New Jersey since the early 1990's. I live in this State, pay taxes here and employ personnel who depend on these contracts. If I had neglected submitting a price sheet, I could understand how I might have an advantage over other bidders, but this reason is totally unfair.

I would very much appreciate your reconsideration of this matter.

I found, in pertinent part, the following in response to Gen-El's August 15, 2016 request for reconsideration:

The requirement to certify that a bidder is not engaged in certain prohibited activities in Iran is set forth in N.J.S.A. 52:32-58. The New Jersey Legislature, in implementing N.J.S.A. 52:32-58, mandated requirements that a bidder must comply with in order to enter into a contract with the State. N.J.S.A. 52:32-58 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 contract is renewed, that the person or entity is not identified on a list created pursuant to subsection b. of section 3 of the act as a person or entity engaging in investment activities in Iran described in subsection f. of section 2 of this act.

[(Emphasis added.)]

In reviewing proposals submitted in response to an RFP, the Division does not have the power to waive this legislative requirement, as only the New Jersey Legislature can change a requirement it has mandated. In order to make this process or certifying easier, the Division provides to the bidding community a *Disclosure of Investment Activities in Iran* Form to be completed in order for bidders to comply with the statutory requirement of N.J.S.A. 52:32-58. Here, because Gen-El uploaded its proposal without the completed *Disclosure of Investment Activities in Iran* Form or other form of certification, it was not in compliance with the Legislative requirement that mandates that a bidder certify at the time of bid submission that it is not engaged in investment activities in Iran.

Were the Division to allow Gen-El to submit a completed and signed *Disclosure of Investment Activities in Iran* Form after bid opening, it would be in violation of the Legislative requirement outlined in N.J.S.A. 52:32-58. This would allow Gen-El the ability

¹ In Gen-El's November 15, 2016 request for reconsideration, it states that this form was "requested." I note that the Notice of Proposal Rejection does not and cannot request any documentation from any bidder; rather, it provides notice that a proposal has been rejected and the reason for rejection.

to submit the form beyond the time frame allowed, which would unlevel the bidders' playing field, as the State received responsive proposals in which all necessary information and documents were provided as required. While I regret the outcome of this unfortunate situation, in light of the findings set forth above, Gen-El is not eligible to participate in the competition for the subject contract. This is my final agency decision related to Gen-El's request for reconsideration.

[(August 30, 2016 FAD, pages 2-3.)]

Gen-El's November 15, 2106 request for reconsideration questions why the Division cannot accept the *Disclosure of Investment Activities in Iran* Form submitted on July 13, 2016, stating that "this form has no bearing on the outcome" of the solicitation. Gen-El states that it is not requesting that the legislative requirement be waived, but that because the State "often requests updated documentation," this should not be considered a different scenario. Gen-El also questions how acceptance of its form after proposal opening would provide Gen-El with an advantage.

As noted in both the August 15 and 30, 2016 final agency decisions, I reiterate that N.J.S.A. 52:32-58 was enacted by our legislature and the Division is governed by the corresponding regulations in the New Jersey Administrative Code, specifically N.J.A.C. 17:12-2.2. This statute requires that a bidder certify, at the time of proposal submission, that it is "not identified on a list created pursuant to subsection b. of section 3 of the act as a person or entity engaging in investment activities in Iran[.]" N.J.S.A. 52:32-58. The specifications outlined in the RFP reflect the Division's governing rules and regulations. Although Gen-El asserts the *Disclosure of Investment Activities in Iran* Form has "no bearing on the outcome" of the solicitation, all bidders must abide by the established statutory and regulatory requirements when submitted a proposal for a State contract. Here the Legislature has mandated that the *Disclosure of Investment Activities in Iran* be submitted with the proposal.


While the Division may request updated or additional information from bidders or contractors, these requests are limited to information not required at time of proposal submission. For instance, the Division may request that a bidder submit a certification from a manufacturer that the bidder is authorized to sell the manufacturer's products, after proposal submission, but prior to contract award. This type of additional documentation is to provide information required by the RFP, but not required by statute.

Gen-El also notes that because it is ineligible for award of contract, many State agencies "are now not going to be able to purchase through this contract the lines that [it] had bid on." Gen-El states that these agencies "have expressed great concern over this determination" and that certain price lines are now "not even being awarded a contract."

As noted by our courts, "a non-conforming bid is no bid at all. In re Protest of Award of On-Line Games Prod. and Operation Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 595 (App. Div. 1995). Because Gen-El's proposal was non-conforming it cannot be considered a proposal. While various lines were not recommended for award of contract, the Bureau did recommend numerous awards of different brands in each of the five categories of this RFP (clothing, shoes/footwear, gloves, head protection, and rainwear). See RFP § 3.1 Qualified Brands List.

In this case, to allow Gen-El to compete for award of the subject contract would be contrary to the statutory requirements. As previously discussed, all bidders were required to submit the *Disclosure of Investment Activities in Iran* Form at the time of proposal submission and were not permitted to supplement a proposal with the document after the submission deadline. N.J.S.A. 52:32-58. The Division may not take action contrary to the statutory requirement and permit Gen-El to submit the form after the deadline specified by the RFP.

Based on the foregoing, I uphold the August 15, 2016 final agency decision in response to Gen-El's protest and the August 30, 2016 final agency decision in response to Gen-El's request for reconsideration. This is my final agency decision.

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

Sincerely,



Maurice Griffin
Chief Hearing Officer

c: J. Kerchner
K. Thomas
K. Popso
A. Nelson