

**FINAL AGENCY DECISION**

Via Email and Regular First Class Mail

January 15, 2016

Kimberley Gillespie
Economic Project Solutions, Inc.
2 King Arthur Court, Suite E
North Brunswick, New Jersey 08902

**Re: Project No. GP-0230-R01
Professional Staffing Services
Bid Protest By Economic Project Solutions, Inc.**

Dear Ms. Gillespie:

The New Jersey Schools Development Authority ("NJSDA") is in receipt of your January 8, 2016 formal bid protest on behalf of Economic Project Solutions, Inc. ("EPS") relating to the above-referenced procurement for Professional Staffing Services (the "Procurement"). This letter is the NJSDA's formal response and final agency decision on EPS's bid protest.

In evaluating EPS's bid protest, the NJSDA has reviewed and considered the following: correspondence from Sean Murphy, NJSDA Director of Procurement to Sabrina Staats of EPS, dated December 21, 2015, with attachment; correspondence from Ms. Staats to David Kutch, NJSDA Senior Procurement Analyst, dated January 4, 2015; your January 8, 2015 correspondence directed to Charles B. McKenna, NJSDA Chief Executive Officer; the advertisement for bids; the Request for Proposals ("RFP") and Addendum No. 1 thereto; bidder Notices of Intent to Participate; and Technical Proposals and Fee Proposals and accompanying documentation submitted by all bidders in connection with the Procurement.

Brief Overview of the Procurement Process

The Procurement was advertised and the RFP was issued on November 23, 2015. Under the terms of the RFP, any firm wishing to submit a proposal was required to submit a Notice of Intent to Participate no later than 2:00 p.m. on December 3, 2015. Addendum No. 1 was subsequently issued on December 9, 2015. On or before December 16, 2015, interested bidders submitted Technical Proposals, sealed Fee Proposals and other documentation in accordance with the requirements of the RFP, as modified by the Addendum.

The Technical Proposals were evaluated and scored by a Selection Committee consisting of four (4) members, plus one alternate, through the evaluation of responsive Technical Proposals addressing the Evaluation Criteria set forth in the RFP.

Raw scores of each of the Selection Committee members in each of the Evaluation Criteria categories were multiplied by an assigned weighting factor, then aggregated and averaged to arrive at a final score for each Technical Proposal. Based on the scores and the number of bidders, no interviews were conducted, and contracts were recommended to be awarded to all responsive bidders.

Following a review of the Technical Proposals, the NJSDA found that EPS had submitted a Disclosure of Investment Activities in Iran Certification (“Iran Certification”) form, dated December 15, 2015, that was neither signed by a representative of EPS nor notarized. By letter dated December 21, 2015, the NJSDA advised EPS that its failure to submit an executed Iran Certification required the disqualification of its bid and rejection of the Technical and Fee Proposals. In order to preserve the rights of all parties in connection with any future actions with respect to this procurement, the NJSDA opened and reviewed EPS’s sealed Price Proposal on January 4, 2016. As a result of that review, additional material deficiencies in EPS’s bid were identified, which, standing alone, further require rejection of EPS’s bid.

EPS’s Bid Protest

On January 4, 2016, the NJSDA received a “request for reconsideration” of the NJSDA’s December 21, 2015 rejection of EPS’s bid from Sabrina Staats of EPS. This submission attached an executed and notarized copy of an Iran Certification form, executed on behalf of EPS by its Chief Executive Officer, Kimberly Gillespie, dated December 15, 2015, and bearing a notarization, dated December 15, 2015. Thereafter, on January 8, 2016, Ms. Gillespie submitted a formal protest on behalf of EPS. For purposes of this response, the NJSDA has considered EPS’s January 4 and January 6, 2016 submissions as a single protest and provides a consolidated response thereto herein.

EPS acknowledges that the Iran Certification form provided with its Technical Proposal was unsigned. However, EPS contends that this omission was simply an administrative error at the time of its bid submission, and that it should be allowed to supplement its bid with an executed Iran Certification after the deadline for receipt of bids.

Analysis of EPS’s Bid Protest

The requirement for a bidder to submit an Iran Certification form is statutory. N.J.S.A. 52:32-58(a) provides that, “[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 contract is renewed, that the person or entity is not identified on a list created pursuant to subsection b. of [N.J.S.A. 52:32-57]...as a person or entity engaging in investment activities in Iran described in subsection f. of [N.J.S.A. 52:32-56]...” Furthermore, N.J.S.A. 52:32-58(b) provides that the “certification required **shall be executed** on behalf of the

applicable person or entity by an authorized officer or representative of the person or entity. (Emphasis added).

Section 2.4 of the Request for Proposals (“RFP”) for the Procurement provides:

At the same time as a Technical Proposal is submitted, the firm must submit a Disclosure of Investment Activities in Iran Form, attached as Attachment F to this RFP, pursuant to Public Law 2012. C. 23 (codified at N.J.S.A. 52:32-55 et. seq.) (the “Act”). Pursuant to the Act, any person or entity that submits a bid or proposal or otherwise proposes to enter into or renew a contract with the New Jersey Schools Development Authority (“NJSDA”) must complete a Certification which states that the person or entity, or one of the persons or entity’s parents, subsidiaries, or affiliates, is not identified on a list created and maintained by the New Jersey Department of the Treasury (“Treasury”) as a person or entity engaging in investment activities in Iran. **Failure to submit such Certification will result in the disqualification of the bid and rejection of the Technical and Fee Proposals.** (Emphasis in original).

Here, EPS argues that it “submitted” a “completed” form, and that it complied with the requirements of the RFP. While the NJSDA did receive a copy of an Iran Certification that had information from the prospective bidder entered thereon, the Iran Certification was not signed (or notarized).

The operative effect of the Iran Certification is only achieved when it is signed on behalf of the entity submitting the Iran Certification. Moreover, as noted above, the requirement for the Iran Certification to be “executed” is statutory in nature, and cannot be waived by the NJSDA. Accordingly, the unsigned Iran Certification was not “complete” under the terms of the RFP or the governing statute.

The NJSDA acknowledges that EPS did ultimately submit a signed and notarized copy of an Iran Certification form on January 4, 2016, after the deadline for submission of bids. However, the statute requires that an executed Iran Certification must be provided “at the time the bid is submitted”. Thus, EPS is not seeking to clarify its bid. Rather, EPS is seeking to supplement its bid with a required document that it failed to include in its bid submission. See I/M/O Online Games Production and Operation Services Contract, 279 N.J. Super. 566, 597 (App. Div. 1995) (“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.”).

Permitting EPS to supplement its bid after the bid submission deadline would give EPS a competitive and unfair advantage over other bidders by providing it more time to comply with the requirements of the RFP and the statute than other bidders. Providing this additional time to EPS would favor EPS and create an inequality in the bidding process in derogation of the interests of prospective bidders. In addition, were EPS to be afforded a waiver under these circumstances (in which the RFP admonishes all bidders that a failure to submit a completed Iran Certification will result in the disqualification of the bid and rejection of the firm's Technical and Fee Proposals), the stability and integrity of the procurement process would be undermined. See generally, Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 320-325 (1994).

Finally, EPS has requested an informal hearing on its protest. The decision on whether an informal hearing will be held is in the sole discretion of the NJSDA. "Informal hearings are for fact-finding purposes for the benefit of the Authority and the Authority shall have the sole discretion whether to hold an informal hearing." N.J.A.C. 19:38B-9.3. Under the foregoing set of facts, there is no need to undertake a fact-finding inquiry since all of the relevant facts are already available to the NJSDA.

For the foregoing reasons, EPS's bid was materially defective. Accordingly, EPS's bid protest is rejected.

Deficiencies in EPS's Fee Proposal

Despite rejecting EPS's bid for the reasons discussed above, in order to preserve the rights of all parties in connection with any future actions with respect to this procurement, the NJSDA opened and reviewed EPS's sealed Price Proposal on January 4, 2016. As a result of that review, additional material deficiencies in EPS's bid were identified, which further warrant rejection of EPS's bid.

Specifically, the Fee Proposal (attached to the RFP as Attachment C) requires the prospective bidders to provide its services based on a Direct Labor Multiplier of 1.9. While EPS executed the Fee Proposal specifying the 1.9 Direct Labor Multiplier, it also stapled to the Fee Proposal EPS's Professional Staff Hourly Rate Structure. Inconsistent with the Fee Proposal, the EPS Hourly Rate Structure specifies rates based on a 1.7 multiplier. EPS also stapled an additional page to its fee Proposal containing numerous additional and substantive provisions, serving to amend its Fee Proposal and the terms of any agreement between EPS and the NJSDA. These additional provisions included an employee non-compete provision, with stated damages assessable against the NJSDA for breach thereof, requirements as to supervision of staff, as well as the imposition of a confidentiality obligation on certain types of information.

The RFP expressly provides that the Agreement to be executed by selected firms is not subject to modification. In contravention of this provision, EPS, through its Fee Proposal, has undertaken to materially modify the terms of the Agreement. Permitting EPS to materially alter the terms of the Agreement through the attachment of its inconsistent Hourly Rate Structure and the addition of multiple other substantive terms would also afford EPS benefits not afforded to other prospective bidders under the competitive process established by the RFP. Were the NJSDA to waive this defect in EPS's bid and to permit EPS's modification of the Agreement, the stability and integrity of the procurement process would be undermined.

Accordingly, the NJSDA determines that EPS's Fee Proposal contains material and non-waivable defects that require the rejection of EPS's bid as non-responsive.

Conclusion

For the foregoing reasons, EPS's bid protest is rejected.

This is a Final Agency Decision.

Sincerely,



Donald R. Guarriello
Vice President and Chief Financial Officer

cc: Charles B. McKenna, NJSDA Chief Executive Officer
Jason Ballard, NJSDA Chief of Staff
Andrew Yosha, NJSDA Executive Vice President, Program Operations & Strategic Planning
Raymond Arcario, NJSDA Vice President, Construction Operations
Jane F. Kelly, NJSDA Vice President, Corporate Governance and Operations
Joanne Walsh, Director of Human Resources
Sean Murphy, NJSDA Director of Procurement
David Kutch, Senior Procurement Analyst
Albert D. Barnes, NJSDA Chief Counsel
Cecelia E. Haney, NJSDA Senior Counsel
Desmond H. O'Neill, NJSDA Assistant Counsel