

From: [Fred Cole](#)
To: dave.bahniuk@efkgroup.com; eleanor.kubacki@efkgroup.com
Subject: NJEDA RFQ/P 2019-083 Award Protest - Final Agency Decision
Date: Tuesday, March 17, 2020 5:06:42 PM
Attachments: [RFQP 2019-083 Web Design Hearing Officer Report.pdf](#)
[image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[Re NJEDA RFQP 2019-083 Award Protest.msg](#)

Dear Mr. Bahniuk and Ms. Kubacki,

First of all, we hope that you and your team are safe and well during this difficult time.

Regarding the subject bid protest, I wanted to follow up with you on status. As you know, a Hearing Officer was assigned. The Hearing Officer reviewed the record and prepared a recommendation. The Hearing Officer's written recommendation was shared with you on Friday, February 21, 2020 (also attached). EFK did not submit exceptions within the 10 business day period, which ended on Friday, March 6, 2020. Our final agency decision on this matter is that the appeal is denied for the reasons articulated in Hearing Officer's written report and recommendation.

As always, we appreciate your interest in doing business with NJEDA. We look forward to hearing from you on other bidding opportunities that arise in the future.

Sincerely,
Fred Cole



Frederick J. Cole

Senior Vice-President, Business Support
New Jersey Economic Development Authority (NJEDA)
36 West State Street | P.O. Box 990 | Trenton, New Jersey | 08625-0990
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From: Fred Cole
Sent: Friday, February 21, 2020 4:40 PM
To: dave.bahniuk@efkgroup.com; eleanor.kubacki@efkgroup.com
Subject: NJEDA RFQ/P 2019-083 Award Protest

Dear Mr. Bahniuk and Ms. Kubacki,

My name is Fred Cole. I serve as Senior Vice-President at the New Jersey Economic Development Authority (NJEDA), reporting to Tim Sullivan, CEO. Mr. Sullivan has delegated his review and decision on this protest matter to me.

Please see attached report of the NJEDA Hearing Officer.

As noted in section 6.9 of the subject RFQ/P, "Protest of Recommended Award", if you dispute the findings in the report of the Hearing Officer, you will be afforded an exceptions period equal to ten (10) business days from receipt of the report to refute the findings. If you avail yourself of this option, I will review your "Exceptions to the Hearing Officer's Report" and will make a final decision regarding the appropriateness of the award. That final decision regarding the award of the contract will be a final Authority action that is appealable to the Appellate Division of the Superior Court of New Jersey.

Let me know if you have questions about the attached report and whether you plan to refute its findings within the ten (10) days provided.

Thank you for your attention to this matter.

Fred Cole, NJEDA



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MEMORANDUM

TO: Fred Cole
SVP of Business Support

FROM: Bette Renaud
Hearing Officer

DATE: February 20, 2019

SUBJECT: EFK Group Protest of award of 2019-RFQ/P- 083

Request:

Adoption by the SVP of Business Support of the Hearing Officer's recommendation to deny the protest of EFK Group ("EFK") of the Authority's award of 2019-RFQ/P- 083 to Spruce Technology.

Background:

In July 2019, the procurement group in the Authority's Internal Process Management section ("IPM Procurement") released 2019 -RFQ/P-083 ("RFQ/P") to the public. The purpose of the RFQ/P was to procure the services of a consultant to assist the Authority in a redesign of its current website. On July 24, an addendum to the RFQ/P was posted to the Authority's website and sent to certain bidders, including EFK. IPM Procurement hosted a Question and Answer session on July 29. After that session, on August 5, a second addendum to the RFQ/P was posted on the Authority's website and sent to certain bidders, not including EFK. On August 27, the Authority received proposals.

The bids were reviewed by IPM Procurement for responsiveness. EFK Group's response was deemed non-responsive because it was not signed. It therefore was not sent to the Authority RFQ/P review committee for evaluation on its merits. Responsive bids were sent to and reviewed by the committee, which recommended the selection of Spruce Technology. Pursuant to delegated authority, based on the recommendations of the review committee, CEO Sullivan determined to award the contract to Spruce Technology.

A conditional notice of award to Spruce Technology was sent to all bidders on October 3. On October 10, the Authority received a notice of protest of the award from EFK. Pursuant to an OPRA request, EFK also requested copies of all bids submitted to the Authority pursuant to the RFQ/P.

On January 7, 2020, the hearing officer was informed by the Authority OPRA custodian's office that all documents that were responsive under the OPRA request had been sent to EFK. The hearing officer contacted both EFK and IPM Procurement to notify them that EFK had until January 22 to amend its protest. EFK did not amend its protest by January 22 and, by email of January 23, confirmed that it would not be amending its protest.

EFK raised four issues in its protest: that the RFP was administered in a questionable manner, that the requirement for an ink signed document was an impossible requirement in an electronic bid context, that the Authority should waive its failure to sign the bid as a minor defect and that the winning bidder has questionable reviews on the internet and a history of using non-U.S. residents to undertake its work. The remedy it sought was the right to resubmit a signed bid and to have the bid reviewed on its merits, which in effect, would set aside the award of the contract to Spruce Technology.

Discussion:

Upon review of EFK protest, IPM Procurement's response, the bidding documents and relevant law, I have concluded that EFK's protest has provided no legal basis to overturn the Authority's award to Spruce Technology.

Irregular Administration of Bid Process

EFK asserts that IPM Procurement followed "questionable administration" procedures with respect to RFQ/P Notifications and Changes to Key Dates. It states that each prospective bidder was notified by email about the release of the RFP and the posting of Addendum 1, but that EFK received no email notification of the posting of Addendum 2. It argues that IPM Procurement created a precedent when it notified prospective bidders by email of Addendum 1 that it did not follow with respect to Addendum 2.

IPM Procurement agrees with the facts as stated and explains that it sent emails regarding Addendum 2, which answered questions posed at the Question and Answer session, solely to vendors who posed questions. It explains that it is not the responsibility of IPM Procurement to notify bidders of addenda and that the RFQ/P clearly states that it is the bidder's responsibility to be knowledgeable about all addenda. It cites the RFQ/P which states: "There are no designated dates for release of addenda Therefore interested bidders should check the Authority's "bidding opportunities" website on a daily basis from time of RFQ/P issuance throughout the proposal submission opening. **It is the sole responsibility of the Proposer to be knowledgeable of all addenda related to this procurement"**

EFK asserts that IPM Procurement's failure to notify it by email that Addendum 2 had been posted constitutes questionable administration, implying that it rises to the level of justifying setting aside the award to Spruce Technology. I do not find this act to constitute an irregularity that warrants setting aside the award to Spruce Technology. As cited by IPM, the RFQ/P clearly

states that it is the sole responsibility of the bidder to check the website on a daily basis. The language in the RFQ/P states in bold:

“It is the sole responsibility of the Proposer to be knowledgeable of all addenda related to this procurement.”

By participating in the RFQ/P process, EFK accepted this requirement. Although IPM Procurement provides no rationale for sending an email concerning the second Addendum solely to parties that participated in the Question and Answer period, and may want to re-examine if it is prudent to send direct emails to certain bidders about addenda as opposed to others, the fact that IPM sent an email about the first Addendum did not create a precedent or a course of dealing that would undermine the very explicit language in the RFQ/P that alerts all bidders to the need to check the website on a daily basis. This isolated instance was not a course of behavior that rewrote the terms of the RFQ/P. (“A course of dealing is a *sequence of previous conduct* between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct” (italics added). Restatement 2d of Contracts Sec. 223.)

Failure to Submit Ink-signed Bid

EFK states that the RFQ/P required the bidder to sign its bid in ink, but it asserts that it is impossible to submit ink -signed documents electronically. It asserts that it therefore submitted its bid forms both electronically and by mail.

IPM Procurement responds that it never received a hard copy of EFK’s proposal. It states that it is not difficult to print, sign, scan and upload the documents to provide a signed bid proposal, which is what the winning bid did. It also points out that EFK did this with other documents, such as the mandatory compliance documents, but not the bid documents.

I do not find the arguments presented by EFK to be persuasive for several reasons. First, there is no evidence that EFK submitted a hard copy of its bid, and EFK has not contested IPM Procurement’s statement, which was shared with EFK, that such hard copy was never received. EFK has not presented a receipt or any evidence that a hard copy was sent.

Second, if EFK truly thought the RFQ/P’s requirement for an ink -signed bid was an impossible task, it had the opportunity to raise this important question at the Question and Answer session hosted by IPM Procurement, but it did not. The RFQ/P also offered a second method of posing questions specifically related to submitting the bid; Section 1.3.4 of the RFQ/P, which addresses electronic submission, states:

“Procedural inquiries may be directed to EDAProcurementQA@njeda.com and/or (609) 858-6700. The Authority will not respond to substantive questions related to this RFQ/P, via this e-mail address or phone number. For inquiries related to substantive questions refer to Section 1.3.1 (Electronic Question & Answer Period).”

There is no evidence that EFK availed itself of this assistance.

Third, it appears that EFK submitted other ink-signed documents, per the statements of IPM Procurement, and therefore understood how to execute a document when faced with the requirement of an electronic submission.

Waiver of Minor Defect

EFK argues that the failure to sign its bid is a minor element of non-compliance and that under the wording of the RFQ/P, which reserves to the Authority “the right, in its sole discretion, to waive minor elements of non-compliance of any entity’s proposal, regarding the requirements outlined in this RFQ/P,” the Authority should waive this defect and give EFK the opportunity to sign its bid.

IPM Procurement responds that the RPQ/P in several places indicates in red that both the Signatory Page and Fee Schedule are required to be signed as a mandatory item. Because the signature was designated as a mandatory item, IPM argues that it therefore is not a minor requirement that the Authority can waive.

After reviewing the RFQ/P, I conclude that nothing in the RFQ/P suggests that the Authority considers signing a bid to be a minor element, susceptible to waiver. In Section 2 of the RFQ/P, there are definitions that alert the bidder that certain items are mandatory and certain are not.

“**May** – Denotes that which is permissible, not mandatory.”

“**Shall or Must** – Denotes that which is a mandatory requirement. Failure to meet a mandatory material requirement will result in the rejection of a proposal as non-responsive.”

The terms “shall or must” are used in the RFQ/P to denote which items are mandatory. Section 4 addresses the mandatory nature of signing the bid:

“4.2.3 SECTION C – FEE SCHEDULE (MANDATORY SUBMISSION WITH BID PROPOSAL-SIGNED)”

“4.2.4.1 SIGNATORY PAGE (MANDATORY FORM WITH BID PROPOSAL-SIGNED)”

The Proposer *shall* complete, including signature of an authorized representative of the Proposer, and submit the Signatory Page accompanying this RFQ/P. If the Proposer is a limited partnership, each Signatory Page *must* be signed by a general partner. Failure to comply will result in rejection of the proposal. (emphasis added)

Section 4 uses the defined terms “shall” and “must.” By using these defined terms, the RFQ/P clearly states that the requirement to have the bid documents signed is mandatory and, from the Authority’s perspective, falls within the category of being so important that failure to include the requirement “will result in the rejection of a proposal as non-responsive,” as stated in the definition of “shall or must” cited above. Further, it is within the discretion of the bidding unit to determine which deficiencies to waive in a bid, Serenity Contracting Group, Inc. v. Borough of Fort Lee, 306 N.J.Super. 151 (1997), provided it is exercising sound business judgement. A signature on a bid serves to bind the bidder to its offered price; requiring this signature eliminates confusion and promotes the underlying purposes of public bidding, which are promoting competition on an equal footing and guarding against “favoritism, improvidence, extravagance and corruption.” Ibid, at 157, citing Township of Hillside v. Sternin, 25 N.J. 317, 322, 136 A.2d 265 (1957). IPM Procurement’s decision not to waive EFK’s failure to sign the bid was consistent with sound business judgement and consistent with the plain language of the RFQ/P.

Negative On-line Comments

EFK, as a concerned citizen, states its concern that the Authority selected a firm that has negative reviews on glassdoor.com and myvisajobs.com and points out Spruce Technology’s apparent use of non-U.S. residents to conduct work. It implies that these comments warrant the Authority to set aside the award to Spruce Technology.

IPM Procurement responds that bids are evaluated based on the bid proposals and not on internet comments. The winning bid submitted resumes and subcontractor utilization forms and these forms did not indicate that the work would be performed by non-U.S. residents.

I conclude that the internet comments provided by EFK do not warrant setting aside the award to Spruce Technology. First, there is no legal prohibition against non-U.S. residents performing a contract. N.J.S.A. 52:34-13.2 requires, with limited exceptions, solely that “every State contract primarily for the performance of services shall include provisions which specify that all services performed under the contract or performed under any subcontract awarded under the contract shall be performed within the United States.” IPM Procurement has ensured that this will occur by including in the RFQ/P and the accompanying Contract for Professional Services contractual protections against work being performed outside of the United States. As explained by IPM Procurement, as part of its bid, Spruce Technology executed a certification that its work and that of its subcontractors would be performed in the United States. This certification becomes part of the Contract for Professional Services that Spruce Technology will execute (Section 1 of Contract), and failure to comply will constitute a breach thereunder.

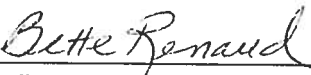
Further, the internet information provided by EFK was very vague and did not raise a specific question about the location at which the work will be performed. For instance, one review on Glassdoor suggested that previous work had been completed by employees with H1 visas, but not that the work was completed outside of the United States. A review from 2016 on myvisajobs.com suggested that marketing work was done in India, but this is dated information and not related to web design. IPM Procurement should welcome any information that a citizen

may provide about its vendors so that appropriate due diligence can be undertaken. In this instance, however, information provided by EFK was vague and unverified and does not in any way warrant IPM Procurement looking outside of the four corners of the bid documents.

Recommendation

The remedy that EFK seeks is the opportunity to resubmit a signed bid, to have its bid deemed responsive and to have it evaluated by the review committee on its merits. By inference, EFK seeks to have the Authority set aside the award to Spruce Technology.

Based on the above analysis, I recommend denying the remedies sought by EFK in its protest and upholding the award to Spruce Technologies.



Bette Renaud
Hearing Officer

Cc: Christine Baker, SVP