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July 2, 2014

Via Fax [848-299-0150] and USPS Mail

Patricia Klein, COO
Red the Uniform Tailor
475 Oberlin Avenue South
Lakewood, NJ 08701

Subject: RFP 14-X-23208 - Protest of Scheduled Award of Contract T0448
Uniforms – Class "A", "B" and Security Officer, and Shoes Class "A" - NJSP

Dear Ms. Klein:

This letter is in response to your letter of protest dated March 19, 2014, submitted on behalf of Red the Uniform Tailor ("RTUT"). Your letter challenges the announced intent of the Procurement Bureau, the unit of the Division of Purchase and Property ("Division") which conducted the subject procurement, including the evaluation of proposals and assessment of sample products in concert with officials of the New Jersey Division of State Police ("NJSP"), to award over 30 individual price/product lines of the subject term contract, each to the bidder who offered the most favorably priced, responsive proposal. RTUT, an incumbent T0448 contractor and slated awardee of four contract lines, contends that certain sample products submitted by Some's Uniforms and by Atlantic Tactical may not meet the product or procurement requirements set forth in the subject Request for Proposal ("RFP"). RTUT further asserts that Atlantic Tactical, in contravention to RFP provisions, conditioned its proposal for grouped RFP price lines 00004 and 00005 by specifying a 100 item minimum order quantity for price line 00004. RTUT requests an opportunity to inspect the samples submitted by Some's Uniforms and Atlantic Tactical as a part of the hearing process "to insure that the RFP specifications are met."

A review of the subject procurement record and consideration of information provided by the Procurement Bureau staff member conducting the subject procurement, relative to the points of protest presented in RTUT's letter, have provided the information necessary to render an informed final agency determination on this matter.

First, I will attend to RTUT's points of protest concerning an alleged award of RFP Price Line 00004 [Coat (Blouse) Class "A" – Stock (NJSP)] to Atlantic Tactical. The Procurement Bureau's record of the subject procurement contains no indication of any intent to award a contract for Lines 00004 and/or 00005 to Atlantic Tactical. In fact, the record indicates that the Procurement Bureau recognized multiple instances where Atlantic Tactical improperly

conditioned its line-item proposed pricing by indicating minimum order amounts greater than the RFP-stipulated minimum order amounts. As a result, the Procurement Bureau properly determined that Atlantic Tactical's offers for those price lines were unacceptable, thus rendering Atlantic Tactical ineligible for an award of contract for the affected lines, which included Lines 00004 and 00005. RTUT's point of protest concerning Atlantic Tactical is therefore dismissed as having no cause or basis for challenge.

With regard to its challenge of the scheduled award of contract for price lines 00004 and 00005 to Some's Uniforms, RTUT expresses its doubt that the samples submitted by Some's Uniforms meet all of the product specifications detailed on RFP pages 20 through 27, as determined by the NJSP representatives who conducted the analyses of the submitted samples. RTUT requests an opportunity to evaluate Some's Uniform's samples.

Addressing this point of RTUT's protest, I note that RFP Section 4, *Proposal Preparation and Submission*, Subparagraph 4.4.3.3, *Samples/Sample Testing*, sets forth the process by which the determination of product acceptability is made. That subparagraph reads as follows:

> The samples submitted must meet the specification requirements set forth in the RFP and must be representative of the product bid. Bid samples **for pricing lines 00001 through 00073** for evaluation and testing purposes are to be made available at no charge and delivered to **N.J.S.P.** at the bidder's expense. The bidder must, within **Ten (10)** working days following a request from the State, submit bid samples to the **N.J.S.P.** Bid samples will not be returned. The N.J.S.P. may conduct laboratory tests to assure that the bid samples submitted **for pricing lines 00001 through 00073** conform to this RFP. The State reserves the right to perform any tests necessary to assure that the bid samples conform to this RFP **for pricing lines 00001 through 00073.** <u>If the sample(s) of the brand/model/product offered by the bidder in its bid proposal fails, the State shall reject the bid for the affected line item(s). The testing results of the State are final.</u>
>
> Bidders not bidding on the required fabric, and shade #'s may submit a sample. This sample will be tested and if approved, will be added as an approved equal for future bidding requirements.
>
> Samples are no charge and non-returnable as they are destroyed in test procedures. [Boldface type in original; Underlining added for emphasis.]

The record of the subject procurement reveals that the Procurement Bureau, as part of its proposal evaluation process, requested Some's Uniforms to submit 13 sample products to NJSP for inspection and determination of acceptability. The list of 13 sample products included "Line item 00004 - Blouse, Class A" and "Line item 00005 – Cruiser Coat". The Procurement Bureau's letter to Some's Uniforms dated January 7, 2014, instructed Some's Uniforms to submit samples by January 22, 2014, and advised the following:

> This item should be the actual item that would be provided if awarded, including brand/mfg. and all case marking requirements stated in the RFP and your bid proposal. The samples must also be annotated or marked to identify the line item that the sample corresponds to [sic].

By cover letter dated January 8, 2014, which was included with the samples NJSP received from Some's Uniform's on January 24, 2014, Some's Uniforms presented numerous notes on the

various sample items. With regard to Lines 00004 and 00005, Some's Uniforms noted the following:

> **Line Item#4-Blouse, Class A and Line Item#5-Cruiser Coat:** Both Samples have been made according to the specifications listed on RFP/Solicitation Number 14-X-23208. Due to the custom nature of this item we have the ability to change, modify or add any design modification you require on the Blouse or Cruiser Coat. Please note if you require any modification price remains the same as RFP/Solicitation Number: 14-X-23208. Sample Blouse & Cruiser Coat have no patches on them as they will be supplied by the agency as per the specifications listed on page 21, 22, 25, 26 and Some's will sew them on which is included in price.

Upon its analysis of the sample blouse and cruiser coat submitted by Some's Uniforms, NJSP concluded that the samples were of acceptable quality and in apparent conformance to the pertinent RFP-stipulated product specifications. However, because the samples provided by Some's Uniforms were prototypical, i.e., not currently in production, NJSP determined that certain clarifications were required before deciding whether the offered blouse and cruiser jacket were compliant with the RFP's product specifications. The procurement record reveals that multiple e-mail communications between or among representatives of NJSP, Some's Uniforms and the Procurement Bureau occurred in an effort to ascertain compliance of Some's Uniforms sample blouse and cruiser coat products to select requirements concerning, e.g., a Velcro hook and loop strip, patches and collar tabs. During that process, in response to inquiries from the Procurement Bureau, Some's Uniforms indicated that cited deficiencies would be remedied at no added cost.

Thereafter, the NJSP representatives communicated to the Procurement Bureau that, with Some's Uniform's responses to the requested clarifications, the samples submitted by Some's Uniforms were acceptable to them, even preferred to the more costly blouse and cruiser coat products offered by RTUT in response to the subject RFP and previously provided through RTUT's now-expired T0448 contract. Based upon that communication and in consideration of the results of the evaluations of proposals submitted in response to RFP 14-X-23208, the Procurement Bureau issued a Recommendation Report and, thereafter, a Notice of Intent to Award letter, indicating its intent to award contracts, including the award of Lines 00004 and 00005 to Some's Uniforms.

However, in consideration of RTUT's protest and upon discovery that NJSP's assessment of Some's Uniforms' sample blouse and cruiser coat had not included full consideration of detailed product specifications set forth in the RFP, the designated Hearing Officer directed the Procurement Bureau to forward the sample blouse and cruiser coats provided by Some's Uniforms, as well as existing stock of the cruiser coat and blouse products provided to NJSP by RTUT as the current contracted provider of those products, to the Division's Quality Control Laboratory ("QAL"), which has the equipment and wherewithal to perform the tests necessary to determine compliance to the RFP's product specifications

A thorough assessment by the QAL testing specialists determined that the blouse and cruiser coat samples submitted by Some's Uniforms and a blouse and cruiser coat taken from NJSP stock of uniform products provided to NJSP via RTUT's current T0448 contract, which has identical product specifications to the subject RFP's product specifications, all four items tested failed to meet all product specifications set forth in the RFP for those products. In his Analyses Report

documents,[1] noting that the subject cruiser coat and blouse product specifications have not been updated or otherwise improved for many years, Kevin Ryan, QAL's Chief, Standards and Specifications, recommended that NJSP representatives and QAL staff work with the Procurement Bureau to develop updated product specifications and RFP provisions prior to the next procurement of the T0448 contract. In light of the outcome of the testing as indicated above, I concur with that recommendation.

In regard of these findings of fact, I have considered whether the failure of the tested products to meet all of the RFP product specifications is cause to reject both RTUT's and Some's Uniforms' proposals for Lines 00004 and 00005. When considering the significance of the deficiencies or variances of the tested products, as necessary to determine whether Some's Uniforms' and/or RTUT's proposals for these two price lines are responsive, or alternatively, whether the proposal or product deficiencies are of no substantial consequence, the Division first considers the language of the New Jersey statutes, the Division's administrative code and the RFP provisions. The statutes and administrative code require that a proposal be responsive to the essential requirements established by the RFP. As previously set forth herein, the subject RFP expressly required bidders to offer products in full compliance with the product specifications for the various articles of uniforms, and further required, as set forth in the previously quoted RFP Subparagraph 4.4.3.3, that if samples of the products offered by a bidder fail to pass the State's testing for conformance of the product to the product specifications, "the State **shall** reject the bid for the affected line item(s)."

Additionally, to determine whether reported product variances or deficiencies are material, the Division looks to pertinent case law as a guide. In this regard, the New Jersey courts have developed a two-prong test to determine the materiality of a deviation and whether the deviation can be waived. In re Protest of the Award of the On-Line Games Production & Services Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 594 (App. Div. 1995), the Appellate Division of New Jersey Superior Court affirmed the criteria used by the Law Division in Township of River Vale v. Longo Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). In River Vale, the Court ruled that in considering the materiality of a deviation or exception and whether it can be waived, one must determine

> . . . first, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

I have considered this matter through application of the River Vale criteria. Consequently, with regard to the absence of complete conformity of the products offered for RFP Lines 00004 and 00005 to the RFP's product specifications, I find that the acceptance of either product as submitted would not serve the best interests of the State, since the bases of failure reported by the QAL are not waivable minor irregularities but potentially cost-relevant variances from the specifications of significant value. Any waiver of the specified requirements could have provided an advantage that undermines the common standard of competition. Additionally, I find that the Procurement Bureau's interactive correspondence with Some's Uniforms regarding

[1] The four QAL Analyses Reports are available for review by contacting Joe Signoretta, the Procurement Bureau's Supervisor overseeing the subject procurement. His telephone number is 609-777-0202.

deficiencies/variances of aspects of the submitted sample prior to the QAL testing allowed Some's Uniforms to offer post-proposal, post-sample submission adjustments to its product offering that has exceeded the provisions for post-proposal clarifications as set forth in RFP Subsection 6.5, *Oral Presentation and/or Clarification of Proposal*, which provides, in pertinent part, that "[c]larifications cannot correct any deficiencies or material omissions or revise or modify a proposal, except to the extent that correction of apparent clerical mistakes results in a modification." The "clarifications" offered by Some's Uniforms constitute unacceptable changes to its product offering.

These circumstances render both Some's Uniform's and RTUT's cruiser coat and blouse product offerings deficient and therefore both proposals are deemed ineligible for an award of contract for these two products. As a result, the intended award of Lines 00004 and 00005 to Some's Uniforms is hereby rescinded. This is my final agency decision on this matter.

To meet NJSP's ongoing need for these products, I am directing the Procurement Bureau to oversee and expedite the updating and enhancement of the product specifications for the cruiser coat and blouse products, and to initiate, as soon as possible, a competitive re-procurement action based upon revised cruiser coat and blouse product specifications developed cooperatively by NJSP and QAL representatives in concert with the Procurement Bureau staff. As is standard procedure for competitive procurements conducted by the Procurement Bureau, potential bidders can utilize the RFP-established Question and Answer forum to express concerns or seek answers to questions regarding the provisions of the RFP prior to preparing and submitting proposals.

While this decision is understandably disappointing to both Some's Uniforms and RTUT, I sincerely appreciate both entities' participation in the competition for the contract. I trust that both entities will apply the information garnered from this experience and continue to participate in contracting opportunities offered by the Division.

In closing, I will take this opportunity to thank you, Ms. Klein, and by copy, Mr. Some and Mr. Conville, for your expressed interest in doing business with the State of New Jersey. Thank you, RTUT and Atlantic Tactical, for registering your business with NJ START, the Division's new eProcurement system, which is scheduled to go live this fall and will provide a "one-stop shop" for vendors to submit proposals, maintain required forms and certifications, and present purchase orders and invoices for payment. I invite Some's Uniforms to register as well by visiting the following website: www.njstart.gov.

Sincerely,

Jighasa Desai-McCleary
Director

JD-M:RW

c: Heschel Some, COO, Some's Uniforms (Via Fax [201-843-3014] Only)
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