



# State of New Jersey

DEPARTMENT OF THE TREASURY  
DIVISION OF PURCHASE AND PROPERTY  
OFFICE OF THE DIRECTOR  
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November 25, 2015

Via Email (George.Demos@bio-oregon.com) and USPS Regular Mail

George Demos, US Account Representative  
Moore Clark d/b/a Bio-Oregon  
15 Saunders Way, Suite 500-E  
Westbrook, ME 04092

Re: Reconsideration of Proposal Rejection  
RFP# 16-X-24039 Feed: Fish Food, Trout Grower Pequest State Fish Hatchery

Dear Mr. Demos:

This correspondence is in response to your email of November 13, 2015, to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of Moore Clark d/b/a Bio-Oregon (Moore). In that letter, Moore protests the Proposal Review Unit's Notice of Proposal Rejection for Solicitation #16-X-24039. The record of this procurement reveals that Moore's proposal was rejected for failing to include a completed *Disclosure of Investment Activities in Iran* Form. In the protest letter, Moore acknowledges that it failed to submit the fully completed *Disclosure of Investment Activities in Iran* Form. With the protest Moore has submitted a fully completed *Disclosure of Investment Activities in Iran* Form and requests that the Division accept the same as a complement to its proposal.

I have reviewed the record of this procurement, including the Request for Proposal (RFP), Moore'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 submitted by Moore. I set forth herein the Division's final agency decision.

By way of background, this RFP was issued by the Division's Procurement Bureau (Bureau) on behalf of Department of Environmental Protection, Division of Fish, Game, and Wildlife to solicit proposals for Fish Food, Trout Grower for Pequest State Fish Hatchery. (RFP § 1.1 *Purpose and Intent*.) In accordance with the RFP, a contract is to be awarded to the responsible bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered. (*Ibid.*)

On November 10, 2015, proposals received by the submission deadline were opened by the Proposal Review Unit. After conducting the intake review, the Proposal Review Unit issued a Notice of Proposal Rejection to Moore pursuant to N.J.A.C. 17:2-2.2 for failing to include a completed *Disclosure of Investment Activities in Iran* Form with its proposal submission. Specifically, Moore failed to check the box in Part 1 of the form "certifying that the bidder listed above nor any of the bidder's parents, subsidiaries, or affiliates is engaged in prohibited activities in Iran."

In response to the Notice of Proposal Rejection, Moore states that:

[It] received the notice of proposal rejection and reviewed the form to find that [it] omitted checking off the box marked **I certify, pursuant to Public Law 2012, c. 25 that neither the bidder listed above none any of the bidder's parents, subsidiaries, or affiliates is listed...**

[It is] resubmitting this to include [the] original omission. We have been asked to bid on this solicitation and are very interested in submitting. Please consider the correction as it was my oversight. Attached is the State of New Jersey Division of Purchase and Property Ownership Disclosure Form<sup>1</sup> and that State of New Jersey Notice of Proposal Rejection.

[Moore's November 13, 2015, protest email (emphasis in the original.)]

The above referenced solicitation was comprised of the RFP and other documents, one of which was the three-part document entitled *NJ Standard RFP Forms* which includes the *Disclosure of Investment Activities in Iran* Form. This form is addressed in RFP Section 4.0 *Proposal Preparation and Submission*, which provides in pertinent part:

#### **4.4.1.2 NJ STANDARD RFP FORMS**

One of the downloadable RFP documents is titled NJ STANDARD RFP FORMS. It is comprised of three separate forms, two of which (Ownership Disclosure and Disclosure of Investment Activities in Iran) discussed below, must be completed, signed and submitted with the bidder's proposal. **The bidder is cautioned that failure to complete, sign and submit either of these two forms will be cause to reject its proposal as non-responsive as noted below.**

....

[*Emphasis in the original.*]

Moreover, pursuant to N.J.A.C. 17:12-2.2, a bidder's proposal must "contain all RFP-required certifications, forms, and attachments, completed and signed as required" or "be subject to automatic rejection." As a courtesy to all bidders, the Division provided a *Proposal Checklist* as an accompaniment to the RFP. The relevant portion of the checklist includes the following:

**N.J. Department of the Treasury  
Division of Purchase and Property  
PROPOSAL CHECKLIST**

Solicitation Number: 16-X-24039      Solicitation Title: FEED: FISH FOOD, TROUT GROWER - Request 5

This checklist was created as a guide to assist bidders in preparing a complete and responsive proposal. It is only advisory in nature. It is the bidder's responsibility to ensure that all requirements of the RFP have been met.

<b>FORMS THAT MUST BE SUBMITTED WITH YOUR PROPOSAL:</b>	
<input type="checkbox"/>	RFP Signatory Page with physical signature or PIN (PIN is for eBid submission ONLY)
<input type="checkbox"/>	Completed Price Sheets as instructed in Section 4.4.5 of the RFP
<input type="checkbox"/>	Completed and signed Ownership Disclosure Form*
<input type="checkbox"/>	Completed and signed Disclosure of Investments in Iran Form*

<sup>1</sup> With its protest, Moore submitted all of the New Jersey Standard RFP Forms.

\* The Ownership Disclosure, Disclosure of Investigations and Other Actions Involving Bidder, and the Disclosure of Investments in Iran forms MUST each contain either a physical or typed signature (typed signatures are only acceptable for eBid submissions). The forms are found in the Standard RFP Forms Packet, which can be downloaded at <http://www.state.nj.us/treasury/purchase/forms/StandardRFPForms.pdf>

As set forth in RFP Section 4.0, the submission of a completed and signed *Disclosure of Investment Activities in Iran* Form as part of a bidder's proposal was required.

A review of the facts of this procurement shows that Moore submitted an electronic proposal through the Division's eBid system. With its submission, Moore included the three-part Standard RFP Forms packet which contained the *Disclosure of Investment Activities in Iran* form. Moore did not check either box on part one of the form, but did not provide any information in Part 2 of the form, which is necessary when checking the second box in Part 1. Moore did sign the certification at the end of the form. With its protest, Moore submitted a *Disclosure of Investment Activities in Iran* form which indicates that neither it nor any of its parents, subsidiaries, or affiliates is listed on the Chapter 25 List.

The general purpose of the public bidding laws is "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Barrick v. State, 218 N.J. 247, 258 (2014). Therefore, "[i]t is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. This rule, however, does not apply to minor or inconsequential conditions. Public contracting units should resolve problems arising from minor deviations in in a sensible or practical way." Terminal Constr. Corp. v. Atlantic City Sewerage Auth., 67 N.J. 403, 411 (2013) (internal citations omitted). In order for Moore's proposal to be considered, the error on the *Disclosure of Investment Activities in Iran* form would have to be deemed a minor irregularity. Minor irregularities can be waived by the Director pursuant to the authority vested in N.J.A.C. 17:12-2.7(d) and RFP Section 1.4.10 *Proposal Acceptances and Rejections*. The New Jersey courts have developed a two-prong test to consider "whether a specific noncompliance constitutes a substantial and hence non-waivable irregularity." Twp. of River Vale v. R. J. Constr. Co., 127 N.J. Super. 207, 216 (Law Div. 1974). The two-prong test requires a determination of

first, whether the effect of a waiver would be to deprive the [government entity] 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 adversely 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.

[Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 315 (1994) (internal quotations omitted) (affirming the two-prong test established in River Vale, supra, 127 N.J. Super. at 216).]

The "distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding." Terminal Constr. Corp., supra, 67 N.J. at 412.

I have considered Moore's position through the lens of the River Vale criteria and find that Moore's submission of the *Disclosure of Investment Activities in Iran* form containing a clerical error does not rise to the level of a material deviation. A permissible inference regarding Moore's intent can be made due to its non-inclusion of a description of investment activities in Iran for itself or its parents, subsidiaries, or affiliates, which would have been required if the second box was checked. I have also reviewed the Chapter 25 List and there is no evidence that either Moore, or one of its parents, subsidiaries or affiliates, is on the list or engaged in investment activities in Iran that would qualify for Chapter 25 listing. I find that a clarification would be appropriate to remedy the ambiguity in Moore's *Disclosure of*

*Investment Activities in Iran* form. Therefore, I accept the November 13, 2015 revised *Disclosure of Investment Activities in Iran* form as a clarification, which affirms that neither Moore nor any of its parents, subsidiaries, or affiliates is on the Chapter 25 List. This statement illuminates Moore's intent to check the first box on the *Disclosure of Investment Activities in Iran* form, which remedies the ambiguity at issue.<sup>2</sup> Permitting this clarification does not deprive the State of "its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements" and does not place Moore "in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition." Meadowbrook, supra, 138 N.J. at 315.

Therefore, I overturn the decision of the Proposal Review Unit to reject Moore's proposal for the above-referenced RFP. I hereby direct the Bureau to proceed accordingly with evaluation of the proposals, inclusive of Moore's received for this procurement. This is the Division's final agency decision on this matter.

Thank you for your interest in doing business with the State of New Jersey. I further invite you to take this opportunity to register your business with [NJ START](http://www.njstart.gov) at [www.njstart.gov](http://www.njstart.gov), the State of New Jersey's new eProcurement system.

Sincerely,



Maurice A. Griffin  
Chief Hearing Officer

MAG: RUD

c: V. Klawitter  
J. Kemery  
D. Reinert  
A. Nelson  
D. Rodriguez

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<sup>2</sup> New Jersey Courts have held that "[i]n 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. It is the alteration of the original proposal which was interdicted by the RFP." In re Protest of the Award of the On-Line Games Prod. & Servs. Contract, Bid No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995)