

Chris Christie, Governor
Kim Guadagno, Lieutenant Governor
Richard T. Hammer, Commissioner
Steven H. Santoro, Executive Director

NJ TRANSIT
One Penn Plaza East
Newark, NJ 07105-2246
973-491-7000

October 31, 2017

Stephen Schnitzer, Esq.
40 West Northfield Road
Livingston, New Jersey 07039

Dear Mr. Schnitzer:

This letter shall serve as the decision on your request for reconsideration with respect to the bid protest initiated by Vito's Trattoria, Inc. ("VTI") regarding Request for Proposal ("RFP") 15-01.

In preparing this decision, I have reviewed the RFP solicitation, Addendum No. 1, and responsive proposals, as well as materials submitted by VTI after it was notified it did not receive the contract award, namely: VTI's letters dated February 26, 2016, March 21, 2016 (the "Palm Letter"), March 22, 2016, September 17, 2016, September 22, 2016, September 26, 2016, November 9, 2016, November 14, 2016, November 27, 2016, December 2, 2016, December 5, 2016, December 6, 2016, the September 21, 2016 Certification of Iqbal Mozawalla. I also reviewed the scoring sheets, correspondence to bidders and the NJ TRANSIT Contracting Officer's Designee's September 12, 2016 written decision. For the reasons that follow, I find that no reasons have been raised by VTI that warrant revisiting the RFP outcome. Thus VTI's request for reconsideration is denied.¹

I. PROCEDURAL HISTORY

On May 12, 2015, NJ TRANSIT issued a notice of a RFP for a "Space S" trattoria in Newark Penn Station, Newark, NJ, seeking expressions of interest from reputable entities. NJ TRANSIT received expressions of interest from 59 entities and, on April 21, 2015, provided those entities with the RFP, which included a copy of a proposed lease for the space. The RFP noticed a proposal submission deadline of October 28, 2015.

NJ TRANSIT held a pre-bid meeting on September 2, 2015. According to records, VTI did not attend the pre-bid meeting. By September 15, 2015, NJ TRANSIT received 34 questions from potential proposers and on September 23, 2015 an addendum to the RFP (Addendum No. 1) was issued to all interested proposers that included responses to each question.

On October 28, 2015, NJ TRANSIT received five proposals. Deficiency notices were sent to all five business entities on November 16, 2015. Only four entities responded to the deficiency notices: Alfred and Dominic Catalanotto, Fratelli Trattoria; Kunal Kapoor, Bronx House Pizza (Bronx House); The Restaurant Group d/b/a Fuel Pizza (Fuel); and Virender Kumar (VTI).

¹ Section G of the bid protest procedures at issue does not require that new issues raised by VTI in rebuttal be considered. In fact, the decision of *Barrick v. State of N.J., Dept. of Treasury, et al.*, 218 N.J. 247, 262 (2014), suggests that in review of whether an award was proper, only the information contained in a proposer's original bid submission is relevant. Nevertheless, I have reviewed VTI's submissions and NJ TRANSIT's responses to same to ensure that VTI has raised no issue warranting a change in outcome.

On January 7, 2016, the proposals were transmitted to the Technical Evaluation Committee (TEC) for review. The TEC, consisting of subject matter experts from three NJ TRANSIT departments – Real Estate, Capital Planning and Programs, and Risk Management – undertook evaluations and scored the proposals based on the RFP scoring criteria. The RFP scoring criteria were divided into four categories, with each category bearing a specific percentage weight. The categories and weight were as follows: Improvements to Location (40%); Financial Benefit (25%); Experience (20%) and Financial Capability (15%).

The TEC completed the bid evaluation process on February 18, 2016. The individual, cumulative percentage scores were as follows: Bronx House Pizza (94%); Fuel Pizza (82%); Fratelli Trattoria (77%) and Vito's Trattoria (58%). On February 23, 2016 rejection letters and security deposits were mailed to the two lowest bidders, VTI and Fratelli Trattoria.

On February 26, 2016, NJ TRANSIT received a bid protest from VTI. On March 9, 2016, award and runner-up letters were mailed to Bronx House and Fuel, respectively. On June 21, 2016, Bid Protest Advisory notices were sent to Bronx House and Fuel.

In its Palm Letter, VTI protested award of the RFP to Bronx House. On September 12, 2016, the designated NJ TRANSIT contracting officer, Greg Diaz, responded and denied VTI's protest. VTI raised the same issues in its initial protest that it raises here, and now submits additional new arguments.

On September 17, 2016, VTI formally requested a hearing for reconsideration. On September 22, 2016, VTI supplemented its protest with a Certification from Iqbal Mozawalla, dated September 21, 2016 ("Mozawalla Cert."). Since that date, VTI filed additional objections and supplemental filings, all which have been reviewed.

A hearing was conducted on March 10, 2017, with counsel and parties from VTI and NJ TRANSIT present. At the hearing, VTI was permitted to raise all bases for their protest of the RFP. This letter constitutes the final decision of the agency on this matter.

II. VTI'S PROCEDURAL CHALLENGES

VTI asserts that I cannot fairly or impartially oversee this matter because I am employed by NJ TRANSIT. Palm Letter, p. 11. I am the current Deputy Executive Director of NJ TRANSIT and served as the Acting Chief of Procurement during all relevant time periods concerning this protest. Therefore, pursuant to Section F and I of the protest procedures at issue, I was and remain the head contracting officer for purposes of this RFP. Thus, I am vested with the authority to administer this decision. This is consistent with the authority of the State's Chief Procurement Officer, the Director of the Division of Purchase and Property, who also adjudicates protests. See N.J.S.A. 52:18A-191.1; N.J.A.C. 17:11-8.2.

Throughout its protest, VTI challenges the weighting of factors in the RFP, such as the forty-percent (40%) weight given to proposed improvements to the premises. Palm Letter, pp. 7, 10. Pursuant to Section B1 of the RFP, these arguments are based on alleged restrictive specifications or improprieties of the RFP itself and, thus, had to be filed five days prior to the bid opening date or five days prior to the closing date for receipt of initial proposals. VTI first objected to the scoring criteria in the Palm Letter – over four months after the bid opening date – so those objections were untimely. Even if those objections had been timely raised, the weighting of factors is a question of business judgment within the purview of NJ TRANSIT.

It is also noted that VTI raises several challenges, including a timeliness challenge, throughout its protest and relies often on N.J.S.A. 40A:11-24. However, this is the Local Public Contracts Law that applies to counties, municipalities and other local public entities. NJ TRANSIT is not governed by any of these provisions and, therefore, objections raised pursuant to this statute are not applicable and not addressed herein.

III. RFP SCORING CRITERIA

VTI has challenged the scoring process, specifically identifying categories it believes were not scored properly or reflect improper influence.

A. SCORING AND "IMPROVEMENTS"

Regarding improvements, VTI alleges that Bronx House's receipt of a score of five in all three categories of improvements demonstrates subjectivity. Palm Letter p. 19.

For improvements to location, the proposers were asked to provide a Concept Plan depicting all proposed physical elements of the premises and provides for quality materials and workmanship. Specifically, the RFP provides that improvements will be "rated according to the degree to which it maximizes, both visually and operationally, the use of the space" and "the vision for the space should be designed to take maximum advantage of historical architectural elements" of Newark Penn Station. Proposers were provided a Cultural Resource Manual and a Sign Manual to inform as to signage and historical elements. Proposers were also asked to provide a construction schedule and a total dollar value of the proposed improvements that separately delineate soft costs and costs for construction.

Review of VTI's proposal for improvements shows that it failed to delineate soft costs from costs of construction. VTI allocated \$25,000 toward plumbing improvements on its proposed cost estimate, but did not even mention plumbing when it detailed its proposed construction. VTI even included basic cleaning and repair costs in its list of proposed improvements. The failure to delineate hard and soft costs is a deviation from an express material term of the RFP. See RFP at p. 5 (Section IIA). In fact, in a deficiency letter sent to VTI, dated November 16, 2015, NJ TRANSIT notified VTI that its bid was missing "dollar value of the proposed improvements separated by hard and soft costs." Instead of responding substantively, on or about December 22, 2015, VTI's counsel simply re-submitted the estimated costs contained in VTI's original bid submission. This constituted a deviation from a material term. Requirements that are material to an RFP are non-waivable. Barrick v. State of N.J., Dept. of Treasury, et al., 218 N.J. 247, 259 (2014). VTI's failure to comply with all material specifications precludes NJ TRANSIT from awarding the contract to VTI.

Furthermore, VTI's proposal showed minimal vision and creativity, with the proposed costs of improvements seeming to exceed the complexity of the proposed improvements. Meanwhile, the Bronx House submission separately delineated soft costs and construction costs, as required by the RFP, and included renderings showing the proposed layout and proposed improvements to Space "S."

VTI's challenge also identified what it believes would have been additional appropriate areas toward evaluating improvements, such as staffing experience, CPR trained individuals, and security. Palm Letter, p. 11. This argument ignores that the RFP process is dictated by the agency; if VTI did not like the specifications set by NJ TRANSIT, it need not have responded to the RFP.

B. "FINANCIAL BENEFIT"

For the financial benefit category, NJ TRANSIT required a fixed rental fee, disallowed any rent proposal based on a percentage of revenue, and demanded a minimum annual cumulative increase in rent for each year of the lease term of 2.5%. VTI took issue with how its proposal was scored. In the financial benefit category, VTI received a 3 score and two 4 scores, and Bronx House received three 4 scores.

Although VTI's initial payment was higher, the proposed escalations result in VTI and Bronx House having only a \$10,000 overall difference. Moreover, the monthly fixed payment proposed by Bronx House was more attractive than the annual payment proposed by VTI. Still, in consideration of all other scoring categories, even accepting that there was a one-point error by one scorer, this amounts to harmless error. A score change of one-point by one scorer would not have affected the overall award of the bid and therefore, this one point alone is insufficient to overturn the award.

C. "EXPERIENCE"

VTI argues that the Bronx House submission was given too high of a score in experience because a) the experience represented in the Bronx House submission is not true because Mr. Kapoor's business is not run by him, but rather his family, and he is inexperienced; and b) the experience of the partners, Bruno DiFabio and Steven Cioffi, should not be considered as they are unlikely to have any impact on the day to day operations. Further, VTI contends that its own score of 2 demonstrates bias in scoring.

For experience, the proposers were required to demonstrate the proposer has industry expertise and skilled resources to successfully operate the type of business proposed. The minimum requirement was "five (5) years of continuous experience in the development, management and operation of an establishment of the type which is being proposed is required." This included demonstration of the proposer's experience, reference information for existing and prior landlords over the past five years, description of strength and experience of key staff, descriptions of retail construction projects from the past ten years, and renderings of past business establishments.

As for allegations regarding the experience disclosed for Kapoor, VTI contends that any award other than zero would be improper. Palm Letter pp. 7, 9. Bronx House disclosed as support for completed retail construction projects, projects by Kunal Kapoor, Steven Cioffi and Bruno DiFabio. A review of the experience disclosed by the Bronx House submission establishes a basis for the award of a high score.

The record does not support VTI's allegations with respect to Kunal Kapoor's experience. His tax returns specifically display income received for his participation in Zee-N-Kay Management, Suburban Newspaper Distributors Inc. and Cups Cafe, Inc., all of which are entities he submits as the basis for his experience.

As for VTI's score of 2, TEC scorers provided VTI with two 2s and one 3 in the experience category. A review of VTI's submission and the historical reference documents that were considered establish a basis for a comparatively lower score. VTI had a history of non-payments that the scorers considered in rating VTI's experience, including a recurring failure to pay rent to NJ TRANSIT at one of VTI's other Newark Penn Station establishments. The RFP explicitly made default history relevant, so it was reasonable for the scorers to consider VTI's payment/default history and score VTI lower.

Additionally, in contrasting the submissions, the experience disclosed by all three Bronx House partners was largely experience in operating pizzerias. The experience submitted by VTI disclosed outside of running the current pizza operation at Newark Penn Station was an array of fast food restaurants, coffee shops, cafes, bakeries, and fine dining Indian restaurants. The TEC could reasonably have concluded that this experience did not merit a comparative high score because it was not experienced in this specific "type" of business, related to trattorias. The combined experience of the

Bronx House applicants revealed significantly more experience with trattorias.

D. "FINANCIAL CAPABILITY"

VTI also alleges that Bronx House is not a registered corporate entity and has no such history upon which to award anything but a zero (0). Palm Letter p. 7. VTI further alleges that information related to Mr. Kapoor's bank officer was redacted and could not be verified, and that Bronx House's liquidity is questionable, casting doubt on its submission. Palm Letter, p. 14. Palm Letter p. 13.

For financial capability, the proposers had to include personal or corporate assets that provide NJ TRANSIT with assurance that the anticipated capital improvements would be completed and rent paid. This includes pro forma revenue and expense data to demonstrate ability to satisfy the rent obligation for the first five years of the lease. At a minimum, a proposer had to submit audited financials, a financial statement by a Certified Public Accountant or a letter signed by a bank officer verifying the proposer's assets. For entities that are not public or have assets less than \$10 million, proposers were required to provide a Guaranty with a last Federal tax return. Finally, all proposers and guarantors were required to include a net worth statement.

For financial capacity, the scorers assigned 5s and 4s to Bronx House and assigned 2s and 3s to VTI. The net worth statements and assets provided in both submissions are comparable. However, the pro forma submitted by Bronx House to demonstrate satisfaction of the rental obligations was much more lucrative and more detailed, providing a sufficient justification for the higher scores compared to VTI, especially when considering that the RFP required detailed pro forma financial information, specifically "all assumptions and analysis including but not limited to the average transaction value and basis for customer capture rate." It should be noted that mere parroting of numbers is not encouraged.

IV. BRONX HOUSE CORPORATE STANDING

VTI alleges Bronx House is a non-entity "which is both legally deficient and a fiction" which renders any award to Bronx House by NJ TRANSIT baseless, contrary to law and violative of public policy. Palm Letter pp. 6, 12. Further, VTI alleges that pursuant to N.J.S.A. 14A:13-1 et seq., an entity "transacting business in the State of New Jersey without a certificate shall not maintain any action or proceeding in the State of New Jersey," and thus the Bronx House bid should not have been permitted because Bronx House was not a valid entity at the time of its bid.

These allegations are simply untrue. Bronx House formed as an LLC on February 16, 2016. Thus, at the time the RFP was awarded to Bronx House as the prevailing bidder, it was a valid corporate entity. There is no authority cited by VTI indicating that an entity must be formed at the time of the RFP response.

For information about a bid response from an entity proposing to operate as an LLC, the proposal required the date and state of organization, names of managers, names of all members with a ten-percent ownership interest, certificate of formation, operating agreement and certificate of good standing. RFP Section II(c)(2). Bronx House provided that, if awarded the lease, it would form a New Jersey limited liability company owned by Bruno DiFabio, Steven Cioffi and Kunal Kapoor. Bronx House further provided that each of those individuals would provide a guaranty for all of the obligations of the Lessee under the Lease. Once the company was formed, Bronx House said, it would provide Articles of Organization and all required Certificates and Agreements.

Given that this section of the RFP does not prohibit a future entity, this argument does not eliminate the proposed LLC by Bronx House. Bronx House provided the form of entity it proposed in

writing in response to the RFP, provided the necessary underlying financial information requested in the RFP for the LLC, and articulated how they would fulfill the requirements of the proposal.

V. ALLEGATIONS OF PANEL BIAS

VTI asserts there was bid-rigging and that accordingly, the bid process is invalid. To support these claims, VTI alleges several actions were taken by NJ TRANSIT to ensure VTI would not win the bid. Specifically, VTI argues that the structure and weight of the RFP criteria was intentionally developed by NJ TRANSIT to ensure VTI would not win the bid, that legal proceedings between NJ TRANSIT and VTI's owners for a liquor store property motivated the bid-rigging, and that NJ TRANSIT, Greystone Properties – NJ TRANSIT's real estate manager – and Bronx House conspired to ensure Bronx House prevailed. VTI presented these claims at the reconsideration hearing and produced Mr. Mozawalla, who answered questions regarding his certification.

VTI alleges that it lost the bid as retaliation for ongoing litigation related to Terminal Wines & Liquors, Inc. Palm Letter, pp. 5-6. To the contrary, RFP 15-01 set up specific criteria from which the TEC derived objective scores. There are no substantiated allegations, nor any indication, that the scores generated by the TEC were arbitrary or biased. In fact, VTI did not present any evidence of retaliation. Rather, the RFP at issue has no correlation to the Terminal Wines litigation. Therefore, VTI's unsubstantiated allegation that there was retaliatory bid-rigging does not provide any basis to overturn the bid award or process.

VTI further alleges that Greystone, Suresh Kapoor and Kunal Kapoor met repeatedly to allow Bronx House to interfere with the outcome of this bid. Palm Letter, p. 9. More specifically, VTI alleges that the outcome was pre-determined in favor of Kapoor through the use of false and subjective criteria. Ibid. VTI further alleges there was a misrepresentation of available storage space on platform H in the terminal as evidence of providing inside information. Palm Letter, p. 16. VTI submits news articles of an investigation in New York that involved Greystone Properties and the Kapoor family, and provides a certification from Mr. Mozawalla discussing representations made by members of the Kapoor family.

No credible evidence has been presented showing a conspiracy to award the RFP to any particular vendor. Rather, a pre-bid meeting took place and was available to all interested parties – a meeting which VTI did not attend. With respect to the contention that the bidding outcome was pre-determined, the validity and objectivity of the TEC was noted above. Regarding the issue of storage space on Platform H, this issue would apply equally to all bidders if true. Nevertheless, VTI substantiates its argument here only with the “belief” of its counsel. Palm Letter, p. 16. VTI's counsel's belief, alone, does not create a valid challenge.

Regarding Mr. Mozawalla's Certification, it need not even be considered. It provides no testimony or evidence about the propriety of the RFP process or its scoring. Notwithstanding, even considering the Certification, it does not present any legitimate challenge to this RFP. It principally addresses the Terminal Wines leasehold interest, only briefly mentioning the Space S leasehold to insinuate impropriety behind the Bronx House bid because Kunal Kapoor suggested he was not part of this RFP process. These allegations, alone, do not undermine the validity of the RFP process. Critically, there is no indication that the TEC scoring would have been any different, even if Mr. Mozawalla's allegations were true.

Review of the bid proposals and scoring sheets failed to show any bias. As set forth in Section III herein, the way in which the TEC scored the proposal was justified by the materials in the proposals themselves. VTI's allegations of bias are unfounded, extraneous and do not change the finding that the TEC's scoring was valid and reasonable.

VI. OPRA REQUEST IMPACT ON RFP VALIDITY


VTI submitted an OPRA Request to NJ TRANSIT on February 29, 2016, and has set forth that its outstanding objections limits its ability to properly challenge the bid. Specifically, VTI alleges that, inter alia, the failure to release OPRA documents and to have redacted same “violates due process of law because it could not pursue a full bid protest with all available information. Palm Letter, p. 8.

This argument is not compelling. Even assuming arguendo that documents were withheld or improperly redacted, that would not change the outcome of the RFP. That is because NJ TRANSIT has full discretion to render an RFP award to any entity whose proposal is deemed “in the best interest” of NJ TRANSIT. N.J.A.C. 16:72-3.12. Here, the TEC reviewed the submissions and deemed the Bronx House bid in the best interest of NJ TRANSIT.

With respect to the issue of allegedly improper redactions, OPRA countenances that an agency cannot release information “which, if disclosed, would give an advantage to competitors or bidders.” N.J.S.A. 47:1A-1.1. That decision is inherently subjective and, in the discretion of the agency, in consideration of promoting full and fair competition, in both the short term and long term. Here, the redactions made to documents provided to VTI through OPRA do not justify reversal of the award.

VII. RELIEF REQUESTED

For the reasons set forth herein, and as set forth in NJ TRANSIT’s letter to VTI dated September 12, 2016, which is incorporated herein by reference, the relief sought by VTI is denied.



Amy Herbold
NJ TRANSIT Bid Protest Hearing Officer