



Via Email, Fax and UPS Overnight Delivery

May 4, 2015

Ms. Maureen Paul
Mr. Sean Solomon
Surety Mechanical Services of NJ, LLC
300 Thomas Avenue
Williamstown, New Jersey 08094

Re: Vineland – Vineland High School South – HVAC System Replacement
NJSDA Contract No. EP-0085-C01
Bid Protest by Surety Mechanical Services of NJ, LLC
Final Agency Decision

Dear Ms. Paul and Mr. Solomon:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of the protest letter from Mr. Solomon, dated April 28, 2015, submitted on behalf of Surety Mechanical Services of NJ, LLC (“Surety”) in connection with the above-referenced procurement. Please note that although Surety’s protest letter is dated April 28, 2015, it was not transmitted until April 30, 2015 and was not received by the NJSDA until May 1, 2015. This correspondence is the NJSDA’s Final Agency Decision on Surety’s protest.

Price Proposals for this procurement were opened on April 23, 2015. Surety’s Price Proposal did not identify an Asbestos Removal/Treatment subcontractor. Documentation submitted by Surety with its Price Proposal did not include a Total Amount of Uncompleted Contracts Form for an Asbestos Removal/Treatment subcontractor.

On April 23, 2015, the NJSDA forwarded correspondence via email and UPS Overnight Delivery to Surety advising of the rejection of Surety’s bid and explaining the rejection as follows:

We regret to inform you that upon review of the Price Proposal, it has been determined by NJSDA staff that the Price Proposal is not compliant with the requirements as outlined in the Instructions to Bidders. Specifically, your Price Proposal does not identify the required Asbestos Removal/Treatment subcontractor nor does it contain an Uncompleted Contracts form for the Asbestos Removal/Treatment subcontractor. Section 4 – Price Proposal, of the Instructions To Bidders states:

- *The Bidder shall include as part of its Price Proposal, all subcontractors required to be named as per the advertisement.*

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- *All Bidders **must** submit a copy of the Uncompleted Contracts Form for themselves and for any subcontractor required to be named, as described in Section 4.1 C (Required Classification, Identification of Required Subcontractors, and Submittals). Failure to submit an Uncompleted Contracts Form with the Price Proposal will result in rejection of the bid.*

Failure to identify a required subcontractor and failure to include an Uncompleted Contracts Form for a required subcontractor are material defects and, therefore, your firm's bid must be rejected as non-responsive.

Surety undertook to transmit its protest letter on April 30, 2015, six (6) days after the NJSDA's April 24, 2015 emailing of its rejection letter to Surety. Surety's protest letter was received on May 1, 2015, seven (7) days after NJSDA's transmittal of its rejection letter. Pursuant to N.J.A.C. 19:38-4.2, "[a] firm protesting the rejection of its own Price Proposal must submit a written protest within five days of receipt of its rejection." Under these circumstances, Surety's protest letter must be viewed as untimely. In providing the following response to the specifics of Surety's protest letter, the NJSDA does not waive or excuse the untimeliness of the protest letter.

Surety challenges the rejection of its bid for the following reasons:

The Procurement Requirements section in the Bid Advertisement . . . and the Required Classification, Identification of Required Subcontractors, and Submittals section in the Instructions to Bidders . . . both clearly indicate that an Asbestos Removal/Treatment subcontractor only needs to be pre-qualified by the NJSDA if their contract is in an amount which is equal to or greater than \$500,000, and none of the Asbestos Removal/Treatment subcontractor bid quotes that we received were equal to or greater than \$500,000 so we did not need to name them or provide their Uncompleted Contracts form."

Surety's protest letter attaches, among other things, excerpts from the Bid Advertisement. Conspicuously omitted from the excerpted material is the unambiguous requirement set forth at the beginning of the Bid Advertisement that the bidder must be classified in or engage a subcontractor classified in "Asbestos Removal/Treatment (C092)." Thereafter, the Bid Advertisement makes clear that "[b]id proposals must list the names of the firms who meet the above classification(s)." The Bid Advertisement therefore requires that bidders identify the entity responsible for Asbestos Removal/Treatment. Surety is not itself DPMC classified in Asbestos Removal/Treatment.

Only at the end of the Bid Advertisement is there material similar to the paraphrased language referenced in Surety's protest letter. The actual language of the Bid Advertisement reads:

In addition to all other requirements listed above, the NJSDA requires all subcontractors of any tier in the DPMC classifications listed below whose contract is in an amount which is equal to or greater than \$500,000 be prequalified by the NJSDA.

[Emphasis Added]. Among the DPMC classifications “listed below” is “C092 – Asbestos Removal/Treatment”.

Thus, under the express terms of the Bid Advertisement, responsive bidders are required both (1) to identify an Asbestos Removal/Treatment subcontractor and (2) to adhere to additional NJSDA prequalification requirements for subcontractors in the listed DPMC trades whose subcontracts will equal or exceed \$500,000.

Section 4.1C of the Instructions to Bidders requires that “[t]he Bidder shall include as part of its Price Proposal, all subcontractors required to be named as per the advertisement . . .” [Instructions to Bidders, page IB-9]. Thus, all bidders, including Surety, were required to identify an Asbestos Removal/Treatment subcontractor in their Price Proposals. In contravention of this express requirement, Surety failed to identify an Asbestos Removal/Treatment subcontractor in its Price Proposal.

The Instructions to Bidders also contains the following requirements:

Each Bidder shall include all required documentation with its Price Proposal, including, but not limited to the following:

[. . .]

- “Total Amount of Uncompleted Contracts” form as provided by the Authority and completed by the respective subcontractor(s) for any subcontractor required to be named, as described in Section 4.1C (Required Classification, Identification of Required Subcontractors, and Submittals).

[. . .]

- Failure to submit the required Uncompleted Contracts Form(s) with the Price Proposal will result in rejection of the bid.

[Instructions to Bidders at IB-11]. Since an Asbestos Removal/Treatment subcontractor is a subcontractor required to be named, as set forth in the Bid Advertisement and as described in Section 4.1C, Surety’s failure to include an Uncompleted Contracts form for an Asbestos

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Removal/Treatment subcontractor with its Price Proposal deviates from the clear requirements of the Instructions to Bidders. Surety's bid, therefore, must be rejected.

Surety's protest letter attaches Page IB-10 from the Instructions to Bidders and "clouds" the following provision as supportive of its position:

Bidders are advised that **in addition to** requiring NJSDA prequalification of subcontractors **required to be named** as described in Section 4.1C (Required Classification, Identification of Required Subcontractors, and Submittals), **regardless of their contract amounts**, NJSDA requires that subcontractors of any tier whose contract is in an amount equal to or more than \$500,000 in any of the following DPMC Trade Classifications be NJSDA prequalified:

[. . .]

C092 – Asbestos Removal/Treatment

[Emphasis Added]. Rather than support its protest, this provision reiterates that there are two sets of subcontractors that must be NJSDA prequalified: first, those subcontractors required to be identified (as set forth and described in the Bid Advertisement and Section 4.1C of the Instructions to Bidders) and second, those subcontractors of any tier not required to be identified whose contract values will equal or exceed \$500,000. Surety's protest letter reflects a logically-flawed conflation of the bidding requirements for these two sets of subcontractors.

For all of the foregoing reasons, Surety's protest is rejected. This is a Final Agency Decision.

Sincerely,



Donald Guarriello, Vice President and Chief Financial Officer
New Jersey Schools Development Authority

cc: 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
C. Aidita Milsted, NJSDA Program Director
Sean Murphy, NJSDA Director, Procurement
Albert D. Barnes, NJSDA Chief Counsel