

**FINAL AGENCY DECISION**

August 30, 2017

Via Email and Regular First Class Mail

Douglas L. Cody, Esquire
The Cody Law Firm
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Hammonton, New Jersey 08037

**Re: Camden – High School Abatement and Demolition
NJSDA Contract No. CA-0022-N01
Protest By Meco Constructors, Inc.**

Mr. Cody:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of the July 31, 2017 formal protest letter submitted by you on behalf of Meco Constructors, Inc. (“Meco”) relating to the above-referenced procurement for abatement and demolition services for the Camden High School project in Camden, New Jersey (the “Procurement”). Through its bid protest, Meco, the third place bidder for the Procurement, seeks the rejection of the bids of the first and second place bidders, USA Environmental Management, Inc. (“USA”) and Tricon, Inc. (“Tricon”), respectively. This letter is the NJSDA’s formal response and final agency decision on Meco’s bid protest.

In evaluating Meco’s bid protest, the NJSDA has reviewed and considered the following: July 31, 2017 electronic mail from Craigg Cody, Demolition Estimator/Project Manager of Meco; July 31, 2017 formal protest letter executed by Craigg Cody and submitted by you to the NJSDA; the August 1, 2017 supplemental correspondence prepared by Craigg Cody and submitted by you to the NJSDA; your August 1, 2017 correspondence to Richard Flodmand, Deputy Director of the New Jersey Division of Property and Management (“DPMC”); August 2, 2017 correspondence, with attachments, from James E. Harris, Vice President of USA; August 11, 2017 correspondence from Richard Ferrara, Assistant Deputy Director of DPMC to you; NJSDA Prequalification Application by USA, dated August 24, 2016; correspondence from the New Jersey State Police to the NJSDA, dated September 26, 2016, regarding results of prequalification investigation of USA; Ownership Disclosure forms submitted by USA in connection with procurements relating to NJSDA Contracts ES-0043-N01 RB1, WT-0023-N01, and PA-0011-N01; the June 9, 2017 advertisement for bids (hereinafter, the “Advertisement”); Addendum Number 1 to the Procurement, dated July 13, 2017; July 28, 2017 countersigned correspondence from Sean Murphy, NJSDA Procurement Director to Mr. Harris, with attached July 28, 2017 Bid Review Meeting minutes; the Information Package made available through a controlled-access website by the NJSDA to all bidders, including without limitation the Project

plans and specifications; and the Project Rating Proposals and Price Proposals and accompanying documentation submitted by all bidders in connection with the Procurement.¹

Brief Overview of the Procurement Process

The Procurement was advertised on June 9, 2017. Under the terms of the Advertisement, any firm wishing to submit a proposal was required to attend a mandatory pre-bid conference and site visit on June 23, 2017. All interested bidders were required to submit a Project Rating Proposal (“PRP”) form no later than 2:00 p.m. on June 30, 2017. One (1) addendum was issued thereafter. On or before July 25, 2017, interested bidders submitted their sealed Price Proposals and other documentation in accordance with the requirements of the Advertisement and the Information Package made available through a controlled-access website by the NJSDA to all bidders, as modified by the Addendum.

A total of eight (8) Price Proposals were received, which were publicly opened on July 25, 2017. At that time, USA was identified as the bidder that had submitted the lowest bid and received a final ranking of 1, while Tricon received a final ranking of 2 and Meco a final ranking of 3.

Meco generally contends that USA’s bid must be rejected as: 1) USA did not identify itself as self-performing demolition activities in its Price Proposal; 2) Winzinger cannot perform all required demolition services within its Aggregate Rating limit; 3) USA failed to disclose owners owning 10% or more of USA, as required by statute; and 4) USA and Winzinger have underestimated the amounts of their respective uncompleted contracts. Meco further contends that Tricon’s bid should be rejected because: 1) Meco anticipates that Tricon’s DPMC Aggregate Rating limit will be lowered based upon recent Occupational Safety and Health Administration (“OSHA”) violations; and 2) Tricon’s Uncompleted Contracts form submitted with its bid purportedly does not contain a corporate seal. Finally, Meco argues that both USA and Tricon have not satisfied their respective SBE goals for the Procurement. Each of these issues is individually addressed below.

Meco’s Bid Protest as to USA

1. USA failed to identify that it would be “self-performing” demolition services for the Procurement.

Pursuant to the terms of the Advertisement, in order to be eligible to submit a bid in connection with the Procurement, a firm was required to be classified by the DPMC of the New Jersey Department of the Treasury, as well as prequalified by the NJSDA in either demolition (Code C021) or general construction (Codes C008 or C009). In addition, to the extent the bidder was not classified and prequalified in specifically identified other trades (i.e. HVACR, Electrical,

¹ Through counsel, Tricon advised that it would not make any submissions in connection with Meco’s bid protest.

Plumbing or Asbestos Removal/Treatment), the bidder was required to identify subcontractors who were so classified and prequalified in those trades. To the extent the bidder was classified and prequalified in General Construction, in addition to the above trades, that bidder was also required to identify a subcontractor who was classified and prequalified in demolition.

In its Price Proposal, USA identified itself as the bidder. At the time of the submission of its Price Proposal, USA was both DPMC classified and NJSDA prequalified in the demolition trade (Code C021). Thus, USA was both eligible to submit a bid and qualified to perform all demolition work required under the Procurement. As such, USA could self-perform all of the demolition work or subcontract some or all of this work to specified subcontractors. Because USA chose to have some of the demolition work performed by a subcontractor, USA properly identified Winzinger, Inc. (“Winzinger”), as a demolition subcontractor on its Price Proposal form. Winzinger is both DPMC classified and NJSDA prequalified in demolition.

On its face, USA’s Price Proposal identified two properly classified and prequalified entities as being responsible for the performance of demolition work, itself and Winzinger. Mecco has failed to adduce any support for its contention that USA’s failure to identify itself as a “C021 self-performer” constitutes a “fatal flaw/material defect”. Under the circumstances described above, even if USA’s failure to expressly state that it was a “self-performer” were to be considered a defect, it would plainly be a non-material and waivable defect.

For the foregoing reasons, Mecco’s protest in this regard is denied.

2. Winzinger cannot perform services for the Procurement within its Aggregate Rating limit.

Mecco contends that USA’s bid should be rejected, as its named demolition subcontractor (Winzinger) does not possess the capacity to perform all of the demolition services for the Procurement within its DPMC aggregate rating limit.²

Pursuant to the Educational Facilities Construction and Financing Act (N.J.S.A. 18A:7G-1, et seq., referred to hereinafter as the “Act”), “a prequalified contractor seeking to bid school facilities projects, ***and any subcontractors required to be named*** under [the Act] shall, as a condition of bidding, submit a sworn contractor certification regarding qualifications and credentials.” N.J.S.A. 18A:7G-37(a) (Emphasis provided). Furthermore, N.J.S.A. 18A:7G-37(c) provides that “the contractor certification form shall further require that a principal owner or officer of the company certify that, at the time that the firm is bidding a project, the amount of its bid proposal and the value of all of its outstanding incomplete contracts does not exceed the

² We note that Mecco has also made several speculative assertions as to Mecco’s prior business relationships with Winzinger on other demolition projects. However, Mecco has provided no objective evidence, nor any sworn statements, certifications or affidavits to support its suppositions regarding these prior projects. Accordingly, the NJSDA has not considered Mecco’s suppositions in this regard as part of its decision.

firm's existing aggregate rating limit.” These statutory requirements are also reflected in the NJSDA’s bidding regulations. See generally, N.J.A.C. 19:38-3.8.

Under the NJSDA’s regulations, “Aggregate Rating” means:

the limit of the outstanding dollar value of all contracts, public and private, which a firm may perform at a given time as assigned by the Authority's Notice of Prequalification in effect at the time of the contractor's bid, which shall be identical to that which is assigned by the New Jersey Department of Treasury, Division of Property Management and Construction. Should the Division of Property Management and Construction modify a firm's aggregate rating after the Authority has issued a Notice of Prequalification, the Aggregate Rating issued by the Authority is considered modified to be identical to that of the Division of Property Management and Construction.

N.J.A.C. 19:38-1.2.

As part of its Price Proposal, USA submitted an Uncompleted Contracts form for Winzinger, in which Winzinger stated that the amount of its uncompleted contracts was \$226,345.00. As part of this form, Winzinger certified that, “the amount of [its] bid proposal, including the amount listed above does not exceed [its] New Jersey Schools Development Authority, Aggregate Rating limit.” At the time of the bid submission, Winzinger’s DPMC and NJSDA Aggregate Rating limit was \$1,000,000.00.³ Thus, the maximum amount of any subcontract to Winzinger in connection with the Procurement would be limited to \$773,655.00 or less.

Meco contends that if USA is awarded the contract for this Procurement, Winzinger will impermissibly exceed its Aggregate Rating limit, thereby requiring the rejection of USA’s bid. Specifically, Meco argues that the value of demolition and site activity work for the Procurement will exceed the maximum possible amount of work that Winzinger can perform within its Aggregate Rating limit.

Meco’s contention in this regard is premised on the assumption that Winzinger will be performing **all** of the demolition and site work. As discussed above, however, USA will be performing demolition services for the project, subcontracting only a portion of the demolition trade work to Winzinger.

Included with USA’s bid submission was Winzinger’s Uncompleted Contracts form by which Winzinger certified that the amount of its bid would not exceed its Aggregate Rating limit, less

³ We note that, as of August 7, 2017 (subsequent to the submission of bids on this Project), DPMC has increased Winzinger’s Aggregate rating limit to \$5,000,000.00. Accordingly, Winzinger’s NJSDA Aggregate Rating limit has been increased to match its DPMC Aggregate Rating limit, pursuant to N.J.A.C. 19:38-1.2.

the value of any uncompleted contracts. The NJSDA is entitled to rely on that Certification. Moreover, as noted in its response to the instant bid protest, USA has confirmed that:

Winzinger's ability to do work on this contract would be limited to their current Pre-Qualification limit of \$1,000,000 less their uncompleted contract value. This was always known by us going into the bidding but we also identified them as a potential subcontractor because of their [Small Business Enterprise/Women's Business Enterprise] status fully aware of the work dollar amount limitations.

For these reasons, Meco's protest in this regard is denied.

3. USA failed to disclose all individuals having a 10% or more interest in the firm.

Meco further contends, "upon information and belief," that it "suspects" that there are undisclosed owners of USA above 10%, which failure to disclose is contrary to the requirements of N.J.S.A. 40A:11-23.2.⁴ Meco avers that the ownership listed in USA's price proposal indicates that no entity owns over 10% of USA. As such, Meco contends that, if this information is inaccurate, it constitutes a material and fatal defect, thereby requiring rejection of USA's bid.

As part of USA's bid submission for the Procurement, USA included an Ownership Disclosure Form, in the form mandated by the New Jersey Department of Treasury, Division of Purchase and Property. In that form, when asked if there were individuals, corporations, partnerships or limited liability companies owning a 10% or greater interest in the firm, USA answered "no." However, in response to Meco's bid protest, USA states that Mr. Tracy L. Smith is the President and sole owner of USA, and that this ownership of USA has not changed since approximately 2006. USA has also provided an excerpted page from its most recent Prequalification Questionnaire submitted to the NJSDA in August 2016, which identifies Mr. Smith as the 100% owner of USA.

By way of background, N.J.S.A. 52:25-24.2 generally requires the submission of a statement of corporate ownership for bidding on public contracts. Specifically, this section provides that:

No corporation, partnership, or limited liability company ***shall be awarded any contract nor shall any agreement be entered into*** for the performance of any work or the furnishing of any materials or supplies..., ***unless prior to the receipt of the bid or accompanying the bid***, of said corporation, said partnership, or said limited liability company there is submitted a statement setting forth the names and addresses of all stockholders in the corporation who own 10 percent or more

⁴ Meco has erroneously cited to a provision of the Local Public Contracts Law (N.J.S.A. 40A:11-1, et seq.) as the basis for NJSDA's requirement for submission of a statement of corporate ownership. The Local Public Contracts Law does not apply to NJSDA procurements. However, a corporate ownership statement is required pursuant to N.J.S.A. 52:25-24.2 and the requirements of the Procurement.

of its stock, of any class, or of all individual partners in the partnership who own a 10 percent or greater interest therein, or of all members in the limited liability company who own a 10 percent or greater interest therein, as the case may be.” (Emphasis provided).

In George Harms Construction Co. v. Borough of Lincoln Park, 161 N.J. Super. 367, 375 (L. Div. 1978), the court held that in enacting N.J.S.A. 52:25-24.2, the Legislature:

expressed its clear purpose to ensure that all members of a governing body and the public be made aware of the real parties in interest with whom they are asked to contract. Thus the public, as well as public officials, can identify any real or potential conflicts of interest arising out of the awarding of public contracts, or can identify those bidders who lack the requisite responsibility.

[Citing Assembly Bill 22, Statement of Purpose (1976).]

As such, the statute itself does not require submission of a statement of ownership with the bid submission. Rather, the statute requires that such a statement be provided either prior to or accompanying the bid. Moreover, the clear legislative intent of this statutory requirement is to insure that the governmental contracting unit is provided with the identity of, not only the bidding entity, but those individuals or entities who hold significant ownership interests in that bidding entity.

The legislative intent of N.J.S.A. 52:25-24.2 is reiterated and amplified under the statutes governing the NJSDA’s vendor prequalification process. N.J.S.A. 18A:7G-34 requires that the NJSDA’s prequalification process include a requirement that the contractor proposing to submit bids on a school facilities project submit a statement under oath on a form designated by the NJSDA, which includes in pertinent part, a list of the names and titles of all individuals or entities who own 10% or more of the bidding entity. In furtherance thereof, the NJSDA’s implementing regulations provide that the Office of Government Integrity in the Department of Law and Public Safety shall, “review each complete application for the purpose of determining the responsibility of the firm, including the character, honesty and integrity of any key person, any person required to be listed in the application or otherwise shown to have a beneficial interest in the firm.” N.J.A.C. 19:38A-3.1(d). We note that this integrity review function is currently delegated by the Department of Law and Public Safety to the New Jersey State Police.

USA’s last NJSDA Prequalification Application or Questionnaire is dated August 24, 2016. In that Questionnaire, USA identified Mr. Smith as its President, with 100% ownership of the firm. Consistent with N.J.A.C. 19:38A-3.1, upon receipt of USA’s completed Questionnaire, the NJSDA forwarded same to the New Jersey State Police for review.

By letter dated September 26, 2016, the New Jersey State Police advised, “the New Jersey State Police School Construction Squad has determined, USA Environmental Management, Inc. its

principals and/or key employees are not currently subject to debarment by another public authority and have not been convicted of a disqualifying crime in the State of New Jersey that would preclude its *renewal* prequalification by the New Jersey Schools Development Authority, pursuant to N.J.S.A. 18A:7G-34.” (Emphasis in original). As such, USA’s continued NJSDA Prequalification remains in full force and effect until September 7, 2018.

We also note that, since USA’s most recent Prequalification renewal, USA has submitted at least three (3) separate Ownership Disclosure forms in connection with other NJSDA procurements.⁵ In each of these submitted forms, USA identified Tracy L. Smith as the only individual or entity that held a 10% or greater ownership interest in USA, consistent with USA’s Prequalification Questionnaire.

With the foregoing in mind, to the extent that the Ownership Disclosure form submitted by USA with its bid was defective, it is not materially so, as the NJSDA was already in receipt of the statutorily required ownership information. USA’s ownership structure was disclosed by USA in its Prequalification Questionnaire, and restated in subsequent Ownership Disclosure forms submitted to the NJSDA for other procurements. Moreover, unlike the majority of other government procurements, the information contained in USA’s Prequalification Questionnaire, including the identification of individuals with greater than 10% ownership interest, was subject to a background check by the New Jersey State Police. Thus, the legislative intent of identifying real parties in interest, potential conflicts or any other circumstance that would otherwise preclude entering into a contract with USA is more than satisfied since the NJSDA was in possession of the necessary information to perform its due diligence in this regard.

There is certainly no basis to infer that had the Ownership Disclosure form submitted with USA’s bid identified Mr. Smith as a person with a greater than 10% ownership interest in USA, USA’s bid would then be subject to rejection. Moreover, there is no discernable competitive advantage garnered by USA as a result of any defect in the Ownership Disclosure form submitted with its bid.

Our courts have stated that N.J.S.A. 52:25-24.2 was not meant to cost public bodies thousands of dollars by requiring acceptance of higher bids for mere technical violations in failing to provide a statement of the bidder’s ownership. Schlumberger Industries, Inc. v. Avalon, 252 N.J. Super. 202 (App. Div. 1991), certif. denied, 130 N.J. 8 (N.J. 1992). The Appellate Division’s instructive language in this regard becomes even more salient under the facts presented in this matter, where the bidder’s ownership information had been submitted, and repeatedly so, in advance of the submission of its bid for the Procurement. Accordingly, USA’s bid protest in this regard is rejected.

⁵ The procurements related to NJSDA Contracts ES-0043-N01 RB1, WT-0023-N01, and PA-0011-N01.

4. USA and Winzinger have underestimated the amount of their Uncompleted Contracts.

Meco also contends that it “suspects” that Winzinger and USA have underestimated the stated amounts of their uncompleted contracts. Specifically, Meco contends that Winzinger has “an emergency demolition contract...worth approximately \$500,000.00” that is not included in Winzinger’s Uncompleted Contracts form. Furthermore, Meco opines that the amount of uncompleted contracts listed by USA is “too low to be credible or relied upon,” apparently based solely on Meco’s apparent estimate of USA’s annual revenue.

Meco has cited no source or provided any objective evidence for the allegations contained in its protest in this regard. Conversely, both USA and Winzinger have submitted certifications as to the amount of their respective uncompleted contracts, with the knowledge that the provision of false information could jeopardize their ability to maintain contracts with New Jersey governmental entities.

Absent objective evidence to the contrary, the NJSDA is entitled to rely on certifications submitted by bidders and cannot disqualify bidders simply based on unsubstantiated assertions leveled by other parties. As such, the NJSDA denies Meco’s bid protest in this regard.

Meco’s Bid Protest as to Tricon

1. Tricon’s DPMC Aggregate Rating limit will be reduced, thereby rendering Tricon’s bid defective.

In its bid protest submissions, Meco has provided information that purportedly identifies violations issued by OSHA to Tricon. However, Meco has not set forth the alleged import of these purported violations, other than to state that, “upon information and belief,” these violations were not disclosed to the DPMC within ten (10) days, as required by DPMC’s regulations. As a result, Meco stated its intent to challenge Tricon’s Aggregate Rating limit issued by the DPMC. In its bid protest, Meco anticipated that DPMC would reduce Tricon’s Aggregate Rating limit to the extent that the rejection of Tricon’s bid would be necessary.

In furtherance thereof, by letter dated August 1, 2017, your office submitted a Request for a Hearing to the DPMC, pursuant to N.J.S.A. 52:35-4, requesting a reevaluation of Tricon’s Aggregate Rating limit. By letter dated August 11, 2017, however, DPMC advised that it could not change Tricon’s classification or Aggregate Rating in response to Meco’s request, as that request was not received at least twenty (20) days preceding the final date set for submission of bids, as required by N.J.S.A. 52:35-4.

As there has been no decrease in Tricon’s Aggregate Rating limit that would have retroactive effect on a bid that has already been opened, Meco’s contentions in this regard are moot. Meco

has not set forth any additional basis that would require rejection of Tricon's bid based on the information made available to the NJSDA. As such, Meco's protest in this regard is denied.

2. No seal on Uncompleted Contracts form

Meco further contends that Tricon "appears to have missed" the corporate seal required on its uncompleted contracts form.⁶ Meco states in a conclusory fashion that the absence of the corporate seal on this document is a material defect, requiring rejection of Tricon's bid.

Without commenting on the import of an absent corporate seal and whether that constitutes a material defect, we simply note that the corporate seal is affixed to the hard copy of the uncompleted contract form submitted by Tricon. As such, Meco's protest on this issue is denied.

Meco's Bid Protest as to both USA and Tricon

In its protest, Meco states that "it appears" that USA and Tricon did not make reasonable efforts to reach the SBE goals identified in the NJSDA's bid documents. However, Meco does not contend that this constitutes a material defect that warrants rejection of the bids submitted by USA and Tricon.

Per the Advertisement, "[t]he NJSDA requires the contractor to make good faith efforts to ensure that small business enterprises (SBEs) have the maximum practicable opportunity to participate in the performance of this engagement. A 25% target has been established pursuant to N.J.A.C. 17:14 et seq." Additionally, as set forth in Section 6 of the Instructions to Bidders:

Immediately upon receipt of the Notice of Award (or as otherwise indicated by the Authority), the recipient of the Notice of Award shall complete and deliver the following documents to the Authority, on forms provided by the Authority:

"SBE Form A" for the Bidder and its subcontractors along with an updated "Form C Certifications of SBE Status" showing SBE contractor/subcontractor participation. The NJSDA requires the Bidder to provide opportunities to SBE firms to participate in the performance of this engagement, consistent with NJSDA's SBE set aside goals of 25%, awarding 5% of the contract value to registered Category 4 SBE firms; 5%

⁶ In its bid protest, Meco makes reference to the apparent absence of a corporate seal on Tricon's uncompleted contracts "Form 701," which is a form published by the DPMC. However, for purposes of clarifying the factual record, we note that Tricon submitted a copy of the NJSDA's Uncompleted Contracts form (UC-1), not the DPMC 701 form. The NJSDA does not distinguish between its own form and the DPMC form, since the forms are functionally identical. Either form is acceptable, and in no case are both NJSDA and DPMC forms required. To the extent that Tricon's failure to utilize the DPMC form can be characterized as a bid defect, the defect is plainly not material and is appropriately waived.

Douglas L. Cody, Esquire
August 30, 2017
Page 10

of the contract value to registered Category 5 SBE firms; and 5% of the contract value to registered Category 6 SBE firms; and 10% of the contract value to SBE firms registered in any of the three Categories; (Emphasis in original).

Accordingly, under the terms of the Procurement, the obligation of a bidder to submit SBE Certifications to the NJSDA only exists after a Notice of Award has been issued to that bidder. Given the pendency of the instant protest, no Notice of Award has been issued. Thus, regardless of whether USA or Tricon is determined to be the successful bidder for the Procurement, neither firm is yet obligated to provide detailed SBE information. Certainly, there is no factual basis for the NJSDA to determine that either firm has failed to reach the identified SBE goals, nor that they have made insufficient good faith efforts to reach those goals.

Moreover, on its face, the bid documents clearly identify the SBE percentages as goals, not as requirements. The only requirement of bidders is to “provide opportunities” to SBE firms to participate in the Project, consistent with the Authority’s “SBE set aside goals.” Even if there was sufficient information available to the NJSDA as to these firms’ SBE participation, Meco has not cited any provision of the bid documents that would suggest that the failure to meet percentages of SBE contribution is somehow fatal to the bids at issue here. Similarly, Meco has not set forth any legal basis for the proposition that any proposed SBE contribution should disqualify either USA’s or Tricon’s bids. Therefore, even if the failure to meet the 25% goal or the individual Category goals was a defect, it would not be a material defect. See T.N. Ward v. South Jersey Transportation Authority, 2010 N.J. Super. Unpub. LEXIS 2591, at *26-7 (App. Div. 2010).

Accordingly, Meco’s bid protest on this issue is rejected.

Conclusion

For the foregoing reasons, Meco’s bid protest as to both USA and Tricon is rejected in its entirety.

This is a Final Agency Decision.

Sincerely,



Donald R. Guarriello
Vice President and Chief Financial Officer

Douglas L. Cody, Esquire
August 30, 2017
Page 11

cc: Charles B. McKenna, NJSDA Chief Executive Officer
Andrew Yosha, NJSDA Executive Vice President, Program Operations & Strategic Planning
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Dorthy Koncur, Esquire, Attorney for Tricon, Inc.