

**FINAL AGENCY DECISION**Via Email

January 27, 2016

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Dilip Verghese, President  
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**Re: Irvington Madison Avenue Elementary School Early Site Package  
NJSDA Contract No. ES-0027-N01 RB1  
Bid Protests By Neuber Environmental Services, Inc., D&K Construction Co., Inc.  
and Tricon Enterprises, Inc.**

Dear Messrs. Edwards, Verghese and Bialkowski and Ms. Petrizzo:

The New Jersey Schools Development Authority ("NJSDA") is in receipt of Mr. Edwards' January 18, 2016 letter on behalf of Neuber Environmental Services, Inc. ("Neuber") relating to the above-referenced procurement for demolition and early site services for the Madison Avenue Elementary School in Irvington, New Jersey (the "Procurement"). The NJSDA is treating the letter as a formal bid protest by which Neuber seeks a determination by the NJSDA that (1) the bids submitted by bidders Tricon Enterprises, Inc. ("Tricon") and D&K Construction Co., Inc. ("D&K") should be rejected and (2) the Contract should be awarded to Neuber as the lowest responsive bidder. The NJSDA is also in receipt of Mr. Verghese's formal protest letter on

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behalf of D&K, dated January 17, 2016, by which D&K seeks a determination that Tricon's bid should be rejected and that D&K should be awarded the Contract. Finally, the NJSDA is in receipt of correspondence from Tom Camarda on behalf of Tricon, dated January 22, 2016, protesting the NJSDA's rejection of Tricon's bid. This letter is the NJSDA's formal response and final agency decision on the Neuber, D&K and Tricon bid protests.

In evaluating the bid protests, the NJSDA has reviewed and considered the following: correspondence from Mr. Edwards to Naimish A. Kathiari, NJSDA Procurement Analyst, transmitted on January 18, 2016; correspondence from Mr. Verghese to Sean Murphy, NJSDA Director of Procurement, dated January 17, 2016; correspondence from Mr. Murphy to Denise Petrizzo, President of Tricon, dated January 20, 2016; a January 21, 2016 email and attachment of subcontractor bid of All Pro Management, LLC ("All Pro") from Madhu Rajan of D&K to Mr. Kathiari; correspondence from Tom Camarda of Tricon, dated January 22, 2016; a January 25, 2016 email from Mr. Rajan to Mr. Kathiari; January 27, 2016 correspondence from Stephen Bialkowski, Esquire on behalf of Tricon to Mr. Kathiari; the Procurement Documents, including but not limited to the Advertisement for Bids, Addendum No. 1, the Instructions to Bidders, the Contract and the Contract Drawings and Specifications; and bidder Price Proposals and accompanying documentation.

### **Brief Overview of the Procurement Process**

The Procurement was advertised and the Instructions to Bidders were issued on November 19, 2015. Subsequent thereto, interested bidders submitted Project Rating Proposals and were assigned Project Rating Limits based thereon. One (1) addendum was issued by the NJSDA thereafter. On or before January 12, 2016, interested bidders submitted sealed lump sum Price Proposals and other required documentation.

Price Proposals were publically opened on January 12, 2016. Tricon was the apparent low bidder. D&K was the apparent second low bidder and Neuber was the apparent third low bidder.

On January 20, 2016, after receipt of the Neuber and D&K protests, the NJSDA issued a letter to Tricon, notifying Tricon of the rejection of its bid based upon Tricon's failure to name on its Price Proposal form an electrical subcontractor required to perform electrical work set forth in the Contract Specifications. On January 22, 2015, Tricon protested the rejection of its bid.

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### **The Neuber, D&K and Tricon Bid Protests as to Tricon's Bid**

Neuber contends that Tricon "did not list an electrical subcontractor as required by the bid documents (Section 024116-8.1-A) and Addenda 001."

D&K asserts the same deficiency in Tricon's bid. Specifically, D&K contends that notwithstanding that electrical work was specified in both the Contract Specifications and Addendum No. 1, Tricon's bid submission failed to identify an electrical subcontractor responsible to perform the electrical work, in contravention of the Advertisement for Bids, Addendum No. 1 and N.J.S.A. 52:18A-243.

Tricon contends that bidders were not required to identify an electrical subcontractor, since the electrical work specified in the contract documentation – verification by a licensed electrician that electrical service has been disconnected and capped before starting demolition operations -- was to be performed by the electrical utility, PSE&G, and not by a subcontractor.

Of the nine (9) bidders on the Procurement, seven (7) identified electrical subcontractors to perform electrical work under the Contract.

### **Analysis of the Neuber, D&K and Tricon Bid Protests as to Tricon's Bid**

The Procurement Documents include specifications for electrical work to be performed by a licensed electrician – to wit verification by a licensed electrician that electrical utilities have been disconnected prior to the commencement of demolition operations.

Section 024116-8.1-A. of the Contract Specifications requires the following:

Verify that all utilities have been disconnected and capped before starting demolition operations. . . . Electric shall be checked by a licensed electrician.

Addendum No. 1 includes the following bidder question and answer:

5. Question: Section 024116-8.1-A. Confirm Licensed Plumber and Electrician will be required **in addition to termination letters that will be provided by utility service providers.**

Answer: **A licensed Plumber and Electrician are required** to perform activities outlined in Section 024116-8.1-A.

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(emphasis added).

The Contract Specifications, as clarified by the NJSDA's response to Bidder Question No. 5 in Addendum No. 1, make it clear that the specified verification of disconnection of electric utilities by a licensed electrician is in addition to the proof of disconnection to be provided by the utility service provider. Requiring that the contractor independently verify the disconnection of electrical service prior to commencement of demolition serves to insure the safety of workers on site and the public at large. Verification of disconnection of electric service by a licensed electrician is electrical work.

The Procurement Documents require that, when electrical work is specified, each bidder is required to identify in its Price Proposal the electrical subcontractor who will be performing the electrical work. The requirements set forth in the Procurement Documents conform to the statutory requirement in N.J.S.A. 52:18A-243 that "there shall be set forth in the bid the name or names of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified in [four] branches" – plumbing, HVACR, electrical and structural steel.

The Advertisement for Bids, the Instructions to Bidders and Addendum No. 1 all expressly require that bidders name those subcontractors who will be furnishing electrical work and any work in the three (3) other trades specified in N.J.S.A. 52:18A-243. For example, the Instructions to Bidders, Section 4.1C provides that "[i]n accordance with N.J.S.A. 52:18A-243, all bidders are required to set forth the names of all subcontractors . . . furnishing . . . any work specified in the plans and specifications for the following branches: . . . the electrical work ("Electrical Branch")." Similar language is contained in the Bid Advertisement, under the header "Procurement Requirements". Finally, Addendum No. 1 includes the following provision:

**6. Identification of subcontractors in Price Proposal:**

Bidders are required to identify on the Price Proposal all subcontractors required to be named by the Advertisement and/or the Instructions to Bidders, including those subcontractors in the statutorily identified trades detailed in N.J.S.A. 52:18A-243 (identified on the Price Proposal as "Plumbing Branch"; "HVACR Branch"; "Electrical Branch"; and "Structural Steel Branch").

Tricon's Price Proposal does not name any entity responsible for the performance of electrical work. On the Price Proposal form, Tricon had been prompted to complete the form as follows:

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**ELECTRICAL BRANCH WORK: The bidder must identify a subcontractor that is DPMC classified in the trade of Electrical (C047), unless the bidder intends to self-perform for this trade. If the bidder intends to self-perform, the bidder must identify itself as self-performing in the trade of Electrical (C047).**

In completing the identification section under this prompt on the Price Proposal form, Tricon entered "N/A".

Because the Contract scope of work expressly includes electrical work, bidders were required to identify in their Price Proposals the entity responsible for the performance of the electrical work. Tricon's Price Proposal is defective because it failed to satisfy this identification requirement. The defect is material and non-waivable.

For these reasons, Tricon's bid was properly rejected as non-responsive and, in this respect, the bid protests of Neuber and D&K are sustained and the Tricon bid protest is rejected.<sup>1</sup>

#### **Neuber Bid Protest as to D&K**

Neuber's January 18, 2016 letter contains the following observation:

The 2<sup>nd</sup> lowest bidder, D&K Construction Co., Inc. Demolition and Asbestos Removal/Treatment sub-contractor, All Pro Management, LLC has a SDA Prequalification limit of \$3,000,000. Considering the size of this project and the likelihood that this contractor has other work under contract we ask that you carefully review the NJSDA Total Amount of Uncompleted Contracts form submitted with their bid.

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<sup>1</sup> In making this determination, the NJSDA does not and need not address or verify D&K's assertion that on another job it encountered live lines after disconnection of electrical service by the electric utility. What D&K may have encountered on another project is not germane to NJSDA's analysis. Similarly, the NJSDA discounts as irrelevant D&K's arguments regarding Tricon's listing of a plumbing subcontractor on its Price Proposal and arguments regarding price differentials in the bids of D&K and Tricon. Finally, the NJSDA accepts Tricon's contention that it intends to utilize generators to provide temporary electricity for the Project.

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**Analysis of Neuber Bid Protest as to D&K**

D&K's total bid is \$3,043,185.00. D&K's subcontractor for demolition and asbestos abatement work, All Pro, has a DPMC and NJSDA aggregate limit of \$3,000,000. All Pro submitted an Uncompleted Contracts form certifying "that the amount of uncompleted work on contracts is \$86,000.00" and "that the amount of this bid proposal, including all outstanding incomplete contracts does not exceed my prequalification dollar limit." Thus, All-Pro's subcontract with D&K cannot exceed \$2,914,000.

D&K has provided All Pro's signed bid proposal for the demolition and abatement work, dated January 12, 2016, reflecting a total subcontract sum well below \$2,914,000. This confirms the accuracy of All Pro's certifications in its Uncompleted Contracts form submitted with D&K's Price Proposal.

For the foregoing reasons, Neuber has failed to demonstrate that there is any basis for the rejection of D&K's bid based upon All Pro's alleged exceedance of its aggregate limit.

**Conclusion**

Tricon's failure to name on its Price Proposal form an electrical subcontractor required to perform electrical work set forth in the Contract Specifications constitutes a material and non-waivable bid defect. Accordingly, Tricon's protest concerning the rejection of its bid and seeking the award of the Early Site Package Contract for the Madison Avenue Elementary School project is denied. The protests of D&K and Neuber seeking the rejection of Tricon's bid are sustained. Because Neuber has failed to establish that an award to D&K would result in D&K's asbestos abatement and demolition subcontractor exceeding its aggregate limit, Neuber's protest relating to D&K's bid is rejected.

This is a Final Agency Decision.

Sincerely,



Donald R. Guarriello  
Vice President and Chief Financial Officer

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cc: Charles B. McKenna, NJSDA Chief Executive Officer  
Jason Ballard, NJSDA Chief of Staff  
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 of Procurement  
Albert D. Barnes, NJSDA Chief Counsel  
Cecelia E. Haney, NJSDA Senior Counsel  
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