

**FINAL AGENCY DECISION**

Via Email and Regular First Class Mail

January 22, 2016

Dilip Verghese
D&K Construction Co., Inc.
155 Union Avenue
Middlesex, New Jersey 08846

**Re: Contract No. HU-0027-N01
Harrison-Harrison Elementary School-Early Site Preparation
Bid Protest By D&K Construction Co., Inc.**

Dear Mr. Verghese:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your January 12, 2016 formal bid protest on behalf of D&K Construction Co., Inc. (“D&K”) relating to the above-referenced procurement for Early Site Preparation services for the Harrison Elementary School in Harrison, New Jersey (the “Procurement”). This letter is the NJSDA’s formal response and final agency decision on D&K’s bid protest.

In evaluating D&K’s bid protest, the NJSDA has reviewed and considered the following: your January 12, 2016 correspondence; correspondence from Sean Murphy, NJSDA Director of Procurement to D&K, dated January 11, 2016; the advertisement for bids (hereinafter, the “Advertisement”); Addendum No. 1 to the Procurement process, dated December 23, 2015; the Information Package made available through a controlled-access website by the NJSDA to all bidders, including without limitation the project plans and Specifications, as well as Instructions to Bidders; and Project Rating Proposals and Price Proposals and accompanying documentation submitted by all bidders in connection with the Procurement.

Brief Overview of the Procurement Process

The Procurement was issued on November 10, 2015. 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 November 24, 2015. Furthermore, all interested bidders were required to submit a Project Rating Proposal (“PRP”) form no later than 2:00 p.m. on December 1, 2015. Addendum No. 1 was subsequently issued on December 23, 2015. On or before January 6, 2016, interested bidders submitted sealed Price Proposals and other documentation in accordance with the requirements of the Advertisement, as modified by the Addendum, and the Instructions to Bidders.

A total of four (4) Price Proposals were received, which were publicly opened on January 6, 2016. At that time, D&K was identified as the bidder who had submitted the lowest bid. Following a review of D&K's Price Proposal, the NJSDA found that D&K had identified Aurora Environmental, Inc. ("Aurora") as its proposed Site Remediation and Underground Storage Tank ("UST") Closure and Installation subcontractor. Further review revealed that Aurora's NJSDA Prequalification status had expired on November 24, 2015. By letter dated January 11, 2016, the NJSDA advised D&K that its bid was rejected as Aurora was not prequalified by the NJSDA at the time of D&K's Price Proposal submission.

D&K's Bid Protest

On January 12, 2016, D&K submitted a protest letter in response to its disqualification. In its protest letter, D&K asserts that it should be awarded the project as it had the lowest responsive and responsible bid.

Generally, D&K contends that the bid documents do not require subcontractors classified by the New Jersey Department of Treasury's Division of Property Management and Construction ("DPMC") to also be prequalified by the NJSDA. D&K also appears to contend in the alternative that NJSDA prequalification was not required for the trade classifications identified in the Advertisement for the Procurement. D&K appears to concede, however, that Aurora was not prequalified by the NJSDA at the time D&K submitted its bid.

Analysis of D&K's Bid Protest

D&K Failed to Name a Required Subcontractor that Was Prequalified by the NJSDA, as Required by Regulation and by the Various Bid Documents.

The Advertisement for this Procurement required all bidders to be either a Site Work Contractor with DPMC Classification of C054, a Construction Contractor with a DPMC Classification of C008 or C009, or a Demolition Contractor with a DPMC Classification of C021. In addition, the Advertisement required that the bidder also possess or engage a subcontractor that possesses a DPMC Classification in Site Remediation (DPMC Classification C119) and UST/Closure & Installation (DPMC Classification C113). Addendum No. 1 modified the Advertisement to permit bidders to possess or engage a subcontractor that possesses a UST/Closure DPMC Classification (DPMC Classification C115) in lieu of the C113 DPMC Classification.

With the foregoing in mind, N.J.A.C. 19:38A-2.1(b) provides in relevant part that, "**all subcontractors required to be named in the bid**, whether pursuant to N.J.S.A. 52:18A-243, **the advertisement for the specific contract**, or the contract documents, **are required to be SDA prequalified pursuant to these regulations**, including having complied with N.J.A.C. 19:38A-3.1 regarding obtaining a DPMC classification, **prior to the submission of the Price Proposal.**" (Emphasis added).

D&K is incorrect in contending that, notwithstanding this regulatory requirement, “no where [sic.] in the bid documents do[es the NJSDA] state that the certified approved certified DPMC subcontractors are required to be NJSDA approved.”

First, the Advertisement itself expressly requires that all bidders must be classified in the identified trades by both the DPMC and the NJSDA, as well as satisfy other requirements. It therefore follows that, if the bidder is not so classified for the identified trades, any subcontractors retained to perform work in those trades must be so classified. It is noteworthy that none of the bidders, including D&K, submitted any bidder questions as to the NJSDA pre-qualification requirements for the named subcontractors.

Moreover, section 4.1(C) of the Instructions to Bidders, which were made available to all bidders through a controlled-access website, states, “the Bidder shall include as part of its Price Proposal, all **subcontractors required to be named as per the advertisement.**” (Emphasis added). This Section further requires that, “all subcontractors required to be named under this section **must be NJSDA prequalified by the NJSDA as of the submittal due date for Price Proposals.**” (Emphasis added).

Furthermore, Section C.(1) on page 2 of the PRP submitted by D&K, expressly states that “the Bidder **MUST** name all subcontractors that will be performing work in any of the trades listed in the Bid Advertisement or required by statute.” (Emphasis in original). Section C.(4) further provides that, “all named subcontractors identified in accordance with Sections C.1. and C.2. above must be classified by the Department of the Treasury, Division of Property Management and Construction in all applicable trades; **pre-qualified by the NJSDA** in all applicable trades; registered with the Department of Labor; and registered with the Department of Treasury, Division of Revenue; and provide a valid contractor or trade licenses where applicable at the time of submission of this bid.” (Emphasis added).

Accordingly, the documents provided to all bidders, including the form PRP that was completed and submitted by D&K unmistakably require that any of the subcontractors by the Advertisement must be NJSDA pre-qualified. Again, D&K acknowledges that the subcontractor that it identified (Aurora) was not so pre-qualified.

We also note that D&K’s lengthy discussion regarding N.J.A.C. 19:38A-2.1(c) is misplaced. As the first line of that section plainly states, the requirements set forth therein are “in addition to the requirements of (a) and (b)...” Thus, subsection (c) does not replace or otherwise alter the obligations or requirements of subsection (b). Rather, subsection (c) applies to the situation where a bidder identifies a subcontractor in a trade in its proposal that is not required (either by statute or by the Advertisement), but falls into one of the specified trades listed therein and the value of that subcontract would be valued at \$500,000.00 or more. As discussed in greater detail above, that is not the situation at issue here.

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With the foregoing in mind, the Advertisement for this Procurement required bidders to identify their Site Remediation and UST Closure/UST Closure & Installation subcontractors. As discussed above, all subcontractors required to be named in the bid must be NJSDA pre-qualified pursuant to the NJSDA's regulations. This requirement was also addressed in the Advertisement for the Procurement, the Instructions to Bidders, as well as the instructions contained in the PRP completed and submitted by D&K. As D&K failed to identify an NJSDA pre-qualified subcontractor in the disciplines required by the Advertisement, D&K's bid is materially defective and non-responsive pursuant to N.J.A.C. 19:38A-2.1(b).

Conclusion

For the foregoing reasons, D&K's bid was materially defective. Accordingly, D&K's bid protest is rejected.

This is a Final Agency Decision.

Sincerely,



Donald R. Guarriello
Vice President and Chief Financial Officer

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
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