

**FINAL AGENCY DECISION**

April 10, 2020

Via Email and Regular First Class Mail

Michael Burdalski, CCM, PMP, LEED AP
Senior Vice President
Joseph Jingoli & Son, Inc.
100 Lenox Drive, Suite 100
Lawrenceville, New Jersey 08648

**Re: Perth Amboy High School – Construction Management Services
NJSDA Contract No. ET-0099-M01
Protest By Joseph Jingoli & Son, Inc.**

Dear Mr. Burdalski:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your March 16, 2020 email and protest letter on behalf of Joseph Jingoli & Son, (“Jingoli”) relating to the above-referenced procurement for Construction Management services for the new High School project in Perth Amboy, New Jersey (the “Procurement”). This letter is the NJSDA’s formal response and final agency decision on Jingoli’s bid protest.

In evaluating Jingoli’s bid protest, the NJSDA has reviewed and considered the following: your March 16, 2020 email correspondence and attached bid protest letter; your March 18, 2020 electronic correspondence and attached supporting documentation; the March 25, 2020 letter from Daniel B. Connelly, Managing Director of Cambridge Construction Management (“Cambridge”), with exhibits; the January 10, 2020 advertisement for bids (hereinafter, the “Advertisement”); the Request for Qualifications and Proposals, dated January, 2020 (“RFP”); Addendum No. 1 to the RFP, dated February 3, 2020; the information package made available through a controlled-access website by the NJSDA to all bidders, including without limitation the Design-Build Project Manual and Addenda; Qualifications and Technical Proposals (“Technical Proposals”), Price Proposals and accompanying documentation submitted by all bidders in connection with the Procurement; Technical Proposal and Interview Evaluation Sheets; and the April 1, 2020 Memorandum from Sean Murphy, NJSDA Director of Procurement to the Members of the NJSDA.¹

¹ By way of brief procedural background, upon receipt of Jingoli’s March 16, 2020 submission, the NJSDA advised Jingoli and Cambridge of a schedule for further submissions relating to the protest. Specifically, the NJSDA required Jingoli to submit any further supporting documentation/arguments by March 18, 2020; Cambridge to provide any rebuttal submission and supporting documentation by March 25, 2020; and any final submissions with supporting documentation from either party by March 27, 2020. Jingoli filed a timely supplementation of its initial submission and Cambridge submitted its timely rebuttal. No further submissions were received from either party.

Brief Overview of the Procurement Process

The Procurement was advertised on January 10, 2020. Under the terms of the Advertisement, any firm wishing to submit a proposal was required to send an emailed Notice of Intent to Participate no later than 2:00 p.m. on January 27, 2020. One (1) Addendum was issued thereafter. On or before February 13, 2020, interested bidders submitted Technical Proposals, separately sealed Price Proposals and other documentation in accordance with the requirements of the Advertisement and RFP, as modified by Addendum.

The Procurement was structured such that Technical Proposals were evaluated by a Procurement-specific Selection Committee consisting of five (5) NJSDA staff members. The Selection Committee reviewed and scored the responsive Technical Proposals addressing the evaluative criteria set forth in the RFP. Raw scores of each of the Selection Committee members in each of the evaluative categories were multiplied by an assigned weighting factor, then aggregated and averaged to arrive at a final score for each Technical Proposal.

Pursuant to the terms of the RFP, a shortlist of the six (6) highest ranked firms would be determined based on the final Technical Proposal scores. Thereafter, the shortlisted firms participated in interviews conducted for the purpose of clarifying the information contained in the Technical Proposals, and were evaluated on the same evaluative criteria used in the evaluation of the Technical Proposals. The individual Interview Scores from the Selection Committee members were added together and averaged to arrive at a Final Interview Score. The Final Interview Score and Technical Proposal Score for each shortlisted firm were then added together and averaged to arrive at a final non-price score for each firm.

The Price Proposals of the six (6) short-listed firms were publicly opened on March 10, 2020. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final ranking of the bidders. Under this Procurement, price is assigned a weighting factor of 40% and non-price or “other” factors are assigned a combined weight of 60%. Cambridge received a final rank of 1, while Jingoli received a final rank of 2.

Analysis of Jingoli’s Bid Protest

In reviewing its bid protest, Jingoli raises three (3) primary arguments: 1) Cambridge’s modification of the forms provided by the NJSDA for Responding Firms to submit as part of their Technical Proposals “may have” given Cambridge an unfair advantage; 2) Cambridge submitted a two page Executive Summary with its Technical Proposal, giving Cambridge an unfair advantage; and 3) Cambridge modified “the intent” of the Price Proposal form. While not raised in its bid protest letters, in its March 16, 2020 email transmittal, Jingoli also raises issues with the experience and employment status of the lead Project Manager proposed by Cambridge. Each of these points are addressed below.

A) Modification of Required Forms by Cambridge

In its bid protest, Jingoli contends that the forms required to be submitted by Responding Firms as part of their respective Technical Proposals were modified by Cambridge in its submission. Jingoli argues that the modifications made to the required forms by Cambridge “could be” material in the evaluation process and “may have” given Cambridge an unfair advantage “in adding more appeal” to its bid submission.

Jingoli contends as follows:

It is obvious that Cambridge recreated ALL the required forms. In doing so, Cambridge added headers, eliminated shading, and enhanced the documents. On the resume documents, they eliminated key language at the footer of the required NJSDA Forms. These differences could be material in the evaluation process.

Jingoli is correct that Cambridge slightly modified the NJSDA’s forms in such non-substantive and immaterial ways as eliminating shading.

It is also true that the resume forms submitted by Cambridge included a header that does not appear on the form provided by the NJSDA. The added header reads “Key Team Members’ Experience on Similarly Sophisticated Projects”. The inclusion of this header, which simply restates the reason why the document is being provided, does not constitute a material defect and in no way can be viewed as affording Cambridge a competitive advantage over other bidders.

Finally, Jingoli is correct that the resume forms utilized by Cambridge eliminated the following footer from the resume form provided by the NJSDA:

*Must provide additional details on current and future assignments per RFP Section 2.2.C. where requested on resume form.

While this footer reminding bidders to include information required in the cited section of the RFP is omitted on the Cambridge resume forms, Jingoli does not contend, nor is there any evidence suggesting, that the forms submitted by Cambridge failed to include the information required to be submitted for evaluation by the Selection Committee. Thus, the omission of the footer from the resume forms submitted, even if viewed as a bid defect, is neither material nor capable of providing Cambridge with a competitive advantage over other bidders. Moreover, even if the content of the forms submitted by Cambridge in some way required clarification, the Selection Committee had ample opportunity to receive such clarification through the interview process.

For these reasons, although Cambridge’s non-substantive modifications of the required forms might be construed to constitute technical defects in Cambridge’s bid, none are material. The NJSDA is within its discretion to waive non-material defects in bid submissions. See Terminal Construction Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 412 (1975); Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 313 (1994).

As part of its bid protest, Jingoli submitted an April 22, 2016 letter from the NJSDA to Jingoli regarding the Technical Proposal it submitted in connection with a prior NJSDA procurement for construction management services. Jingoli appears to rely on this letter as a basis for supporting its position that Cambridge's bid submission should be rejected. However, in reviewing the text of that letter, we note that it states in pertinent part, "at this time, the NJSDA has not yet made any determination as to whether these technical deficiencies render your submission non-responsive. Failure to follow the instructions contained within the RFP may result in your firm's submission being deemed non-responsive."

Accordingly, the NJSDA's April 22, 2016 correspondence noted technical deficiencies in Jingoli's bid submission for that procurement, including Jingoli's modification of required forms. However, while noting the technical deficiencies in Jingoli's submission, the NJSDA expressly stated that there was no decision made to reject Jingoli's bid submission for that reason. Indeed, Jingoli continued to participate through the bid process for that project until completion, including the bid opening. For purposes of the instant protest, we simply note that Jingoli's bid for that prior procurement was not rejected for its use of modified forms. As such, the NJSDA's April 22, 2016 correspondence actually serves to refute Jingoli's arguments in this regard.

Finally, as to Jingoli's contention that Cambridge "may have" obtained an unfair advantage, we note that Jingoli actually finished in first place on nonprice scoring.

For the reasons set forth above, the NJSDA rejects Jingoli's arguments with respect to Cambridge's use of modified forms.

B) Cambridge's Provision of an Executive Summary Afforded an Unfair Advantage

Jingoli further argues that, on previous RFP requests, proposers were told to "only" provide what was requested by the NJSDA "and nothing more." In connection with the instant Procurement, Cambridge submitted a two page Executive Summary, which Jingoli contends violated the NJSDA's "directive" and gave Cambridge an unfair advantage by allowing them to "further enhance their experience for the RFP."

As a preliminary matter, Jingoli does not provide any factual basis or support for its contention of what the NJSDA purportedly told proposers on other projects. Absent such any such attribution, the NJSDA cannot accept the accuracy of such a "directive" being provided with respect to other projects.

Assuming *arguendo* that such a statement was made to Jingoli in connection with past procurements, there is no suggestion by Jingoli whatsoever that a similar statement was made in connection with the instant Procurement. Moreover, as noted by Cambridge in its response to the bid protest, there is no language in the RFP or Addendum that prohibits a proposing firm from submitting an executive summary.

There are specific instances expressly highlighted in the RFP in which a bidder's failure to provide certain information or documentation or failure to observe certain prohibitions will result in the rejection of its Technical Proposal or Price Proposal. By way of example:

- Section 2.2(C) of the RFP provides that, “[n]o firm may propose as a Key Team Member any person who has assisted the Authority by materially participating in the preparation of an RFQ/RFP for this Construction Management Services procurement or for the Design-Build Services procurement for the Project. “Materially participating in the preparation of an RFQ/RFP” shall mean the preparation of the RFP or RFQ/RFP themselves, as well as the preparation of plans, specifications, reports or other documents that are produced with the intent to be incorporated into a Project Manual or Design-Build Information Package that is part of that RFP or RFQ/RFP. **Failure to observe this prohibition shall result in disqualification of the conflicted person from the Proposed Team, and rejection of the entire proposal that includes the ineligible person.**” (Emphasis provided).
- Section 2.4 of the RFP provides, “[f]ailure to submit such Certification [in connection with the required provision of a completed Disclosure of Investment of Activities in Iran form] **will result in the disqualification of the bid and rejection of the Responding Firm’s Qualifications and Technical Proposal and Price Proposal.**” (Emphasis in original).
- Section 2.5 of the RFP provides that “Failure to submit [an] Ownership Disclosure Form will result in the disqualification of the bid and rejection of the Design-Builder’s Technical and Price Proposals.”
- Section 2.7(A) of the RFP and the required Price Proposal form itself provide that “[a]ny alteration, modification or exception to the wording or the calculation formula of the Price Proposal Form shall cause the Price Proposal to be rejected as non-responsive.

As such, there are numerous instances in the RFP that call for the rejection of a bid for a bidder’s failure to provide certain information or documentation or failure to observe certain prohibitions. However, there is no such mandatory language relating to the provision of any additional information not otherwise required by the RFP. Even if such a prohibition existed, here, Cambridge’s executive summary appears to merely summarize the contents of the proposal, including information that was required to be submitted as part of the bid. In other words, the executive summary is only a distillation of the information that is included elsewhere in its Technical Proposal.

Although Jingoli contends that Cambridge obtained an unfair competitive advantage through its inclusion of an executive summary in its Technical Proposal, we again note that Jingoli received the highest technical/non-price score with respect to its Technical Proposal and interview performance.

For the foregoing reasons, the NJSDA is not persuaded to reject Cambridge’s bid based on its provision of additional information/documentation. As such, Jingoli’s bid protest on this point is rejected.

C) Cambridge Modified the Price Proposal Form

Jingoli also contends that Cambridge violated the requirements of the Price Proposal form by charging a different rate for certain Key Team Members during different portions of the project (i.e. during the construction phase versus during the close-out process). Jingoli argues that by providing different rates, Cambridge modified the NJSDA's "intent" that bidders should provide the same rates for Key Team Members during the construction phase versus the closeout phase. By doing so, Jingoli contends that Cambridge modified the Price Proposal form, thereby requiring rejection of Cambridge's bid.

By way of background, the Price Proposal form requires bidders to provide monthly rates for specific Key Team Members for the anticipated construction phase (in this case, 52 months). The Price Proposal form also requires that the bidders provide monthly staffing costs for only three of these Key Team Members (specifically, the Project Manager, Office Engineer, and MEP Manager) for the estimated six month duration of the closeout phase. Jingoli correctly notes that, with respect to the Project Manager, Office Engineer and MEP Manager, Cambridge provided different monthly rates for those roles in the closeout phase than it did for those positions during the construction phase.

In its protest letter, Jingoli contends that "the standard for the NJSDA Price Proposal form has always been for the monthly fees for closeout to be equal to or greater than the monthly fees for the construction."² Jingoli provides no factual basis for its supposed understanding of the NJSDA's intent in this regard. Quite simply, there is nothing in the RFP, Addendum, or Price Proposal form itself that dictates or otherwise requires a bidder to provide the same monthly rates for the two project phases.

We also note that Cambridge utilized the required Price Proposal form, without modification, and that Jingoli does not contend otherwise. Rather, it is Jingoli's position that, by providing two different monthly rates, Cambridge in essence modified the Price Proposal form. The NJSDA rejects that contention.

The language that requires rejection of the bid relates to a prohibition of a bidder potentially removing required items/roles that are required to be identified and priced by the prospective bidders. In this case, Cambridge did not modify the content of the form in any way. Moreover, Cambridge did not modify any "intent" with respect to form.

In its response, Cambridge points to the requirements of an RFP for another NJSDA construction management procurement, which specified: "SDA requires that the Close-Out Services Amount

² We take this opportunity to address what appears to be a common theme in each of Jingoli's arguments. Specifically, Jingoli relies on its experience with respect to prior NJSDA procurements as a basis for attempting to have Cambridge's bid rejected. To the extent that Jingoli's arguments suggest that the NJSDA's procurements are static and not subject to change or alteration, the NJSDA rejects any such suggestion. The NJSDA is entitled to change its processes for each procurement, consistent with other legal requirements, to address efficiencies or project-specific requirements. In other words, each NJSDA procurement should be viewed separately and distinctly from previous procurements, as the NJSDA may make alterations to the requirements for a specific procurement if it deems necessary.

must be GREATER THAN or EQUAL TO three times the Monthly Fee.” Cambridge correctly notes that such language was not contained in the RFP for the instant Procurement. In the absence of any language to the contrary, there is no requirement that the monthly rates for the specified Key Team Members be the same during the construction phase and the closeout phase.

The NJSDA also notes that, if Cambridge had charged the same monthly rates for the three Key Team Members in both the construction and closeout phases (as Jingoli contends that Cambridge was required to do), its bid price would have increased from \$4,180,922 to \$4,338,234. However, even if Cambridge had submitted the higher bid price, that price remains lower than all of the prices quoted by the other bidders. As such, Cambridge would still have finished first in its price rating. Accordingly, even if the higher price was used, the final rankings would not have changed. In other words, even if Cambridge had utilized the same monthly rates for the three Key Team Members during the closeout phase, they would remain the presumptive winning bidder.

The NJSDA is entitled to rely upon the information provided by prospective bidders in their bid submissions, and the bidders are bound by the prices that they have quoted therein. Of course, this does not mean that the NJSDA is obligated to accept a quoted price if it is not practically or technically feasible. To verify the completeness of Cambridge’s bid proposal, the NJSDA held a bid reconciliation conference with Cambridge on March 13, 2020 prior to the receipt of Jingoli’s bid protest. In his April 1, 2020 Memorandum to the NJSDA Board of Directors, NJSDA Director of Procurement Sean Murphy summarized the results of the bid reconciliation conference as follows:

In order to ensure the firm’s Price Proposal was inclusive of all scope elements, a conference was conducted on March 13, 2020 with Cambridge and staff from Procurement, Construction Operations, Program Operations and Financial Operations to review the bid. The NJSDA staff reviewed with Cambridge the assignment of staff during the construction and closeout phases of the contract as well as all other cost proposal items. Cambridge confirmed that required staff will satisfy the full time nature and responsibilities of the assignment and for the required durations during both phases as per requirements of the contract. Cambridge recognized that it intentionally submitted a very competitive proposal, reinforcing that the proposal included all costs. In summary, Cambridge assured the NJSDA to the satisfaction of staff that its proposal was complete.

For the foregoing reasons, the NJSDA does not accept Jingoli’s contention that Cambridge improperly modified the Price Proposal form. Accordingly, Jingoli’s bid protest is denied as to this point.

D) Experience/Employment Status of Cambridge’s Proposed Project Manager

While not included in its bid protest letter, in its email transmittal, Jingoli notes that Cambridge’s lead Project Manager’s largest project was \$60,000,000. Jingoli also observes that the proposed Project Manager was not even an employee of Cambridge. Jingoli opines that, with most

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government agencies, this is not allowed and the lead project manager “must be an employee of the Prime Consultant.”

Suffice it to say, there is no requirement in the RFP for this Procurement that requires the lead Project Manager proposed by a bidder to be an employee of the bidder. To the extent that these facts are relevant to the instant Procurement, the proposed Project Manager’s employment status and prior work experience were identified in the bid documents, and the Selection Committee had the opportunity to consider those factors in evaluating Cambridge’s Technical Proposal and to address any clarifications with respect to his experience during the interview process (particularly since the proposed Project Manager attended the interview), and to thereafter score accordingly. As such, this does not present a basis warranting the rejection of Cambridge’s bid.

Conclusion

Accordingly, Jingoli’s bid protest is denied.

This is a Final Agency Decision.

Sincerely,



Donald R. Guarriello
Vice President and Chief Financial Officer

cc: Manuel DaSilva, NJSDA Chief Executive Officer
Andrew Yosha, NJSDA Vice President – Program Operations and Strategic Planning
Jane F. Kelly, NJSDA Vice President, Corporate Governance and Legal Affairs
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