



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY

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July 22, 2016

Via Electronic Mail [allenm@ajconstruct.com] and USPS Regular Mail

Allen Montefusco, President
A&J Construction Co.
5026 Industrial Road
Farmingdale, NJ 07727

RE: Protest of Notice of Award
RFP #15-X-22978 Aboveground Storage Tanks: Installation, Removal, Repair and Related Equipment

Dear Mr. Montefusco:

This correspondence is in response to your letter of protest on behalf of A&J Construction Co. (A&J), received April 23, 2015, referencing the subject Request for Proposal (RFP) and regarding the Notice of Intent to Award issued by the Procurement Bureau (Bureau) of the Division of Purchase and Property (Division). In your letter, you protest the slated award to R.J. Walsh and Independence Constructors, contending the proposals submitted by these bidders did not conform to the labor wage specifications mandated by the New Jersey Prevailing Wage Act. As such, A&J requests the intended award to these bidders be rescinded.

I have reviewed the record of this procurement, including the RFP, the proposals in question, and relevant statutes, regulations, and case law. This review has provided me with the information necessary to determine the facts of this matter and to render an informed determination on the merits of A&J's protest.

On December 2, 2014, the Bureau publicly released and advertised the subject RFP to solicit proposals for Aboveground Storage Tanks: Installation, Repair, Removal, and Accessory Equipment on behalf of the New Jersey Department of Transportation (DOT) and Statewide Using Agencies. The RFP included three categories of work, as set forth in RFP Section 3.0 *Commodity Description/Scope of Work*; bidders were not required to bid on all three categories.¹ Category III, which forms the basis of A&J's protest, is "for the installation, removal and repairs of aboveground storage tanks described in this RFP." Concerning Category III, the RFP specified an award would be made to all responsible, responsive bidders conforming to the RFP, price and other factors considered. (See RFP Section 7.2 *Final Contract Award*.)

The Bureau received 18 proposals by the deadline of February 10, 2015. A number of proposals were rejected for failure to provide mandatory documents, signatures, or pricing information. Upon completing a review of the remaining proposals, the Bureau made the following award recommendation, in pertinent part, for category III:

¹ Category I is "for the supply of various brands and sizes of aboveground diesel and gasoline storage tanks complete with outer shell tanks and all inclusive related accessories[;]" Category II is "for Fuel Storage Tank related equipment (i.e. fuel dispensers, pumps, filtration and monitoring systems, etc.)." The RFP intended an award be made to one responsible, responsive bidder for each approved brand or equal in Category I and II.

Category III – Lines 00015 – 00032 *South Region Only

R.J. Walsh
A & J Construction
Whitemarsh Corporation
Independence Constructors
E.O. Habegger
Fairfield Maintenance
TTI Environmental
Petro Mechanics
Aurora Environmental
C3 Technologies
John W. Kennedy Company
Spark Electric*

The Bureau issued a formal Notice of Intent to Award Letter on April 10, 2015, to all bidders. This protest followed.

In A&J's letter of protest, it contends that both RJ Walsh and Independence Constructors submitted pricing for specific labor rates covered by the Prevailing Wage Act that are "significantly below applicable prevailing wage rate determinations as published by the State of New Jersey Department of Labor Division of Wage and Hour Compliance effective 2/05/15 through 6/30/15." A&J provides various examples pertaining to both bidders and lists the Department of Labor's scheduled pay rate.

The RFP required all bidders for Category III to be Public Works registered and to submit all-inclusive hourly labor rates on the provided *Price Sheet*. The RFP provided the following guidance:

3.3.3.2 Prevailing Wage shall be all-inclusive, and be comprised of all direct and indirect costs including but not limited to: overhead, fee or profit, travel expenses, per diem, managerial/administrative/clerical support, safety equipment, supplies, tools, employee benefits, etc. This rate includes portal-to-portal expenses as well as per diem expense such as food.

3.3.3.3 It shall be the responsibility of the contractor to make payments to their employee in accordance with the Department of Labor and Workforce Development (DLWD) prevailing wage determination rate for the specific trade and county.

Furthermore, the New Jersey Standard Terms and Conditions² set forth in Section 2.3:

PREVAILING WAGE ACT - The New Jersey Prevailing Wage Act, N.J.S.A. 34: 11-56.26 et seq. is hereby made part of every contract entered into on behalf of the State of New Jersey through the Division of Purchase and Property, except those contracts which are not within the contemplation of the Act. The bidder's signature on [this proposal] is his guarantee that neither he nor any subcontractors he might employ to perform the work covered by [this proposal] has been suspended or debarred by the Commissioner, Department of Labor for violation of the provisions of the Prevailing Wage Act and/or the Public Works Contractor Registration Acts; *the bidder's signature on the proposal is also his guarantee that he and any subcontractors he might employ to perform the work covered by [this proposal] shall comply with the provisions of the Prevailing Wage and Public Works Contractor Registration Acts, where required.*

[(Emphasis added.)]

By signing and including the Signatory Page with a proposal, a bidder attests to reading, understanding, and agreeing to all conditions, specifications, and addenda of the RFP.

A review of the record reveals that neither of the intended awardees in question took exception to any terms contained in the RFP and included a properly executed *Signatory Page* with their proposals. Because a

² The Standard Terms and Conditions govern the subject RFP and are incorporated into all contracts made with the State.

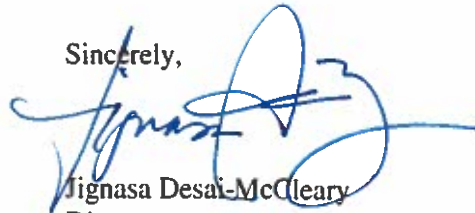
properly executed Signatory Page certifies compliance with the Standard Terms and Conditions, the State was also assured compliance with the Prevailing Wage Act. Furthermore, in a letter dated April 23, 2015, R.J. Walsh confirmed its intent to comply with the Prevailing Wage Act. Similarly, in an email dated April 27, 2015, Independence Constructors confirmed its intent to comply with the Prevailing Wage Act. (Both correspondences are included as attachments to this decision.)

Therefore the Bureau did not err in accepting the proffered pricing, allowing that a company may opt to operate at a loss in certain categories. Such a business decision is the prerogative of the bidding entity. There exist enforcement provisions and remedies in place to monitor compliance.

Based on the foregoing, I must deny A&J's protest. The Bureau is instructed to continue with award of contract as applicable. This is my final agency decision.

Thank you for your continued interest in doing business with the State of New Jersey and for registering your business with NJSTART at www.njstart.gov, the State of New Jersey's new eProcurement system.

Sincerely,



Jignasa Desai-McCleary
Director

JD-M:DF
Enclosures

c: G. Olivera
K. Woolford
R. Regan

A&J Construction Co.

RE: Protest of Notice of Award

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Additionally c:

Robert Walsh, RJ Walsh Associates, Inc.

Chris Trebus, Independence Constructors