

Kenai Peninsula Borough

Office of the Borough Mayor

ADMINISTRATION PRESENTATION

TO: Brent Johnson, Assembly President
Members, Kenai Peninsula Borough Assembly

FROM: John Hedges, Purchasing & Contracting Director *JH*
Todd Sherwood, Deputy Borough Attorney *TS*

DATE: June 14, 2022

RE: *Larry Smith dba D & L Construction* - Case No. 2022-01- BAA
Appeal of the Mayor's Decision Regarding RFP 22-044, Summer & Winter
Road Maintenance - West Region Unit 6

Administration Written Argument and Presentation

The appellant, D&L Construction, raised six points in its appeal to the mayor. The appeal points are in the materials, but can be summarized as follows:

Point 1: That the Bidder committed a bid error by submitting their bid on page 2 of 2 of the bid form for Unit 5, instead of Unit 6, and as such was non-responsive.

Point 2: The instructions to bidders for Item 10 states, in part, "only the amounts and information asked for on the Bid Schedule will be considered as the bid. Each bidder shall bid upon the work exactly as specified and as requested on the Bid Schedule" and because of this the Bidder did not bid the work exactly as specified and the bid should be considered non-responsive.

Point 3: The Bidder did not properly acknowledge the Addendums issued for this project.

Point 4: Incorporation of Bid documents into the contract created a problem for KPB as follows: 1) KPB drafted a contract for West Region, Unit 6 using the Bidder's bid using a West Region, Unit 5 Bid form; or 2) KPB asks the Bidder to submit a revised bid using the West Region, Unit 6 Bid Form; or 3) KPB creates its own copy of West Region, Unit 6 Bid Form using the Bidder's numbers. Any of

those choices would constitute falsification of documents and a fraudulent contract.

Point 5: KPB failed to notify D&L Construction or any other contractors of the bid error.

Point 6. There was confusion regarding the Bidder's business license.

The Administration responds as follows:

Point 1: References to Section 10 are noted and bidders should be aware of complications that may lead to a rejection of their bid. However, Section 10 states that bids "may" be rejected, not that it is *required* in every instance of an irregularity. Section 13 Acceptance – Rejection of Bids, specifically states that, "The Borough reserves the right to reject any or all bids, **to waive minor irregularities in any bids or in the bidding procedure, and to accept any bid presented which meets or exceeds said specifications and which is deemed to be in the best interest of the Borough.** See KPB Code of Ordinances, section 5.28.240 – Waiver of irregularities, (emphasis added).

In this instance, the Bidder mistakenly submitted sheet two of the bid form on the Unit 5 page 2 of 2. The signature page of this bid was appropriately submitted on sheet 1 of 2 for Unit 6. The Bidder's intention was clearly indicated by their submission and signature on the bid form for Unit 6, page 1 of 2. It is also important to note that the Bidder stated their intention to submit a bid for Unit 6 at the bid opening, immediately upon the reading of their bid. The bidder's use of the incorrect sheet was an irregularity and accordingly, was appropriately waived by the Purchasing Officer.

Point 2: The pages 2 of 2 in the ITB for all three Units' bid forms are identical with the exception of the noted Unit in the title block on each sheet. The Bid Schedule on the Unit 5 bid form page 2 of 2 is exactly the same as the bid schedule on the Unit 6 bid form page 2 of 2 and would not alter the values in any way. This issue is part of the same fact pattern as raised in Issue 1, was a minor irregularity, and accordingly, was appropriately waived by the Purchasing Officer.

Point 3: Under the facts of this matter, it is reasonable to assume that the three check boxes on the Bid Form for Unit 6 serve to acknowledge the Bidder's acceptance of the three addendums issued for this ITB. In any event, all addenda will be included in the contract documents upon award. Not only does this not constitute a "fraudulent contract" it is not even clear that it is an irregularity in need of a waiver. Nonetheless, to the degree it is an irregularity, it also was appropriately waived by the action of the Purchasing Officer.

Point 4: This is acknowledged as a minor irregularity and was also appropriately waived by the Purchasing Officer. Clarification of the intent will be addressed through the contract award process.

Point 5: Although there is no requirement that the Purchasing Officer inform other bidders of a "bid error" (in this case, an irregularity), nonetheless, on May 6, 2022, at 2:44 pm, and prior to the intent to award, the Purchasing and Contracting Director responded to a request from D&L Construction about the ITB22-044 bid opening (attached). The body of the email stated the following:

"Upon further review of the bid documents the signature page of the bid was in fact for Unit 6. The error was in the use of the bid sheet for Unit 5. That bid sheet is identical to the Unit 6 sheet in format and does not alter the value provided. It was apparent through the signature page and the response from the contractor at the bid opening that the intent was to submit a bid for Unit 6. This is a minor irregularity and is not cause for finding Alaska Scrap and Recycling's bid nonresponsive."

This email also included a copy of the Bid Form pages 1 of 2 and 2 of 2, for reference.

As such, the Borough did respond to D&L regarding the minor irregularity in the bid process. All other claims under this Section are addressed in the explanations above.

Point 6: The Bidder currently operates three other Roads Service Area Winter and Summer Maintenance contracts under the licensing provided in the bid tab. No discrepancies with that existing licensing status are known to exist at this time. As such, Alaska Scrap and Recycling has the necessary business license. Again, this is not an irregularity, or other error, but to the degree it is, it was appropriately waived by the Purchasing Officer based on the KPB already having a proper business license from Alaska Scrap and Recycling.

As noted, to the degree any of these are actual problems or irregularities, KPB 5.28. 240 specifically allows the purchasing officer to waive irregularities. There are no particular areas that cannot be waived except the two noted in the ordinance, as long as the purposes of the purchasing code are met. This code provision states:

5.28.240. - Waiver of irregularities.

The purchasing officer shall have the authority to waive irregularities on any and all bids, except that timeliness and signature requirements shall not be waived.

As long as the process – including any waiver of irregularities - used in ultimately awarding the bid fulfills the purpose of the purchasing code, then the award of the bid is legal and should be upheld.

The purpose of the purchasing code is set forth as follows:

5.28.010. - Purpose.

The purpose of this chapter is to:

- A. Establish consistent procurement principles for all agencies of the borough;**
- B. Ensure the fair and equitable treatment of all persons who deal with the procurement system of the borough;**
- C. Maximize fair and open competition and to discourage collusive bidding for borough contracts;**
- D. Maximize to the fullest extent practicable, the purchasing value of borough funds; and to**
- E. Clearly define authority for the purchasing function within the borough organization.**

The entire bidding process, including the waiver of irregularities, fulfilled these purposes. It was, and remains, a fair and open competition that ensured the fair and equitable treatment of all persons involved. It also ensured the maximization of the purchasing value of borough funds, which, ultimately is in the best interest of the borough.

Finally, based on an Alaska Supreme Court case with similar facts (Chris Berg, Inc. v. State, Dep't of Transp. & Pub. Facilities, 680 P.2d 93, 94 (Alaska 1984)) KPB was, under the factual circumstances, not only permitted, but *legally required* to award the bid to Alaska Scrap and Recycling as the lowest responsive and responsible bidder. To do otherwise, as the Court in the Berg case stated, would have been an abuse of discretion on the part of the Purchasing Officer.

In the Berg case, Chris Berg's corporation bid on a State DOT project, but in bid documents he mistakenly wrote price information for a line item, that was meant to be on one line lower than where it was written (similar to Alaska Scrap and Recycling using one incorrect sheet of the two, for the unit it bid on). In the Berg case, a state contract official, by examining the bid, determined that the price information for that line item had mistakenly

been written one line below. Using the total bid price, which was not mistaken, as well as some elementary mathematics, the official was able to discern the nature of the mistake and the intended price for the line item.

The state official then contacted Chris Berg's corporation and asked a representative to read him the intended bid for the mistaken portion. The intended bid corresponded to official's interpretation. Accordingly, the official stated to the corporate representative that no further documents were necessary and that the bid would be accepted.

However, higher State DOT officials later reversed that determination stating the bid was "non-responsive" and "beyond the flexibility" of DOT. Chris Berg filed an administrative appeal which was denied and then appealed to Superior Court which also denied his request.

However, upon appealing to the Alaska Supreme Court it reversed the lower court and ruled in Mr. Berg's favor stating:

***"A minor technical defect or irregularity which does not and could not affect the substance of a low bid in any way does not justify the rejection of that bid on the ground that it is not responsive, when the agency is required by law to award the contract to the "lowest responsible bidder." We believe that the bid error in the present case falls within this category, since the mistake and the bid actually intended are reasonably ascertainable from the invitation to bid and the bid itself, and the mistake was discovered immediately by the agency. Thus, any rejection of Chris Berg's bid on the basis of the bid error would constitute an abuse of discretion as a matter of law."* (Emphasis added).**

Chris Berg, Inc. v. State, Dep't of Transp. & Pub. Facilities, 680 P.2d 93, 94-95 (Alaska 1984)

The current administrative appeal before the Assembly parallels in Supreme Court's Berg decision in the same way.

In the borough matter the Purchasing Officer did not even need to expend as much effort as in the Berg case, to ascertain the intent of the bid by Alaska Scrap and Recycling. It was apparent both from the bid sheets used and from the comment of the bidder at bid opening that he had used the wrong sheet from what he intended.

The Purchasing Officer immediately learned of a minor irregularity which could not affect the substance of the low bid as being the responsive bid. Further, for the Purchasing Officer to have rejected Alaska Scrap and Recycling's Bid as non-responsive would have

been an abuse of discretion by the Purchasing Officer and exposed KPB to a lawsuit by Alaska Scrap and Recycling.

Accordingly, the Administration asks the Assembly to follow the example of the Alaska Supreme Court and uphold the waiver of irregularities and the Mayor's decision on appeal.