



State of New Jersey

DEPARTMENT OF THE TREASURY
DIVISION OF PURCHASE AND PROPERTY
OFFICE OF THE DIRECTOR
33 WEST STATE STREET
P. O. BOX 039
TRENTON, NEW JERSEY 08625-0039

FORD M. SCUDDER
State Treasurer

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

JIGNASA DESAI-MCCLEARY
Director

Telephone (609) 292-4886 / Facsimile (609) 984-2575

October 20, 2016

Via Email (mmasala@ptd.net) and USPS Regular Mail

Michele Masala, Vice President
Melick Aquafeeds, Inc.
139 South First Street
Catawissa, PA 17820

Re: Protest of Notice of Intent to Award
Solicitation #16-X-24039 Feed: Fish Food, Trout Grower Pequest State Fish Hatchery

Dear Ms. Masala:

This correspondence is in response to your letter dated December 29, 2015, to the Hearing Unit of the Division of Purchase and Property (Division) on behalf of Melick Aquafeeds, Inc. (Melick). In that letter, Melick protests the Notice of Intent to Award (NOI) a contract for Solicitation #16-X-24039 Feed: Fish Food, Trout Grower Pequest State Fish Hatchery issued by the Division's Procurement Bureau (Bureau) which states that a contract will be awarded to Zeigler Brothers Inc. (Zeigler) for the subject solicitation. Melick requests that the Division review the proposals submitted and reconsider the intended contract award.

By way of background, this Request for Proposal (RFP) was issued on September 30, 2015 by the Bureau on behalf of the Department of Environmental Protection, Division of Fish, Game, and Wildlife to solicit proposals for Fish Food and Trout Grower for Pequest State Fish Hatchery (Pequest). (RFP § 1.1 *Purpose and Intent*.) In accordance with the RFP, a contract is to be awarded to the responsible bidder whose proposal, conforming to this RFP, is most advantageous to the State, price and other factors considered. *Ibid*; RFP § 4.4.7 *Method of Bidding*; RFP § 7.2 *Final Contract Award*.

On November 10, 2015, three proposals received by the submission deadline were opened by the Proposal Review Unit. On December 22, 2015, the Bureau issued the NOI which indicated that a contract would be awarded to Zeigler. On December 29, 2015, Melick submitted a letter of protest to the Division stating:

Melick Aquafeeds, Inc. would like to file a formal inquiry/protest in regards to Solicitation #: 16-X-24039. We believe that the award recipient, Zeigler Bros., did not quote the correct feed to be supplied on Line Item#: 001. Line Item#: 001 feed is to contain a color additive, unlike the feed to be supplied on Line Item #: 007, but they submitted the quote at the same price. With the exception of this one Line Item, Melick Aquafeeds, Inc. was the low bidder and we feel that had they bid the correct feed, Melick Aquafeeds, Inc. would have been awarded the bid.

I have reviewed the record of this procurement, including the RFP, the proposals submitted, the relevant statutes, regulations, and case law. This review of the record has provided me with the information necessary to determine the facts of this matter and to render an informed final agency decision on the merits of the protest submitted by Melick. I set forth herein the Division's final agency decision.

Melick protests the fact that Zeigler proposed the same unit price for line item 1 (5.0mm (3/16) or 6.0mm (1/4) extruded slow sinking pellets which requires a color additive)¹ and line item 7 (3.0mm (1/8) extruded slow sinking pellets, without a color additive); and then appears to conclude that Zeigler's proposal for line item 1 does not contain the color additive as required by the specifications. Melick offers no other arguments that relate to the award to Zeigler.

In connection with the Hearing Unit's review of this protest, Zeigler was provided the opportunity to respond to Melick's protest. Zeigler confirms that Astaxanthin is included in line item 1 - at the price listed. Given that the addition of the Astaxanthin is a mandatory, non-waivable requirement of the RFP, and that Zeigler confirms that the additive is included in the product offered on line 1, Zeigler's proposal is responsive.

Whether Zeigler chooses to offer the same unit price for the products offered on line items 1 and 7 is at Zeigler's discretion. Nothing in the governing statutes, regulations or case law precludes a vendor from submitting the same price in its proposal for distinct products.

The general purpose of the public bidding laws is "to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition." Barrick v. State, 218 N.J. 247, 258 (2014). The New Jersey Appellate Division has held on this pricing issue that:

Every contractor may apply his own business judgment in the preparation of a public bid, and his willingness to perform one of the items for a nominal amount is but his judgmental decision in an effort to underbid his competitors.

As [previously held], in the absence of a factual showing that such a decision subverts the principles of fair and competitive bidding there is no reason to invalidate the resulting bid.

[Turner Const. Co. v. New Jersey Transit Corp., 296 N.J. Super. 530, 537-538 (App. Div. 1997) (internal citations omitted).]

Indeed, it is common practice for bidders to offer selected products at less than standard prices to gain a pricing advantage in an effort to secure a contract award.² The Division does not interfere with a bidder's business decision with respect to proposal pricing. Additionally, as is the case here, where there is no evidence of fraud, collusion or any substantial irregularity affecting fair and competitive bidding, the objection to a vendor submitting the same price for distinct products is without merit. Ibid. Therefore, it was within Zeigler's discretion to submit the same price for line items 1 and 7, and it is within the Division's purview to accept the pricing as submitted.

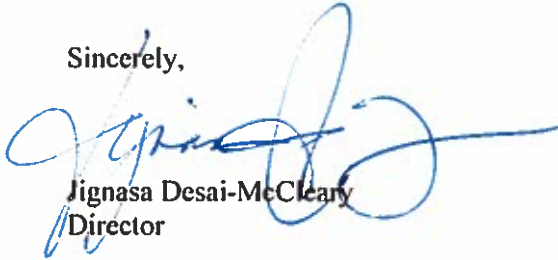
¹ RFP § 3.5 *Appendixes: Appendix A – Formulation Specification for Grower Diets* requires use of a color additive for certain pellets stating "Astaxanthin will be added to the 5.0mm or 6.0mm pellets to enhance natural color."

² In fact, in response to Solicitation #15-X-23961, which resulted in the current contract for Feed: Fish Food, Trout Grower Pequest State Fish Hatchery, Melick - the current vendor and protestor - also proposed the same price for distinct products on price lines 1 and 7, which are identical to the products sought in the new solicitation.

In light of the findings set forth above, I sustain the Bureau's NOI. This is my final agency decision with respect to the protest submitted by Melick.

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

Sincerely,



Jignasa Desai-McCleary
Director

JD-M: RUD

c: J. Kerchner
K. Thomas
V. Klawitter
S. Thompson