

Memo

To: Millbury Jr./Sr. High School Fitness Room Renovation, Bid no. 0186-2301

All Prospective Bid Plan Holders and Interested Parties

From: Richard G. Bedard, Jr., Assistant Superintendent for Finance/Operations



cc: Jesse Hilgenberg, Dixon and Salo Architects

Date: August 15, 2022

Re: **Addendum #1**

Please accept this addendum to the Millbury Jr./Sr. High School Fitness Room Renovation Project, Bid no. 0186-2301.

The awarding authority, Millbury Public Schools, has hereby waived the requirement to attend the pre-bid conference or conduct a site visit before bid submittal. Therefore subcontractor bids that may not have not complied with that requirement or have "see bid note" on the "Invitation for Bids Results and Minutes" are accepted.

Please see the enclosed September 1, 2015 Massachusetts' Office of the Attorney General previous determination on this subject matter.

All Prospective Bidders shall acknowledge this "Addendum #1" in their General Bid submittal.



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL

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September 1, 2015

In Re:)	
)	
Town of Dartmouth:)	
Infrastructure Improvement)	ATTORNEY GENERAL
)	
)	BID UNIT, FAIR LABOR DIVISION
)	
Protestor:)	BID PROTEST DECISION
)	
I.W. Harding Construction Co., Inc.)	
)	

INVESTIGATION SUMMARY

Pursuant to M.G.L. c. 149, § 44H, the undersigned conducted an investigation of the captioned matter to determine whether a violation of the public bidding laws had occurred. The Protestor, I.W. Harding Construction Co., Inc. (“Harding”) argues that the Town of Dartmouth (the “Town”) should enforce its mandatory pre-bid meeting requirement and reject the bid of P.A. Landers (“Landers”) for not attending it. The Town waived the pre-bid meeting requirement after the bids were opened and Landers emerged as the lowest bidder. Harding argues this disrupts equal footing; the Town argues that it has the power to waive local requirements, and equal footing should not be considered.

No hearing was held in this case since the facts were undisputed, and only a question of law is presented. Memoranda were received up to August 14, 2015. For the reasons that follow, I find that Harding has not demonstrated that equal footing has been compromised, and also find that the

Town retained the right to waive the meeting requirement post-bid. The Protest is therefore Denied.

STATEMENT OF THE FACTS

The Town published its bid documents in June 2015. The Invitation to Bid contained a provision that mandated attendance at a pre-bid meeting on July 10:

A pre-bid meeting will be held on July 10, 2015 at 10:00 A.M. at the Town of Dartmouth DPS Office (address listed above). The pre-bid meeting is mandatory for all perspective (sic) bidders.

Article 5 of the Invitation to Bid reiterated this requirement:

Article 5. Pre-Bid Conference

§ 1....The pre-bid conference is mandatory for all perspective (sic) bidders.

Harding attended the pre-bid meeting, along with two other prospective bidders. Landers did not attend the meeting. The bids were opened on July 16, 2015. Landers submitted a bid of \$1,588,306 and Harding was second lowest at \$1,929,564, a difference of more than \$400,000.

POSITIONS OF THE PARTIES

Harding argues that the Town should enforce its mandatory pre-bid meeting requirement and reject the bid Landers for not attending it and to do otherwise disrupts equal footing. Harding contends that post-bid waiver of a mandatory pre-bid meeting is unlawful under the bid laws. In support of his argument, Harding submits that it decides whether to bid a project in part based on whether there is a pre-bid meeting. If it is required, Harding expects that the pool of bidders would be reduced, and therefore bids the project. Harding argues that equal footing requires that the bidders bear the same risk of rejection, which did not happen in this case.

The Town argues that equal footing does not play a role in determining whether the waiver of a local requirement is lawful. It argues that the Town's discretion regarding waiving local requirements is absolute and can always be exercised, regardless of the waiver's impact on equal footing.

ANALYSIS

Peabody Construction Co., v. Boston, 29 Mass.App.Ct. 100, 104 (1989) established the general rule that, although an awarding authority has no power to waive statutory requirements, if the bidder's deviation is from a requirement imposed by the awarding authority, the awarding authority has the discretion to waive it. But that discretion is not unlimited. The court in *Charwill Construction v. Kingston*, 10 Mass.L. Reporter 706 (1999) examined that discretion and found that it must be exercised in accord with the two fundamental purposes of the bidding laws: (1) to obtain the lowest price for public work that competition can secure, and (2) to establish an open and honest procedure for public construction so that all bidders are on an equal footing in the competition to gain the contract award. See also *Interstate Engineering Corp. v. Fitchburg*, 367 Mass. 751, 757 (1975). Equal footing among bidders is maintained as long as bidders have the "opportunity to bid in the same way, on the same information, and to bear the same risk of rejection." *Department of Labor and Industries v. Boston Water and Sewer*, 18 Mass.App.Ct. 621, 626 (1984). The Town's argument that equal footing does not have an impact on whether the waiver of a local requirement is lawful is therefore without merit.

In *Murphy Specialty, Inc. v. Acushnet*, Attorney General Bid Protest Decision (March 5, 2015), we examined whether an awarding authority could waive a local meeting requirement for a bidder who arrived after the meeting had concluded, but who had notified the awarding authority before the meeting that it was running late and who was invited to come to the Town anyway. That Decision held that the Town could waive a non-statutory requirement and stated: "[t]here is no evidence of favoritism since there was no evidence that any other contractors who expressed an intent to attend the meeting [late] were turned down by the Town." Similarly, in the instant case, there is no evidence that any other contractor, who may have skipped the meeting but nevertheless submitted a bid that was rejected by the Town. All contractors bore the same risk of being rejected if the Town it they missed the meeting, including Harding.

Finally, Harding's decision whether to bid a job based, in part, on whether there is a pre-bid meeting is a strategic business decision that does not implicate equal footing. Since the bidders bid on the same information, in the same way, with an equal risk of rejection, there was no impact on equal footing. As such, there is no evidence of a violation of the equal footing principle, and the Protest is therefore Denied.

Respectfully submitted,



Deborah A. Anderson 616
Assistant Attorney General

cc: Anthony Savastano, Esq. [Town]
Robert Ferguson Jr., Esq. [Harding]