



March 22, 2013

Dear Mr. Martinsen:

I have received and reviewed Tamico's protest of the Borough's Notice of Intent to Award the bid on the North Harbor Renovation Project to Western Dock and Bridge. Pursuant to Borough Ordinance §4.04.090 (F), I am denying the protest, for the following reasons. Tamico's arguments are addressed in the order you have presented them.

1. Parameters and Interpretation of State Procurement Statute regarding Deferred Funding.

Approximately \$3.5 million for this North Harbor Renovation Project were Borough funds, the principal of which was originally received by the City of Petersburg from the State of Alaska pursuant to the Transfer Project Agreement signed by DOTPF on December 13, 2005. That Agreement, at paragraph 10, required that in its selection of third party construction contractors, the municipality use competitive procurement principles consistent with the State Procurement Code, AS 36.30. Contrary to your assertion, the state code does not provide for nor allow a local bidder preference, such as would be used through application of Borough Code §4.04.050(A). Use of a local bidder preference would have placed the Borough at substantial risk of being in breach of the Transfer Project Agreement with DOTPF. In my view, procurement principles "consistent" with the State Procurement Code would not permit application of a local preference, which does not exist in the state code.

Whether or not an "Alaska Bidder Preference" was expressly included in the bid document is irrelevant to Tamico's protest, as both Tamico and Western Dock and Bridge are Alaska bidders. I do not agree with your reasoning that, if the Alaska Bidder Preference was not applied, then a local bidder preference, which is inconsistent with the State Procurement Code, should be applied.

2. The Borough did not follow proper procedure for 4.04.090 Protests and Remedies regarding allegations of ambiguities in a solicitation.

I am aware of no written request for clarification on the local preference. In any case, clarifications are frequently sought by bidders, both at the meeting with

bidders and afterward; these sometimes result in addenda to the bid documents. There is no requirement that an addendum to the bid documents precede the bid opening by 10 days. As you know, on this bid, there were a total of four addenda, dated February 25, February 28, March 1 and March 3, respectively, all of which were issued less than 10 days prior to the bid opening. As you also know, time is of the essence on this project, and the Borough should not be required to choose between either delaying a bid opening or foregoing a needed change to the bid solicitation documents. It was not a violation of Borough Code to issue these addenda less than 10 days before the bid opening.

Your argument appears to be based upon Borough Code §4.04.090(B), which requires that a protest alleging impropriety or ambiguities in the bid solicitation be filed at least 10 days before the due date of the bid. The remainder of subsection (B) reads that, if a solicitation is made on shortened time, the protest must be made before the bid or proposal is due. Tamico could have, and should have made any protest to the solicitation (as opposed to the award) prior to the bid opening, and its failure to do so constituted a waiver of its complaint regarding the language of a solicitation, including the addenda. Addendum 3 was clear and unambiguous, and was consistent with at least two previous Petersburg harbor projects (Middle Harbor and South Harbor) on which Tamico submitted bids, neither of which featured local bidder preference.

Moreover, the Borough's Standard General Provisions, which were expressly incorporated in the bid solicitation, specified that submission of a bid shall be an admission that the bidder has made an examination of the bidding documents, and is satisfied as to the requirements and accuracy of the bidding documents. In summary, Tamico's failure to protest the solicitation, and its submission of a bid, precludes it from now challenging the solicitation.

3. The Borough did not follow proper protocol as outlined in 4.04.060 Bid Procedure.

You are correct that the Borough should have preceded award of the contract with a Notice of Intent to Award. Once this error was discovered, it was promptly corrected, with notification to you and the other bidders, including Western Dock and Bridge. Now that the correct procedure is being followed, the issue is moot, and there is no harm to Tamico. I understand you advised the Borough Clerk to retain your \$750 protest fee check pending further action in this matter, and that fee will now be applied to your present protest.

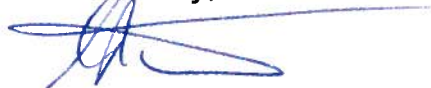
4. The Borough has shown that their actions do not have the best interests of the taxpayers of this Borough.

As you know, subsection (C) of Borough Code §4.04.050 provides that the local preference specified in subsection (A) shall not be interpreted to mean that, although the price quoted by the resident is less than 5% in excess of the price quoted by the nonresident, the Borough is precluded from making the purchase from whatever source is most advantageous to the Borough after considering all factors in the public interest. At least two such factors support awarding this project to the low bidder, in the public interest. First, as described above, failure to do so would place the Borough at risk of being found in breach of the State Transfer Project Agreement, an issue which could be raised by DOTPF or by another bidder, jeopardizing timely completion of the project.

Second, award to the low bidder is in the financial interest of the Borough which, as you know, has a substantial amount of its own funds committed to this project. The magnitude of the project, and the increased costs resulting from application of a local preference, certainly comes within "all factors in the public interest" which may be considered in determining not to apply local preference. Unlike the Alaska Bidder Preference of the State Procurement Code which you reference, the Borough's Ordinance retains discretion to the Borough to determine that a low bid is "most advantageous" to the Borough, such as to not apply local preference.

Accordingly, Tamico's bid protest is denied. As you are aware, if you wish to request a review (appeal) of my decision to the Borough Assembly, Tamico's notice of intent to seek such review should be filed with the Clerk by the end of the first working day following issuance of this decision, and your appeal itself must be filed within 5 working days of this decision. In the interest of expediting review of this matter, I again urge you to determine promptly whether you are going to appeal, and if so, to file your appeal as soon as possible, to permit timely review by the Assembly.

Sincerely,



Stephen Giesbrecht  
Borough Manager