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August 18, 2017

Frank A. Rizzo, Business Administrator/Board Secretary
Black Horse Pike Regional School District
580 Erial Road
Blackwood, NJ 08018

RE: Bid No.: 18-01
Physical Education Equipment
Black Horse Pike Regional School District

Dear Mr. Rizzo:

I. INTRODUCTION

This office has reviewed documents provided regarding the bid submission for Bid No.: 18-01, Physical Education Equipment on behalf of the Black Horse Pike Regional School District submitted by Promaxima Manufacturing, Ltd. in the amount of \$56,984.00

II. FACTUAL ANALYSIS

The apparent low bid for the above referenced contract was submitted by Promaxima Manufacturing, Ltd. ("Promaxima") with a total bid amount of \$56,984.00. Upon review of the bid submitted by Promaxima, apparent defects were uncovered. Specifically, within the Statement of Ownership Disclosure form submitted within Promaxima's bid, the bidder failed to check either box indicating that the either list below contains the names of all stockholders owning 10 percent or more of its stock, or that no one stockholders owns 10 percent or more of its stock.

Moreover, upon review of the bid, District staff has opined that the warranties included within Promaxima's bid do not meet the base requirements as set forth in the bid specifications. Such warranties were specifically included within the bid specifications issued by the District in order to transfer repair and replacement from the District to the supplier. The warranties included within Promaxima's bid do not provide for such.

III. LEGAL ANALYSIS

The Public Schools Contract Law, N.J.S.A. 18A:18A-1 et seq. regulates bidding on contracts of public schools in New Jersey. In general, the practice of public bidding is universally recognized and deeply imbedded in the public policy of the State of New Jersey. N.E.R.I. Corp. v. New Jersey Highway Authority, 147 N.J. 223, 236 (1996). There is a prima facie presumption that power and discretion of governmental action in awarding bids on public contracts has been properly exercised. Colonnelli Bros., Inc. v. Village of Ridgefield Park, 284 N.J.Super. 538, 541 (App.Div.1995).

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Public bidding statutes are to be construed with sole reference to the public good and rigidly adhered to by courts. Hall Const. Co., Inc. v. New Jersey Sports & Exposition Authority, 295 N.J.Super. 629, 634 (App.Div.1996). Furthermore, public bidding statutes exist for the good of taxpayers, not bidders, and they must always be construed for the public good and to guard against favoritism, improvidence, extravagance, and corruption. Sevell v. New Jersey Highway Authority, 329 N.J.Super. 580, 584 (App.Div.2000).

Every contract for the provision or performance of any goods or services, the cost of which in the aggregate exceeds the bid threshold, shall be awarded only by resolution of the board of education to the lowest responsible bidder after public advertising for bids and bidding therefor. N.J.S.A. 18A:18A-4(a). The lowest responsible bidder means the bidder or vendor: (1) whose response to a request for bids offers the lowest price and is responsive; and (2) who is responsible. N.J.S.A. 18A:18A-2(t). Responsive means conforming in all material respects to the terms and conditions, specifications, legal requirements, and other provisions of the request. N.J.S.A. 18A:18A-2(y). The lowest responsible bidder on a public contract must not only be deemed responsible but must submit the lowest bid which conforms to the contract specifications. Matter of Protest of Award of On-Line Games Production & Operation Services Contract, Bid No. 95-X-20175, 279 N.J.Super. 566, 590 (App.Div.1995).

It is firmly established in New Jersey that material conditions contained in bidding specifications may not be waived. Terminal Const. Corp. v. Atlantic Cty. Sewerage Auth., 67 N.J. 403, 409 (1975). A contracting body is generally without discretion to accept a defective bid. Meadowbrook Carting Co. v. Borough of Island Heights, 138 N.J. 307, 314 (1994). However, while material conditions contained in bidding specifications may not be waived, this rule does not apply to minor or inconsequential conditions. Public contracting units may resolve problems arising from such conditions in a sensible or practical way. Terminal Const. Corp., 67 N.J. at 409-11. Materiality of a particular specification is to be determined as a matter of law. Hanover Tp. v. Inter. Fidelity Ins. Co., 122 N.J.Super. 544, 548 (App.Div.1973).

There are two (2) criteria for determining whether a specific non-compliance constitutes a substantial and, hence, non-waivable irregularity: (1) Whether the effect of a waiver would be to deprive the public body of its assurance that the Contract will be entered into, performed, and guaranteed according to its specific requirements; and (2) Whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over the other bidders or by otherwise undermining the necessary common standard of competition. Township of River Vale v. R.J. Longo Constr. Co., 127 N.J.Super. 207, 222 (Law.Div.1974).

The court has provided further guidance as to materiality where an error is "patent and the true intent of the bidder obvious". In such a situation, the Appellate Division has held that such an error may be disregarded by the public agency. The Court held that certain non-compliance (i.e. obvious error) with the bid specifications may be deemed not material and therefore waivable by the public entity. Spina v. Borough of Fairview, 304 N.J. Super. 425, (App. Div. 1997).

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Finally, a local board of education is permitted to reject all bids under certain conditions. N.J.S.A. 18A:18A-22, provides in pertinent part:

"A board of education may reject all bids for any of the following reasons:

- a. The lowest bid substantially exceeds the cost estimates for the goods or services;
- b. The lowest bid substantially exceeds the board of education's appropriation for the goods or services;
- c. The board of education decides to abandon the project for provision or performance of the goods or services;
- d. The board of education wants to substantially revise the specifications for the goods or services;
- e. The purposes or provisions or both of N.J.S.A. 18A:18A-1 et seq. are being violated; and
- f. The board of education decides to use the State authorized contract pursuant to N.J.S.A. 18A:18A-10."

N.J.S.A. 18A:18A-22.

As outlined above, the warranties included within Promaxima's bid do not meet the base requirements as set forth in the bid specifications. As such, the failure to satisfy the warranty base requirements is a clear defect in Promaxima's bid. Upon researching the applicable law, it is my legal opinion that such a defect is a material defect, and therefore, may not be waived by the District. A waiver of such defect would deprive the District of its assurance that the Contract will be entered into, performed, and guaranteed according to its specific requirements. The District specifically included such warranties within the bid specifications to transfer the exposure for repair and replacement to the supplier. Promaxima's bid fails to provide the District with any assurances that this will be provided. Moreover, to waive such a defect would place Promaxima in a position of advantage over other potential bidders who would have been required to comply with the specifications. As such, due to Promaxima's failure to satisfy the base requirements for the product's warranty as set forth in the bid specifications, the District is left with no alternative but to reject the bid submitted by Promaxima as non-responsive pursuant to the Court's holdings in Terminal Construction Corp. and River Vale.

IV. CONCLUSION

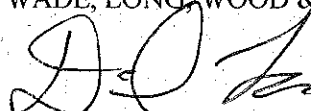
After researching the applicable law, reviewing the Contract specifications and documents, and conferring with staff, it is my legal opinion that the bid submitted by Promaxima for Bid No.: 18-01,

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Business Administrator/Board Secretary
August 21, 2017
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Physical Education Equipment on behalf of the District be rejected as nonresponsive for the reasons set forth above. If you have any questions or require any further clarification, please do not hesitate to contact me.

Very truly yours,
WADE, LONG, WOOD & LONG, L.L.C.

A handwritten signature in black ink, appearing to read 'D. Long', is written over the printed name of Daniel H. Long.

Daniel H. Long, Esq.

DHL/cjs