

Purchase Order



State of West Virginia
 Department of Administration
 Purchasing Division
 2019 Washington Street East
 Post Office Box 50130
 Charleston, WV 25305-0130

PURCHASE ORDER NO.
 ABATMNT08C

PAGE
 1

BLANKET RELEASE
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CORRECT PURCHASE ORDER NUMBER
 MUST APPEAR ON ALL PACKAGES,
 INVOICES, AND SHIPPING PAPERS.
 QUESTIONS CONCERNING THIS PUR-
 CHASE ORDER SHOULD BE DIRECTED
 TO THE BUYER AS NOTED BELOW.

CHANGE ORDER
 1

SEE REVERSE SIDE FOR
 TERMS AND CONDITIONS

ALL STATE AGENCIES
 AND POLITICAL SUBDIVISIONS
 VARIOUS LOCALES AS INDICATED
 BY ORDER

AGENCY COPY

*709032913 410-785-0001
 MARCOR REMEDIATION INC
 246 COCKEYSVILLE ROAD

 HUNT VALLEY MD 21030

ALL STATE AGENCIES
 AND POLITICAL SUBDIVISIONS
 VARIOUS LOCALES AS INDICATED
 BY ORDER

DATE PRINTED		TERMS OF SALE		FEIN/SSN		FUND	
12/01/2008		NET 30		522006784			
SHIP VIA		F.O.B		FREIGHT TERMS		ACCOUNT NUMBER	
BEST WAY		DESTINATION		PREPAID		MUL-MUL	
LINE	QUANTITY	UOP	VENDOR ITEM NO		UNIT PRICE	AMOUNT	
	DELIVERY DATE	CAT.NO	ITEM NUMBER				
			CHANGE ORDER #01				
	TO CANCEL CONTRACT PER THE ATTACHED, EFFECTIVE JANUARY 1, 2009.						
	NOTE: THIS IS THE 30 DAY CANCELLATION NOTICE.						
	***** NO ADDITIONAL CHANGES *****						
			PREVIOUS PO TOTAL==>		OPEN	END	
			PO NET CHANGE (+)==>				

PURCHASING DIVISION
 CERTIFIED ENCUMBERED

DEC 3 2008

Beverly Toler

IF APPROVAL AS TO FORM IS REQUIRED BY ATTORNEY GENERAL, CHECK HERE *R* 12/01/08

OPEN END

TOTAL

Dwayne Wayfield
 APPROVED AS TO FORM BY
 ASSISTANT ATTORNEY GENERAL

BY *J* JO ANN ADKINS 304-558-8802
 PURCHASING DIVISION AUTHORIZED SIGNATURE

GENERAL TERMS & CONDITIONS PURCHASE ORDER/CONTRACT

1. **ACCEPTANCE:** Seller shall be bound by this order and its terms and conditions upon receipt of this order.
2. **APPLICABLE LAW:** The laws of the State of West Virginia and the *Legislative Rules* of the Purchasing Division shall govern all rights and duties under the Contract, including without limitation the validity of this Purchase Order/Contract.
3. **NON-FUNDING:** All services performed or goods delivered under State Purchase Orders/Contracts are to be continued for the terms of the Purchase Order/Contract, contingent upon funds being appropriated by the Legislature or otherwise being made available. In the event funds are not appropriated or otherwise available for these services or goods, this Purchase Order/Contract becomes void and of no effect after June 30.
4. **COMPLIANCE:** Seller shall comply with all Federal, State and local laws, regulations and ordinances including, but not limited to, the prevailing wage rates of the WV Division of Labor.
5. **MODIFICATIONS:** This writing is the parties final expression of intent. No modification of this order shall be binding unless agreed to in writing by the Buyer.
6. **ASSIGNMENT:** Neither this Order nor any monies due, or to become due hereunder may be assigned by the Seller without the Buyer's consent.
7. **WARRANTY:** The Seller expressly warrants that the goods and/or services covered by this order will: {a} conform to the specifications, drawings, samples or other description furnished or specified by the Buyer; {b} be merchantable and fit for the purpose intended; and/or {c} be free from defect in material and workmanship.
8. **CANCELLATION:** The Director of Purchasing may cancel any Purchase Order/Contract upon 30 days written notice to the seller.
9. **SHIPPING, BILLING & PRICES:** Prices are those stated in this order. No price increase will be accepted without written authority from the Buyer. All goods or services shall be shipped on or before the date specified in this Order.
10. **LATE PAYMENTS:** Payments may only be made after the delivery of goods or services. Interest may be paid on late payments in accordance with the *West Virginia Code*.
11. **TAXES:** The State of West Virginia is exempt from Federal and State taxes and will not pay or reimburse such taxes.
12. **RENEWAL:** Any reference to automatic renewal is hereby deleted. The Contract may be renewed only upon mutual written agreement of the parties.
13. **BANKRUPTCY:** In the event the vendor/contractor files for bankruptcy protection, this Contract may be deemed null and void, and terminated without further order.
14. **HIPAA BUSINESS ASSOCIATE ADDENDUM:** The West Virginia State Government HIPAA Business Associate Addendum (BAA), approved by the Attorney General, and available online at the Purchasing Division's web site (<http://www.state.wv.us/admin/purchase/vrc/hipaa.htm>) is hereby made part of the agreement. Provided that, the Agency meets the definition of a Cover Entity (45 CFR §160.103) and will be disclosing Protected Health Information (45 CFR §160.103) to the vendor.
15. **WEST VIRGINIA ALCOHOL & DRUG-FREE WORKPLACE ACT:** If this Contract constitutes a public improvement construction contract as set forth in Article 1D, Chapter 21 of the West Virginia Code ("The West Virginia Alcohol and Drug-Free Workplace Act"), then the following language shall hereby become part of this Contract: "The contractor and its subcontractors shall implement and maintain a written drug-free workplace policy in compliance with the West Virginia Alcohol and Drug-Free Workplace Act, as set forth in Article 1D, Chapter 21 of the West Virginia Code. The contractor and its subcontractors shall provide a sworn statement in writing, under the penalties of perjury, that they maintain a valid drug-free work place policy in compliance with the West Virginia and Drug-Free Workplace Act. It is understood and agreed that this Contract shall be cancelled by the awarding authority if the Contractor: 1) Fails to implement its drug-free workplace policy; 2) Fails to provide information regarding implementation of the contractor's drug-free workplace policy at the request of the public authority; or 3) Provides to the public authority false information regarding the contractor's drug-free workplace policy."

ABATMNT08

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DEPARTMENT OF ADMINISTRATION

FILE LOCATION

11876

ASTAR ABATEMENT, INC.,
a West Virginia corporation,
Protestant,

SCANNED

v.

Protest of Award
ABATMNT08

WV PURCHASING
DIVISION

2008 NOV 24 PM 4:55

RECEIVED

DAVID TINCHER, Director Of Purchasing,
Division Of The West Virginia Department
Of Administration, and PURCHASING
DIVISION OF THE WEST VIRGINIA DEPARTMENT
OF ADMINISTRATION,
Respondents.

SWC

FINAL ORDER

On September 24, 2008, this matter came on before Hearing Examiner, the Honorable John T. Poffenbarger, upon protest filed by Astar Abatement, Inc. ("Astar") to a decision by the Department of Administration (the "Department") to reject the bid of Astar for a "blanket open-end statewide contract for asbestos abatement for all West Virginia state agencies and political subdivisions" identified as ABATMNT08. Astar seeks an award of the contract for the work as the lowest, qualified, responsible bidder in accord with West Virginia law.

For the reasons set forth in detail below, the hearing examiner is of the opinion to and does GRANT the relief requested by Astar and denies and reverses the rejection of Astar's bid for RFQ ABATMNT08.

FINDINGS OF FACT

1. Astar Abatement, Inc. ("Astar") is a West Virginia corporation organized and existing under the laws of the State of West Virginia and having its principal place of business at 6041-B Sissonville Drive, Charleston, West Virginia 25312. Astar is a licensed, professional asbestos removal firm which has been in the business of providing asbestos inspection and removal services for fourteen years. See Transcript- Testimony of Gregory Pauley, pages 12-14; Exhibit 12- "Order Granting Writ of Mandamus," Findings of Fact, paragraph 1.

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DATE: DEC 01 2008

2. David Tincher, is the Director of the Purchasing Division for the State of West Virginia.

3. The Purchasing Division is a division of the Department of Administration and is an agency of the State of West Virginia located at 2019 Washington Street, East, Charleston, West Virginia 25305.

4. By Request for Quotation Number ABATMNT08 (the "RFQ") dated September 12, 2007, the Respondents solicited quotes for a blanket open-end statewide contract for asbestos abatement for all West Virginia state agencies and political subdivisions. See Exhibit 1, Page 1; Exhibit 12- "Order Granting Writ of Mandamus," Findings of Fact, paragraph 4.

5. The RFQ required bidders to submit pricing on three separate bid scenarios. The RFQ also required unit prices to be submitted for a substantial number of pricing categories. See RFQ. Specifically, the RFQ provided that "vendors must submit pricing for all categories and evaluation will be based on bid scenarios." See Exhibit 1, page 2; Transcript- Testimony of Gregory Pauley, pages 23 & 24.

6. The RFQ also called for multiple awards and specifically provided as follows:

"Contracts are to be awarded to the lowest three bids meeting requirements of the specifications. Release will be afforded to the lowest bidder first. In the event the lowest bidder is unable to perform the work in the needed time frame, the release order will be offered to the 2nd lowest bidder, etc."

See Exhibit 1, page 13.

7. Each of the unit prices supplied by bidders were to include all labor, materials, equipment, supplies, transportation, etc. necessary to perform complete projects. (Emphasis added.) See Exhibit 1, page 9; Transcript- Testimony of Pauley, pages 19 & 21; Transcript- Testimony of David Olthaus, page 77. Also, the RFQ in a different section required as follows: "All prices are to include the cost of mobilization, demobilization, labor, equipment and material required..." (Emphasis added.) See Exhibit 1, page 47; Transcript- Testimony of Gregory Pauley, page 21; RFQ bid scenarios.

8. It is standard in the construction industry for an RFQ requesting unit pricing to include labor in the unit prices. See Transcript- Testimony of Gregory Pauley, page 22.

9. Astar's unit prices were properly calculated to include pricing for labor, materials, disposal, mobilization, demobilization, etc. and were responsive to the RFQ. See Exhibit 1; Transcript- Testimony of Gregory Pauley, pages 20 & 21.

10. In preparing their bids for each bid scenario, the bidders were required to apply their unit prices to items of work identified in each scenario. See RFQ- Bid Scenarios.

11. The RFQ stated that the lowest qualified bidder would be based on the bid scenarios. See Exhibit 1, page 2; Transcript- Testimony of Gregory Pauley, pages 23 & 24.

12. Subsequently, bidders were informed at the pre-bid conference that the evaluation would not be based on the bid scenarios alone but that the individual unit prices submitted would also be considered. See Transcript- Testimony of Gregory Pauley, pages 24 & 25.

13. Following the pre-bid conference, a list of questions and answers were made part of an addendum to the RFQ which indicated to the bidders that: "the winning bids will be based on the three scenarios and the evaluation of the individual costs." See RFQ Addendum.

14. Each of the bid scenarios also required bidders to identify a labor rate per hour for labor that may be necessary that was not included in the unit prices. See RFQ bid scenarios. The State admits that the purpose for requesting the labor rate per hour was to determine how much each vendor would charge for labor not included in the unit prices. See Transcript- Testimony of Daniel Olthaus, page 85.

15. Prior to submitting its bid, Astar had some questions as to what the additional labor per hour unit was to cover. Gregory Pauley, a representative of Astar, contacted Daniel Olthaus of the State of West Virginia- General Services and was advised that the information requested was indeed for a rate for labor that may be necessary that was not included within the unit prices provided. See Transcript- Testimony of Gregory Pauley, page 29.

16. At the hearing, Dan Olthaus agreed that the labor per hour identified on the bid scenarios was for labor “above their unit pricing.” See Transcript- Testimony of Daniel Olthaus, page 78.

17. Astar submitted a bid of \$40 per hour for additional labor costs on each of the three bid scenarios. See Transcript- Testimony of Gregory Pauley, page 30, 33 & 37; Exhibit 1.

18. Astar’s combined bid for the three bid scenarios was the lowest. See Exhibit 5; See Transcript- Testimony of David Tincher, page 53; See Transcript- Testimony of Daniel Olthaus, page 89. In fact, Astar’s total bid of \$133,350.99 was more than \$75,000.00 lower than the second lowest bid. See Exhibit 5.

19. By letter dated July 11, 2008, the State rejected Astar’s bid indicating that Astar had made “calculation errors” and “did not indicate bid total for labor for any of the scenarios.” See Exhibit 13; Transcript- Testimony of David Tincher, page 54.

20. Astar protested the decision of the State and has demanded that award of the contract be made to it as the lowest, qualified, responsible bidder in accord with West Virginia law. See Exhibit 14.

21. The only “calculation error” on any of the bid scenarios of Astar was contained on bid scenario #2. It was simply a multiplication error for “removal- steam piping- 12 inch piping.” Although Astar’s stated unit price of \$13.15 per linear foot was correct, multiplying the unit price by the 32 linear feet required for the scenario results in an extension price of \$420.80 versus the amount listed of \$42.08. This error result in Astar’s total price for bid scenario #2 being \$378.72 lower than it should have been. See Exhibit 1, Bid Scenario #2; See Transcript- Testimony of Gregory Pauley, page 33.

22. It is standard in the industry and a legislative rule that unit prices prevail in the event of clerical errors and it is the Purchasing Division’s policy and obligation to correct the mathematical errors based upon the unit price. (Emphasis added.) See Transcript- Testimony of David Tincher, page 66; See Transcript- Testimony of Gregory Pauley, page 34.

23. Even after adjusting Astar's bid for the calculation error in bid scenario #2, Astar remains the lowest bidder for all of the scenarios. See Transcript- Testimony of Daniel Olthaus, page 100.

24. The State's representative admits that Astar submitted the lowest bid for not only the three bid scenarios but also on unit prices for the abatement portion of the work as well as the insulation portion of the work:

Q. And isn't Astar actually lower than Master Mechanical?

A. On the overall total of the total of the prices, yes, according to these numbers.

Q. So they're lower on asbestos abatement, they're lower on insulation, they're lower on the scenarios, correct?

A. Correct.

See Transcript- Testimony of Daniel Olthaus, pages 92 &93; Exhibit 17.

25. The only other reason given by the State for rejecting Astar's bid was the allegation that the General Services representative, Mr. Olthaus, was unable to understand Astar's hourly labor price. See Transcript- Testimony of Daniel Olthaus, pages 77, 95; See Transcript- Testimony of David Tincher, page 60.

26. While Mr. Olthaus claims he was unable to understand Astar's hourly labor price, it is clear that he waived his right to challenge Astar's bid based on the hourly labor price because Mr. Olthaus failed to dismiss other bids containing similar hourly labor price descriptions.

27. Of the other bidders who have been deemed successful by the State, the following hourly labor rates were submitted:

A. Raze International

Bid Scenario #1- \$6.75

Bid Scenario #2- \$84.00

Bid Scenario #3- \$49.00

- B. Marcor Remediation, Inc.- \$65.00
- C. Master Mechanical- no specific rate given/ referral to union scale

See Exhibits 2, 3, 4; See Transcript- Testimony of Daniel Olthaus, pages 79-86.

28. Despite the fact that each bidder did not indicate the labor hourly charge in the exact same manner, the State could easily identify the hourly rate each bidder, including Astar, would charge for additional labor that was not included in a unit price. See Exhibits 1, 2, 3, 4; See Transcript- Testimony of Daniel Olthaus, page 85; Transcript- comment of Hearing Examiner, page 88.

29. The State has admitted that the alleged calculation errors/ omitted items in Astar's bid do not materially affect the bid and, even considering the same, Astar's bid remains the lowest. See Transcript- Testimony of Daniel Olthaus, page 100.

CONCLUSIONS OF LAW

Based upon all of the evidence presented, the Hearing Examiner makes the following Conclusions of Law:

1. Jurisdiction and authority are vested with this Tribunal and Hearing Examiner in accord with W. Va. CSR 148-1-8.2.1

2. West Virginia Code § 5A-3-10 sets out a nondiscretionary duty with regard to the purchase of and contract for commodities, printing and services as follows:

A purchase of and contract for commodities, printing and services shall be based, whenever possible, on competitive bids.

The directors shall solicit sealed bids for the purchase of commodities and printing which is estimated to exceed ten thousand dollars. ...

3. Legislative rules promulgated pursuant to authority granted by W. Va. Code § 5A-3-4, provide that:

The director shall make an award to the lowest responsible bidder meeting minimum specifications. The directors shall consider such factors as quality (meeting specifications), price, time of delivery, cost of delivery, and other terms and conditions considered prudent. Unit prices shall prevail in all cases. In some cases the director shall make multiple or split awards when they are in the best interest of the State. *148 C.S.R.1-6.4.1.* (Emphasis added.)

4. The work contemplated by the RFQ at issue calls for removal of asbestos and insulation from public structures. As the RFQ at issue is a contract for construction services, the Respondents are required to "solicit competitive bids" and to award to the "lowest, qualified responsible bidder" which is defined as follows:

- (1) "Lowest qualified responsible bidder" means the bidder that bids the lowest price and that meets, as a minimum, all the following requirements in connection with the bidder's response to the bid solicitation. The bidder must certify that:
 - (A) Is ready, able and willing to timely furnish the labor and materials required to complete the contract;
 - (B) Is in compliance with all applicable laws of the State of West Virginia; and
 - (C) Has supplied a valid bid bond or other surety authorized or approved by the contracting public entity.

West Virginia Code § 5-22-1.

5. The Protestant, Astar Abatement, Inc., submitted the lowest, qualified, responsible bid meeting minimum specifications for this project and is therefore entitled to award of the contract as the low bidder.

6. The Respondents' rejection or disqualification of the bid of Astar is without merit.

7. It was expressly stated in the RFQ and was clearly understood by all bidders and the State of West Virginia that unit prices submitted were to include labor. Further, after review of the evidence, it was clearly understood that the additional labor per hour figure was to be the amount charged by the successful bidder for labor not included in a particular unit price.

8. In accord with West Virginia law and legislative rules, and in accord with the testimony of the Director of Purchasing, the clerical error admitted by Astar in bid scenario #2 should have been corrected to apply the number of units multiplied by Astar's unit price. After making such correction, Astar remains the lowest, qualified, responsible bidder.

9. The Respondents had and have no discretion to reject or disqualify the bid of the lowest, qualified, responsible bidder, Astar Abatement, Inc.

10. In accord with W. Va. Code §5-22-2(b)... The public entity may only reject an erroneous bid after the opening if all of the following conditions exist: (1) an error was made; (2) the error materially affected the bid; (3) rejection of the bid would cause a hardship on the public entity involved, other than losing an opportunity to receive construction projects at a reduced cost; and (4) enforcement of the bid in error would be unconscionable.

11. The Respondent failed to prove any of the requirements of W. Va. Code §5-22-2 other than that a clerical error was made by Astar which should have been corrected. Therefore, the public entity, the Purchasing Division, is not legally allowed to reject Astar's bid.

12. The line of cases on the issue of "abuse of discretion" by a State agency, including *EDS Federal Corp. v. Ginsberg*, 163 W.Va., 647, 259 SE 2nd 618 (1979) are not applicable to this case for the following reasons:

A. In *Ginsberg*, the State agency was clothed with discretion to award a contract that was not to be determined solely on price; and

B. In the present case, the State has no discretion in comparing the bids as price was and is the only factor and Astar's bid was clearly the lowest and was responsive to the requirements of the RFQ in every way.

WHEREFORE, based upon the findings of fact and conclusions of law contained herein, it is **ORDERED, ADJUDGED** and **DECREED** as follows:

1. The bid protest of the Protestant, Astar Abatement, Inc., was well taken and the rejection or disqualification of Astar's bid by the Respondents was without merit.

2. Astar Abatement, Inc. is hereby awarded a contract for RFQ ABATMNT08 as the lowest, qualified, responsible bidder meeting minimum specifications.

3. The effective date of the contract for RFQ ABATMNT08 awarded to Astar Abatement, Inc. shall take effect as of the date of the entry of this Order.

All of which is so **ORDERED**.

The objections and exceptions of Respondents are hereby noted for the record.

ENTERED this 21 day of November, 2008.


JOHN T. POFFENBARGER, HEARING EXAMINER



State of West Virginia
 Department of Administration
 Purchasing Division
 2019 Washington Street East
 Post Office Box 50130
 Charleston, WV 25305-0130

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 ASSISTANT ATTORNEY GENERAL

BY _____
 PURCHASING DIVISION AUTHORIZED SIGNATURE