

**FINAL AGENCY DECISION**

October 30, 2014

Mr. Frank J. Patock, President
Patock Construction Co.
43 Gilbert Street North
Tinton Falls, New Jersey 07701

**Re: Elizabeth Elementary School
Design Build Contract
NJSDA Contract No. EL-0042-B01
Bid Protest By Patock Construction Co.**

Dear Mr. Patock:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your October 14, 2014 formal bid protest letter on behalf of Patock Construction Co. (“Patock”) relating to the above-referenced procurement of design build services for the Elizabeth Elementary School in Elizabeth, New Jersey (the “Design Build Procurement”). This letter is the NJSDA’s formal response and final agency decision on Patock’s bid protest.

In evaluating Patock’s bid protest, the NJSDA has reviewed and considered Patock’s October 14, 2014 protest letter; the Technical and Price Proposals submitted in connection with the Design Build Procurement; the advertisement for bids, the Design Build Procurement Request for Proposals (“RFP”), including all addenda; Selection Committee evaluator score sheets; the final scoring worksheet and the Procurement Selection Committee Evaluator Questionnaire submitted by Selection Committee member Luis Couto, Director of Plant, Property and Equipment for the Elizabeth Public School District (“District”). The NJSDA has also considered a response to Patock’s bid protest submitted by Torcon, Inc. (“Torcon”), dated October 22, 2014.

Brief Overview of the Design Build Procurement Process

The Design Build Procurement was advertised on June 9, 2014. Sealed bids were accepted on September 19, 2014. A three-person Selection Committee, consisting of one representative from the District and two NJSDA staff members, reviewed the bidders’ written Technical Proposals and conducted interviews of the bidders. In accordance with the evaluation criteria set forth in the RFP, the Selection Committee evaluators individually scored the bidders based upon their Technical Proposals and interviews. The resulting evaluator non-price scores were then added together and averaged, thereby generating a non-price score for each of the bidders. Bidder Price Proposals were thereafter opened in public on October 3, 2014, with a price score being calculated for each Price Proposal based upon criteria established in the RFP. Bidder non-price and price scores were then weighted, with price scores assigned a weighting factor of 60% and non-price scores assigned a

weighting factor of 40%. After compilation of the weighted non-price and price scores for each of the bidders, Torcon was determined to be the apparent prevailing bidder, with the highest combined score. Patock was ranked second to Torcon, with the second highest combined score.

Patock's Bid Protest

Patock contends that the Technical Proposal submitted by Torcon reveals "that a blatant conflict of interest exists between USA Architects [Torcon's designated Design Consultant for the Project], the Elizabeth Board of Education and Mr. Luis Couto." By way of evidence for this contention, Patock refers to the following information contained in Torcon's Technical Proposal:

1. USA Architects states that it has worked successfully with the District for 17 years and has been the District's Architect of Record for 10 years.
2. USA Architects states that "the NJSDA RFP bridging documents and narrative 'do a very thorough job of communicating the desires and expectations of [the District].'"
3. USA Architects' Andrew P. Adomoto, AIA is identified as a Key Team Member whose resume reflects that he has "served as the project manager of the Elizabeth Public School District under the architect of Record contract for over ten years" and "is extraordinarily dedicated to every project and maintains a clear channel of communication with his clients."
4. Strunk Albert Engineering, Torcon's MEP Design Consultant, lists "over (42)" District projects on which the firm has worked.
5. Luis Couto is named as a contact person at least ten times with respect to District projects included on USA Architects' list of project experience.
6. Luis Couto is quoted as saying that "the firm (USA Architects) has a customer oriented approach to providing services that facilitates the establishment of project goals and expectation. They work close with our staff to meet budget and timeline expectations from the initial design to the construction phase, dealing effectively with the contractors . . . very easy to work with, very dependable, and dedicated to the projects. Any concerns are promptly addressed and resolved in the best interest of the Board. USA listens to our needs and materializes them in the construction documents to achieve a quality product at the budget cost and timeline. Working with them feels like they are an extension to our staff."

Patock also points to information outside of the Torcon Technical Proposal that it contends demonstrates the existence of a conflict of interest, including the following:

1. Patock draws an inference from the information in the Torcon Technical Proposal “that USA Architects was involved and communicated with the [District] and their facilities representatives prior to the . . . RFP.”
2. Patock asserts that USA Architects was hired by the District as its Architect of Record on recommendation from Mr. Couto.
3. Patock asserts that the District has contracted with USA Architects on dozens of projects over ten years on recommendation of Mr. Couto.
4. Patock asserts that Mr. Couto has recommended Strunk Albert Engineering for each of the projects on which it has worked for the District.
5. Patock asserts that Mr. Couto has approved payment vouchers submitted to the District by both Strunk Albert Engineering and USA Architects over a period of ten (10) years.
6. Patock asserts that the District utilized the services of USA Architects to develop its Long Range Facilities Plan (“LRFP”) and the LRFP was “used to secure” approval of the Project.

Patock contends that Mr. Couto “cannot be an objective reviewer/scorer” of the Torcon Technical Proposal. Patock variously refers to the relationship between USA Architects and Mr. Couto as a “close inside working relationship,” a “close professional working relationship” and an “inside working relationship.” This relationship, according to Patock, creates an “unjust conflict of interest” that gives Torcon “an unfair bidding advantage” over Patock and the other bidders.

Patock also challenges the scoring of Torcon’s Technical Proposal, contending that a score of 87.5 by one evaluator and a score of 62.3 by another evaluator “suggests favoritism and a lack of fairness.”

Patock contends that “Torcon/USA must be disqualified as potential contractors.” We take this to mean that Patock seeks to have the Torcon bid rejected as a result of the alleged conflict of interest. It should be noted that, if the NJSDA were to find that a conflict of interest exists, the only appropriate remedy to assure fairness to all bidders and to maintain the integrity of the bidding process would be to cancel the procurement and reject all bids.

Analysis of Patock’s Bid Protest

N.J.S.A. 52:34-10.3 prohibits a person with a conflict of interest from serving as a member of a contract procurement evaluation committee. It provides:

When a State agency, [including the NJSDA], is a contracting agency, the members of any evaluation committee shall have no personal interest, financial or familial in any of the contract vendors, or principals thereof, to be evaluated.

N.J.S.A. 52:34-10.3a. The NJSDA has promulgated regulations for its design build procurements that implement the requirements of the conflict of interest statute. N.J.A.C. 19:36-2.2(c) provides:

Once the responses are received and the identity of the bidders is ascertained, the members of the technical evaluation committee will be given a list of all firms that submitted a bid. Each member of the technical evaluation committee, prior to the evaluation of any submission, shall execute a certification that he or she has no personal interest, financial or familial, in any of the bidders to be evaluated, any of the named subcontractors or subconsultants to the bidders, or any of the principals, subsidiaries, or parent companies of such bidders. Furthermore, should any of the technical evaluation committee members indicate that a conflict or personal interest exists once the identity of the bidders is revealed, that member shall not serve on the technical evaluation committee.

N.J.A.C. 19:36-2.2(c).

On September 22, 2014, after receipt but prior to evaluation of bidder Technical Proposals, Mr. Couto completed a Procurement Selection Committee Evaluator Questionnaire, pursuant to which he disclaimed any personal interest, financial or familial, in any of the bidders and other business entity subconsultants being evaluated in connection with the Design Build Procurement.

Although not relevant to Patock's protest, it is worthy of note that the NJSDA has promulgated an additional conflict of interest regulation pursuant to which "Professional consultants who assist the [NJSDA] in the preparation of an RFQ or an RFP [are] not . . . permitted to participate as a bidder or subconsultant to a bidder submitting a statement of qualifications in response to the RFQ or a proposal in response to the RFP." N.J.A.C. 19:36-3.5. Patock has not asserted that USA Architects or any member of the Torcon team assisted the NJSDA in the preparation of the RFP for the Design Build Procurement.

1. Patock Has Not Shown that Mr. Couto Has a Personal Interest in USA Architects.

The content from Torcon's Technical Proposal highlighted by Patock establishes only that Mr. Couto and the District have had an extensive, long-term, positive and successful professional working relationship with USA Architects over the course of 17 years. Likewise, the information outside of the Torcon Technical Proposal cited (but not substantiated) by Patock demonstrates only that Mr. Couto has recommended hiring and that the District has hired and paid USA Architects and MEP subconsultant Strunk Albert Engineering on multiple District projects over the course of ten years.

That there has been a past or is a present professional working relationship between an evaluator and an entity being evaluated does not constitute a conflict of interest under N.J.S.A. 52:34-10.3 and N.J.A.C. 19:36-2.2(c). Were that the case, the NJSDA and its staff would be precluded from participating in the NJSDA's own procurement. The mere fact that Mr. Couto and the District have contracted with and have broad professional familiarity with USA Architects (and with Strunk Albert

Engineering) simply does not constitute or create the personal interest, financial or familial, that is forbidden by statute and by NJSDA regulation. Nor do Mr. Couto's comments on the District's satisfactory experience with USA Architects establish any conflict of interest.

To demonstrate that a conflict of interest exists, Patock must be able to show some type of personal interest Mr. Couto might have in favoring USA Architects, Strunk Albert Engineering and Torcon in the Design Build Procurement. There is an absence of any evidence of such a personal interest. There is no allegation or proof of any ownership or control of any of the profits or assets of any of these entities. There is no suggestion of a debtor/creditor relationship. There is nothing to suggest a gift or uncompensated services from any of these entities to Mr. Couto. There is no showing of any employment or prospective employment relationship. There is no evidence that any of these entities have provided professional services to Mr. Couto personally. There has been no showing of a personal, as opposed to professional, relationship between Mr. Couto and USA Architects. And there has been no suggestion or showing that there is any connection between a member of Mr. Couto's family and USA Architects.

In short, Patock has failed to demonstrate the existence of any indicia of a true conflict of interest.

2. Patock Has Failed to Provide Proof of Any Improper Communication or Disqualifying Conduct by USA Architects.

Patock argues that it should be inferred that USA Architects had some type of communication with the District and its representatives prior to the issuance of the RFP. Assuming, for purposes of argument only, that such an inference could be drawn, there is no proof offered that any proscribed, improper or disqualifying communication occurred.

Patock also contends that USA Architects' purported involvement in assisting the District in preparing its LRFP must preclude its participation in the Design Build Procurement. Even if it is accurate that USA Architects assisted in the preparation of the District's LRFP, such participation does not establish any conflict of interest and does not run afoul of N.J.S.A. 52:34-10.3, N.J.A.C. 19:36-2.2(c) or N.J.A.C. 19:36-3.5.

3. Scoring Differences Do Not Establish Favoritism or Lack of Fairness.

Patock claims that differences between the scoring of Torcon on non-price factors by Selection Committee members evidences improper favoritism of Torcon by one member. Specifically, Patock makes the following claim:

We have reviewed the technical scores and it is obvious that one of the reviewers strongly supported the Torcon/USA Architects team with an overall score of 87.5 while another reviewer scored the exact same Torcon proposal at 62.3. This suggests favoritism and a lack of fairness.

The Design Build Procurement selection process benefits from the separate and independent input of three individuals whose assessments and scoring decisions -- by design -- may reasonably be

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expected to differ. Variability between and among committee members' scores is no indication of a flawed or defective process, but is a hallmark of the separate and independent judgment that each committee member exercises in the review and scoring process. In recognition of this variability, the selection process provides for an averaging of the total non-price scores of the Selection Committee members' individual scores, thereby resulting in a blended final score on non-price factors that fairly accounts for inevitable scoring differences among the evaluators.

Patock's allegation of favoritism presupposes that the purported favoritism arises from and was motivated by an underlying conflict of interest. Since Patock has failed to make any showing of an underlying conflict of interest, no inference of improper favoritism or unfairness can be drawn from mere differences in evaluator scores.

Conclusion

For the foregoing reasons, Patock's protest seeking the rejection of the Torcon bid is rejected.

This is a Final Agency Decision.

Sincerely,



Donald R. Guarriello
Vice President and Chief Financial Officer

cc: Charles B. McKenna, NJSDA Chief Executive Officer
Jason Ballard, NJSDA Chief of Staff
Andrew Yosha, NJSDA Executive Vice President, Program Operations & Strategic Planning
Raymond Arcario, NJSDA Vice President, Construction Operations
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Benedict J. Torcivia, Jr., Co-President, Torcon, Inc.