

**FINAL AGENCY DECISION**

July 7, 2016

Via Email and Regular First Class Mail

George E. Pallas, Esquire
Cohen, Seglias, Pallas, Greenhall & Furman, P.C.
United Plaza, 19th Floor
30 South 17th Street
Philadelphia, Pennsylvania 019103

**Re: Perth Amboy – Seaman Avenue Elementary School
NJSDA Contract No. ET-0031-B01
Protest By Hall Construction Co., Inc.**

Dear Mr. Pallas:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your June 20, 2016 formal protest letter on behalf of Hall Construction Co., Inc. (“Hall”) relating to the above-referenced procurement for design-build services for the Seaman Avenue Elementary School in Perth Amboy, New Jersey (the “Procurement”). We are also in receipt of Hall’s prior bid protest submissions under cover of letters dated June 14 and June 15, 2016. This letter is the NJSDA’s formal response and final agency decision on Hall’s bid protest.

In evaluating Hall’s bid protest, the NJSDA has reviewed and considered the following: the June 14, 2016 and June 15, 2016 correspondence from Mark D. Hall, President of Hall, with attachments; correspondence from Joel G. Lizotte, Senior Vice President of Epic Management, Inc. (“Epic”), dated June 16, 2016; your June 20, 2016 correspondence; the February 3, 2016 advertisement for bids (hereinafter, the “Advertisement”); Addenda Nos. 1 through 5 to the Procurement process, dated March 24, 2016, April 6, 2016, April 14, 2016, April 26, 2016, and May 12, 2016 respectively; the March 29, 2016 correspondence from Edward J. Avallon, P.E. of Epic to the NJSDA (Request for Information No. 3); the Request for Proposals, last revised February 3, 2016; the Information Package made available through a controlled-access website by the NJSDA to all bidders, including without limitation the project plans and Specifications, as well as Instructions to Bidders; and Project Rating Proposals and Price Proposals and accompanying documentation submitted by all bidders in connection with the Procurement.

Brief Overview of the Procurement Process

The Procurement was advertised on February 3, 2016. Under the terms of the Advertisement, any firm wishing to submit a proposal was required to attend a mandatory pre-bid conference and site visit on February 23, 2016. Furthermore, all interested bidders were required to submit a

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Project Rating Proposal (“PRP”) form no later than 2:00 p.m. on March 8, 2016. Five (5) addenda were issued thereafter. On or before May 24, 2016, interested bidders submitted sealed Price Proposals and other documentation in accordance with the requirements of the Advertisement, as modified by Addenda, and the Instructions to Bidders.

The Procurement was structured such that Technical Proposals consisted of two separate portions – a portion addressing Experience Criteria and a portion addressing Project Approach Criteria. Experience Criteria were evaluated by a panel of Standing Evaluation Committee members to determine whether each interested bidder had demonstrated sufficient experience in each of the Experience Criteria categories to be considered for an award of the Design-Build Services Contract. All bidders submitting Technical Proposals were determined to have demonstrated such experience.

Project Approach Criteria were evaluated and scored by a Project-specific Selection Committee consisting of six (6) members through the evaluation of responsive Technical Proposals addressing the Project Approach Criteria and interviews conducted for the purpose of clarifying the information contained in the Technical Proposals.

Raw scores of each of the Selection Committee members in each of the Project Approach Criteria categories were multiplied by an assigned weighting factor, then aggregated and averaged to arrive at a final non-price score for each Technical Proposal. Under this Procurement, price is assigned a weighting factor of 60% and non-price or “other” factors are assigned a combined weight of 40%.

A total of five (5) Price Proposals were received, which were publicly opened on June 10, 2016. Of these Price Proposals, Epic submitted the lowest bid, while Hall submitted the highest bid. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final ranking of the bidders. Epic received a final rank of 1, while Hall received a final rank of 2.

Hall’s Bid Protest

As noted above, on June 14, 2016, Hall submitted a protest as to Epic’s bid, followed by another protest letter dated June 15, 2016, raising additional arguments. By letter dated June 16, 2016, Epic submitted a response to Hall’s bid protest, contending that none of Hall’s observations were “of material consequence in regard to process or procedure, nor do they provide any advantage to Epic or disadvantage to other proposers or the [NJSDA].” On June 20, 2016, your office, on behalf of Hall, submitted a bid protest letter, restating most of the arguments previously raised by Hall in its June 14 and June 15, 2016 submissions.

In its original protest letter, and subsequent submissions, Hall asserts that Epic’s bid should be rejected and that Hall should be awarded the project as it is the next ranked responsive bidder. For purposes of this response, the NJSDA has considered Hall’s June 14, 15 and 20, 2016 submissions as a single protest and provides a consolidated response thereto herein.

Generally, Hall contends that Epic's bid should be rejected because: (1) Epic failed to include a fully "completed" Ownership Disclosure Form; (2) Epic failed to submit an NJSDA Uncompleted Contracts Form; (3) Epic did not satisfy the Small Business Enterprise ("SBE") "requirements" for the Procurement; (4) Epic's bid "likely" contains a material omission affecting its quoted price; (5) the signature of Epic's Price Proposal was not "witnessed"; and (6) Epic failed to include "completed" copies of required forms in the electronic copy of its Technical Proposal submission. Each of these contentions is individually addressed below.

Analysis of Hall's Bid Protest

1. Epic failed to include a fully completed Ownership Disclosure Form with its submission.

Hall first contends that the Ownership Disclosure Form submitted by Epic pursuant to N.J.S.A. 52:25-24.2 is incomplete, requiring the rejection of Epic's bid. Specifically, while Epic's form did list two individuals who held more than 10% ownership of Epic, after the second listed individual, Epic failed to check either the "yes" or "no" box after the question as to whether there are "additional entities holding 10% or greater ownership interest in the bidder/offeror and its parent corporation/partnership."

By way of background, the form provided to prospective bidders is in PDF format and is provided by the New Jersey Department of the Treasury's Division of Purchase and Property Ownership. The form provides one text box for bidders to identify individuals holding 10% or greater ownership in the bidder, and a separate text box to identify partnerships/corporations holding 10% or greater ownership interest. If a bidder needs to add another individual (or entity) they must simply click a button, which generates a new textbox for the second (third, fourth, etc.) individual or partnership/corporation.

Here, Epic filled out the provided text box for individuals with information relating to Robert Epifano, Jr. Epic then affirmatively added a second textbox to identify John Epifano. Epic did not add any further textboxes, leading to the inference that no further individuals were required to be added.

We would also note that the Ownership Disclosure Form contains a Certification, whereby the signatory represents that the "foregoing information and any attachments thereto to the best of my knowledge are ***true and complete***," with the awareness that it "is a criminal offense to make a false statement or misrepresentation in this certification..." (Emphasis added). Accordingly, the NJSDA is entitled to accept Epic's Certification as to the completeness of the form and the information contained therein.

This position is both clarified and confirmed by Epic's June 16, 2016 letter in response to Hall's protest. Specifically, Epic advises that Robert Epifano, Jr. and John Epifano own 100% of Epic

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Management. This information is entirely consistent with the information contained in Epic's submitted Ownership Disclosure Form.

The NJSDA is within its discretion to waive non-material defects in bid submissions. See Terminal Construction Corp. v. Atlantic County Sewerage Auth., 67 N.J. 403, 412 (1975); Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 313 (1994). The failure to check the box as to whether there were additional individuals or partnerships/corporations that were required to be added is non-material, for the reasons discussed above. As such, NJSDA finds no reason to reject its bid on the grounds set forth in Hall's protest.

2. Epic failed to submit an NJSDA Uncompleted Contracts form.

Hall contends that Epic's proposal should be rejected because Epic submitted a Division of Property Management and Construction ("DPMC") Form 701 Uncompleted Contracts form for its proposed structural steel subcontractor, Sparta Steel Corp. ("Sparta"), rather than an NJSDA UC-1 Uncompleted Contracts form. Hall also contends that the DPMC form submitted for Sparta is invalid as the date listed thereon has been "egregiously altered."

As a preliminary matter, the NJSDA does not distinguish between its own form and the DPMC form, since the forms are functionally identical. Either form is acceptable, and in no case are both NJSDA and DPMC forms required.

Hall suggests that the absence of an NJSDA UC-1 form from Sparta means that Sparta "has not made any certification that performing work on the project...will not cause it to exceed its NJSDA aggregate rating." However, Hall fails to recognize that the NJSDA aggregate rating is identical to the rating assigned by DPMC. See N.J.A.C. 19:38-1.2. Thus, Sparta's DPMC 701 certification that its bid proposal, including all outstanding contracts, does not exceed its DPMC prequalification dollar limit, satisfies its obligation to certify that its bid proposal and uncompleted contracts do not exceed its NJSDA aggregate rating because its DPMC prequalification dollar limit is identical to its NJSDA aggregate rating.

To the extent that Hall's failure to utilize the NJSDA form can be characterized as a bid defect, the defect is plainly not material and is appropriately waived.

The NJSDA requires that bidders submit uncompleted contracts forms that are dated 120 days or less prior to the bid due date. The uncompleted contracts form submitted by Epic for Sparta satisfies this requirement.

It does appear that "Wite-Out" or a similar product may have been applied to the Sparta DPMC Form 701 supplied by Epic directly below the type-written date on the form. There is no reason, however, to infer or presuppose any impropriety on Epic's part associated with this apparent form correction. Indeed, as Hall points out in its own protest, the Sparta DPMC Uncompleted

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Contracts form submitted by Epic is identical to the Sparta Uncompleted Contracts DPMC Form 701 included in the bid submission of another bidder, Ernest Bock & Sons, Inc. (“Bock”). The fact that two competing contractors submitted identical forms for the same structural steel subcontractor supports the inference that any date modification on the form was made by Sparta itself and that the form reflects Sparta’s certification that the information contained in the form was complete and accurate as of the date shown on the form. There is no basis for Hall’s contention that the purported alteration constitutes a bid defect or renders Epic’s bid non-responsive and subject to rejection.

We conclude, therefore, that Hall’s challenges as to the sufficiency and validity of the Sparta Uncompleted Contracts Form have no merit.

3. Epic did not satisfy the SBE requirements for the Procurement;

In its protest, Hall states that Epic’s bid should be rejected because Epic’s total SBE for architectural consultant participation amount is listed as “TBD” or “To Be Determined” on the SBE Form B included with Epic’s Technical Proposal. As such, Hall contends that Epic has not met its SBE “obligations” and that the omission of the architect’s fee on the SBE form effectively provides Epic with a competitive advantage, as Epic is supposedly continuing negotiations with the architect post bid-submission.

Section 3.9 of the Request for Proposals (“RFP”) for the Project provides in pertinent part, “...NJSDA requires the Design Builder and its Design Consultant to provide *opportunities* to SBE firms to participate in the performance of this engagement, consistent with NJSDA’s consultant SBE *set aside goals* of 25%...” (Emphasis added). Accordingly, on its face, the RFP clearly identifies the SBE percentages as goals, not as requirements. The only requirement of bidders is to “provide opportunities” to SBE firms to participate in the Project, consistent with the Authority’s “SBE set aside goals.” Hall has not cited any provision of the RFP that would suggest that the failure to meet percentages of SBE contribution is somehow fatal to Epic’s Bid.

Hall is reminded that the 25% goal is not limited to design or construction, but is intended for the contract as a whole. Therefore, even if a failure to meet the 25% goal was a defect, it would not be a material defect. See T.N. Ward v. South Jersey Transportation Authority, 2010 N.J. Super. Unpub. LEXIS 2591, at *26-7 (App. Div. 2010). The foregoing notwithstanding, whatever the ultimate SBE participation for the architect and the various design subconsultants, it will be subsequently aggregated with the construction SBE participation to determine the ultimate SBE participation for the project. Epic’s identification of more than half of the Design Services as being performed by SBEs is sufficient to demonstrate a good faith effort to comply with the NJSDA 25% SBE project participation goal at this time.

Hall contends that Epic’s failure to finalize the amount of its contract with its project architect, Design Ideas Group Architecture + Planning, LLC (“DIG”), gives Epic a competitive advantage over the other bidders. Hall does not articulate, nor can we comprehend, what that competitive

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advantage might be. Epic is bound by its Price Proposal. Epic's Price Proposal fixes total contract compensation at \$43,570,000 and total fees payable to Epic for Design Services at \$2,333,000. Epic's bid is the lowest of the five (5) bids submitted. As between Epic and the other bidders, Epic's finalization of the amount of its contract with DIG has nothing to do with the outcome of the competitive bidding process. Any advantage received by Epic was the advantage it earned fair and square by submitting the lowest Price Proposal.

Accordingly, the NJSDA concludes that Hall's protest based on Epic's alleged failure to satisfy SBE requirements has no merit.

4. Epic's bid contains a material omission affecting its quoted price.

Hall further contends that Epic's bid "likely" contains a material omission that would justify the rejection of Epic's bid. As part of its protest, Hall attaches an approximately two year old project budget that was attached to the NJSDA's August 2014 Board Meeting Minutes.¹ Specifically, Hall appears to contend that Epic relied upon the estimated Gross Building Area of 120,000 square feet (s.f.) referenced therein, rather than the updated estimated area of 128,000 s.f. As such, Hall contends that Epic's bid "likely" contains material errors or omissions that will prevent Epic from performing the work at the bid price.

Hall's entire argument in this regard is speculative and fails to consider or contemplate other valid reasons why a materially sufficient bid could be lower than that submitted by Hall. Rather, Hall suggests that Epic's bid is based on a smaller Gross Building Area simply because it is lesser than the other submitted bids, while providing no factual support for same. Indeed, despite failing to acknowledge that it submitted the highest bid for the Procurement, Hall does not argue that any of the other bids "likely" contained material omissions merely because those other bids were more cost-competitive than Hall's. In any event, Hall has provided no objective evidence to support its contention that Epic's bid was based on a smaller estimated Gross Building Area, nor has Hall advanced or posited any specific examples of what material errors or omissions "likely" exist in Epic's bid.

Moreover, it appears highly unlikely that Epic used the 120,000 SF Gross Building Area, no matter what the source of that information may have been. By letter dated March 29, 2016, Epic submitted the following bidder's question:

The overall floor area for the proposed building is indicated as approximately 128,000 SF by the Bid Advertisement and approximately 120,000 SF by Section 01010-Summary of Work. Which is correct?

¹ This document was not part of the bid documents. Furthermore, this document, dated August 6, 2014, states that "the project budget represented below is based upon the application of planning assumptions based upon the **current** project scope..." (Emphasis added).

By way of Addendum #2, dated April 6, 2016, the NJSDA responded to Epic's question: "The overall floor area is approximately 128,000 SF." In its Price Proposal, Epic acknowledged receipt and incorporation of Addendum #2 (and the other four addenda) in its bid. Accordingly, it seems extremely unlikely that Epic was unaware of the estimated 128,000 s.f. Gross Building Area at the time it prepared its bid, particularly when it had taken steps to confirm the Gross Building Area through the addendum process.

In any event, Hall has failed to provide any objective evidence that Epic used the wrong square footage in the preparation of its bid, or that Epic's bid contains omissions as to price and scope for that reason. Accordingly, there is no basis for the NJSDA to reject Epic's bid for the reasons alleged by Hall in its protest.

5. The signature on Epic's Price Proposal was not "witnessed."

Hall further argues that Epic's Price Proposal was not "witnessed," rendering Epic's Price Proposal non-responsive.² Specifically, the Price Proposal was apparently signed by John Epifano, President of Epic, on behalf of Epic on April 26, 2016, while the witness's signature is dated May 10, 2016. In its June 16, 2016 letter, Epic states that the signatory to the Price Proposal represented to the witness that the signature on the Price Proposal was his, at which time the witness signed and sealed the Price Proposal.

On its face, the NJSDA must conclude that the witness satisfied herself that it was appropriate to execute the Price Proposal as a witness. Indeed, Epic has represented that the signatory acknowledged to the witness that he had previously signed the Price Proposal, and that the signature thereon was in fact his.

Endorsing the position advocated by Hall would effectively be placing form over substance. The witnessing of the Price Proposal only serves to confirm that it was signed by an authorized representative of the bidder with the authority to bind the bidder to the terms therein. Here, Mr. Epifano's representation to the witness that he had signed the Price Proposal, that it was his signature on the document presented to the witness, and the affixing of Epic's corporate seal to the Price Proposal, satisfies this purpose. Accordingly, there is no basis to reject Epic's bid as to this issue.

6. Epic failed to include "completed" copies of required forms in the electronic copy of its Technical Proposal submission.

While not raised in your letter, in its prior submissions, Hall contends that Epic's failure to include completed copies of certain required forms in the electronic copy of its Technical Proposal submission should have precluded the opening of the Price Proposal. Hall has not cited

² Hall also contends that the signature page is missing Epic's corporate seal. Without commenting on the import of an absent corporate seal, we simply note that the corporate seal is affixed to the hard copies submitted by Epic.

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any provision of the RFP that would suggest that the failure to provide a “completed” copy of the Technical Proposal in electronic format is somehow fatal to Epic’s bid. Moreover, the NJSDA has confirmed that the forms identified in Hall’s bid protest were fully completed in the hard copy submissions of the Technical Proposal to the NJSDA.

Thus, to the extent that the electronic copy did not fully match the hard copy submission may be a technical defect, it is not a material one, as the NJSDA did receive all of the required information. As noted above, the NJSDA is within its discretion to waive non-material defects in bid submissions. See Terminal Construction Corp. and Meadowbrook Carting Co., Inc., supra. As such, NJSDA finds no reason to reject its bid on the grounds set forth in Hall’s protest for the reasons claimed by Hall.

Conclusion

For the foregoing reasons, Hall’s bid protest is rejected in its entirety.

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
Jane F. Kelly, NJSDA Vice President, Corporate Governance and Operations
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