



October 20, 2015

Mr. Mark D. Hall
President
Hall Construction Co., Inc.
P.O. Box 770
Howell, NJ 07731

**Re: New South Street Elementary School, Newark, NJ
Design-Build Services
NJSDA Contract No. NE-0003-B01
Bid Protest by Hall Construction Co., Inc.
FINAL AGENCY DECISION**

Dear Mr. Hall:

The New Jersey Schools Development Authority ("NJSDA") is in receipt of your bid protest letter dated October 2, 2015 on behalf of Hall Construction Co., Inc. ("Hall") relating to the above-referenced procurement of design-build services for the New South Street Elementary School Newark, New Jersey (the "Project").

Hall has protested the bid of the highest scoring bidder, Ernest Bock & Sons, Inc. ("Bock"), on the following grounds: (1) that Bock's bid contains a material defect and is non-responsive because Bock identified the same individual as both the proposed Project Manager and the proposed LEED Specialist; and (2) that Bock failed to achieve the goal of the contract amount to be let to certified Small Business Enterprises ("SBE's"). Hall has argued that both of these purported defects in Bock's submission render its bid non-responsive. Hall has requested that the NJSDA reject Bock's bid due to these alleged deficiencies.

Analysis of Hall's Bid Protest

The NJSDA has reviewed the relevant materials regarding this project, including the scope of work, the Advertisement, the RFP, and other materials provided to prospective bidders. The NJSDA has also reviewed the Price Proposals and Technical Proposals submitted by both Bock and Hall and the bidder questions submitted during the pre-bid period. The NJSDA has further considered the correspondence received on behalf of Bock from John F. Palladino, Esquire, dated October 6, 2015. Based upon this review, the NJSDA has made the following determinations:

1. Bock's Selection of One Individual to Perform the Roles of Project Manager and LEED Specialist

Hall has alleged that, in its Bid, Bock identified Marcus Rosenau as both the proposed "Project Manager" and the LEED Specialist. Hall essentially contends that an individual cannot serve in more than one Key Team Member position, unless the RFP explicitly provides otherwise. Hall further

contends that Bock's naming Mr. Rosenau as both the Project Manager and the LEED Specialist is a material defect that renders Bock's bid non-responsive.¹

As an initial point of clarification, we note that Mr. Rosenau is *not* identified as the proposed **Design-Builder** Project Manager in Bock's bid. Instead, Mr. Rosenau is identified as the Project Manager for the Design-Builder's **Design Consultant**, as well as the LEED Specialist. A separate individual (Joe Pellitteri) was identified by Bock as the proposed Design-Builder Project Manager.

With the foregoing in mind, the RFP contains no explicit prohibition to individuals serving in more than one design consultant team position for the same project. Hall correctly notes that the RFP does preclude a Design Consultant's Project Manager or Project Architect from fulfilling either of those roles in *another* NJSDA Project. However, that is not the situation presented by this protest, nor does this protest require a determination whether such language precludes a single individual from performing both the Design Consultant's Project Manager and Project Architect roles on the same Project.

There is no limitation that prevents a Design Consultant's Project Manager or a Project Architect from also serving as the LEED Specialist. Accordingly, if an individual was working as either a Project Manager or Project Architect on a NJSDA project, they would not be precluded from working as a LEED Specialist on another NJSDA project. Following this logic, they should not be precluded from so acting on the same project.

Hall attempts to make its prohibition case by pointing to the original language of the initial RFP, which allowed a single individual to serve as both the QA/QC Coordinator and the Safety Coordinator/Inspector for a Project. This language was later modified by Addendum #4 for this procurement to explicitly require that the Safety and QA/QC functions be performed by separate individuals. Hall argues that Addendum #4's elimination of the joint performance of the Safety and QA/QC Coordinator roles suggests that it is NJSDA's position that an individual is generally precluded from serving in more than one position on the same project. However, Hall has ignored the actual rationale for this change. In particular, Addendum #4 states:

The Authority has decided to require an improvement in the qualifications for the Safety Coordinator/Inspector position and for the Quality Assurance/Quality Control Coordinator/Inspector position for the Project, including increasing the required years of experience for each position, requiring or requesting relevant certifications, and instituting a prohibition on having one single individual perform both functions (Safety and QA/QC).

Because these changes comes late in the procurement process, and the Design-Builders may need to adjust their staffing to conform to the new qualifications requirements, the Authority has decided that it **WILL NOT REQUIRE THE IDENTIFICATION OF A SAFETY COORDINATOR AND INSPECTOR OR A QUALITY ASSURANCE/QUALITY CONTROL COORDINATOR/INSPECTOR** in the Technical Proposal, and will not include the evaluation of such personnel as part of the Evaluation and Scoring Process for this procurement.

Instead, the Authority has chosen to make contractual changes to require the Design-Builder to employ or otherwise engage a separate individual, meeting the new qualifications requirements as

¹ No bidder question on this point was submitted by Hall during the bidding process.

outlined in this Addendum, for each position, and the contractual requirements for the employment and engagement of individuals meeting the new upgraded qualifications requirements for the Safety and QA/QC positions need not be fulfilled now at the bidding stage, but will be deferred until after award and execution of the contract. (Emphasis in original).

Additionally, the Contract Documents for the Project require that the Safety Coordinator/Inspector and the QA/QC Coordinator/Inspector, like the Superintendent, must be present on the Project Site at all times Work is being performed. The contractual language consistently prevented a Superintendent from performing any other duties on the project, such as administrative/clerical duties or the functions of the Safety Coordinator/Inspector and the QA/QC Coordinator/Inspector. However, previous contractual language further distinguished the Superintendent's separate role from those of the Safety Coordinator/Inspector and QA/QC Coordinator functions by explicitly allowing a single individual to perform the Safety and QA/QC functions. When the NJSDA determined to enhance the contractual and RFP requirements for the Safety Coordinator/Inspector and QA/QC Coordinator functions, it was also determined that these functions should be performed by separate individuals. Hall can point to no contractual or RFP language that creates similar distinctions between the functions of the Design Consultant's various named Key Team Member roles. Thus, Hall's attempt to analogize the distinction between, and ultimate separation of, the QA/QC Coordinator and Safety Coordinator/Inspector functions identified in the RFP, with a purported distinction between the roles of the Design Consultant Project Manager and LEED Specialist, is misplaced.

Hall's contention that the absence of specific permission to perform dual roles suggests an implied prohibition on the performance of multiple functions by a single individual goes too far, and is unsupported by the documents. As can be seen from the language of the RFP and the Contract Documents explicitly prohibiting the performance of multiple duties by the Superintendent, as well as the language of Addendum #4 which explicitly prohibits a single individual from performing the roles of both Safety Coordinator/Inspector and QA/QC Coordinator, when NJSDA requires that a particular job function be performed by a single person performing only that specific role, then explicit language is employed to obtain that result. Thus, by negative implication, where a prohibition on the performance of dual or multiple roles is not articulated, NJSDA does not specifically require separate individuals to perform such functions, and disqualification is not triggered if a bidder proffers a single person to perform multiple functions on the Project.

Hall also appears to place significant emphasis on the responsibility of Bock's proposed Design Consultant Project Manager to "manage over twenty separate consultants and numerous different firms." However, it is commonplace within the construction industry for a lead design professional, whether in a Design-Build or a Design-Bid-Build project, to bear the responsibility of coordinating the necessary design efforts amongst the various sub-disciplines. Indeed, Hall's own proposed Organization Chart depicts its proposed Design Consultant as overseeing at least fifteen separate consultants in numerous firms.

Furthermore, the issue of whether one individual's assumption of dual responsibility for performing the Design Consultant Project Manager role as well as the LEED Specialist role has presumably already been considered by the Selection Committee members in the Technical Proposal evaluation and scoring of the "Experience of Design-Builder's Design Consultant on similarly sophisticated projects" criterion,

and, as such, any potential negative ramifications of the responsibility for dual roles would have factored in the scoring of that category.

Accordingly, Hall has failed to demonstrate that Bock's identification of the same individual as both the Design Consultant Project Manager and the LEED Specialist constitutes a material defect in departure from the RFP, or afforded any unfair pricing advantage in favor of Bock that was not also afforded to the other bidders.

2. Bock's Purported Failure to Achieve 25% SBE Goals

Hall has alleged that Bock's bid is not responsive and should be rejected because Bock failed to satisfy the purported Design Consultant SBE "requirements" of awarding 5% of the contract value to registered Category 1 SBE firms and 5% of the contract value to registered Category 3 SBE firms. Hall further contends that Bock's Design Consultant SBE Form "B", a copy of which was attached to its Protest, does not have any Category 1 SBE firms and does not meet the "required" 5% goal for Category 3 SBE firms.

Section 3.8 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%, awarding 5% of the contract value to registered Category 1 SBE firms; 5% of the contract value to registered Category 2 SBE firms; and 5% of the contract value to registered Category 3 SBE firms; and 10% of the contract value to SBE firms registered in any of the three Categories. (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 identified percentages of SBE contribution is somehow fatal to Bock's Bid. Similarly, Hall has not set forth any legal basis for the proposition that Bock's proposed SBE contribution should disqualify Bock as the presumptive winning bidder.

Moreover, we note that the SBE Form B is for informational purposes only at this point in the bid process. Bock's representation of 85% total SBE participation is more than sufficient to demonstrate a good faith effort to comply with the NJSDA's 25% SBE participation goal.² In the event that Bock is awarded the contract, the NJSDA's Vendor Services Division would work with Bock to seek methods to increase participation level of various categories to reach the NJSDA goals. Therefore, even if this failure to meet the individual Category goals was a defect, it would not be a material defect.

² The NJSDA further notes that Hall's own proposed SBE participation is 25.2%.

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Conclusion

For the foregoing reasons, Hall's protest seeking the rejection of Bock's bid is rejected.

This is a Final Agency Decision.

Sincerely,

A handwritten signature in black ink that reads "Donald Guarriello". The signature is written in a cursive style with a large initial "D".

Donald Guarriello
Vice President and Chief Financial Officer

cc: Charles B. McKenna, NJSDA Chief Executive Officer
Andrew Yosha, NJSDA Executive Vice President, Program Operations and Strategic Planning
Raymond Arcario, NJSDA Vice President, Construction Operations
Jane F. Kelly, NJSDA Vice President, Corporate Governance and Operations
Manuel DaSilva, NJSDA Program Director
Sean Murphy, NJSDA Director of Procurement
Albert Barnes, NJSDA Chief Counsel
Cecelia Haney, NJSDA Senior Counsel
Desmond O'Neill, NJSDA Assistant Counsel
John F. Palladino, Esquire, Counsel for Ernest Bock & Sons, Inc.