



FINAL AGENCY DECISION

October 19, 2015

Lisa H. Lesser, Esquire
General Counsel
Dobco, Inc.
30 Galeski Drive, Suite 202A
Wayne, New Jersey 07410

**Re: Garfield James Madison Elementary School No. 10
Price and Other Factors Construction Contract
NJSDA Contract No. NT-0014-C03
Bid Protest By Dobco, Inc.**

Dear Ms. Lesser:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your October 6, 2015 formal bid protest letter on behalf of Dobco, Inc. (“Dobco”) relating to the above-referenced Price and Other Factors procurement for construction services for the James Madison Elementary School No. 10 in Garfield, New Jersey (the “Procurement”). This letter is the NJSDA’s formal response and final agency decision on Dobco’s bid protest.

In evaluating Dobco’s bid protest, the NJSDA has reviewed and considered the following: your October 6, 2015 protest letter; October 7, 2015 correspondence from Robert Hedinger, Esquire on behalf of Brockwell & Carrington Contractors, Inc. (“Brockwell & Carrington”); your October 14, 2015 correspondence; correspondence from Mr. Hedinger, dated October 15, 2015; the advertisement for bids; the Request for Proposals (“RFP”); the Technical and Price Proposals submitted in connection with the Procurement; Selection Committee evaluator score sheets; the technical and final scoring worksheets; Certificate of Final Completion, dated April 8, 2010, for the Union City New Early Childhood Center (“Union City ECC”); NJSDA Form 710 – Construction Contract Final Completion Checklist for Contract No. HU-004-C01 (Union City ECC); Final Certificate of Occupancy, dated July 20, 2009, for the Union City ECC; Final Certificate of Occupancy, dated June 9, 2008, for Asbury Park Thurgood Marshall Elementary School (“Marshall Elementary School”); and Program Payment Reports for NJSDA Contracts HU-0004-C01 (Union City ECC) and ET-0041-C02 (Marshall Elementary School).

Brief Overview of the Procurement Process

The Procurement was advertised and the RFP was issued on June 30, 2015. Subsequent thereto, interested bidders submitted Project Rating Proposals and were assigned Project Rating Limits based thereon. Bidders later submitted Technical Proposals, sealed Price Proposals and other documentation in accordance with the requirements of the RFP.

This is a “Price and Other Factors” Procurement, with price assigned a weighting factor of 90% and non-price or “other” factors assigned a combined weight of 10%.

The Procurement was structured such that non-price factors were to be evaluated and scored through the evaluation of responsive Technical Proposals by a Selection Committee consisting of no fewer than three members. The non-price criteria evaluated by the Selection Committee included the Bidder’s experience on similarly sophisticated projects, identification and qualification of the Bidder’s required Key Team Members, the Bidder’s demonstrated prior affirmative action experience, the Bidder’s schedule compliance experience on similarly sophisticated projects, the Bidder’s safety record, the Bidder’s history of subcontractor claims made on payment bonds, the Bidder’s overall approach to the Project and the Bidder’s approach to Constructability Review.

Bidders were evaluated by the Selection Committee on each of these eight non-price categories utilizing raw point scores of between 0 and 10 as follows:

- Outstanding (9-10): depth and quality of response offers significant advantages.
- Superior (7-8): exceeds RFP requirements with no deficiencies.
- Sufficient (5-6): meets RFP requirements with no significant deficiencies.
- Minimal (3-4): meets RFP requirement but contains some significant deficiencies.
- Marginal (1-2): comprehends intent of RFP but contains many significant deficiencies.
- Unsatisfactory (0): requirements not addressed and lack of detail precludes adequate evaluation.

Raw scores in each of the eight non-price categories were then multiplied by an assigned weighting factor, then aggregated and averaged to arrive at a final non-price score for each Technical Proposal.

Price Proposals were publically opened on September 24, 2015. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final ranking of bidders. Brockwell & Carrington received a final rank of 1 and Dobco received a final rank of 2. Accordingly, Brockwell & Carrington is the presumptive awardee.

Dobco’s Bid Protest

Dobco contends that in addressing the Bidder’s experience on similarly sophisticated projects, Brockwell & Carrington’s Technical Proposal “was materially defective and/or non-responsive” in that it “failed to include three (3) case studies of projects completed within the last seven (7) years.” Although Brockwell & Carrington’s Technical Proposal included a total of four case studies, two of the case studies referenced an end date that was more than seven years prior to June 30, 2015, the date the Procurement was advertised.

Section 3.1 of the RFP provides, in part, as follows:

Utilizing the Bidder's Experience form provided by the Authority, the Bidder shall submit at least three, but no more than six, case studies as examples of the Bidder's past experience in performing and managing construction projects comparable in size, cost and complexity to the Project. The case studies shall describe projects completed within the past seven (7) years, for which the Bidder served as the prime construction contractor. Case studies showing public sector projects are preferable.

Dobco asserts that "inclusion of three case studies within the last seven years is a material bid component that cannot be waived or cured after bid opening" and that Brockwell & Carrington's "bid must be rejected as materially defective" because it submitted only two (2) conforming case studies.

Brockwell & Carrington's Response to Bid Protest

Brockwell & Carrington responded to Dobco's protest arguing first, that adherence to the seven year parameter set forth in the RFP was neither mandated by statute or regulation nor intended to be an inflexible responsiveness standard. Second, Brockwell & Carrington proffered evidence that, notwithstanding the end dates listed on the case study forms, both of the challenged case studies were NJSDA projects on which final payments were received less than seven years prior to the date of the issuance of the RFP.

Dobco's Reply to Brockwell & Carrington's Response

In Dobco's written reply, Dobco argues that under the NJSDA's "standard agreements", neither Substantial Completion nor Final Completion makes mention of or refers to final payment as an indicator of completion. Dobco's reply quotes the following definition of Final Completion:

The Design Consultant and the Authority shall issue a Certificate of Final Completion and determine the date of Final Completion of the Project. Final Completion means that [sic.] the point in time on the Project when the Project is 100% complete and ([sic.] all requirements of the Contract Documents have been completed, (ii) all items on the Punchlist have been performed, (iii) all required inspection and [sic.] items of work required by Authorities having Jurisdiction have been completed, including, without limitation, inspections by soil erosion agencies, DEP, etc.; and (iv) a Certificate of Occupancy, or a Certificate of Acceptance, as applicable, has been issued by DCA...

Dobco also asserts that, if final payment is determinative of completion, the first two studies submitted by Brockwell & Carrington are non-compliant with the RFP requirement that the projects described in the case studies be completed within the past seven years. As to these projects, Dobco offers that it has confirmed that there is on-going litigation with counsel to Montclair State University, the public owner of both projects, "over final payment". Since final payment has not been made, Dobco asserts that these two case studies do not relate to completed projects and are thus non-compliant with the RFP.

Surreply by Brockwell & Carrington

Brockwell & Carrington provided a surreply in which it points out that nowhere in the RFP is project “completion” defined, thus belying the suggestion that compliance with the seven year project completion parameter was a material requirement of the Procurement. It further argues that during its review of the bids for responsiveness, the NJSDA did not identify the challenged case studies as lying outside the seven year completion window. Finally, Brockwell & Carrington challenges factually the suggestion that final payment on the two Montclair State University projects has not been made. It avers that final payments on both projects were made years ago.

Analysis of Dobco’s Bid Protest

The Procurement for construction services for the Garfield James Madison Elementary School No. 10 was designed to have the Selection Committee evaluate each Bidder and the team assembled by the Bidder in eight distinct non-price evaluation categories. Selection Committee member evaluations were recorded as raw point scores utilizing a 0 to 10 point scale. The scale, as quoted above, clearly recognizes that bidders are not held to a standard of perfection; that responsive Technical Proposals may vary substantially; and that responsive bids may contain “many significant deficiencies” or even fail to address RFP requirements altogether. Thus, with certain specifically delineated exceptions, most deficiencies in Technical Proposals are dealt with through scoring rather than outright bidder disqualification. This approach promotes an open and robust competitive bidding process among firms that already possess the requisite DPMC Classifications and NJSDA Prequalification.

There are specific instances expressly highlighted in the RFP in which a bidder’s failure to provide certain information or documentation will result in the rejection of its Technical Proposal. By way of example:

- Section 1.3 of the RFP provides that “[a] responding Bidder’s failure to identify properly prequalified and classified subcontractors in the listed required trades will result in disqualification of that Bidder and rejection of the Bidder’s Technical Proposal.”
- Section 3.2 of the RFP provides that **“FAILURE TO UTILIZE REQUIRED FORMS FOR IDENTIFICATION OF REQUIRED SUBCONTRACTORS AND IDENTIFICATION OF REQUIRED KEY TEAM MEMBERS MAY RESULT IN REJECTION OF THE TECHNICAL PROPOSAL AND DISQUALIFICATION OF THE RESPONDING FIRM FROM FURTHER PARTICIPATION IN THIS PROCUREMENT.”**
- Section 3.2B.2 b. of the RFP provides that **“Failure to comply with the above Key Team Member identification requirements will result in rejection of the Firm’s response to this RFP.”**

There is no comparable language in the RFP with respect to the submission of case studies relating to a bidder's experience on similarly sophisticated projects. In the absence of such language, deficiencies in the number, content and quality of case studies submitted is a matter for scoring by the Selection Committee.

Plainly, the seven year time frame provided for in the RFP was designed to elicit case studies with temporal relevance to the school project, not to serve as a rigid deadline for acceptance or rejection of Technical Proposals. Selection Committee members are fully capable of evaluating and assigning a score based upon case studies relating to projects completed within and outside of the seven year time frame.

Accordingly, even if the challenged case studies relate to projects that were completed more than seven years ago, Brockwell & Carrington's Technical Proposal is not thereby rendered non-responsive.

It is equally clear that the RFP did not intend a hyper-technical construction of the words "projects completed". In the context of the RFP, "completed" was neither defined nor utilized with reference to any specific contractual provisions. Nonetheless, it is worth noting that at least one of the NJSDA projects on which case studies were submitted by Brockwell & Carrington did, in fact, achieve many of the indicia of final completion cited by Dobco, well within the seven year timeframe.

On the Union City ECC (Case Study No. 3), final payment was made on October 14, 2008, final punch list work was completed on January 9, 2009, a Final Certificate of Occupancy issued on July 20, 2009 and a Certificate of Final Completion was executed on April 8, 2010, all within seven years of the RFP on this Procurement. These milestones are consistent with the elements of Final Completion in the "standard agreement" language quoted by Dobco.

On the Marshall Elementary School (Case Study No. 4), a Certificate of Occupancy issued on June 9, 2008 (21 days outside the 7 year window) and final payments were made on August 25, 2008 and October 14, 2008 (both within the 7 year window).

Thus, between the two Monclair State University case studies and the Union City ECC case study (which clearly falls within the seven year completion window), Brockwell & Carrington did submit at least three case studies completed within seven years of the issuance of the RFP.

Given the broad meaning intended in the RFP's use of the word "completed", the factual dispute between Dobco and Brockwell & Carrington as to whether final payment has been made on the two Montclair State University projects is irrelevant.

Dobco has requested an informal hearing on its protest. The decision on whether an informal hearing will be held is in the sole discretion of the NJSDA. "Informal hearings are for fact-finding purposes for the benefit of the Authority and the Authority shall have the sole discretion whether to hold an informal hearing." N.J.A.C. 19:38B-9.3. Under the foregoing set of facts, there is no need to undertake a fact-finding inquiry since all of the relevant facts are already available to the NJSDA.

Lisa H. Lesser, Esquire
October 19, 2015
Page 6

Dobco has indicated that in the event an informal hearing is not afforded, it intends to file a request for formal hearing before an Administrative Law Judge. For the reasons stated above, Dobco's protest does not constitute a contested case and is therefore not subject to transmittal for hearing before the Office of Administrative Law.

Conclusion

Brockwell & Carrington's bid was neither materially defective nor non-responsive. Accordingly, Dobco's bid protest seeking the rejection of Brockwell & Carrington's bid is rejected.

This is a Final Agency Decision.

Sincerely,



Donald 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
Corrado Minervini, NJSDA Program Director
Sean Murphy, NJSDA Director of Procurement
Albert D. Barnes, NJSDA Chief Counsel
Cecelia E. Haney, NJSDA Senior Counsel
Desmond O'Neill, NJSDA Assistant Counsel
Robert Hedinger, Esquire, Counsel for Brockwell & Carrington Contractors, Inc.