

**FINAL AGENCY DECISION**Via Email

July 10, 2020

Mr. Mark D. Hall, AIC, CPC  
Hall Construction Co., Inc.  
P.O. Box 770  
Howell, New Jersey 07731

**Re: NJSDA Contract No. EP-0105-C01**  
**Project Name: Bridgeton High School Building Envelope – Roofing**  
**& Masonry Repairs**  
**Bid Protest By Hall Construction Co., Inc.**

Dear Mr. Hall:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your June 29, 2020 correspondence on behalf of Hall Construction Co., Inc. (“Hall”) relating to the above-referenced procurement for construction services for building envelope and roofing & masonry repairs for the Bridgeton High School in Bridgeton, New Jersey (the “Procurement”). The NJSDA considers your June 29, 2020 correspondence as a formal bid protest and hereby provides this formal response and final agency decision with respect to that protest.

In evaluating Hall’s protest, the NJSDA has reviewed and considered the following: correspondence from Sean Murphy, NJSDA Director of Procurement to you, dated June 24, 2020; your June 29, 2020 protest letter, with attachments; the May 4, 2020 advertisement for bids; the May 2020 Instructions to Bidders, provided to all bidders for the Procurement; Addendum #1 to the Procurement, dated June 5, 2020, and attachments thereto; the Price Proposals (inclusive of Uncompleted Contracts Forms and other accompanying documents) submitted by all bidders in connection with the Procurement; and the June 17, 2020 bid opening worksheet.

**Brief Overview of the Procurement Process**

The Procurement was advertised on May 4, 2020. Subsequent thereto, interested bidders submitted Project Rating Proposals and were assigned Project Rating Limits based thereon. One (1) addendum was issued by the NJSDA thereafter. Interested bidders were required to submit sealed Price Proposals and other documentation in accordance with the requirements of the Procurement, as modified by the addendum, to the NJSDA by 2:00 p.m. on June 17, 2020.

Mr. Mark D. Hall, AIC, CPC  
July 10, 2020  
Page 2

Price Proposals were publicly opened at 11:00 a.m. on June 17, 2020 and the prices were then tabulated to arrive at a final ranking of bidders. Ernest Bock & Sons, Inc. (“Bock”) had the second lowest bid, while Hall had the third lowest bid.

Following a review of the Price Proposals, the bid of the lowest bidder (TN Ward) was rejected as non-responsive. As a result, Bock was identified as the presumptive winning bidder. Additionally, the NJSDA found that Hall had failed to include required supporting documentation from Pravco, Inc. (“Pravco”), the firm identified by Hall as its Roofing subcontractor, most notably the required Uncompleted Contracts Form from Pravco. On June 24, 2020, the NJSDA sent correspondence to Hall advising that its bid was being rejected as non-responsive as a result of Hall’s failure to include the Uncompleted Contracts Form from Pravco.

### **Hall’s Bid Protest**

As a preliminary matter, Hall’s protest in no way impacts an award of a contract for this Procurement to Bock. In its protest, Hall simply argues that its bid should not have been rejected. Hall has not protested the award of a contract for this Procurement to Bock, the first ranked firm, and has not identified any deficiencies in Bock’s Price Proposal. The foregoing notwithstanding, for purposes of completeness, the NJSDA nevertheless addresses the arguments raised by Hall in its protest.

Hall acknowledges that it failed to include an Uncompleted Contracts Form from Pravco with its Price Proposal submission. Hall has provided with its protest letter various documents from Pravco that were omitted from its bid submission, including an Uncompleted Contracts Form from Pravco. This supplemental documentation was provided twelve (12) days after bids were due and publicly opened. In addition to providing the supplemental documents, Hall’s protest letter further notes that another bidder also named Pravco in its bid, and that other bidder included an Uncompleted Contracts Form for Pravco. Hall argues that that form sets forth an uncompleted contracts dollar value identical to the amount identified in Hall’s belatedly submitted Uncompleted Contracts Form for Pravco.<sup>1</sup> As such, Hall contends that since the NJSDA was in possession of Pravco’s paperwork (submitted by another bidder) at the time of bid, Hall's bid should not have been rejected.

### **Analysis of Hall’s Bid Protest**

- A. Hall Failed to Provide the Uncompleted Contracts Form From Its Roofing Subcontractor As Required By the Instructions to Bidders and By Statute.*

Section 4.1A of the Instructions to Bidders for this Procurement states:

---

<sup>1</sup> While not raised by Hall in its protest, for the sake of completeness, the NJSDA notes that Pravco was also named by Niram, Inc. (“Niram”), the bidder ranked immediately below Hall, as its roofing subcontractor. Niram’s bid included an Uncompleted Contracts Form for Pravco.

All Bidders **must** submit a copy of the Uncompleted Contracts Form for themselves and for any subcontractor required to be named, as described in Section 4.1 C (Required Classification, Identification of Required Subcontractors, and Submittals). Failure to submit an Uncompleted Contracts Form with the Price Proposal will result in rejection of the bid. (Emphasis in original).

The requirement that Hall and its named subcontractors submit with the bid a certification regarding uncompleted work also arises from statute. N.J.S.A. 18A:7G-37 provides that both prequalified contractors and subcontractors required to be named in the bid “shall, as a condition of bidding, submit a sworn contractor certification regarding qualifications and credentials.” For this Procurement, bidders were required to name a subcontractor that possessed a “Roofing – Membrane EPDM” Classification from the New Jersey Department of Treasury-Division of Property Management and Construction (“DPMC”) and Prequalification from the NJSDA.

Thus, roofing subcontractors are required to be named both by statute and by the terms of the Advertisement and Instructions to Bidders for this Procurement. See N.J.S.A. 18A:7G-37, Section 4.1.C. of the Instructions to Bidders, and May 4, 2020 Advertisement. N.J.S.A. 18A:7G-37c. requires that bids include certifications from the contractor and all named subcontractors stating that “at the time that the firm is bidding a project, the amount of its bid proposal and the value of all of its outstanding incomplete contracts does not exceed the firm’s existing aggregate rating limit.” See also Brockwell & Carrington Contractors, Inc. v. Kearny Board of Education, 420 N.J. Super. 273, 279-280 (App. Div. 2011)(responsive bids must be accompanied by certifications from subcontractors required to be named “that their bid ‘and the value of all of [their] outstanding incomplete contracts do[ ] not exceed the firm’s existing aggregate rating limit.’”).

*B. Hall’s Failure to Include With Its Bid the Uncompleted Contracts Form From Its Roofing Subcontractor Is a Material and Non-Waivable Bid Defect.*

Hall admits that it failed to submit the required Pravco Uncompleted Contracts Form with its bid. Thus, the question presented on Hall’s protest is whether Hall’s omission of the Uncompleted Contracts Form for Pravco constitutes a material and non-waivable bid defect.

Assessment of the materiality of a bid defect involves a two-prong analysis to determine

“first whether the effect of a waiver would be to deprive the [public body] of its assurance that the contract will be entered into, performed and guaranteed according to its specific requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.”

Mr. Mark D. Hall, AIC, CPC  
July 10, 2020  
Page 4

River Vale v. R. J. Longo Construction Co., 127 N.J. Super. 207, 216 (L. Div. 1974) (quoted in and adopted by Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 315 (1994)).

Without question, Uncompleted Contracts Forms from the bidding contractor and from subcontractors required to be named are essential to providing the NJSDA with the “assurance that the contract will be entered into, performed and guaranteed according to its specific requirements.” Unless it receives Uncompleted Contracts Forms from the bidding contractor and from subcontractors required to be named, the NJSDA is denied the assurance that the bidder and its named subcontractors have sufficient capacity under their respective aggregate ratings to take on an additional contract.

Hall failed to submit Pravco’s certification form until after the deadline for submission of bids. The Instructions to Bidders made it abundantly clear that Uncompleted Contracts Forms were required to be submitted with the Price Proposal. N.J.S.A. 18A:7G-37c expressly required Hall’s submission of all such forms “as a condition of bidding”.

As a preliminary matter, Hall apparently seeks to cure the defect in its bid after the deadline for submission of bids through the belated submission of the required Pravco form. Hall does not seek to clarify its bid; rather, Hall seeks to supplement its bid with a document that it failed to include in its bid submission. This distinction is important. “A deviation from an RFP may not be remedied by clarification after bids are opened.” I/M/O the Petition of Thomas-United, Inc. v. Atlantic Cape Community College, 2013 N.J. Super. Unpub. LEXIS 1606, at 26 (App. Div. 2013). “In clarifying or elaborating on a proposal, a bidder explains or amplifies what is already there. In supplementing, changing or correcting a proposal, the bidder alters what is there.” I/M/O Online Games Production and Operation Services Contract, 279 N.J. Super. 566, 597 (App. Div. 1995). Presuming that Hall contends that its belated submission of Pravco’s Uncompleted Contracts Form should cure its bid, Hall would effectively be seeking to supplement its bid by supplying a missing document after the bid submission deadline.

To allow Hall to supplement its bid after the bid submission deadline would give Hall a competitive advantage over other bidders by providing it more time to comply with the requirements of the Instructions to Bidders and statute than other bidders. Providing this additional time to Hall would favor Hall and create an inequality in the bidding process in derogation of the interests of prospective bidders who might have been deterred from bidding by their inability to provide mandatory documentation required by the Instructions to Bidders prior to the bid submission deadline. In addition, were Hall to be afforded a waiver under these circumstances (in which the Instructions to Bidders expressly admonishes all bidders that a failure to submit all required Uncompleted Contracts Forms will result in bid rejection), the stability and integrity of the procurement process would be undermined. See Meadowbrook Carting, 138 N.J. at 311-12, 320-325 (bidder’s failure to submit required consent of surety form could not be cured through supplemental submission of missing form after bid opening).

Mr. Mark D. Hall, AIC, CPC  
July 10, 2020  
Page 5

In any event, Hall seeks to mitigate the materiality of its bid defect by referring to and attempting to rely upon the Uncompleted Contracts Form submitted by Pravco to TN Ward (whose bid, as noted above, was rejected). As a result of this serendipitous submission, Hall would have the NJSDA use the Pravco Uncompleted Contracts Forms provided to TN Ward to supplement and correct Hall's defective bid. The NJSDA declines to do so.

It is certainly true that TN Ward submitted a photocopied Uncompleted Contracts Form for Pravco (DPMC Form 701, denominated "Total Amount of Uncompleted Contracts") that by all physical appearances is identical to that belatedly submitted by Hall with its protest. It is not true, however, that the certifications made in each of these forms was identical.

The context of the submission of the Uncompleted Contracts Form by Pravco to TN Ward and purportedly to Hall renders the content of the certified facts different for each of the three bidder recipients. Each of the forms contains the following certification: "I further certify that the amount of this bid proposal, including all outstanding incomplete contracts does not exceed my prequalification dollar limit." (emphasis added). "[T]his bid proposal" in the Pravco Uncompleted Contracts Form submitted to TN Ward meant the bid proposal submitted by Pravco to TN Ward – not Pravco's bid proposal to Hall. Because Pravco submitted separate and distinct bid proposals to TN Ward and Hall, the certifications contained in each of the Uncompleted Contracts Forms were unique to each bid proposal and were not interchangeable.

For these reasons, Hall is incorrect in its contention that the NJSDA had in its possession the required Pravco Uncompleted Contracts Form omitted from Hall's bid. The required form containing Pravco's certification relating to its bid to Hall was only provided to the NJSDA on June 29, 2020, twelve (12) days after the bid submission deadline.

Even if the mathematics of the bids led to the suggestion that Pravco would not exceed its Aggregate Rating limit given the amount of the total bid here, NJSDA is unwilling to adopt the course of action advanced by Hall, which is contrary to the statutory requirement and which would only serve to obviate the clear statutory intent of insuring that the NJSDA had the requisite assurance that no subcontractor would exceed its Aggregate Rating limit by virtue of its bid. Excusing Hall from its statutory obligations here would only open the door to further evisceration of the statutory requirement in the future.

Moreover, if the NJSDA was to excuse Hall's defective bid, it would only serve to improperly favor Hall over other bidders. Leaving aside Hall's attempt to rely on another bidder's bid without the express knowledge, let alone consent of that other bidder, the other bidder complied with its obligations under the terms of the Procurement and under governing law to provide the requisite Uncompleted Contracts Forms for named subcontractors, while Hall did not. Overlooking Hall's omission in comparison to those bidders who complied with the necessary requirements would only serve the interests of Hall, potentially at the expense of other bidders. For example, as noted above, Niram, the bidder ranked just behind Hall, also named Pravco as its

Mr. Mark D. Hall, AIC, CPC  
July 10, 2020  
Page 6

roofing subcontractor and provided the requisite Uncompleted Contracts Form. If we were to endorse the course of action proposed by Hall, Niram would be prejudiced in its overall ranking, despite complying with the requirements of the Instructions to Bidders.

Furthermore, Hall's attempt to rely upon a fortuitous submission by another bidder has only been made after the bid submission deadline. Thus, Hall is attempting to supplement its bid submission with information/documentation after the deadline for the receipt of bids, which is impermissible for the reasons discussed above.

In sum, to allow Hall to rely on either its late submission or on components of other bidder's bids to cure its own defective bid would improperly favor Hall over other bidders and would undermine the integrity of the bidding process. As such, Hall's bid was properly rejected.

### **Conclusion**

Hall's failure to provide an Uncompleted Contracts Form for a named subcontractor constitutes a material and non-waivable bid defect. Accordingly, Hall's protest from the rejection of its bid is denied.

This is a Final Agency Decision.

Sincerely,



Donald Guarriello  
Vice President and Chief Financial Officer

cc: Manuel DaSilva, NJSDA Chief Executive Officer  
Andrew Yosha, NJSDA Vice President – Program Operations and Strategic Planning  
Jane F. Kelly, NJSDA Vice President, Corporate Governance and Legal Affairs  
Sean Murphy, NJSDA Director of Procurement  
Andrew Oakley, NJSDA Program Director  
Albert D. Barnes, NJSDA Chief Counsel  
Cecelia E. Haney, NJSDA Deputy Chief Counsel  
Desmond H. O'Neill, NJSDA Senior Counsel  
Alison Perry, NJSDA Procurement Analyst