

**FINAL AGENCY DECISION**

December 23, 2019

Via Email and Regular First Class Mail

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30 South 17th Street
Philadelphia, Pennsylvania 19103

**Re: Perth Amboy High School – Design Build
NJSDA Contract No. ET-0099-B01
Protest By Epic Management, Inc.**

Dear Mr. Pallas:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your November 18, 2019 protest letter on behalf of Epic Management, Inc. (“Epic”) relating to the above-referenced procurement for Design-Build services for the new High School project in Perth Amboy, New Jersey (the “Procurement”). Generally, Epic’s protest challenges an award to the presumptive successful bidder, the joint venture of Terminal Construction Corporation/Dinallo Construction Corporation (referred to hereinafter as the “Joint Venture”). This letter is the NJSDA’s formal response and final agency decision on Epic’s bid protest.

In evaluating Epic’s bid protest, the NJSDA has reviewed and considered the following: your November 18, 2019 correspondence; your November 27, 2019 correspondence, with attachments; December 5, 2019 correspondence from Angelo J. Genova, Esq. on behalf of the Joint Venture; your December 10, 2019 correspondence, with attachment; the March 26, 2019 advertisement for bids (hereinafter, the “Advertisement”); the Request for Proposals, last revised March 26, 2019 (“RFP”); Addenda Nos. 1 through 13 to the RFP, dated May 8, 2019, May 24, 2019, June 7, 2019, June 13, 2019, June 28, 2019, July 12, 2019, July 29, 2019, August 9, 2019, August 30, 2019, September 12, 2019, September 19, 2019, September 25, 2019 and September 26, 2019 respectively; the Information Package made available through a controlled-access website by the NJSDA to all bidders, including without limitation the project plans and Specifications; the April 16, 2019 Statement of Joint Venture submitted on behalf of the Joint Venture; the Project Rating Proposals (and NJSDA Project Rating Proposal Evaluation Worksheets), Technical Proposals, Price Proposals and accompanying documentation submitted by all bidders in connection with the Procurement; November 6, 2019 Memorandum from Sean Murphy, NJSDA Procurement Director, Corrado Minervini and Joseph Lucarelli, NJSDA Program Directors to the Members of the NJSDA, regarding the Design-Build Award and Approval of Final Project Charter for the Procurement, with attachments; November 26, 2019 Notice of Award from Mr. Murphy to Donald Dinallo on behalf of the Joint Venture; December 2, 2019 correspondence on behalf of the Joint Venture with enclosures of required post-award

submissions from the Joint Venture, including without limitation, Corporate Resolutions, Payment and Performance Bonds and certificates of liability insurance.

Brief Overview of the Procurement Process

The Procurement was advertised on March 26, 2019. 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 April 9, 2019. Furthermore, all interested bidders were required to submit a Project Rating Proposal (“PRP”) form no later than 2:00 p.m. on April 23, 2019. Thirteen (13) addenda were issued thereafter. On or before October 8, 2019, interested bidders submitted Technical Proposals, sealed Price Proposals and other documentation in accordance with the requirements of the Advertisement and RFP, as modified by Addenda.

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 Procurement-specific Selection Committee consisting of eight (8) members (including two (2) alternates) 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 was assigned a weighting factor of 60% and non-price or “other” factors were assigned a combined weight of 40%.

A total of two (2) Price Proposals were received. Price Proposals were publicly opened on October 18, 2019. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final ranking of the bidders. The Joint Venture received a final rank of 1, while Epic received a final rank of 2.

Epic’s Bid Protest

Generally, Epic contends that the Joint Venture’s bid should be rejected because Terminal Construction Corporation (“Terminal”) and Dinallo Construction Corporation (“Dinallo”) are “inextricably related parties” who formed the Joint Venture in order to obtain an aggregated Project Rating Limit (“PRL”) sufficient to submit a bid in the amount of \$247,950,000. The various contentions set forth by Epic in its Protest are individually addressed below.

Analysis of Epic's Bid Protest

In its bid protest, Epic raises four (4) primary arguments: 1) Terminal and Dinallo are not truly separate entities, and thus, cannot enter into a joint venture; 2) the NJSDA does not have the assurance that a contract with the Joint Venture would be performed and guaranteed according to specified requirements; 3) Dinallo "exaggerated" its work experience to increase its PRL for the Project; and 4) the Joint Venture is "unqualified" to perform the work for the Project.

As a preliminary matter, in its December 10, 2019 submission, Epic has clarified that it is not challenging the NJSDA's PRL process or the processes set forth in the RFP. Of course, to the extent that Epic were to raise such a challenge at this time, it would be untimely and subject to rejection on those grounds. See generally, N.J.A.C. 19:36-7.2(a)(2) and 19:38B-9.2(a)(1) and (2). Similarly, Epic does not contend that the Joint Venture failed to comply with the requirements of the RFP, as modified by addenda, with respect to submissions to be provided by joint ventures. Rather, Epic challenges the award of a contract to the Joint Venture by questioning the validity of the Joint Venture itself.

A) Contention that Terminal and Dinallo are not Separate Entities

The RFP and Addenda for the Procurement anticipated the potential for bids to be submitted by joint ventures. In New Jersey, a joint venture has been defined as "a special combination of two or more persons where in some specific venture, a profit is jointly sought without any actual partnership or corporate designation," and "a joint adventure is an undertaking usually in a single instance to engage in a transaction of profit where the parties agree to share profits and losses." Wittner v. Metzger, 72 N.J. Super. 438, 444 (App. Div.), certif. denied 37 N.J. 228 (1962)(citing Kurth v. Maier, 133 N.J. Eq. 388, 391 (E. & A. 1943); Kahn v. Massler, 140 F. Supp. 629 (D. N.J. 1956), affirmed 241 F.2d 47 (3rd Cir. 1957)). Between the parties to a joint venture, a common element is a fiduciary relationship. Id. (citing Wiley v. Wirbelauer, 116 N.J. Eq. 391 (Ch. 1934); Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (Ct. App. 1928)).

Our courts have also noted that "a joint adventure is not dissimilar to a partnership...; the character of the relationship being more informal and usually limited to a single transaction although the conduct of the particular business may continue for a number of years.... The contract between the parties establishing the joint adventure need contain no particular form of expression nor is formality of execution necessary. It may be express or may be implied in whole or in part from the conduct of the parties." Id. (citing Cooperstein v. Shapiro, 122 N.J. Eq. 238, 241 (E. & A. 1937)).

With the foregoing in mind, pursuant to the terms of the RFP, prospective bidders were required to submit extensive documentation as part of their bid. Certain of this documentation with respect to the Joint Venture's bid, on its face, indicate that Terminal and Dinallo are separate and distinct corporate entities. Specifically, the Joint Venture submitted separate Business Registration Certificates issued by the New Jersey Department of Treasury, Division of Revenue,

with different effective and issuance dates, different Contractor Registration Numbers and different Taxpayer Identification Numbers.¹

Each entity also has a separate Registration from the New Jersey Department of Labor and Workforce Development, Division of Hour and Wage Compliance issued pursuant to the New Jersey Public Works Contractor Registration Act (N.J.S.A. 34:11-56.48, et seq.), with different registration and effective dates. Each firm also submitted DPMC 701 and NJSDA UC-1 forms with the Joint Venture's bid, setting forth the total amount of each firm's uncompleted contracts consistent with N.J.A.C. 19:38B-6.1 and 17:19-2.13. The forms submitted by Terminal indicated an uncompleted contract balance of \$245,035,526, while Dinallo's forms reflect an uncompleted contract balance of \$3,653,105.

Additionally, the RFP required all prospective bidders to be classified by DPMC. In order to be classified, prospective bidders are required to submit a DPMC Form 27. N.J.A.C. 17:19-2.1. This regulation (and the DPMC Form 27) generally requires firms that wish to be eligible to bid for work in a specified trade on a public works project to provide the following:

- A certified audited (or reviewed and compiled) financial statement, with a cover letter signed by a Certified Public Accountant or Public Accountant, complete with a balance sheet, related statements of income and retained earnings, cash flows and notes to the financials. The financial statements must be in conformity with generally accepted accounting principles, and all financial statements shall be for at least a six-month accounting cycle, but cannot be more than one year old;
- A statement as to organization, demonstrating the adequacy of officers and key management personnel to undertake a project in the classification desired;
- A statement as to prior experience, including the number of years of experience in the construction business;
- A performance statement, including a complete record of work completed by the contractor over the past four years;
- A statement that the applicant has adopted or will comply with an Affirmative Action Program for Equal Opportunity, in accordance with State and Federal laws, rules, and regulations;
- A statement as to bonding capacity, including aggregate bonding limits, from a surety authorized to issue bid, performance and payment bonds in New Jersey;
- If the contractor is a corporation or partnership, a statement listing all stockholders or partners owning any interest in the company; and
- A statement of any other pertinent material and facts to justify the classification requested by the contractor.

Based on these requirements, and consistent with N.J.A.C. 17:19-2.8, the DPMC issues an Aggregate Rating to applicant firms. "Aggregate Rating" is defined as "the limit of the dollar value of all contracts, public and private, that a firm may perform at any given time." N.J.A.C. 17:19-1.1.

¹ Both Certificates do reflect the same address for each entity.

With these requirements in mind, the DPMC issued Terminal DPMC classifications in the trades of General Construction (C008) and Design Build (C007), with an unlimited Aggregate Rating. Furthermore, DPMC has issued Dinallo a DPMC classification in General Construction, only, with an Aggregate Rating limit of \$158,000,000.² However, if Terminal and Dinallo were the same entity or “alter-egos” of one another, given the materials that are received and reviewed by DPMC, it would follow that each entity should have exactly the same DPMC classifications and Aggregate Ratings. That Terminal and Dinallo do not have the same trade classifications and have different Aggregate Ratings is inconsistent with Epic’s characterization of these corporate entities as “one in the same”.

We also note that all bidders, including the Joint Venture, were required to and did submit a Technical Proposal Certification. With respect to the Joint Venture’s bid, the Certification, executed by both Terminal and Dinallo, swears and affirms that “all statements and information contained in the Technical Proposal...are true and correct; and all such statements are made with full knowledge that the NJSDA relies upon the truth of the statements contained in the Proposal.”

In its submissions, Epic places great emphasis on the fact that both Terminal and Dinallo have identical New Jersey Workers Compensation Insurance Experience Modification Ratings (“EMR”s) of 1.392. Epic contends that these numbers “establish that Terminal and Dinallo operate as a singular entity.” See Epic’s submissions of 11/18/19 (p. 2) and 11/27/19 (p. 4). A review of the governing standards for EMR determinations, however, reveals that not be the case.

By way of background, a firm’s EMR is determined by the New Jersey Compensation Rating & Inspection Bureau (“NJ CRIB”), which was created, established and continued pursuant to N.J.S.A. 34:15-89 and -90.1 with the following statutory authority:

- To establish and maintain rules, regulations and premium rates for workers compensation and employers liability insurance;
- To adopt means for assuring uniform and accurate audit of payrolls as they relate to workers compensation insurance; and
- To encourage employers to reduce the number and severity of accidents by adjusting premiums through the use of credits and debits under a uniform system of experience rating.³

The NJSDA uses the EMR derived by NJ CRIB as a factor in determining a bidder’s PRL (or the maximum amount a firm may bid on any individual school facilities project based upon the information contained within a firm’s PRP). See e.g. N.J.A.C. 19:38B-3.5 and -3.7.

² Consistent with the requirements of N.J.A.C. 19:38A-2.1, and in compliance with the requirements of the RFP, each entity is also prequalified by the NJSDA, in the same trades and with the same Aggregate Ratings as determined by DPMC.

³ <https://www.njcrib.com/AboutCrib/OurMission> (last accessed December 20, 2019).

A review of the applicable statute and of NJ CRIB's 2019 Workers Compensation and Employers Liability Insurance Manual (the "Manual")⁴ does not support Epic's contention that since both Terminal and Dinallo have an identical EMR of 1.392⁵, then they "operate as a singular entity."

N.J.S.A. 34:15-88, as cited in the Manual, provides that:

Every insurance company or mutual association which insures employers against liability either under this chapter or for damages imposed by law arising out of any other liability to employees because of personal injuries including death at any time resulting therefrom, or both, shall file with the Commissioner of Banking and Insurance its classification of risks and premiums and rules pertaining thereto, together with the basis rates and system of merit or schedule rating applicable to such insurance which system of merit or schedule rating shall be applied as hereinafter provided. Neither classifications of risks, rules pertaining thereto, basis rates, nor system of merit or schedule rating shall take effect until the Commissioner of Banking and Insurance shall have approved the classifications, rules, basis rates, and system of merit or schedule rating, as reasonable and adequate for the risks to which they respectively apply.

In furtherance thereof, Part 3.1.8 of the Manual defines the term "risk" as meaning and including "the entire insured operations within the State of New Jersey or to which the New Jersey Compensation Law is applicable, conducted by any one legal entity, or by two or more separate entities in which the same person, or group of persons, or corporation, holds a majority interest." (emphasis added).

Stated more clearly by a separate NJ CRIB publication:

The concept of experience rating is based on ownership with an assumption that owners of a business have ultimate authority in controlling work-related injuries. Businesses owned in their majority by the same person, a group of individuals or a corporation are treated as a single risk. Experience ratings are processed on an individual risk basis. An employer's experience rating will therefore include combined experience developed by all entities which share common majority ownership. *Exploring Experience Rating*, NJ CRIB (2018), p.1.⁶

Thus, the issuance of the same EMR to both Terminal and Dinallo is because the entities have a commonality of a majority ownership; not, as Epic contends, that they are the same entity.⁷

⁴ <https://www.njcrib.com/Search/ViewPDFByName?documentTitle=Manual&share=Manual&extension=pdf> (last accessed December 20, 2019).

⁵ The NJSDA notes without comment that, effective June 30, 2019 (i.e. after the deadline for submission of PRP's for the Procurement), both Terminal and Dinallo's EMR's decreased to 1.067.

⁶ https://www.njcrib.com/SharedDocs/HandBooks/XR_Booklet_2018.pdf (last accessed December 20, 2019).

⁷ By way of further illustration, we note that a review of Epic's listing on NJ CRIB indicates that its EMR also applies to several other entities, including: Epic Inc, Epic Interiors, LLC, Epic Group, Inc., and Epic Manpower, Inc.

Epic's reliance on Verni v. Harry M. Stevens, Inc., 387 N.J. Super. 160 (App. Div. 2006) is misplaced. Generally, Epic has made no attempt to cite to any language within Verni other than its very broad discussion regarding the potential ability to pierce the corporate veil. Furthermore, Epic makes no effort to apply the various factors cited in Verni with respect to Terminal and Dinallo. Indeed, Verni does not even involve a joint venture. Notably, the Verni court ultimately ruled against "piercing the veil". Simply stated, Epic has failed to establish any meaningful nexus between Verni and the facts presented in this protest.

While Epic also cites to a recent unpublished decision that does generally relate to joint ventures -- Holder Group v. Pike Construction Co., No. A-5098-17T1, 2019 N.J. Super. Unpub. LEXIS 2272 (App. Div., November 6, 2019) -- this case is also factually and legally distinguishable. As a preliminary matter, the Court's analysis in the Holder case was premised on a party disputing that it was participating in a joint venture. Here, there is no such dispute between Terminal and Dinallo.

Holder emphasized that the parties must agree upon the central terms of a joint venture, citing to Sullivan v. Jefferson, Jefferson & Vaida, 167 N.J. Super. 282, 290 (App. Div. 1979) for the proposition that the contract must be purposely entered into by the parties. However, our courts have also noted that an agreement to participate in a joint venture "...*may be express or may be implied in whole or in part from the conduct of the parties.*" Wittner, supra, citing Cooperstein v. Shapiro, 122 N.J. Eq. 238, 241 (E. & A. 1937)(emphasis added). Here, the parties have submitted a Statement of Joint Venture and other documentation discussed in greater detail, infra, which expressly state the intent of Terminal and Dinallo to form and enter into the Joint Venture. Accordingly, Holder is wholly inapplicable to the facts presented in this protest.

What the record before us supports is that Terminal and Dinallo have adhered to legal and corporate formalities in all material respects as separate and distinct legal entities. Their Certificates of Uncompleted Contracts and their separate classifications with DPMC and prequalifications with the NJSDA evidence, among other things, the separateness of their contractual obligations and of the public works trades in which they are authorized to engage. That Terminal and Dinallo are commonly owned, have the same physical address and utilize a common email domain does not, as Epic suggests, impel the conclusion that their separate corporate forms should be disregarded and treated as a mere "façade or a sham . . . invoked to perpetrate a fundamental injustice". There is simply no legal support that, under these circumstances, there must be a piercing of the corporate veil or that Terminal and Dinallo should be precluded from venturing together on this or any other common project.

B) Contention that the NJSDA Lacks the Assurance that a Contract with the Joint Venture Would be Performed and Guaranteed

Epic also contends that the Joint Venture's bid should be rejected because the NJSDA does not have any assurance that any contract entered into with the Joint Venture would be performed and guaranteed according to the specified requirements, citing 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)). However, a review of the facts and record reflect otherwise.

Pursuant to the requirements of the RFP, the Joint Venture provided a Bid Bond as part of its bid submission. The Bid Bond is executed separately on behalf of the Principals, Terminal, Dinallo and the Joint Venture, as well as by the Attorney in Fact for the Surety, Liberty Mutual Insurance Company. By its terms, the Bid Bond is issued “in the sum of 10% of the accompanying bid for the payment of which sum well and truly made, the Principal[s] and the Surety firmly bind themselves...jointly and severally.” The Bid Bond further provides that it shall become void so long as the Joint Venture is awarded the Contract, enters into the Contract, and executes and delivers payment and performance bonds and any other required documents to the NJSDA. Otherwise, “the Principal[s] and Surety shall pay to the NJSDA the difference in money between the amount of the bid...and the amount for which the NJSDA contracts with another party to perform the work....”

Additionally, by correspondence dated November 26, 2019, the NJSDA wrote to the Joint Venture requesting documents that would be necessary to enter into a Contract in connection with the Procurement.⁸ In response, by letter dated December 2, 2019, the Joint Venture provided numerous documents, including a Payment Bond and a Performance Bond. As with the Bid Bond discussed above, the Payment and Performance Bonds are executed separately on behalf of the Principals, Terminal, Dinallo and the Joint Venture, as well as by the Attorney in Fact for the Surety, Liberty Mutual Insurance Company. Generally, the Payment Bond binds the Principals and the Surety to pay any unpaid claims due to beneficiaries, as defined in N.J.S.A. 2A:44-143, for any labor or materials used or consumed in “carrying forward, performing or completing” the Contract. Furthermore, the Performance Bond binds the Principals and the Surety to “well and faithfully do and perform each and every, all and singular, the things agreed by it (or them) to be done and performed according to the terms” of the Contract.

The Joint Venture’s December 2, 2019 submission also provided notarized Corporate Resolutions from both Terminal and Dinallo, separately authorizing Donald Dinallo to “execute and deliver any and all documents including without limitation, contracts and other legal instruments” on behalf of Terminal and Dinallo respectively, as well as the Joint Venture.

Also included, as required by the terms of the anticipated written Contract between the parties were separate Certificates of Liability Insurance for Terminal, Dinallo and the Joint Venture, all of which reflect coverage under Commercial General Liability, Automobile Liability, Umbrella Liability and Equipment Floater Contractor’s Pollution policies of insurance. These Certificates further name the NJSDA, the New Jersey Economic Development Authority, New Jersey Department of Education, the State of New Jersey, the Construction Manager and the Project

⁸ This letter advised that it was “not to be considered a binding contract or a Notice to Proceed; rather it is a request to the Joint Venture as the apparent successful bidder for the documentation set forth below.” The letter further stated, “as you know, another bidder has filed a written protest. Any execution by the NJSDA of the contract or issuance of a Notice to Proceed is dependent upon the outcome of the protest, as set forth in a Final Agency Decision.”

School District and their respective directors, officers, members, employees and agents as additional insureds.

As part of its bid submission, the Joint Venture provided a Statement of Joint Venture (“Statement”), executed by both Terminal and Dinallo. The Statement states that Terminal and Dinallo are authorized to execute the Statement, are each classified by the Division of Property and Management (“DPMC”) of New Jersey’s Department of the Treasury, are each prequalified by the NJSDA to bid for New Jersey school construction work, and that these entities have entered into a joint venture for the special purpose of carrying out the work and improvement for the Procurement. The Statement further provides that the assets of both Terminal and Dinallo will be available for the performance of the joint venture and “liable therefore for all obligations incurred in connection therewith.” See Statement at Paragraph 3. Furthermore, Paragraph 4 of the Statement states, “[a]ny bid, bond, and contract relating to the work and improvement [for the Procurement] shall be executed by any person authorized to bind any Bidder to this joint venture, and when so executed, shall bind this joint venture and each and every Bidder named herein [i.e. Terminal and Dinallo] severally and jointly, simultaneous with the execution of the contract.”

Accordingly, the NJSDA has in fact received assurances that the Contract with the Joint Venture will be performed and guaranteed in accordance with the requirements of the Project, not only through the issuance of Bid, Payment and Performance Bonds issued by a Surety in the required amounts, but also through the proof of insurance provided, as required by Contract. As such, Epic’s arguments in this regard are not substantiated.

C) Contention that Dinallo “Exaggerated” its Work Experience

Epic’s November 27, 2019 submission states “Epic believes that in an effort to ‘exaggerate their work experience’, the alleged joint venture may have presented false or misleading information to the Authority” with respect to information set forth in Dinallo’s PRP relating to a project known as “The Beacon”. Epic purports to have submitted documentary evidence to support this contention, in the form of its “review of permits” for the project at issue, referring to Exhibit M to its submission.

The source of the information identified in Exhibit M is not cited in Epic’s submissions, nor is the document itself self-authenticating. As such, the NJSDA’s ability to rely on this information is questionable at best. Assuming *arguendo* that the information provided is complete and accurate, it is not dispositive as to the alleged inaccuracies in Dinallo’s PRP.

During the course of any construction project, it is not required that the prime contractor “pull” all of the permits. Indeed, it is often the case that subcontractors or other vendors may have or take on that responsibility. Although Terminal is identified as the “Agent” that purportedly pulled some of the permits, there is no evidence provided by Epic indicating that Terminal did so in any other role than that of a subcontractor on the project. Certainly, Epic has provided no information or documentation refuting Dinallo’s affirmation that it delivered the entirety of The Beacon project “pursuant to the terms of a single, cost-plus-fee construction management

agreement”. See Correspondence from Angelo J. Genova, Esquire, dated December 5, 2019 at p. 10.

Epic also asserts that the total amount of permit work does not add up to “anywhere close” to the project amount set forth in Dinallo’s PRP. In Exhibit M to its November 27, 2019 submission, Epic purports to itemize and calculate the total contract value of The Beacon project by apparent reference to costs reflected on the various permits issued during the course of the project. Epic does not provide the methodology it used to derive the information presented and the NJSDA lacks assurance that the information provided is both complete and accurate. Even assuming the completeness and accuracy of the information reflected in Exhibit M, there are many different potential explanations for why the amounts reflected in permit applications could differ from amounts ultimately paid under the Beacon Project contract. These explanations include additional costs not captured on the permit applications, including, but not limited to, costs associated with changes in project scope (change orders), the utilization of allowances and contingencies, required design services, acceleration and escalation costs, and extended general conditions. Thus, estimates of the cost of work reflected on permit applications for a more than \$256 million project cannot be expected to be a reliable record of total contract costs.

Epic contends that “the amount of time elapsed between permits and different entities involved in pulling the permits would indicate that The Beacon was not performed as a singular project, but multiple projects over time.” Notwithstanding Epic’s attempt to draw inferences from the permitting record for the Beacon Project, the NJSDA, like any public entity making a public bid solicitation, has the right to rely upon information received from and certified by its bidders. In its PRP, Dinallo identifies The Beacon as a single project. The PRP submitted by the Joint Venture contains a lengthy certification (Section E) executed on behalf of Dinallo executed “under penalty of perjury under the laws of the United States and the State of New Jersey.” The certification states that “all information provided herein is accurate and truthful”, and:

“That the bid has been executed with full authority to do so; that the Bidder has not directly or indirectly entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free, competitive bidding in connection with these projects; and that all statements contained in this bid and in this certification are true and correct and made with full knowledge that the Authority relies upon the truth of the statements contained in this bid and in the statements contained in this certification in awarding the contract for the projects.”

The NJSDA’s regulations relating to PRL determinations, as well as the terms of the RFP and the PRP form, require prospective bidders to provide an Owner or Project Contact. Moreover, the NJSDA’s regulations (e.g. N.J.A.C. 19:38B-3.6) require the NJSDA to contact that representative for purposes of confirming the firm’s performance on the cited project. This information is then used as a Reference Adjustment in calculating the firm’s PRL. N.J.A.C. 19:38B-3.5.

Consistent with these requirements, the NJSDA's Procurement Division contacted the reference listed for The Beacon project, and confirmed with the representative the project information provided in Dinallo's PRP. Additionally, the NJSDA inquired and was advised as to whether Dinallo either exceeded, met or fell below the representative's expectations for the project in seven different areas, including: safety, quality of construction, timeliness of work performed, efficiency of bidder's contract administration, bidder's supervision of subcontractors, bidder's level of cooperation during construction, and the timeliness and efficiency of punch list work corrections. The representative's responses to these items were used to determine the Reference Adjustment for purposes of calculating Dinallo's PRL.⁹

D) Contention that Terminal and Dinallo are "Unqualified" to Perform the Work

Epic also contends that Terminal and Dinallo are "unqualified" to perform the work for the Project. Epic's arguments in this regard proceed from its unsubstantiated assumption that Terminal and Dinallo are not separate entities. In fact, the NJSDA review committee assigned to assess bidder experience concluded that the Technical Proposal submitted by the Joint Venture establishes that the Joint Venture does possess the experience required to deliver the Project. Indeed, a separate committee reviewed the bidder's proposed approach to the Project and conducted an interview of the Joint Venture's team, ultimately scoring the Joint Venture's Technical Proposal higher than that submitted by Epic. Moreover, as noted above, each of the companies comprising the Joint Venture has performed large projects and has a significant amount of experience in the construction industry. Accordingly, there is no basis to conclude that the Joint Venture is unqualified to perform the work for the Project.

The Construction Cost Estimate and the bid amounts received establish this Procurement as the largest single Design-Build procurement in the history of the NJSDA. The NJSDA's RFP for the Procurement specifically anticipated that there might be submissions by joint venturers whose individual PRLs would have rendered them individually ineligible to bid. Under the RFP, two or more joint venture entities are permitted to aggregate their individual PRLs and to submit bids up to the sum of their PRLs. Permitting bidding by joint ventures increases the chances for an enhanced pool of bidders – a result that benefits both the NJSDA and the competitive bidding process.

Epic argues, correctly, that neither Terminal nor Dinallo have the necessary PRLs, individually, to bid the job. But this is not a basis for declining to enter into a contract with the Joint Venture. To the contrary, this is precisely why the RFP permits and anticipates joint ventures. In making their bid submissions and participating in the Procurement process, the Joint Venture has simply taken advantage of and complied with a bidding mechanism expressly invited and permitted by the RFP. As detailed above, in entering into a contract with the Joint Venture, the NJSDA does have the assurance that the contract entered into will be performed and guaranteed according to the specified requirements.

⁹ The NJSDA also notes that any purported "exaggeration" of Dinallo's experience would be of questionable benefit to the Joint Venture here, since Dinallo's Aggregate Rating is capped at \$158,000,000, as discussed in Section A above.

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Epic's contention that an award to the Joint Venture would somehow chill the competitive process and increase costs to taxpayers is paradoxical. The paradox is that, were Epic's protest to be sustained, only one responsive bidder would remain – Epic – the bidder whose bid price is actually higher than that of the Joint Venture.

Conclusion

Epic 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. 19:36-7.3 and 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.

Under the record presented on this protest, the proposed Joint Venture has provided numerous certifications with respect to its PRP, Technical Proposal, Statement of Joint Venture, regarding the correctness of the information it provided. Both the New Jersey Department of Treasury and the Department of Labor recognize Terminal and Dinallo as separate legal entities. None of the issues raised by Epic are dispositive in demonstrating that the proposed Joint Venture does anything other than maintain a status separate from each of its members.

Moreover, in the Statement of Joint Venture and the fact of the bid in the Joint Venture's name, the NJSDA has a definitive acknowledgement of the voluntary agreement by these two separate legal entities to join into this enterprise. It is for purposes of a single undertaking. They have each agreed, at least with respect to NJSDA, to share losses to the extent that they have each agreed to be separately and jointly liable. They have each provided benefit at this time by obtaining and presenting the Bid, Payment and Performance Bonds, as well as Certificates of Liability Insurance. Each has further contributed to the Joint Venture by providing their project rating to the process.

In short, there is no basis upon which the NJSDA can or should disregard the corporate separateness of Terminal and Dinallo, disallow aggregation of the PRLs of Terminal and Dinallo as joint venturers, ignore the project and contract information provided by Dinallo in connection with its PRP, or reject the bid of the Joint Venture as non-responsive or as substantially and materially defective.

Accordingly, Epic's Bid Protest is denied.

This is a Final Agency Decision.

Sincerely,



Donald R. Guarriello
Vice President and Chief Financial Officer

George E. Pallas, Esquire
December 23, 2019
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cc: Manuel DaSilva, NJSDA Interim Chief Executive Officer
Andrew Yosha, NJSDA Vice President, Program Operations and Strategic Planning
Jane F. Kelly, NJSDA Vice President, Corporate Governance and Legal Affairs
Joseph Lucarelli, NJSDA Program Director
Sean Murphy, NJSDA Director of Procurement
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Angelo J. Genova, Esquire (Terminal Construction Corporation/Dinallo Construction Corporation)