

**FINAL AGENCY DECISION**

November 9, 2016

Via Email and Regular First Class Mail

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

**Re: Harrison – New Harrison Elementary School
NJSDA Contract No. HU-0027-B01
Protest By Hall Construction Co., Inc.**

Dear Ms. Budd:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your October 28, 2016 formal protest letter on behalf of Hall Construction Co., Inc. (“Hall”) relating to the above-referenced procurement for design-build services for the New Harrison Elementary School in Harrison, New Jersey (the “Procurement”). We are also in receipt of Hall’s prior bid protest submission under cover of letter dated October 25, 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 October 25, 2016 correspondence from Mark D. Hall, President of Hall, with attachments; correspondence from Robert T. Lawless, Esquire, counsel for Brockwell & Carrington (“Brockwell”) dated October 26, 2016, with attachments; your October 28, 2016 correspondence; October 31, 2016 correspondence from Brockwell’s counsel, with attachments; your October 31, 2016 correspondence; the July 13, 2016 advertisement for bids (hereinafter, the “Advertisement”); the Request for Proposals, last revised July 13, 2016 (“RFP”); Addenda Nos. 1 through 4 to the RFP, dated September 1, 2016, September 9, 2016, September 16, 2016, and September 23, 2016, 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; and the 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 July 13, 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 August 1, 2016. Furthermore, all interested bidders were required to submit a Project

Rating Proposal (“PRP”) form no later than 2:00 p.m. on August 12, 2016. Four (4) addenda were issued thereafter. On or before October 6, 2016, interested bidders submitted their 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 seven (7) 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 seven (7) Price Proposals were received, which were publicly opened on October 20, 2016. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final ranking of the bidders. Brockwell received a final rank of 1, while Hall received a final rank of 2.

Hall’s Bid Protest

Generally, Hall contends that Brockwell’s bid should be rejected because: (1) the Bid Bond submitted by Brockwell with its Price Proposal (referred to hereinafter as the “Bond”) does not satisfy the requirements for the Procurement; and (2) Brockwell failed to identify properly prequalified firms as part of the Design Builder’s Design Consultant team. Each of these contentions is individually addressed below.

Analysis of Hall's Bid Protest

1. The Bid Bond submitted by Brockwell is limited to \$20,000, not the 10% required by the RFP.

Hall first contends that the Bid Bond submitted by Brockwell with its Price Proposal does not comply with the requirements for the Procurement, thereby rendering Brockwell's bid non-responsive. Specifically, Hall notes that a "Surety Disclosure Statement and Certification" (referred to hereinafter as the "Disclosure") was submitted with Brockwell's Bid Bond. Paragraph 4 of this Disclosure states that "the amount of the bond to which this statement and certification is attached is 10% of the total amount bid not to exceed \$20,000." Hall contends that this statement serves to modify the terms of the Bid Bond, so that the maximum limit that could be recovered under the Bid Bond is \$20,000. As such, Hall contends that the Bid Bond does not satisfy the requirement of the Procurement that the Bid Bond must be for 10% of the bid amount, thereby requiring rejection of Brockwell's bid.

By way of background, Section 4.2.2 of the RFP requires all prospective bidders to include all required documentation with its Price Proposal, including, but not limited to, "...submission of a valid Bid Bond in the proper amount on the form supplied by the Authority." Section 4.5 of the RFP further provides that "the Authority, in determining the successful Design-Builder, will evaluate the Price Proposals for responsiveness, including but not limited to verifying ... the submission of a valid Bid Bond in the proper amount."

The Bid Bond form provided by the NJSDA, and required to be used by bidders per the RFP, provides that both the bidder (identified on the form as the Principal) and the Surety are "**held and firmly bound unto the NJSDA, in the sum of 10% of the accompanying bid**, for the payment of which sum well and truly to be made, the Principal and the Surety firmly bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally." (Emphasis provided). The Bid Bond form further provides:

THE CONDITION OF THIS OBLIGATION IS SUCH THAT if the Principal is awarded the Contract, and the Principal, within the time required by the Contract Documents, enters into the Contract and executes and delivers to the NJSDA such payment and performance bonds and other documents as are required as conditions precedent by the Instructions to Bidders and other Contract Documents, then this obligation shall be void; otherwise, the Principal and Surety shall pay to the NJSDA the difference in money between the amount of the bid of the Principal and the amount for which the NJSDA legally contracts with another party to perform the Work if the latter amount is in excess of the former, but in no event will liability hereunder exceed the penal sum hereof.

Brockwell submitted a Bid Bond using the form provided by the NJSDA, confirming that the Bid Bond was for 10% of Brockwell's bid. This Bid Bond identifies the project that is the subject of the Procurement by both name and contract number. The Bid Bond was executed by both Michael B. Dassatti, President of Brockwell, and Donald Goetz of Great American Insurance Company ("Great American"), as Attorney-in-Fact. Both signatures were properly witnessed and sealed, in accordance with the requirements of the Bid Bond form. Also provided was a Power of Attorney from Great American, appointing Mr. Goetz as its "true and lawful attorney-in fact," with the authority to bind Great American as a surety to "any and all bonds, undertakings and contracts of suretyship, or other written obligations in the nature thereof," up to \$100,000,000.

In addition to the Power of Attorney, there were four (4) other documents that were submitted with the Bid Bond submitted by Brockwell. The first document is a Consent of Surety, wherein Great American consents and agrees that if the contract for the Procurement (which is identified by name and contract number) is awarded to Brockwell, then Great American agrees to execute the final bond required by the specifications and to become surety in the full amount of the contract price. The second is a Statement of Great American's Assets, Liabilities and Capital & Surplus as of December 31, 2015. The third is a Certificate of Authority from the New Jersey Department of Banking and Insurance, confirming that Great American is licensed to transact the lines of insurance identified therein. The final document, and the one that forms the gravamen of Halls' Bid Protest as to Brockwell's Bid Bond, is the Disclosure, which states that it is issued pursuant to N.J.S.A. 2A:44-143.

In considering Hall's arguments, we first note that the only provision of N.J.S.A. 2A:44-143 that addresses the requirement of a Disclosure submission is subsection (d), which provides in pertinent part that:

A board, officer or agent contracting on behalf of the State, contracting unit or school district shall not accept **a payment or performance bond** unless there is attached thereto a Surety Disclosure Statement and Certification to which each surety executing the bond shall have subscribed. ... (Emphasis provided).

Thus, assuming *arguendo* that either the terms of the RFP or other governing statutes/regulations implicate the applicability of N.J.S.A. 2A:44-143, a plain reading of the provision therein relating to Disclosures, indicates that it applies only to payment or performance bonds. In other words, the applicable provision of the referenced statute is utterly silent as to its applicability to bid bonds.

With the foregoing in mind, we next look to Paragraph 4 of the Disclosure submitted by Brockwell, which contains the purportedly offensive representation identified by Hall. While Hall contends that this paragraph serves to modify the terms of the Bid Bond, an objective review of the submission demonstrates the contrary to be the case. Regardless of whether the

submission of a Disclosure was required, nothing contained therein functions to modify or otherwise alter the clear agreement contained in the Bid Bond form, executed by both Brockwell and its Surety, that the Bid Bond is for 10% of Brockwell's bid.

The Bid Bond form does not refer to or incorporate the content of the Disclosure. Moreover, the Disclosure is not signed by either the Principal or the Attorney in Fact that executed the Bid Bond itself. To argue that the Disclosure functions to amend the express written terms of the Bid Bond, when the Disclosure is not signed by the parties that executed the Bid Bond, runs afoul of well-settled principles of contract law.

Granted, Paragraph 4 of the Disclosure misstates the amount of the bond, but this appears to be no more than a scrivener's error,¹ and cannot serve to unilaterally modify the Bid Bond. Quite simply, there is nothing stated in the Disclosure that evidences or even suggests an intent to amend or alter the obligations set forth in the Bid Bond form executed by both Brockwell and its Surety. While not dispositive in and of themselves, the letters from Brockwell's Surety and its broker in connection with this bid protest confirms this analysis.

Accordingly, the NJSDA finds no basis to conclude that the Bid Bond submitted by Brockwell is defective. To the extent that an ancillary form submitted with the Bid Bond contains a factual misstatement, this does not represent a material defect. 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). As such, the NJSDA denies Hall's request to reject Brockwell's bid.

2. Brockwell's proposed Design Consultant indicated that it intends to self-perform in various design disciplines in which it is not prequalified.

Hall's Bid Protest notes that Brockwell submitted an "Identification of Required Subconsultant to the Design Consultant" form (referred to hereinafter as the "Form") with both its Technical and its Price Proposal.² Hall contends that this form indicates that Brockwell's proposed "Design Consultant" (in this case, the architectural/planning firm of Fraytak, Veisz, Hopkins, Duthie, P.C. ("FVHD")) would be self-performing in various identified subconsultant areas, including various engineering disciplines. Hall contends that, since FVHD is not classified by

¹ We note that the language entered by Great American in Paragraph 4 (i.e. "10% of total amount bid not to exceed \$20,000") is consistent with numerous other procurement statutes for government contracts (See e.g. N.J.S.A. 18A:18A-24, N.J.S.A. 18A:64-67, N.J.S.A. 18A:64A-25.16 and N.J.S.A. 40A:11-21), further supporting the conclusion that the entry on Brockwell's disclosure is merely a scrivener's error.

² We note that it appears that the "Identification of Required Subconsultant to the Design Consultant" form submitted by Brockwell with its Price Proposal (which was not required under the terms of the RFP) is a duplicate of what was submitted with Brockwell's Technical Proposal. We further note that one of the copies of this form submitted with Hall's protest letter appears to have transposed the final two pages of the Form.

the Division of Property and Management (“DPMC”) of New Jersey’s Department of the Treasury or NJSDA prequalified for the design subconsultant areas required for the Procurement, Brockwell’s bid is non-responsive and must be rejected.

In reviewing the Form, it is apparent that Brockwell identified firms other than FVHD for the required subconsultant roles. Specifically, on the Form, Brockwell identified Gillan & Hartmann, Inc. as performing Electrical, HVAC and Plumbing Engineering; Whitman as performing Civil and Environmental Engineering; and Harrison-Hamnett, PC as performing Structural Engineering. These firms were also identified as generally performing in these disciplines on both the project Organization Chart and the Small Business Enterprise (“SBE”) Form B submitted by Brockwell with its Technical Proposal. Additionally, with its Price Proposal, Brockwell submitted copies of these subconsultant firms’ DPMC Notices of Consultant Prequalification. Furthermore, on its “Identification of Design Consultant’s Required Team Members” form, Brockwell listed several individuals (along with their firm affiliation) from the identified subconsultant firms.³

The foregoing notwithstanding, Brockwell did answer “yes” to the question as to whether the Design Consultant (i.e. FVHD) would be self-performing in each of the required design disciplines. However, in reviewing this one form in light of the ample evidence to the contrary in the rest of Brockwell’s Technical and Price Proposals, it is plainly evident that this was not Brockwell’s intent. The notion that FVHD was to provide the design services for the various subconsultant disciplines, despite not being DPMC classified or NJSDA prequalified in those disciplines, and contrary to the extensive information in Brockwell’s Technical and Price Proposals that the named subconsultant firms would provide those services, strains credulity, at best. Rather, it is far more likely that Brockwell answered “yes” to the self-performance question to indicate that the identified subconsultant firms, **not** FVHD, would be performing this work.

Thus, while Brockwell’s misinterpretation of the self-performance question may be a technical defect in Brockwell’s bid, it is certainly not a material one. As previously noted, the NJSDA is within its discretion to waive non-material defects in bid submissions. See Terminal and Meadowbrook Carting, supra. The inadvertent indication that FVHD would be self-performing in disciplines where it had identified other firms to perform those services that are DPMC classified and NJSDA prequalified in those disciplines, is non-material for the reasons discussed above. As such, NJSDA finds no reason to reject Brockwell’s bid on the grounds set forth in Hall’s protest.

³ We would also note that the NJSDA has confirmed that each of the subconsultant firms identified by Brockwell are both DPMC classified and NJSDA prequalified in the identified disciplines.

Jennifer R. Budd, Esquire
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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
Corrado Minervini, NJSDA Program Director
Sean Murphy, NJSDA Director of Procurement
Alison Perry, Procurement Analyst
Albert D. Barnes, NJSDA Chief Counsel
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Desmond H. O'Neill, NJSDA Assistant Counsel
Robert T. Lawless, Esquire, Counsel for Brockwell & Carrington Contractors, Inc.