

**FINAL AGENCY DECISION**

Via Email and Regular First Class Mail

December 14, 2015

John F. Palladino, Esq.
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30 S. New York Avenue
Atlantic City, New Jersey 08401

**Re: Passaic Leonard Place Elementary School
Design-Build Services
NJSDA Contract No. NT-0050-B01
Bid Protest By Ernest Bock & Sons, Inc.**

Dear Mr. Palladino:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your November 30, 2015 formal bid protest letter on behalf of Ernest Bock & Sons, Inc. (“Bock”) relating to the above-referenced procurement for design-build services for the Leonard Place Elementary School in Passaic, New Jersey (the “Procurement”). This letter is the NJSDA’s formal response and final agency decision on Bock’s bid protest.

In evaluating Bock’s bid protest, the NJSDA has reviewed and considered the following: correspondence from Donald R. Guarriello, NJSDA Vice President and Chief Financial Officer, to Donald N. Dinallo, President and Chief Executive Officer of Terminal Construction Corporation (“Terminal”), dated November 20, 2015; correspondence from Mr. Dinallo to Mr. Guarriello, dated November 20, 2015, with attachments; correspondence from Adrienne L. Isacoff, Esquire on behalf of Terminal, dated November 25, 2015, as supplemented with complete exhibits; your November 30, 2015 protest letter; correspondence from Lisa Lesser, Esquire on behalf of Dobco, Inc. (“Dobco”), dated December 1, 2015; supplemental correspondence from counsel for Terminal, dated December 3, 2015; supplemental correspondence from counsel for Dobco, also dated December 3, 2015; Terminal’s December 7, 2015 correspondence; the advertisement for bids; the Request for Proposals (“RFP”) and five (5) Addenda thereto; and the Technical and Price Proposals (inclusive of Uncompleted Contracts Forms and other accompanying documents) submitted by all bidders in connection with the Procurement.

Brief Overview of the Procurement Process

The Procurement was advertised and the RFP was issued on August 13, 2015. Subsequent thereto, interested bidders submitted Project Rating Proposals and were assigned Project Rating

Limits based thereon. Five (5) addenda issued thereafter. On November 5, 2015, interested bidders submitted Technical Proposals (addressing both Experience Criteria and Project Approach Criteria), sealed Price Proposals and other documentation in accordance with the requirements of the RFP, as modified by the 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, on a “yes” or “no” basis, 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 Project-specific Selection Committee consisting of six (6) members through the evaluation of that portion of the Technical Proposals addressing the Project Approach Criteria and interviews conducted for the purpose of clarifying the information contained in this portion of 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. Terminal had the highest non-price score among all bidders.

Under this Procurement, price is assigned a weighting factor of 60% and non-price or “other” factors are assigned a combined weight of 40%.

Price Proposals were publically opened on November 19, 2015. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final ranking of bidders. Terminal received a final rank of 1, Dobco received a final rank of 2, and Bock received a final rank of 3.

Following a review of the Price Proposals, the NJSDA found that Terminal had failed to include an Uncompleted Contracts Form from Centralpack Engineering Corp. (“Centralpack”), the firm identified in Terminal’s Price Proposal as Terminal’s HVACR subcontractor. On November 20, 2015, the NJSDA sent correspondence to Terminal advising that its bid was being rejected as non-responsive as a result of Terminal’s failure to include the Uncompleted Contracts Form from Centralpack.

Bock’s Bid Protest

On November 25, 2015, Terminal submitted a protest letter in response to its disqualification. Thereafter, Bock submitted its own protest letter on November 30, 2015, asking that the NJSDA reject the bids submitted by both Terminal and Dobco. In its protest letter, Bock contends that

the NJSDA properly rejected Terminal's bid and that Dobco's bid must "likewise" be rejected. As a result, Bock argues that the NJSDA must award the contract for the Procurement to Bock, as the highest ranking responsive and responsible bidder.

Specifically, Bock contends that the NJSDA's rejection of Terminal's bid was correct, due to Terminal's failure to include a form for Uncompleted Contracts for its HVACR subcontractor, Centralpack. Bock further contends that Dobco's bid was materially defective for two reasons: 1) Dobco failed to segregate the Experience Criteria and Project Approach Criteria portions of its Technical Proposal, as required by Addendum 1 to the RFP, and 2) Dobco purportedly failed to comply with the RFP requirement that Dobco name its proposed Project Superintendent and/or to provide a properly conforming Certification regarding the Project Superintendent's availability.

Analysis of Bock's Bid Protest

As a preliminary matter, Bock's arguments on Terminal's bid protest are addressed in the NJSDA's separate Final Agency Decision, of even date, rejecting Terminal's protest. This correspondence solely addresses Bock's protest contentions with respect to Dobco's bid.

A. Dobco's Experience and Project Approach Proposals

The RFP, as modified by Addendum 1 thereto, specified that each bidder's Technical Proposal submission was to consist of two separate portions:

First: "Experience Criteria" Categories

Design-Builder's Experience on Similarly Sophisticated Projects

Design-Builder's Design Consultant's Experience on Similarly Sophisticated Projects

Design-Builder's Demonstrate Prior Affirmative Action Experience

Second: "Approach Criteria" Categories

Design-Builder's Overall Approach to the Project

Identification and Qualification of Required Team Members

Design-Builder's Approach to Schedule

Approach to LEED requirements

[RFP Sections 1.3B.2. and 3]. That portion of each bidder's Technical Proposal addressing the Experience Criteria was to be evaluated by a panel drawn from the NJSDA's Standing Evaluation Committee. That portion of each bidder's Technical Proposal addressing Approach Criteria, also referred to as "Project Approach Criteria", was to be evaluated by a project-specific Selection Committee. [RFP Sections 1.4A and 1.4B].

The RFP expressly reminded bidders that Technical Proposal submissions addressing the Experience Criteria and submissions addressing the Project Approach Criteria were to be segregated.

NOTE that the responses to the three “Experience Criteria” categories must be submitted separately from the rest of the Technical Proposal submission, and may not be bound with or included in the rest of the Technical Proposal. The three Experience Criteria submissions may be placed in individual envelopes (sealed or unsealed) marked with the names of the individual categories, or the responses to all three Experience Criteria categories may be submitted together in an envelope (sealed or unsealed) marked “Experience Criteria Submission.”

[RFP Sections 3 and 4.1.1].

Rather than separately submit the Experience Criteria and Project Approach Criteria portions of its Technical Proposal, Dobco provided a consolidated Technical Proposal. Dobco’s Technical Proposal Submission consisted of looseleaf notebooks that included discrete and separately tabbed sections addressing each of the seven (7) Experience Criteria and Project Approach Criteria categories.

Bock argues that Dobco’s bid should be rejected because Dobco failed to segregate the Experience Criteria and Project Approach Criteria portions of its Technical Proposal. While the NJSDA agrees that Dobco’s failure to adhere to the RFP instructions constitutes a bid defect, the NJSDA finds, under the facts presented on this Procurement, that the defect is not material and is properly waived by the NJSDA.¹

Upon receipt of Dobco’s bid, the NJSDA’s Procurement Staff recognized that Dobco had failed to make separate submissions on the Experience Criteria and Project Approach Criteria. The Table of Contents of Dobco’s Technical Proposal, however, did list the components of the submission, organized by and submitted under separately numbered tabs. Materials under the three separate Experience Criteria tabs were removed from the Technical Proposal looseleaf notebooks and provided to the panel drawn from the NJSDA’s Standing Evaluation Committee. The remaining materials in the Technical Proposal addressing the Project Approach Criteria were provided to the members of the Project-specific Selection Committee for review and evaluation.

Although Dobco failed to segregate the Experience Criteria and Project Approach Criteria portions of the Technical Proposal, as required by the RFP, Dobco did separately organize,

¹ In reaching this determination, the NJSDA does reject the suggestion in Dobco’s counsel’s December 3, 2015 letter that in acknowledging receipt of Addendum 1, Dobco somehow did not “acknowledge agreement” with the terms of the addendum. In its Price Proposal, Dobco expressly acknowledged both receipt of all addenda and the incorporation into its bid of all addenda issued in connection with the Procurement.

compile and tab each of its submissions relating to the three (3) Experience Criteria. This organization was consistent with the RFP's instructions and made it a purely mechanical and clerical function for NJSDA Procurement staff to extract the three Experience Criteria tabs from the Technical Proposal notebooks.

Accordingly, each of the two committees involved in this Procurement were provided with and reviewed only those materials relevant to their respective evaluation tasks. There was thus no opportunity for members of one committee to "peek" at "superfluous information" supplied by Dobco, as suggested by Bock.

While "material conditions contained in bidding specifications may not be waived"[.] . . . "minor or inconsequential discrepancies and technical omissions can be the subject of waiver." Meadowbrook Carting v. Borough of Island Heights, 138 N.J. 307, 314 (1994)(quoting Terminal Construction Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 411 (1975).

Essentially this distinction between conditions that may or may not be waived stems from a recognition that there are certain requirements often incorporated in bidding specifications which by their nature may be relinquished without there being any possible frustration of the policies underlying competitive bidding. In sharp contrast, advertised conditions whose waiver is capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance, or likely to affect the amount of any bid or to influence any potential bidder to refrain from bidding, or which are capable of affecting the ability of the contracting unit to make bid comparisons, are the kind of conditions which may not under any circumstances be waived.

Meadowbrook Carting, 138 N.J. at 314 (quoting Terminal Construction Corp., 67 N.J. at 412)).

Under the facts presented on this protest, a waiver of Dobco's deviation from the technical requirements of the RFP is appropriate. The policies underlying competitive bidding are not frustrated and the waiver can in no way be said to be "capable of becoming a vehicle for corruption or favoritism, or capable of encouraging improvidence or extravagance" as suggested in Bock's protest.

B. Dobco's Technical Proposal Certification

Dobco identified Milutin "Miki" Stevanovic as its Superintendent for the Project on its Identification of Design Builder's Key Team Members form, its Design Builder's Required Key Team Members Resume form and its Organizational Chart. Mr. Stevanovic also attended and participated as Dobco's proposed Project Superintendent at Dobco's interview with the Selection Committee on November 18, 2015.

But Dobco also submitted a Technical Proposal Certification (hereinafter "Certification") in which the name "James Philbin" is inserted next to the designation of Superintendent for the Project. In the Certification, Dobco's principal swears and affirms that certain Key Team Members, including "Superintendent: ___ James Philbin _____ . . . are or will be available to perform their designated functions on this Project, without any conflicts or overlap with other SDA projects, if the contract is awarded to the above-named firm."

Bock contends, alternatively, that the Certification is defective because there has been no certification as to Mr. Stevanovic's availability as project Superintendent or that, if Mr. Philbin is Dobco's proposed Superintendent, Dobco has failed to properly identify him or provide his resume as a Key Team Member in its Technical Proposal submissions. In either case, Bock contends that the defect in Dobco's bid is material and non-waivable and requires rejection of Dobco's bid.

Dobco concedes that its insertion of Mr. Philbin's name in its Certification was a "clerical error" but insists that this error does not constitute a material bid defect.

At the outset, we dispatch as without merit the suggestion that there is any question of who Dobco identified as its proposed Project Superintendent. That person was Milutin "Miki" Stevanovic. The sole issue to be resolved on this aspect of Bock's protest, therefore, is whether the admitted defect in Dobco's Certification constitutes a material and non-waivable bid defect.

The purpose of the challenged portion of the Certification was to provide the NJSDA with the assurance that Key Team Members, including the Project Superintendent, would be able to perform on the Project without any conflicts or overlap with other NJSDA projects. Thus, the information provided with this portion of the Certification solely inures to the benefit of the NJSDA.

With this in mind, the NJSDA is capable of independently verifying and/or confirming whether any Key Team Member named by a bidder is working on other NJSDA projects and, if so, whether that individual will have any conflicts or overlap with the Project that is the subject of the bid. In this case, the NJSDA has confirmed that Mr. Stevanovic does not have a conflict that would preclude him from serving as a Superintendent for the Project at issue.

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Accordingly, while the NJSDA recognizes that Dobco's Certification is technically deficient, this is certainly not a material defect, especially given that the NJSDA has been able to confirm the absence of any personnel conflict between this Project and other current or pending NJSDA projects.

Conclusion

Dobco's bid was neither materially defective nor non-responsive. Accordingly, Bock's bid protest seeking the rejection of Dobco'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
Thomas Schrum, NJSDA Program Director
Sean Murphy, NJSDA Director of Procurement
Albert D. Barnes, NJSDA Chief Counsel
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Lisa H. Lesser, Esquire, Counsel for Dobco, Inc.