

**FINAL AGENCY DECISION**

Via Email and Regular First Class Mail

December 14, 2015

Adrienne L. Isacoff, Esquire
Florio, Perrucci, Steinhardt & Fader
218 Route 17N, Suite 410
Rochelle Park, New Jersey 07662

**Re: Passaic Leonard Place Elementary School
Design-Build Services
NJSDA Contract No. NT-0050-B01
Bid Protest By Terminal Construction Corporation**

Dear Ms. Isacoff:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your November 25, 2015 formal bid protest letter on behalf of Terminal Construction Corporation (“Terminal”) 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 Terminal’s bid protest.

In evaluating Terminal’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, Terminal’s President and Chief Executive Officer, dated November 20, 2015; correspondence from Mr. Dinallo, dated November 20, 2015, with attachments; your November 25, 2015 protest letter, as supplemented with corrected exhibits; correspondence from John F. Palladino, Esquire on behalf of Ernest Bock & Sons, Inc. (“Bock”), dated November 30, 2015; correspondence from Lisa Lesser, Esquire on behalf of Dobco, Inc. (“Dobco”), dated December 1, 2015; correspondence from Ms. Lesser, dated December 3, 2015; correspondence from you, dated, December 3, 2015; correspondence from Mr. Palladino, dated December 4, 2015; correspondence from you, dated December 7, 2015; the advertisement for bids; the Request for Proposals (“RFP”) and five (5) Addenda thereto; the Technical and Price Proposals (inclusive of Uncompleted Contracts Forms and other accompanying documents) submitted by all bidders in connection with the Procurement; and the November 19, 2015 bid opening worksheet.

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 were issued by the NJSDA 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.

Terminal’s Bid Protest

Terminal acknowledges that it failed to include an Uncompleted Contracts Form from Centralpack with its Price Proposal. Nonetheless, Terminal maintains that for the reasons set forth in its protest letter, “the identified deficiency was minor, immaterial and waivable” by the

NJSDA. Terminal further maintains that it is the NJSDA's duty "to waive minor deficiencies when, as here, there will be no adverse impact on the integrity of the bid solicitation, nor will the [NJSDA] be deprived of its assurance that the contract will be entered into in the manner specified."

Among the reasons cited by Terminal requiring the NJSDA's waiver of Terminal's omission of Centralpack's Uncompleted Contracts Form are the following:

- With Terminal's post-bid correspondence, dated November 20, 2015, and your November 25, 2015 protest letter, Terminal has provided documentation of its receipt of an email and attachments from Centralpack, sent at 1:21 p.m. on November 5, 2015. The email attached an Uncompleted Contracts Form from Centralpack, executed on October 15, 2015.
- The Centralpack Uncompleted Contracts Form provided by Terminal (DPMC Form 701) contains a certification "that the amount of uncompleted work on contracts is \$1,412,588.35" and "that the amount of this bid proposal, including all outstanding incomplete contracts does not exceed my prequalification dollar limit."
- Centralpack is DPMC classified and NJSDA prequalified in the HVACR trade with an Aggregate Rating of \$15 million.
- Because Terminal named Centralpack in its bid, had Centralpack's "price quote, and had all of [Centralpack's] DPMC documentation prior to the Submission Time, none of the mischief that can occur if subcontractor quotes and/or related documentation are not procured and submitted at the time of bid comes into play."
- Two other bidders participating in the Procurement, Prismatic Development Corp. ("Prismatic") and Brockwell & Carrington Contractors, Inc. ("Brockwell & Carrington"), identified Centralpack as their HVACR subcontractor and each provided an Uncompleted Contracts Form from Centralpack with its bid submissions.
- Since Prismatic and Brockwell & Carrington identified Centralpack as their HVACR subcontractor and provided Uncompleted Contracts Forms from Centralpack as part of their bid submissions, the NJSDA "was in possession of that Form and already had knowledge that Centralpack was fully qualified and had the requisite capacity to undertake the scope of work for which it was named as subcontractor at the time of the opening of bids and while the [NJSDA] was undertaking its review of Terminal's Proposal."

- “In light of these circumstances, waiving this minor deficiency will in no way erode the public bidding and policy principles that undergird the usual reason for rejecting a bid that does not include required subcontractor documentation.”

Analysis of Terminal’s Bid Protest

A. Terminal Failed to Provide the Uncompleted Contracts Form From Its HVACR Subcontractor As Required By the RFP and By Statute.

The RFP for this Procurement expressly required the submission with the Price Proposal of Uncompleted Contracts Forms for both the bidder and required subcontractors. Section 4.2 of the RFP provided that “[a]ll Design-Builders must submit a copy of the Uncompleted Contracts Form for themselves and for any subcontractor required to be named” and that a “[f]ailure to submit an Uncompleted Contracts Form with the Price Proposal will result in the rejection of the bid.” Section 4.2.2 of the RFP reiterated that bidders’ Price Proposals must be accompanied by Uncompleted Contracts Forms completed by subcontractors required to be named and that “[f]ailure to submit the required Uncompleted Contracts Form(s) with the Price Proposal will result in the rejection of the bid.”

The requirement that Terminal 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.” HVACR subcontractors are required to be named both by statute and by the terms of the RFP for this Procurement. N.J.S.A. 18A:7G-3 and 52:18A-243 and RFP Section 1.3.A. 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. Terminal’s Failure to Include With Its Bid the Uncompleted Contracts Form From Its HVACR Subcontractor Was a Material and Non-Waivable Bid Defect.

Terminal admits that it failed to submit the required Centralpack Uncompleted Contracts Form with its bid. Thus, the question presented on Terminal’s protest is whether Terminal’s omission of the Uncompleted Contracts Form for Centralpack 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.”

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.

Terminal has presented proofs in response to the rejection of its bid that minutes prior to its submission of its Technical and Price Proposals, Terminal received an Uncompleted Contracts Form from Centralpack certifying to the amount of uncompleted work on contracts and certifying “that the amount of [its] bid proposal, including all outstanding incomplete contracts does not exceed [its] prequalification dollar limit.” Terminal contends that

because Terminal named its HVACR subcontractor, had its subcontract price quote, and had all of its DPMC documentation prior to the Submission Time, none of the mischief that can occur if subcontractor quotes and/or related documentation are not procured and submitted at the time of bid comes into play under these circumstances. Moreover, immediately upon receipt of the SDA’s letter advising Terminal that Centralpack’s Uncompleted Contracts Form was missing, Terminal submitted that Form”

The fact remains, however, that Terminal failed to submit Centralpack’s certification form until after the deadline for submission of bids. The RFP 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 Terminal’s submission of all such forms “as a condition of bidding”.

On this aspect of Terminal’s protest, Terminal seeks to cure the defect in its bid after the deadline for submission of bids. Terminal does not seek to clarify its bid; rather, Terminal 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). Terminal seeks to supplement its bid by supplying a missing document after the bid submission deadline.

To allow Terminal to supplement its bid after the bid submission deadline would give Terminal a competitive advantage over other bidders by providing it more time to comply with the requirements of the RFP and statute than other bidders. Providing this additional time to Terminal would favor Terminal 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 RFP prior to the bid submission deadline. In addition, were Terminal to be afforded a waiver under these circumstances (in which the RFP 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).

Terminal seeks to mitigate the materiality of its bid defect by referring to and relying upon Uncompleted Contracts Forms submitted by Centralpack to two other bidders on the Procurement -- Prismatic and Brockwell & Carrington. As a result of these serendipitous submissions, Terminal would have the NJSDA use the Centralpack Uncompleted Contracts Forms provided to Prismatic and Brockwell & Carrington to supplement Terminal’s defective bid.

It is certainly true that Centralpack submitted photocopied Uncompleted Contracts Forms to Prismatic and Brockwell & Carrington (DPMC Form 701, denominated “Total Amount of Uncompleted Contracts”) that by all physical appearances are identical to each other and to the form Terminal contends was provided to it by Centralpack in advance of the bid deadline. 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 Centralpack to each of the three prospective bidders 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 Centralpack Uncompleted Contracts Form submitted to Prismatic meant the bid proposal submitted by

Centralpack to Prismatic – not Centralpack’s bid proposal to Brockwell & Carrington and not its bid proposal to Terminal. Because Centralpack submitted separate and distinct bid proposals to each of Prismatic, Brockwell & Carrington and Terminal, the certifications contained in each of the Uncompleted Contracts Forms were not the same and were not interchangeable.

For these reasons, Terminal is incorrect in its contention that the NJSDA had in its possession the required Centralpack Uncompleted Contracts Form omitted from Terminal’s bid and had “knowledge that Centralpack was fully qualified and had the requisite capacity to undertake the scope of work for which it was named as subcontractor at the time of the opening of bids” The required form containing Centralpack’s certification relating to its bid to Terminal was only provided on November 20, 2015, the day after the bid submission deadline.

In your December 7, 2015 submission on behalf of Terminal, you attach a copy of what is represented to be Centralpack’s November 5, 2015 bid quote to Terminal. In your letter, you point out that this document, together with the Centralpack Uncompleted Contracts Form submitted to the NJSDA on November 20, 2015, demonstrate that the bid amount plus the value of uncompleted work totals only \$4,977,588.35, well below Centralpack’s \$15,000,000 aggregate rating. Even so, this information and documentation is provided after the bid submission deadline. To allow Terminal to rely on these late submissions would improperly favor Terminal over other bidders and prospective bidders and would undermine the integrity of the bidding process.

The cases cited by Terminal in support of its contention that the defect in its bid should be waived are inapposite to the undisputed facts presented in its protest. Of particular note, Terminal cites to I/M/O Contract for Route 280 Section 7U Exit Project, 179 N.J. Super. 280 (App. Div. 1981) in support of the proposition that a bid defect may be waived through a post-bid cure if the cure will not undermine the integrity of the bidding process. Unlike in Route 280, in which the bidder submitted a status of contracts form that was one month out of date from that required under the bid specifications, Terminal failed entirely to submit the required Uncompleted Contracts Form. In ruling that the Commissioner of Transportation could, in his discretion, waive the bid deviation, the court in Route 280 expressly took “note that this is not a case of an ‘omission’ to furnish certain financial data, but rather the submission of data that was outdated by one month.” Route 280, 179 N.J. Super. at 283. Moreover, Route 280 noted that under Title 27, the Commissioner had authority to require and consider the submission of supplemental information and documentation relevant to bidder’s financial capacity to perform contract work even after the opening of bids.

Thus, Route 280 is factually and legally distinguishable from the Terminal protest. As discussed in greater detail above, permitting Terminal a waiver from its bid defect under the facts of this Procurement would unfairly favor Terminal and undermine the competitive process.

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C. Submission of a DPMC Uncompleted Contracts Form by a Bidder Does Not Render a Bid Materially Defective.

Bock contends that Terminal's bid is defective because it utilized DPMC Form 701, denominated "Total Amount of Uncompleted Contracts", rather than the "NJSDA Total Amount of Uncompleted Contracts" form (NJSDA Form UC-1) specified in the RFP. To the extent that use of the DPMC form constitutes a bid defect, the defect is not material and is waivable because the substantive content of the certifications contained in both forms is the same. Thus, Terminal's bid cannot be rejected for this reason.

Conclusion

Terminal's failure to provide an Uncompleted Contracts Form constitutes a material and non-waivable bid defect. Accordingly, Terminal's protest from the rejection of its bid and seeking the award of the contract for design-build services for the Leonard Place Elementary School project is denied.

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
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Albert D. Barnes, NJSDA Chief Counsel
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John F. Palladino, Esquire, Counsel for Ernest Bock & Sons, Inc.