

**FINAL AGENCY DECISION**

December 5, 2017

Via Email and Regular First Class Mail

John F. Palladino, Esquire
Hankin, Sandman, Palladino & Weintrob
30 South New York Avenue
Atlantic City, New Jersey 08401

**Re: Passaic – New Dayton Ave. Educational Campus
NJSDA Contract No. NT-0052-B01
Protest By Ernest Bock & Sons, Inc.**

Mr. Palladino:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of your November 11, 2017 formal protest letter on behalf of Ernest Bock & Sons, Inc. (“Bock”) relating to the above-referenced procurement for design-build services for the Dayton Avenue Educational Campus 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: your November 11, 2017 correspondence with attachments and Certification of Heather Cahill; the November 15, 2017 correspondence with attachments from Patrick J. Greene, Jr., Esquire, on behalf of Terminal Construction Corp. (“Terminal”); your November 17, 2017 correspondence; the October 31, 2017 correspondence from Rich Yarsinsky, NJSDA Records Custodian, to Heather M. Cahill of Bock; the October 31, 2017 correspondence from Mr. Yarsinsky to Anthony J. DePascale of Bock; the June 13, 2017 advertisement for bids (hereinafter, the “Advertisement”); the Request for Proposals, last revised June 13, 2017 (“RFP”); Addenda Nos. 1 through 5 to the RFP, dated July 31, 2017, August 18, 2017, August 30, 2017, September 13, 2017 and September 21, 2017, 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, Technical 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 June 13, 2017. 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 June 29, 2017. Furthermore, all interested bidders were required to submit a Project

Rating Proposal (“PRP”) form no later than 2:00 p.m. on July 14, 2017. Five (5) addenda were issued thereafter. On or before October 5, 2017, 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 prospective bidders were required to submit Technical Proposals that provided information regarding the past experience and qualifications of the bidder and its Design-Build Team, the bidder’s overall approach to the project and to the LEED™ requirements of the Project, as well as other information as set forth in the RFP. A Procurement-specific Selection Committee consisting of six (6) members scored the Technical Proposals in all of the non-price evaluation categories described in the RFP through evaluation of responsive Technical Proposals, as well as interviews conducted for the purpose of clarifying the information contained in the Technical Proposals.

Raw scores of each of the Selection Committee members’ evaluation of the Technical Proposals were multiplied by an assigned weighting factor for each non-price evaluation category, 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 six (6) Price Proposals were received, which were publicly opened on October 27, 2017. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final ranking of the bidders. Terminal received a final rank of 1, while Bock received a final ranking of 2.

Bock’s Bid Protest

Bock contends that Terminal’s bid must be rejected due to a purported discrepancy between information listed on the Small Business Enterprise (“SBE”) Forms B and C submitted with Terminal’s Technical Proposal. In addition, Bock contends that Terminal’s bid must be rejected since Terminal failed to provide an electronic copy of its Technical Proposal that matches the hard copy of its submission. Each of these contentions is individually addressed below.

Analysis of Bock’s Bid Protest as to Terminal

1. SBE Forms B and C submitted with Terminal’s Technical Proposals contain discrepancies.

By way of background, as part of its Technical Proposal, and consistent with the requirements of the Procurement, Terminal submitted an SBE Form B reflecting proposed SBE participation by its Design Team. In addition, Terminal submitted separate SBE Form C’s for each of the subconsultants that it identified for SBE participation on its SBE Form B.

RSC Architects (“RSC”) is identified in Terminal’s Price Proposal as the “Design-Builder’s Design Consultant.” Furthermore, Terminal’s Technical Proposal, including a proposed Organization Chart, identifies RSC as the “Design Consultant,” as well as various design subconsultant firms that would be retained by RSC.

As part of its Technical Proposal, Terminal submitted an SBE Form C for RSC identifying the “Subcontract Bid Amount” for RSC as \$7,455,000. RSC is also listed on Terminal’s SBE Form B with a “Subconsultant Amount” of \$2,900,000. Bock contends that the amounts listed for RSC on the respective SBE forms evidence a discrepancy, and that this purported discrepancy constitutes a material defect warranting rejection of Terminal’s bid. Bock’s contention in this regard fails, however, based upon an objective review of Terminal’s Technical Proposal.

On the SBE Form C submitted for RSC, \$7,455,000 is listed as the “Subcontract Bid Amount.” As the lead design consultant with identified subconsultants, RSC’s subcontract bid to Terminal would necessarily include, in addition to RSC’s own fee, the amounts of the various fees from the various SBE and non-SBE subconsultants’ bids. In contrast, the SBE Form B, upon which the percentage of SBE participation is based, reflects RSC’s individual fee, i.e. not including the amount of its subconsultants. Quite simply, the amounts listed on the respective SBE forms reflect different, but related, information, i.e. the \$2,900,000 RSC fee is merely a component of the \$7,455,000 overall subcontract bid price for RSC, including subconsultants.

Terminal’s response to Bock’s bid protest confirms that this interpretation is correct. In its November 15, 2017 letter, Terminal explains that the \$2,900,000 reflected on the SBE Form B is but a component of RSC’s total subcontract bid amount of \$7,455,000 (as reflected on Terminal’s SBE Form C).

Bock’s November 17, 2017 submission characterizes Terminal’s confirmation in this regard as an impermissible correction, modification, or supplementation of Terminal’s bid. Notwithstanding this characterization, however, our courts have long recognized a distinction between post-submission clarification of bids versus post-submission corrections, modifications or supplementation of bids.

In Matter of Protest of the Award of the On-Line Games Production and Operation Services Contract, Bid. No. 95-X-20175, 279 N.J. Super. 566, 597 (App. Div. 1995), the Appellate Division held that when “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.” Under the circumstances presented under this protest, Terminal’s response does not seek to alter or supplement any of the information provided in its Technical Proposal. Rather, Terminal’s response is designed to clarify its bid submission, in light of Bock’s argument that Terminal’s bid contains a material defect. As such, Terminal’s response may be considered and does not constitute a material defect in and of itself, particularly given that it merely seeks to clarify and confirm that which is already apparent in Terminal’s bid submission.

Accordingly, Bock's protest of Terminal's bid in this regard is rejected.

2. Terminal failed to submit an electronic copy of its Technical Proposal that matched the original hard copy of same.

Bock further contends that Terminal's failure to provide an electronic copy of its Technical Proposal that matched the original hard copy of same is a material, non-waivable defect, which requires the rejection of Terminal's bid.¹ However, Bock has not cited any provision of the RFP that would suggest that the failure to provide a "completed" copy of the Technical Proposal in electronic format is somehow fatal to Terminal's bid. There are specific instances expressly highlighted in the RFP in which a bidder's failure to provide certain information or documentation will result in the rejection of its Technical Proposal. By way of example:

- Section 1.3 of the RFP provides that "[a] responding Design-Builder's failure to identify properly prequalified and classified subcontractors and subconsultants in the listed required trades will result in disqualification of that Design-Builder and rejection of the Design-Builder's Technical Proposal."
- Section 3.5.A(3) of the RFP provides that "**Failure to comply with the above Key Team Member identification requirements will result in rejection of the Firm's response to this RFP.**" (Emphasis in original).
- Section 3.5.A(7) of the RFP provides that "Failure to identify required Key Team Members, and/or failure to provide resumes for required Key Team Members will result in rejection of the Technical Proposal as non-responsive and will disqualify the responding firm from further participation in this procurement."
- Section 3.12 of the RFP provides that "Failure to submit [an] Ownership Disclosure Form will result in the disqualification of the bid and rejection of the Design-Builder's Technical and Price Proposals."
- Section 4.2.2 of the RFP provides that "Failure to submit the required Uncompleted Contracts Form(s) with the Price Proposal will result in rejection of the bid."

There is no comparable language in the RFP with respect to the submission of a matching electronic copy of the Technical Proposal. Moreover, the NJSDA has confirmed that the forms identified in Bock's bid protest were fully completed in Terminal's hard copy submissions of its Technical Proposal to the NJSDA. Furthermore, Bock concedes, as it must, that the original hard

¹ We note that Terminal's November 15, 2017 correspondence cites to previous NJSDA Final Agency Decisions. While instructive as to this issue in this case, bidders are advised that individual determinations of bid protests are determined on the specific facts at issue and are not by nature precedential.

copy of Terminal's Technical Proposal included the required forms that were omitted or incomplete in the electronic copy concurrently submitted by Terminal.

Thus, to the extent that the electronic copy did not fully match the original hard copy submission may be a technical defect, it is not a material one, as the NJSDA did receive all of the required information. 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).

Bock further asserts that Terminal's failure to provide a matching electronic copy of its Technical Proposal afforded Terminal a competitive advantage, in that it purportedly allowed Terminal additional time to negotiate with subcontractors to obtain a better price.

Notwithstanding Bock's contentions, all bidders were given exactly the same amount of time to complete and submit their bid documents. Terminal was given no additional time. Terminal, like every other bidder, faced the challenge of endeavoring to prepare its bid in compliance with the specifications of and within the time constraints imposed by the RFP. Any bidder that submits a bid package that contains a defect, either wittingly or unwittingly, takes the risk that the defect might be material and that its bid might thereby be subject to rejection. In this case, although Terminal's bid failed to include a complete electronic copy of the entire original hard copy bid package, the inclusion of all required information and documentation in the original hard copy rendered this omission an immaterial bid defect. Since Terminal received no additional time to submit its bid package, Bock's argument that Terminal received a competitive advantage is rejected.

Furthermore, Bock's contention that Terminal was somehow afforded a post-bid advantage by allegedly subverting the review efforts of potential challenges by providing a non-matching electronic copy of its Technical Proposal is without merit. Here, Bock requested and was provided with the electronic copies of the Technical Proposals submitted by all the bidders, as well as the hard copy of Terminal's Technical Proposal for in-person review at the NJSDA's office. Assuming *arguendo* that there was some disadvantage in receiving only the electronic copies submitted by the bidders, no advantage was gained by Terminal here, given that Bock timely reviewed both the original and the electronic copy of Terminal's Technical Proposal, and submitted the instant bid protest based on its review of both versions.

Accordingly, the NJSDA finds no basis for rejection of Terminal's bid for the reasons claimed by Bock in its bid protest.

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Conclusion

For the foregoing reasons, Bock'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
Andrew Yosha, NJSDA Executive Vice President, Program Operations & Strategic Planning
Jane F. Kelly, NJSDA Vice President, Corporate Governance and Operations
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