

**FINAL AGENCY DECISION**

April 27, 2017

Via Email and Regular First Class Mail

Gerard J. Onorata, Esquire
Peckar & Abramson
70 Grand Avenue
River Edge, New Jersey 07661

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

**Re: Millville – New Senior High School
NJSDA Contract No. ST-0046-B01
Protests By Epic Management, Inc. and Ernest Bock & Sons, Inc.**

Gentlemen:

The New Jersey Schools Development Authority (“NJSDA”) is in receipt of Mr. Onorata’s March 17, 2017 formal protest letter on behalf of Epic Management, Inc. (“Epic”) and Mr. Palladino’s March 15, 2017 and March 17, 2017 formal protest letters on behalf of Ernest Bock & Sons, Inc. (“Bock”) relating to the above-referenced procurement for design-build services for the New Senior High School project in Millville, New Jersey (the “Procurement”). These protest letters challenge an award to Hall Construction Co., Inc. (“Hall”), the apparent successful bidder in the Procurement. Additionally, in his March 27, 2017 correspondence replying to Bock’s protest on behalf of Epic, Mr. Onorata asserts that Bock’s bid should be rejected. The NJSDA interprets this assertion to constitute an additional bid protest. This letter is the NJSDA’s formal response and final agency decision on Epic’s and Bock’s bid protests.

In evaluating the three bid protests, the NJSDA has reviewed and considered the following: the March 8, 2017 correspondence from Joel G. Lizotte, Senior Vice President of Epic, with attachments; Mr. Palladino’s March 15, 2017 correspondence, with attachments; Mr. Palladino’s March 17, 2017 correspondence, with attachments; Mr. Onorata’s March 17, 2017 correspondence, with attachments; correspondence from Robert T. Lawless, Esquire, counsel for Hall, dated March 20, 2017, with attachments; Mr. Lawless’s March 21, 2017 correspondence, with attachments; Mr. Palladino’s March 23, 2017 correspondence; Mr. Lawless’s March 24, 2017 correspondence; Mr. Onorata’s two (2) letters, both dated March 27, 2017, with attached exhibits and certifications; Mr. Lawless’ March 28, 2017 correspondence; Mr. Palladino’s April 3, 2017 correspondence; Mr. Onorata’s April 3, 2017 correspondence; Mr.

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 2

Lawless's April 3, 2017 correspondence; the September 30, 2016 advertisement for bids (hereinafter, the "Advertisement"); the Request for Proposals, last revised September 30, 2016 ("RFP"); Addenda Nos. 1 through 6 to the RFP, dated December 6, 2016, December 14, 2016, January 5, 2017, January 12, 2017, January 20, 2017 and January 26, 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 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 September 30, 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 October 19, 2016. All interested bidders were required to submit a Project Rating Proposal ("PRP") form no later than 2:00 p.m. on October 31, 2016. Six (6) addenda were issued thereafter. On or before February 8, 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 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 at least two of the three 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 six (6) 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 five (5) Price Proposals were received, which were publicly opened on March 2, 2017. Price and non-price scores for each bidder were then weighted and tabulated to arrive at a final

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 3

ranking of the bidders. Hall received a final ranking of 1, while Epic received a final ranking of 2 and Bock a final ranking of 3.

Epic's and Bock's Bid Protests

Both Epic and Bock have submitted bid protests seeking rejection of Hall's bid. Generally, Epic contends that the electrical subcontractor named by Hall in its bid (R. Palmieri Electrical Contractors, Inc. ("Palmieri")) "materially misrepresented its aggregate rating limit of uncompleted work." Specifically, Epic contends that Hall's proposed electrical subcontractor cannot perform the requisite electrical work without exceeding its aggregate rating limit established by the Division of Property and Management ("DPMC") of the New Jersey Department of the Treasury, thereby requiring a rejection of Hall's bid. Similarly, Bock contends that Hall's bid must be rejected based on Hall naming Palmieri as its electrical subcontractor, noting that Palmieri had submitted a proposal to Bock for the Project, with a price that would have exceeded its aggregate rating limit. Both Epic and Bock have further argued that, to the extent that Hall seeks to purchase some of the electrical equipment directly in an effort to reduce Palmieri's price, this is impermissible under the applicable governing statute (N.J.S.A. 52:18A-243) and the RFP.

In addition to protesting Hall's bid, Bock is also seeking rejection of the bid submitted by Epic. Specifically, Bock contends that Epic's bid must be rejected for the following reasons: 1) Epic failed to provide an electronic copy of its Technical Proposal that matched the hard copy of its submission; 2) Epic purportedly failed to identify properly prequalified firms as part of the Design Builder's Design Consultant team; and 3) Epic failed to identify and provide a resume for a qualified Engineering Design Manager.

Furthermore, in the course of the multiple submissions by the parties, Epic has further asked that Bock's bid be rejected due to Bock's purported inability to meet the certification requirements of the NJSDA's Price Proposal. Specifically, Epic contends that Bock's apparent decision to voluntarily refrain from bidding on jobs issued by the City of Philadelphia renders Bock unable to meet the NJSDA's criteria for a public project.

Each of these protests is individually addressed below.

Analysis of Epic's and Bock's Bid Protests as to Hall

Pursuant to the Advertisement. "[i]n accordance with the requirements of N.J.S.A. 52:18A-243, each design-builder is required to set forth in its bid the name or names of all subcontractors to whom the design-builder will directly subcontract for the furnishing of any of the work and materials specified in the plans and specifications for... [t]he electrical work..." The Advertisement further required that the "design-builder must identify a subcontractor that is

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 4

DPMC classified and NJSDA prequalified in the trade of Electrical (C047), unless the design-builder intends to self-perform for this trade.”

Hall’s proposed subcontractor for electrical work, Palmieri, has a DPMC and NJSDA aggregate limit of \$15,000,000. As part of Hall’s bid, Palmieri submitted a notarized DPMC Form 701 “Total Amount of Uncompleted Contracts” form, certifying “that the amount of uncompleted work on contracts is \$5,420,508” and “that the amount of this bid proposal, including all outstanding incomplete contracts does not exceed my prequalification dollar limit.” Hall further submitted NJSDA Form UC-1 “NJSDA Total Amount of Uncompleted Contracts Form” from Palmieri, which certifies that Palmieri’s “total amount of uncompleted construction work (defined as the total contract value of unbilled work – including public and private) as of the bid due date is \$5,420,508.” In its UC-1 Form, Palmieri further certified that “the amount of this bid proposal, including the amount listed above does not exceed my New Jersey Schools Development Authority, Aggregate Rating limit.”

Based upon Palmieri’s certifications as to the amount of its uncompleted contracts, Palmieri’s subcontract with Hall cannot exceed \$9,579,492. Hall has provided Palmieri’s signed design build quotation for electrical, dated February 6, 2017, reflecting a total subcontract sum (at the time of the bid) in the amount of \$9,168,000. As a result of post-bid opening reconciliation meetings with Hall, it now appears that the amount of the electrical subcontract will be \$9,488,000, which is still within Palmieri’s Aggregate Rating Limit, given the amount of its Uncompleted Contracts. On its face, this confirms the accuracy of Palmieri’s certifications in its Uncompleted Contracts forms submitted as part of Hall’s bid.

The foregoing notwithstanding, Epic contends that it is “inconceivable” that Palmieri’s quote to provide electrical equipment and services is \$10 million less than the electrical bid price contained in Epic’s proposal. This position is echoed by Bock, who has advised that Palmieri had apparently submitted a separate proposal to Bock in the amount of \$16,557,000. Bock further notes that after negotiations with Palmieri, Bock obtained quotes from two other electrical subcontractors in the amount of \$28,799,000 and \$32,909,000.

Initially, we note that the mere difference in electrical bids, in and of itself, does not mean that a lower bid is defective. There can be many reasons for such differences. Here, in its March 20 and March 21, 2017 responses, Hall acknowledges that the quote provided by Palmieri to Hall contemplates that Hall (as the Design Builder) will purchase some of the electrical equipment for the Project. Leaving aside for a moment whether Hall’s approach is permissible under New Jersey law, it is significant that neither Epic nor Bock contend that, even if Palmieri’s quote was entirely for labor (i.e. did not include the purchase of any electrical equipment), that \$9,488,000 is an unreasonable value for those services.

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 5

With the foregoing in mind, we turn to address the contention raised by both Epic and Bock that Hall is precluded from purchasing the materials used in the electrical scope of work.

N.J.S.A. 52:18A-243(a) provides in pertinent part:

In undertaking any school facilities projects where the cost of construction, reconstruction, rehabilitation or improvement will exceed \$25,000, the development authority may prepare, or cause to be prepared, separate plans and specifications for: (1) the plumbing and gas fitting and all work and materials kindred thereto, (2) the steam and hot water heating and ventilating apparatus, steam power plants and all work and materials kindred thereto, (3) ***the electrical work***, (4) structural steel and miscellaneous iron work and materials, and (5) all general construction, which shall include all other work and materials required to complete the building. [Emphasis added].

Subsection (b) of that section further provides:

The development authority shall advertise and receive (1) separate bids for each of the branches of work specified in subsection a. of this section [N.J.S.A. 52:18A-243(a)]; or (2) bids for all the work and materials required to complete the school facilities project to be included in a single overall contract, in which case there shall be set forth in the bid the ***name or names of all subcontractors to whom the bidder will subcontract for the furnishing of any of the work and materials specified in branches (1) through (4) in subsection a. of this section***; or (3) both. [Emphasis added].¹

A plain reading of these provisions reveals that the work and materials for schools facilities construction projects may be performed by a single contracting party. In other words, these provisions expressly authorize one contractor to provide all of the work and materials. However, these provisions also require that, to the extent another subcontractor will be used to provide “any” of the work and materials in the plumbing, HVAC, electrical or structural branches, then that subcontractor must be identified.

Accordingly, there is nothing in the cited statute that precludes Hall from performing any of the work in the various branches or from obtaining any of the materials for that work. N.J.S.A. 52:18A-243(b) merely requires Hall to identify any of the subcontractors to whom it will subcontract for the furnishing of “any of the work and materials” for the applicable branches. Here, Hall has identified Palmieri as the subcontractor it will subcontract with to perform the

¹ The terms of the RFP generally mirror the requirements of these statutory sections.

electrical work. While there may be an inherent assumption that Palmieri will also purchase the associated materials, the statutory provision at issue here does not mandate that that be the case.

Bock and Epic also contend that, if Hall is going to “self perform” in any of the identified trades, it must so indicate in its Technical Proposal. Bock and Epic further contend that the purchasing of electrical equipment constitutes “self performance,” and that Hall’s failure to identify itself as “self performing,” while not being DPMC or NJSDA prequalified in electrical, is a material defect.

It is undisputed that Hall’s Technical Proposal did not indicate that Hall would be self-performing in the electrical branch. Furthermore, as discussed in greater detail above, Hall did not explicitly state in its Technical Proposal that it would be purchasing any of the equipment or materials for the electrical branch. However, for the reasons below, these omissions do not constitute material defects that would warrant the rejection of Hall’s bid.

In addressing the statutory requirements relating to the four branches, Section 1.3 of the RFP at page 6 states:

Subcontractors in the above disciplines must be identified in the Technical Proposal (unless the Design-Builder proposes to self-perform in such disciplines), and all requested information regarding such subcontractors must be supplied as requested. [Emphasis omitted from original] ***If a design-builder intends to self-perform any of the work*** of four above-described branches of Work, ***and is DPMC classified and NJSDA prequalified to do so***, the design-builder shall so indicate and include the required information where called for in the Technical Proposal and Price Proposal. [Emphasis added].

As is plainly evident, the terms of the RFP only impose the self-performing identification and DPMC classification and NJSDA prequalification for the performance of any “work” in the applicable branches. There is absolutely no reference to the provision of materials in the context of the above requirements.² As such, there was no requirement for Hall to identify itself as “self performing” in the context of purchasing or obtaining materials for work relating to the four branches.

This conclusion is consistent with N.J.S.A. 45:5A-9(a), which governs the licensure of electrical contractors. It provides that “no person shall advertise, enter into, engage in or work as an electrical contractor, unless such person has secured a business permit and ... has obtained a license from the Board [of the Examiners of Electrical Contractors].” N.J.S.A. 45:5A-2 defines “electrical contractor” as “a person who engages in the business of contracting to install, erect,

² Indeed, neither Bock nor Epic have pointed to any provision in the statute or the RFP that requires bidders to identify any materials suppliers in their bid submissions.

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 7

repair or alter electrical equipment for the generation, transmission or utilization of electrical energy.” Notably, the definition does not refer to “supply,” “purchasing,” “obtaining,” or “procurement” of electrical equipment for the generation, transmission or utilization of electrical energy. Thus, a plain reading of these provisions leads to the conclusion that the role of an “electrical contractor” is to provide the services relating to the transmission of electrical energy, but nothing in the definition suggests that the supply, sourcing or procurement of electrical equipment is the sole province of an electrical contractor.

This analysis is entirely consistent with common sense. As noted by Hall in its submissions, anyone can purchase electrical equipment from a supplier. Put another way, one need not be licensed as an electrical contractor to obtain such equipment.

Furthermore, simply because the electrical subcontractor might not be purchasing the equipment does not mean that the electrical subcontractor can disclaim responsibility for the electrical work. N.J.S.A. 45:5A-9(a) provides that an electrical contractor “shall assume full responsibility for inspection and supervision of all electrical work to be performed by the permittee in compliance with recognized safety standards.” As such, even if the electrical equipment is purchased by another entity, the electrical contractor retains the statutory duty to ensure that the electrical work is performed in compliance with recognized safety standards.

We would also note that N.J.S.A. 52:18A-243(a) makes explicit reference to “materials” when discussing plumbing and gas fitting, steam and hot water heating and ventilating apparatus, steam power plants, structural steel and miscellaneous iron work. Significant by its omission is the absence of a similar reference to materials in the context of electrical work. As such, the terms of the statute itself suggest an intentional exclusion of the provision of electrical materials from the scope of electrical work.

Bock also contends that, since Hall will be providing the electrical equipment directly, the alarm manufacturer is required to be named by Hall in its bid, as the alarm manufacturer will supposedly be performing electrical work. In advancing this argument, Bock purports to identify an industry standard that would necessitate Hall naming the alarm manufacturer as a primary subcontractor. However, Bock has not made any proffer as to whether Hall will proceed as posited by Bock, as to whether the purported standard is the absolute standard used in the construction industry or as to whether alarm installation is within the scope of electrical contracting pursuant to the licensing statute for electrical contractors. Rather, Bock has requested an informal hearing on this point to present additional proofs.

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. 19:38B-9.3. In connection with the instant bid protests, the parties have submitted fourteen (14)

submissions to the NJSDA, some with numerous exhibits and certifications. Bock itself has tendered four (4) substantive written submissions. As such, Bock has had ample opportunity to submit any proofs that it asks the NJSDA to consider on this point, but has failed to do so. 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. As such, the NJSDA declines to reject Hall's bid on the speculative grounds raised by Bock on this point.

Finally, we dismiss the arguments raised by both Epic and Bock that Hall's proposed mechanism for the delivery of electrical work constitutes impermissible "bid shopping" or a post-bid modification. Hall has identified the electrical subcontractor that will be performing the electrical work. The costs for this work are set forth in Palmieri's quote, which predates the date of the bid submission to the NJSDA. Neither Bock nor Epic have set forth any factual basis for ascribing any ulterior or improper motives to Hall's proposed delivery mechanism.

In sum, while both Epic and Bock have advanced numerous and lengthy arguments as to why Hall's bid should be rejected based on the electrical work, each of these arguments relies on a misinterpretation of the governing statutory requirements and/or the terms of the RFP. Through their respective bid protests, Epic and Bock are seeking to impose constraints upon Hall's bid that run afoul of the clear requirements of the applicable statutes and the RFP. Most significantly, neither party has cited to any dispositive case law that would prohibit the approach utilized by Hall in its bid or that supports its various interpretations of N.J.S.A. 52:18A-243.

For the foregoing reasons, neither Epic nor Bock has demonstrated that there is any basis for the rejection of Hall's bid based upon Palmieri's alleged exceedance of its aggregate limit. Furthermore, neither Epic nor Bock has demonstrated that the approach utilized by Hall relating to the performance of electrical work is precluded under the RFP, the governing statute or any case law interpreting that statute. As such, Epic's and Bock's protests relating to Hall's bid are rejected.

Having now determined that there is no basis for rejecting the Hall bid, Bock's protest of the Epic bid and Epic's protest of the Bock bid are purely academic. Nonetheless, these additional protests are addressed hereinafter solely for the purpose of creating a complete record for any potential appeal.

Analysis of Bock's Bid Protest as to Epic

- 1. Epic failed to submit an electronic copy of its Technical Proposal that matched the original hard copy of same.***

Bock contends that Epic's failure to provide an electronic copy of its Technical Proposal that matched the original hard copy of same is a material, nonwaivable defect, which requires the

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 9

rejection of Epic's bid. 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 Epic'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 3.5.1(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 3.5.1(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 Epic's hard copy submissions of its Technical Proposal to the NJSDA. Furthermore, Bock concedes, as it must, that the original hard copy of Epic's Technical Proposal included the required forms that were omitted or incomplete in the electronic copy concurrently submitted by Epic.

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 Epic's failure to provide a matching electronic copy of its Technical Proposal afforded Epic a competitive advantage, in that it purportedly allowed Epic 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. Epic was given no additional time. Epic, 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, either wittingly or unwittingly, contains a defect takes the risk that the defect might be material and that its bid might thereby be subject to rejection. In this case, although Epic'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 Epic received no additional time to submit its bid package, Bock's argument that Epic received a competitive advantage is rejected.

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

2. Epic's proposed Design Consultants indicated that they intend to self-perform in various design disciplines in which they are not prequalified.

Bock's Bid Protest notes that Epic submitted an "Identification of Required Subconsultant to the Design Consultant" form (referred to hereinafter as the "Form") with its Technical Proposal. Bock contends that this form indicates that Epic's proposed "Design Consultants" (in this case, the architectural firms of Garrison Architects ("Garrison") and Clarke Caton Hintz ("CCH")) would be self-performing in various identified subconsultant areas, including various engineering disciplines. Bock contends that, since neither of these firms are DPMC classified or NJSDA prequalified for certain of the design subconsultant areas specified for the Procurement, Epic's bid is non-responsive and must be rejected.

In reviewing the Form, it is apparent that Epic identified firms other than Garrison and CCH for the required subconsultant roles. Specifically, on the Form, Epic identified French & Parrello as performing Electrical, HVAC, Plumbing, Civil and Environmental Engineering and Harrison-Hamnett, PC as performing Structural Engineering. These firms were also identified as generally performing in these disciplines on Epic's project Organization Chart and Harrison-Hamnett, PC on the Small Business Enterprise ("SBE") Form B submitted by Epic with its Technical Proposal. Additionally, with its Price Proposal, Epic submitted copies of these subconsultant firms' DPMC Notices of Consultant Prequalification and NJSDA prequalification.

Furthermore, on its “Identification of Design Consultant’s Required Team Members” form, Epic listed several individuals (along with their firm affiliation) from the identified subconsultant firms.³

The foregoing notwithstanding, Epic did answer “yes” to the question as to whether the Design Consultant (i.e. Garrison and/or CCH) 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 Epic’s Technical and Price Proposals, it is plainly evident that this was not Epic’s intent. The notion that Garrison and/or CCH were 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 Epic’s Technical and Price Proposals that the named subconsultant firms would provide those services, strains credulity, at best. Rather, Epic answered “yes” to the self-performance question to indicate that the identified subconsultant firms, **not** Garrison and/or CCH, would be performing this work.

Thus, while Epic’s misinterpretation of the self-performance question may be a technical defect in Epic’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, supra and Meadowbrook Carting, supra. The inadvertent indication that Garrison and/or CCH 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 Epic’s bid on the grounds set forth in Bock’s protest.

3. Epic failed to identify and provide a resume for a qualified Engineering Design Manager.

Finally, Bock avers that Epic purportedly failed to both identify and provide a resume for a qualified Engineering Design Manager. As such, Bock contends that Epic’s failure to comply with the Key Team Member identification requirements of the RFP is a fatal defect, thereby requiring rejection of Epic’s bid.

We first note that, while Bock’s protest in this regard suggests that Epic failed to identify an Engineering Design Manager in its proposal, for some reason, Bock has instead cited to the provision of the RFP that requires bidders to identify the Design Consultant’s Project Manager. Moreover, despite Bock’s contention Epic failed to identify an Engineering Design Manager, paradoxically, Bock further contends that the Engineering Design Manager identified by Epic is not qualified to serve in that position.

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

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 12

The foregoing notwithstanding, the NJSDA has confirmed that the hard copy of Epic's Technical Proposal does contain an Identification of Design Consultant's Required Key Team Members form, that identifies both a Design Consultant Project Manager (indeed, the form identifies two individuals for this role: Michael Hanrahan, AIA of CCH and Brooks Garrison, RA of Garrison) and an Engineering Design Manager (Keith Smith, P.E., PP, CME of French & Parrello Associates). These individuals are also identified in those roles on Epic's Organizational Chart.

Thus, Epic did identify the required Key Team Member, regardless of whether Bock's actual contention was, Epic's purported failure to name a Design Consultant Project Manager or a Design Consultant Engineering Design Manager. To the extent, that it is Bock's contention that the electronic copy of Epic's Technical Proposal did not contain the requisite form(s), the fact that the required form(s) and Key Tem Member identification were contained in the hard copy of Epic's Technical Proposal renders Epic's bid responsive for purposes of the Procurement, consistent with the NJSDA's analysis in Point 1 above.

As noted above, in its Technical Proposal, Epic identified Keith Smith as its proposed Engineering Design Manager. Bock contends that Mr. Smith is not qualified to serve in this role based on the copy of his resume included in Epic's Technical Proposal on the NJSDA's "Design Consultant's Required Key Team Member Resume" form.

As a preliminary matter, we note that the copy of Mr. Smith's resume does identify his proposed "Key Team Member Title" as "Civil Engineering Task Leader," rather than "Engineering Design Manager." However, we further note that Mr. Smith is identified on Epic's Identification of Design Consultant's Required Key Team Members form and its Organizational Chart as being the Engineering Design Manger. Thus, the reference on Mr. Smith's resume to his title as "Civil Engineering Task Leader," does not negate his identification as the Engineering Design Manager. Moreover, even if were considered a defect, it is not a material one. As previously noted, the NJSDA is within its discretion to waive non-material defects in bid submissions. See Terminal, supra and Meadowbrook Carting, supra.

Based on the foregoing, Mr. Smith is clearly Epic's proposed Design Consultant Engineering Design Manager for the project. This conclusion is also plainly evident to Bock, as Bock's bid protest next proceeds to criticize Mr. Smith's qualifications to serve in that role.

Bock's criticism on that point is unavailing. Having appropriately been identified as the Engineering Design Manger, Mr. Smith's qualifications are the subject of the Selection Committee's review and scoring, and once identified in that role, cannot serve as grounds for rejection of the bid. We note that Mr. Smith's resume sets forth his design experience as a licensed Professional Engineer and was included in the Technical Proposals evaluated by the Selection Committee. Furthermore, Mr. Smith attended Epic's interview with the Selection Committee. As such, the Committee had ample opportunity to address any questions as to Mr.

Smith's qualifications to Epic, and most importantly, to Mr. Smith himself. Thus, the Selection Committee had the ability to evaluate and score Epic's entire bid accordingly.

Other than the unsupported arguments raised by its counsel, Bock proffers no competent basis for its assertion that Mr. Smith is somehow unqualified to serve in his designated role. As such, and for the other reasons set forth above, Bock's protest in this regard is rejected.

4. Epic failed to provide requisite number of case studies for itself and its identified Design Consultant.

In its most recent submission, Bock contends that Epic's bid should be rejected for only including two (2) case studies of similarly sophisticated projects for itself and only one (1) for its lead architect, CCH. Bock contends that as three (3) case studies for each should have been provided, Epic should have received two "no" scores under the Experience Criteria, mandating rejection of Epic's bid.

By way of background, Section 1.4A of the RFP provides:

The Design-Builder's Experience on Similarly Sophisticated Projects, Design-Builder's Design Consultant's Experience on Similarly Sophisticated Projects, and the Design-Builder's Affirmative Action Experience criteria (collectively, the "Experience Criteria") will be evaluated by a panel drawn from SDA's Standing Evaluation Committee, tasked with evaluation of the Experience Criteria on a non-numeric, "yes/no" basis. The evaluation of the "Experience Criteria" will be based upon the information provided by a firm in its Technical Proposal.

The panel of Standing Evaluation Committee members shall collectively evaluate the Experience Criteria, and shall, on a consensus basis, arrive at a "yes" or "no" determination for each Experience Criteria category, depending on whether a bidder has demonstrated sufficient experience in each of the Experience Criteria categories. In the event the Evaluation Committee arrives at a "no" determination on a given firm's experience in any two (or more) of the three Experience Criteria categories (Design-Builder's Experience; or Design-Builder's Affirmative Action Experience), such firm will not be considered for award.

With the foregoing in mind, Section 3.1 of the RFP provides, in part, as follows:

Utilizing the Design-Builder's Experience form provided by the Authority, the Design-Builder shall submit at least three, but no more than six, case studies as examples of the Design-Builder's past experience in performing and managing construction projects or design-build projects, comparable in size, cost and

complexity to the Project. The case studies shall describe projects completed within the past seven (7) years, for which the Design-Builder served as the prime construction contractor. Case studies representing comparable design-build experience, if applicable, should be indicated, but case studies need not be limited to design-build projects.

Furthermore, Section 3.2 of the RFP provides in part:

Utilizing the Design Consultant Experience Form provided by the Authority, the Design-Builder shall submit at least three, but no more than six, case studies as examples of the past experience of the Design-Builder's identified Design Consultant, in designing and administering either design-build projects, or other construction projects comparable in size, cost and complexity to the Project. The case studies shall describe projects completed within the past seven (7) years, for which the Design Consultant served as the Architect of Record. Case studies representing comparable design-build experience, if applicable, should be indicated, but case studies need not be limited to design-build projects.

Bock asserts that two of the four projects for which Epic submitted case studies were not "completed" within the last seven years, thereby leaving only two conforming case studies for consideration of by the Evaluation Committee. In addition, while Bock concedes that the consulting architect named by Epic (Garrison) submitted four case studies, Bock asserts that only one case study was provided by the architect of record named by Epic (CCH). As such, Bock asserts that these issues constitute material defects, requiring the rejection of Epic's bid.

The Procurement for design-build services for the Millville New Senior High School was designed, in part, to have the Evaluation Committee evaluate each Bidder in three distinct non-price evaluation categories and to arrive at a consensus as to whether the Bidder has demonstrated sufficient experience in at least two of the three Experience Criteria categories. In and of itself, this process clearly recognizes that bidders are not held to a standard of perfection and that, with certain specifically delineated exceptions, most deficiencies in Technical Proposals could be dealt with through scoring rather than outright bidder disqualification. This approach promotes an open and robust competitive bidding process among firms that already possess the requisite DPMC Classifications and NJSDA Prequalification.

As discussed in greater detail in Point 1 above, 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. There is no comparable language in the RFP with respect to the submission of case studies relating to a bidder's experience on similarly sophisticated projects. In the absence of such language, deficiencies in the number, content and quality of case studies submitted is a matter for consideration by the Evaluation Committee.

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 15

Plainly, the seven year time frame provided for in the RFP was designed to elicit case studies with temporal relevance to the school project, not to serve as a rigid deadline for acceptance or rejection of Technical Proposals. Evaluation Committee members are fully capable of evaluating and reaching a consensus based upon case studies relating to projects completed within and outside of the seven year time frame.

Accordingly, even if the challenged case studies relate to projects that were completed more than seven years ago, Epic's Technical Proposal is not thereby rendered nonresponsive.

Additionally, even if the NJSDA were to accept Bock's argument that a failure to provide three case studies was a material defect, this would not disqualify the case studies submitted by Epic for its Design Consultant. As discussed in greater detail in section 2 above, Epic's Technical Proposal names both CCH and Garrison as its "Design Consultant." Following Bock's rationale, only one "conforming" case study was purportedly submitted for CCH. However, Bock concedes that Garrison submitted four "conforming" case studies.

Bock points to no language in the RFP that would require the submission of additional case studies under the scenario presented here. The RFP requires the submission of case studies for the "Design Consultant." Here, Epic has named both CCH and Garrison as its "Design Consultant," and has provided, by Bock's count, six "conforming" case studies. Thus, even if the NJSDA were to adopt the draconian approach suggested by Bock, Epic nevertheless complied with the case studies "requirement" set forth in the RFP.

Accordingly, Bock's protest regarding the submission of case studies is rejected.

Analysis of Epic's Bid Protest as to Bock

In one of its March 27, 2017 submissions, Epic, as the second place bidder, contends that the bid submitted by Bock as the third-place bidder is "fatally flawed," requiring the NJSDA to reject Bock's bid. As noted above, the NJSDA is interpreting Epic's request in this regard as a separate bid protest, and addresses Epic's contentions in this regard below.

Epic claims that Bock's bid is "irredeemably defective" because Bock cannot satisfy the "certification requirements" of the Price Proposal. In its Price Proposal, Bock states "that it is voluntarily refraining from entering into or seeking to enter into projects advertised by the City of Philadelphia's Procurement Department" for a period of three years. Epic contends that this statement constitutes a material defect, thereby requiring a rejection of Bock's bid in its entirety.

As part of its Price Proposal, Bock advised that it could not certify to paragraphs 4(A) and 4(B) of the Price Proposal Certification, which asks the bidder to certify that neither the bidder nor its principals:

- A. are currently debarred, suspended, proposed for debarment, declared ineligible, or excluded from bidding or contracting by, any agency of government including but not limited to federal, state, regional, county or local government agency, in this or any other state including any department, division, commission, authority, office, branch, section and political subdivision or other governmental or quasi-governmental entity;
- B. are voluntarily excluded from bidding or contracting, or have agreed to voluntarily refrain from bidding or contracting, through an agreement with any agency of government including but not limited to federal, state, regional, county or local government agency, in this or any other state including any department, division, commission, authority, office, branch, section and political subdivision or other governmental or quasi-governmental entity;

It is important to note, however, that paragraph 12 of the Certification affords bidders the opportunity to provide an explanation if it is unable to certify to any of the statements otherwise contained in the Certification section. By affording bidders the opportunity to provide an explanation, the inability of a bidder to certify as to all the statements in the Certification section does not automatically render the Price Proposal submission defective. Here, Bock advised:

Ernest Bock & Sons, Inc. ("EBS") reports that it is voluntarily refraining from entering into or seeking to enter into projects advertised by the City of Philadelphia's Procurement Department for a time period commencing on July 17, 2015 and ending on July 16, 2018 as the result of a lawsuit settlement. Settlement Agreement between EBS and City of Philadelphia is available upon request.

This statement does not serve to disqualify Bock from bidding. Based upon all available information presented and considered, at the time that Bock submitted its Project Rating Proposal, Technical Proposal and Price Proposal in connection with this Procurement: (1) Bock was both DPMC classified and NJSDA prequalified to submit a bid for the Millville Senior High School project; (2) Bock had neither been suspended nor debarred in accordance with N.J.A.C. 19:38A-4.1; and (3) Bock had neither been suspended nor debarred from participating in public bidding in any other jurisdiction.

Accordingly, Epic's protest as to Bock is rejected.

Gerard J. Onorata, Esquire
John F. Palladino, Esquire
April 27, 2017
Page 17

Conclusion

For the foregoing reasons, both Epic's and Bock's bid protests as to Hall are rejected. Furthermore, Bock's bid protest as to Epic is rejected in its entirety. Finally, Epic's bid protest as to Bock is also rejected.

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
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
Martin Taylor, Procurement Analyst
Albert D. Barnes, NJSDA Chief Counsel
Cecelia E. Haney, NJSDA Senior Counsel
Desmond H. O'Neill, NJSDA Assistant Counsel
Robert T. Lawless, Esquire, Counsel for Hall Construction Co., Inc.