



May 12, 2015

**Via Facsimile and Regular Mail**

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Re: H-Wing Second Floor Les Paul Studio Renovation  
RCNJ Project No. 2014-02-01C  
Dismissal of Bid Protest-Final Decision of Contracting Officer

Dear Ms. Djuric and Caterino and Messrs. Catalano and Winkles:

As Contracting Officer<sup>1</sup> for Ramapo College of New Jersey (the "College"), I am writing to provide a decision on the protest objecting to the intent to award a contract to the lowest bidder, Slate Construction, LLC (hereinafter referred to as "Slate") for the College's H-Wing Second Floor Les Paul Studio Renovation construction project (hereinafter referred to as the "Project").

After reviewing the written submissions from the parties, it has been decided, in accordance with Section IB2.4 of the Project's Instructions to Bidders, that the bid protests filed by CatCord Construction, Inc. (hereinafter referred to as "CatCord"), the third low bidder, and Brahma Construction Corp. (hereinafter referred to as "Brahma") the second low bidder, shall be considered on the written record and decided based upon the factual and legal issues timely raised during the protest period.

Based upon the record in this matter, I am rendering the following decision on behalf of the College.

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<sup>1</sup>I am acting in a capacity as "Contracting Agent" as that term is defined in N.J.S.A. 18A:64-53(b).

## **Background**

This matter involves a bid protest with regard to a project to alter a recording studio and control room located on the second floor of Academic Wing H. The project scope includes: elimination of a window; relocations of doors; extension of mechanical and electrical systems; and addition of equipment. The College's designated number for the Project is 2014-02-01C.

In accordance with the New Jersey State College Contracts Law (N.J.S.A. 18A:64-55), the College publicly advertised the project in the Star-Ledger newspaper on February 10, 2015 (Exhibit 1). A mandatory pre-bid meeting was held on February 17, 2015. On February 27, 2015, the College issued an addendum to the bid specifications to all bidders who attended the pre-bid meeting. On March 2, 2015 the College issued a revision to Addendum No. 1 to correct a typographical error on the due date of the Proposal Form (Exhibit 2). The bid form required bidders to provide lump sum amounts for a base bid and two "Add or Deduct Alternates." On March 10, 2015 the College publicly opened the bids. A total of three firms submitted bids. Exhibit 7 is a copy of the bid tabulation on the bids submitted for the Project.

After the opening of bids, CatCord sent a letter dated March 10, 2015 to Steve Sondey, the College's Director of Purchasing, protesting a potential contract award to the apparent low bidder, Slate, based upon six alleged defects in Slate's submittal, *viz*: (1) page 5 of the bid form did not have a corporate seal as required; (2) page 5 of the bid form did not have a specific dollar amount listed for the bid bond; (3) the revision to Addendum No.1 issued on March 2, 2015 was not listed; (4) the bid bond did not have a corporate seal; (5) the form Disclosure of Investment Activities in Iran was not included; and (6) a full copy of Addendum No. 1 was not included (Exhibit 9).

In addition, CatCord alleged defects in the bid of the second lowest bidder, Brahma, *viz*: (1) page 1 of the bid form had white-out; (2) page 5 of the bid form did not have a specific dollar amount listed for the bid bond; and (3) the DPMC Form 701 for Uncompleted Contracts had white-out. CatCord asserts that all of the Slate and Brahma defects are incurable. As a result, CatCord claimed that both bids should be disqualified and the College should award the contract to CatCord.

On March 26, 2015, the College issued a Letter of Intent to Award a Contract to the apparent low bidder, Slate, based upon the firm's base bid plus Alternates I and II (Exhibit 8). The letter also included the protest correspondence submitted by CatCord dated March 10, 2015. On March 31, 2015 the College received a protest letter from Brahma asserting five defects in Slate's bid, *viz*: (1) the revision to Addendum No.1 issued on March 2, 2015 was not included, (2) a full copy of Addendum No. 1 was not included as required, (3) the form Disclosure of Investment Activities in Iran was not included, (4) the bid bond did not have a corporate seal, and (5) Page 5 of the bid form did not have a corporate seal. In addition, Brahma asserted that the three (3) defects noted by CatCord against Brahma were not defects. Brahma claimed it is the lowest responsible bidder and the College should award a contract to Brahma (Exhibit 10).

On March 31, 2015 the College received a response from Slate refuting the protest claims of Brahma and CatCord (Exhibits 11 and 12). On April 16, 2015, I forwarded a letter to all involved firms confirming receipt of Slate's rebuttal and providing the protesting firms Brahma and CatCord the opportunity to comment by April 21, 2015 (Exhibit 13). A letter was received by

the College on April 21, 2015 from Stephen Winkles, Esq. from the law firm of Tesser & Cohen on behalf of Brahma (Exhibit 15). In the letter, Mr. Winkles reaffirmed Brahma's protest of the award to Slate and claimed that Slate's bid was nonresponsive because of material defects.

After reviewing the written submissions, I determined, pursuant to IB2.4 of the College's Appeal Procedures in the Project Specifications, that an in-person presentation/fact-finding hearing was not necessary and a decision on the protests could be rendered based upon the written record.

The written record for the protest includes the following Exhibits:

#### Bid Documents

1. Ramapo College of New Jersey Request for Bid – H-Wing Second Floor Les Paul Studio Renovation Project – RCNJ Project No. 2014-02-01C, including Notice to Bidders, Instructions to Bidders, General Conditions, Supplemental Conditions, Bid Document Forms, Project Specifications and Drawings (Exhibit 1).
2. Addendum No. 1 issued February 27, 2015 (Exhibit 2).
3. Revision to Addendum No. 1 March 2, 2015 (Exhibit 3).
4. Slate bid dated March 10, 2015 (Exhibit 4).
5. Brahma bid dated March 10, 2015 (Exhibit 5).
6. CatCord bid dated March 10, 2015 (Exhibit 6).
7. List of bids from March 10, 2015 Bid Opening (Exhibit 7).
8. Ramapo College of New Jersey Letter of Intent to Award a Contract dated March 26, 2015 (Exhibit 8).

#### Protest Documents

1. March 10, 2015 protest letter from Vishal V. Patel of CatCord (Exhibit 9).
2. March 31, 2015 protest letter from Rob Russo of Brahma (Exhibit 10).
3. March 31, 2015 Slate's rebuttal letter of Brahma's protest (Exhibit 11).
4. March 31, 2015 Slate's rebuttal letter of Catcord's protest (Exhibit 12).
5. April 16, 2015 letter from the College to bidders allowing comment on Slate's rebuttal (Exhibit 13).

6. April 21, 2015 rebuttal letter from Stephen Winkles, Esq. of the law firm of Tesser & Cohen on behalf of Brahma (Exhibit 14).
7. List of banned companies due to investments in Iran dated February 3, 2015 (Exhibit 15).

Due to the voluminous nature of the Exhibits, they are not being attached to this decision. However, they are available online as the record for the protest at <http://www.ramapo.edu/construction-projects/h-wing-les-paul-studio/>.

### **Protest Issues**

CatCord contends that Slate's bid is non-responsive on the following grounds, *viz*: (1) page 5 of the bid form had no corporate seal as required; (2) page 5 of the bid form did not have a specific dollar value stated for the 10% bid bond as requested on the form and response I-1 of Addendum No. 1; (3) the revision to Addendum No. 1 issued on March 2, 2015 was not listed; (4) the bid bond legal document had no corporate seal on it as required; (5) the form "Disclosure of Investment Activities in Iran" was not included; and (6) a full copy of Addendum No. 1 was not included with the bid as required.

CatCord contends that Brahma's bid is non-responsive due to two defects, *viz*: (1) page 5 of the bid form did not have a specific dollar value stated for the 10% bid bond as required on the form and response I-1 of Addendum No. 1; and (2) Brahma's use of white-out on page 1 of the bid response form and on the DPMC Form 701 Uncompleted Contracts makes these documents invalid because the use of white-out is not allowed to correct entries on legal documents.

Brahma contends that Slate's bid is non-responsive due to the following defects: (1) a full copy of Addendum No. 1 was not submitted with the bid as required; (2) the revision dated March 2, 2015 to Addendum No. 1 was not acknowledged as required; (3) the form Disclosure of Investment Activities in Iran was not submitted with the bid; (4) lack of a corporate seal on the bid bond; and (5) the absence of a corporate seal on page 5 of the bid form.

### **Applicable Law**

The award of public construction contracts by State Colleges and Universities is governed by the State College Contracts Law. N.J.S.A. 18A:64-52 *et seq.* Contracts exceeding the amount prescribed under N.J.S.A. 18A:64-54 b. must be awarded after public advertising for bids. N.J.S.A. 18A:64-55 and N.J.S.A. 18A:64-76.1. No bid may be accepted which does not conform to the specifications. N.J.S.A. 18A:64-66. A State college may in its discretion reject all bids. N.J.S.A. 18A:64-66 and 69. Bid guaranty is governed under 18A:64-67 and provision of surety under 18A:64-68. Contracts for construction must be advertised and awarded as per N.J.S.A. 18A:64-76.1. That section requires public advertising and provides that contracts "shall be awarded to the lowest responsible bidder whose bid, conforming to the invitation for bids, will be the most advantageous to the State college." As permitted by N.J.S.A. 18A:64-76.1, the College advertised for single bids which included all of the work on the project rather than separate bids for the separate categories of work. N.J.S.A. 18A:64-76.1a.(2).

As a result of there being few judicial decisions under the State College Contracts Law, cases decided under other public bidding statutes, primarily the Local Public Contracts Law, N.J.S.A. 40A:11-1, *et seq.* have to be relied upon. The Local Public Contracts Law and the State College Contracts Law are not identical and apply to different levels of government. There are differences between the provisions in the two statutes, but both require public bidding for public contracts so that judicial decisions regarding general principles of public bidding should be equally applicable to both statutes. In addition, there are other cases under other public bidding statutes which state general principles that also provide helpful guidance. See Matter of On-Line Games Contract, 279 N.J. Super. 566, 589-91 (App. Div. 1995) in which the Appellate Division considered cases under the Local Public Contracts Law in deciding a protest to the award of a State contract governed by Title 52.

The courts have said that public bidding statutes are intended to secure for the public the benefits of unfettered competition. See Terminal Const. Corp. v. Atlantic County Sewerage Authority, 67 N.J. 403, 410 (1975). Statutes requiring competitive bidding accomplish this goal by promoting competition between bidders, who are on equal footing, and by guarding against, “favoritism, improvidence, extravagance and corruption.” See Meadowbrook Carting Company, Inc. v. Borough of Island Heights, 138 N.J. 303, 313 (1994); Township of Hillside v. Sternin, 25 N.J. 317, 322 (1957). Consistent with these purposes, the State College Contracts Law in N.J.S.A. 18A:64-76.1, provides that a contract should be awarded to the “lowest responsible bidder whose bid, conforming to the invitation for bids, will be the most advantageous to the State College.” Similar language has been construed under the Local Public Contracts Law “to mean that the contract must be awarded not simply to the lowest bidder, but rather to the lowest bidder that complies with the substantive and procedural requirements in the bid advertisements and specifications.” See Meadowbrook, 138 N.J. at 313; Hillside, 25 N.J. at 324. There is no reason to interpret this language differently in the State College Contracts Law.

In analyzing whether a bid complies with the terms advertised and specified, the Supreme Court ruled that material departures will invalidate a nonconforming bid. Meadowbrook, 138 N.J. at 314. A material term may not be waived. Ibid. On the other hand, minor or inconsequential discrepancies and technical omissions may be waived. Ibid. The Supreme Court in Meadowbrook quoted language from its earlier decision in Terminal regarding the distinction between deficiencies which may be waived and those which may not be waived, as follows (138 N.J. at 314-315):

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 [that] 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 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 [that] may not under any circumstances be waived.

The Supreme Court in Meadowbrook adopted a two-pronged test for determining materiality, citing a decision by Judge Pressler in Township of River Vale v. R. J. Longo Construction Co., Inc., et al, 127 N. J. Super. 207, 216 (App. Div. 1974). First, a determination must be made “whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed or guaranteed according to its specified requirements.” Second, it must be determined 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.” While this test was formulated in cases under the Local Public Contracts Law, the basic requirements of that statute are similar to the State College Contracts Law. Moreover the test has been utilized in a case involving the State itself. See Matter of On-line Games Contract, 279 N.J. Super. 566, 594-5 (App. Div. 1995). Therefore, this approach should be utilized in considering the protest here.

There are instances in which courts found material defects in bids that were not waivable and subject to rejection. See Barrick v. State of New Jersey, Dept. of Treasury, Division of Property Management and Construction, 2013 WL 1809803 (App. Div. 2013) (bid was deemed non-conforming for failure to comply with specific distance from accessible public transportation requirement in specifications); In Re Jasper Seating Co., Inc., 406 N.J. Super. 213 (App. Div. 2009) (bid rejection for failure to comply with requirement in request for proposals upheld); Muirfield Const. Co., Inc. v. Essex County Improvement Authority, 336 N.J. Super. 126 (App. Div. 2000) (plumbing contractor's failure to submit a statement indicating a master plumber's 10% ownership interest with its bid for a public contract was a material defect that was not curable); Ace-Manzo, Inc. v. Neptune, 258 N.J. Super. 129, (Law Div.1992) (low bidder's failure to execute a bid bond forfeiture provision constituted a material defect that could not be waived); Gaglioti Contracting, Inc. v. Hoboken, 307 N.J. Super. 421 (App. Div. 1997) (low bid for a public construction project was disqualified for failure to submit a listing of subcontractors); Hall Const. Co., Inc. v. New Jersey Sports & Exposition Authority, 295 N.J. Super. 629 (App. Div. 1996) (bid for construction contract which left blank space where bid for landscaping alternate was to be inserted was incomplete and materially defective); Meadowbrook Carting Co., Inc. v. Borough of Island Heights, 138 N.J. 307, 320 (1994) (low bidder's failure to include consent of surety with its bid proposal was material defect that could not be waived or cured); George Harms Constr. Co. v. Borough of Lincoln Park, 161 N.J. Super. 367 (Law Div.1978) (contractor's failure to submit a required statement disclosing the names and addresses of stockholders was a non-waivable defect); Township of Hillside v. Sternin, 25 N.J. 317, 322 (1957) (bid rejected for failure to provide required bid security).

Conversely, there are a number of cases that provide examples of deficiencies in bids which were found to be waivable. See P. Michelotti & Sons, Inc. v. Fair Lawn, 56 N.J. Super 179 (App. Div. 1959), app. dismissed, 31 N.J. 556 (security check not certified, cure permitted); Tp. of Hanover v. InterFidelity Ins. Co., 122 N.J. Super 544 (App. Div. 1973) (bid bond amount wrong); Young v. West Orange Redev. Agency, 125 N.J. Super 440 (App. Div. 1973) (2 minutes late for bid opening); Tp. Of River Vale v. R.J. Longo Const. Co., 127 N.J. Super 207 (Law Div. 1974) (bid bond instead of check); Marvec Allstate v. Gray & Fear, Inc., 148 N.J. Super 481 (App. Div. 1977) (bid bond amount wrong, cure allowed); In re Route 280 Contract, 179 N.J. Super 280 (App. Div. 1981), appeal dismissed, 89 N.J.1 (prequalification statement not updated); Stano v. Soldo Const. Co., 187 N.J. Super 524 (App. Div. 1983) (copy of surety commitment, statement listing shareholders confusing); Palamar Const. Inc. v. Tp. of Pennsauken, 196 N.J. Super 241 (App. Div. 1933) (no contractor qualification statement, cure allowed); Schlumberger Ind. v. Bor. of Avalon,

252 N.J. Super 202 (App. Div. 1991) (statutorily required statement of ownership incomplete); Tec. Elec. v. Franklin Lakes Bd, 284 N.J. Super 480 (Law Div. 1995) (no prequalification affidavit, cure allowed); Turner Const. v. New Jersey Transit, 296 N.J. Super 530 (App. Div. 1997) (few minutes late for bid opening, failure to initial a cross-out); R.C.G. Constr. v. Mayor of Keyport, 346 N.J. Super 58. (App. Div. 2001), affirmed on opinion below, 175 N.J. 68 (subcontractor not registered prior to bid submission, failure to include price in corporate resolution); Benj R. Harvey v. Bd. Of Ed., 358 N.J. Super 383 (Law Div. 2002) (error in statement of percentage of work to be performed by bidder).

Courts have further stated that the underlying purpose of public bidding statutes to achieve economy in public procurement should be considered in deciding whether to waive a non-material deficiency in a bid. Tp. of Hanover v. Inter. Fidelity Ins. Co. 122 N.J. Super 544,551 (App. Div. 1973); Young v. West Orange Redev. Agency, 125 N.J. Super 440, 443 (App. Div. 1973); Tp. Of River Vale v. R. J. Longo Const., 127 N.J. Super 207, 222 (Law Div. 1974) (may be duty as well as right to waive); Marvec Allstate, Inc. v. Gray & Fear, Inc., 148 N.J. Super 481, 488-489, 492 (App. Div. 1977) (mere irregularity does not ordinarily justify rejection of a bid); In re Route 280 Contract, 179 N.J. Super 280, 285 (App. Div. 1981), appeal dismissed, 89 N.J. 1 (Commissioner in deciding whether to waive non material deficiency on remand should bear in mind that public policy favors award to the lowest responsible bidder so long as fair competition is not impaired); Palamar Const., Inc. v. Tp. of Pennsauken, 196 N.J. Super 241, 257 (App. Div. 1983); Schlumberger Inc. v. Bor. of Avalon, 252 N.J. Super 202, 212 (App. Div. 1991) (public bidding statute was not meant to cost public bodies many thousands of dollars by requiring acceptance of higher bids for mere technical violations); Spina Asphalt Paving v. Fairview, 304 N.J. Super 425, 431 (App. Div. 1997); Benj. R. Harvey v. Bd. of Ed., 358 N.J. Super 383, 388, 396 (Law Div. 2003) (competitive bidding provisions should not be construed in such a way as to thwart the primary purpose of achieving economy).

The goal of achieving economy can also come into play where a bid must be rejected. The Supreme Court in Meadowbrook Carting Co. v. Island Heights Borough, 138 N.J. 307 (1994) concluded that the basic policy of achieving economy dictated that a project be re-bid where a low bid had to be rejected because of a material deficiency and the next low bid was considerably higher.

### **Analysis – Factual Findings and Conclusions of Law**

Preliminarily, the State College Contracts Law includes some provisions which are limited to certain types of contracts. The contract in question is governed by the provisions in the statute which apply to construction contracts because the contract requires providing permanent installation of material and equipment for a College building. For construction contracts, see N.J.S.A. 18A:64-74 to 77 and especially N.J.S.A.18A:64-76.1, which is the applicable public bidding provision that governs the award of construction contracts. Specifically, 18A:64-76.1 provides that construction contracts shall be awarded to "the lowest responsible bidder" whose bid is most advantageous to the College. When read in conjunction with N.J.S.A. 18A:64-70, it is clear that construction contracts must be awarded to the lowest bidder who is responsible and who submits a responsive bid.

### **Corporate Seal Missing on Slate's Bid Bond and Bid Form**

Both CatCord and Brahma contend that Slate's bid is non-responsive because of Slate's failure to include a corporate seal on two different bid forms (page 5 of the Proposal form and Page 2 of the Bid Bond form). Slate rebuts that it is not obligated to supply a seal because Slate is organized as a sole-member limited liability company which has a legal status of a sole proprietorship.

In reviewing the Project bid documents, page 5 of the Proposal Form has a designated area that seeks the name of the bidder's firm; signature of bidder, title of signatory, business address of bidder, telephone number and facsimile number, and a check box for any change in ownership information of the bidder. Next to this information, the following typewritten text appears: "(Seal if bid is a corporation)".

All of the information provided by Slate in its bid indicates that the firm is a limited liability company and not a corporation. Limited liability companies and corporations are different types of legal entities recognized in the State of New Jersey. Since the requirement on the form was for a corporation, this requirement was not applicable for a limited liability company. Therefore, I find that there was no error by Slate in not inserting a corporate seal on the document and that such omission would not constitute a defect in its bid.

The Project bid documents included a Bid Bond form consisting of two (2) pages. On the second page of the form, there is an area designated for the name of the bidder and the signatory. To the left of that section is a space for the signature of an attesting witness and seal.

As discussed *infra*, the New Jersey courts have addressed the legal requirements for bid bonds in public contracting cases. I am informed that there is no case that identified a bidder's failure to affix a corporate seal to a bid bond as a material defect that would disqualify the bid.

However, I am advised of well-settled cases regarding the general acts of a corporation's president and the use of corporate seals that would be instructive in evaluating this issue. In Bennett v. Millville Imp. Co., 67 N.J.L. 320 (E.A. 1902), there was a contractual dispute involving a payment to an employee that was approved by the corporation's president. In affirming the award of certain damages to the plaintiff employee, the court, in part, addressed the defendant corporation president's authority to contractually bind the corporation with the employee.

In all cases the president binds the corporation by his acts and contracts when he is expressly authorized to so act or contract, or when he has been permitted by the corporation for some time to act and contract for it. Thus when the president had been accustomed to act and contract for the company without express authority, and his acts had always been accepted, his order to a contractor to stop work binds the company.

Bennett v. Millville Imp. Co., 67 N.J.L. at 322 *quoting* 2 Cook, Corp. § 716.

In Gottfried v. Miller, 104 U.S. 521 (1881), a United States Supreme Court case, the Court found that a corporate action taken by the corporation's president in assigning patent rights without the corporate seal was valid. The matter of Feder v. Forest Hill Apartments, Inc., 100 N.J. Eq. 455



(Ch. 1927) involved a real estate sales contract dispute wherein the court held that the contract was valid and enforceable and binds the corporation when executed by the corporation's president although the contract was not under the common seal of the corporation and in the absence of corporate by-laws and express authority for the president to act for the corporation. In rendering this decision, the Court acknowledged the following regarding the use of corporate seals:

At an early day it was considered that as a general rule a corporation could not manifest its intention and therefore could not contract, except by the use of its corporate seal; but this doctrine has long since been abandoned, and the general rule now is that, unless the charter or some other statute provides otherwise, a corporation need not use a corporate seal except where an individual would be required so to do, but may appoint agents and act and make contracts by resolution or writing not under seal or by parol [sic], just as an individual may. Nor is the formal adoption of a particular and common corporate seal, or the use of such seal, if adopted, necessary, even to enable a corporation to transact business requiring the use of a seal.

Feder v. Forest Hill Apartments, Inc., 100 N.J. Eq. at 457  
quoting Corpus Juris, vol. 14, p. 334, § 405.

With regard to Slate's Bid Bond form, the seal would be required if the bidder is a corporation, which Slate is not. Therefore, I find that the corporate seal is not required for this document. Even if this was assumed to be a defect (which it was not), it would still not be considered a material defect to disqualify Slate's bid.

In this context, the two part test in Meadowbrook, 138 N.J. at 314-315 and Township of River Vale, 127 N.J. Super. 207, 216, would be applied. First, it is apparent that the bid bond would be enforceable against the bidder and surety because all of the legal requirements (i.e. valid bid bond, consent of surety and power of attorney) have been satisfied. The execution of the bid bond by Slate's president is a valid and enforceable act of the limited liability company, and the omission of the seal would not render the bid bond invalid. Further, the College has the intended assurance of the remedy required if an award is made to Slate and Slate does not sign the contract. Second, if the bid bond is enforceable against the surety, Slate has no potential competitive advantage over other bidders because it provided security required in the form of an enforceable bid bond and that is what all bidders were required to submit.

### **Copy of Addendum No. 1 Was Not Included with Slate's Bid**

Both CatCord and Brahma contend that Slate's bid is non-responsive because Slate did not include a copy of Addendum No. 1 with its bid. Slate responded that it included a signed acknowledgement of Addendum No. 1 on its Proposal Form and returned a signed acknowledgment page from Addendum No. 1 with its bid.

The College issued Addendum No. 1 (Exhibit 2) to every company that attended the Project pre-bid meeting. Language on the Bid Addendum No. 1 Cover Sheet indicated that bidders were to include a complete copy of the addendum in their bids.

In interpreting the Local Public Contracts Law, the New Jersey Courts have construed the bidder's acknowledgment of receipt of addenda as a material, non-waivable defect. See: P & A Const., Inc. v. Township of Woodbridge, 365 N.J. Super. 164, 175 (App. Div. 2004); Star of Sea Concrete Corp. v. Lucas Bros., Inc., 370 N.J. Super. 60, 66, footnote 2 (App. Div. 2004). However, the case law does not address the requirement of having complete copies of addenda included in bid submissions. Although the Local Public Contracts Law and case law interpreting this statute are distinguished from the State College Contracts Law, the same general principles in the Local Public Contracts Law have been applied to other public contracting cases involving State government. Thus, it can be reasonably construed that a bidder's failure to acknowledge receipt of addenda in State public contracting cases is a material defect.

After reviewing Slate's bid, it is obvious that Slate properly acknowledged receipt of Addendum No. 1 in its Proposal form and signed the Addendum No. 1 Cover Sheet that acknowledged its receipt of the addendum, but omitted the complete copy of Addendum No. 1 from its bid. Since the failure to provide the complete copy as specified by the College's Addendum No. 1 is a defect, it must be determined if such defect is material and would render Slate's bid non-responsive. Therefore, the two-pronged test in Meadowbrook and Township of River Vale must be applied to determine if the failure to submit the complete copy of Addendum No. 1 is material. The first prong is whether the effect of the waiver would be to deprive the College of its assurance that the contract will be entered into, performed or guaranteed in accordance with the Project specifications. The omission of the complete copy of Addendum No. 1 in the bid is not a material defect that affects the ability of Slate to perform the Project in accordance with the substantive specifications. Slate met the legal obligation under P & A Const., Inc. and Star of Sea Concrete Corp. by properly acknowledging receipt of Addendum No. 1. Such defect is an administrative error that is minor and inconsequential in nature and would not prevent Slate from performing the contract.

The second prong is if the College's waiver of this requirement would undermine the underlying competitive bidding process and disadvantage the other Project bidders. The waiver of the requirement to submit a complete copy of Addendum No. 1 in the Project bids is not substantive. The failure by Slate to include a complete copy of Addendum No. 1 in its bid was an administrative error that does not affect Slate's ability to perform the Project contract. As such, the failure to provide the complete copy of Addendum No. 1 does not frustrate the competitive bidding process nor create any disadvantage to any bidder. The defect falls into the category of minor, inconsequential and technical, which qualifies for waiver in accordance with existing case law. See: Meadowbrook, 138 N.J. at 314; Terminal Construction Corp., 67 N.J. at 411. CatCord's and Brahma's allegation that this defect is material and unwaivable is without merit.

### **Slate Failed to Acknowledge Revision to Addendum No. 1**

Both CatCord and Brahma contend that Slate's bid is non-responsive because Slate did not list the Addendum No. 1 revision on its bid submission. Slate responded that acknowledgment of the Addendum No. 1 revision was not required on the bid form.

IB 9.2 of the College's Instruction to Bidders states, in pertinent part:

Any and all interpretations or clarifications must be issued by the College, in the form of Addenda and e-mailed to all prospective Bidders no later than seven (7) business days prior to the date of the opening of Bids. All Addenda issued shall become part of the Contract Documents and shall be acknowledged on the Proposal Form. Failure of a Contractor to acknowledge receipt of all such Addenda on the proposal form may result in the Bidder's proposal being considered non-responsive, at the option of the College.

On February 27, 2015 the College issued Addendum No. 1 that contained a typographical error designating March 6, 2015 as the bid opening date. Thereafter, on March 2, 2015, the College issued by e-mail a **revision** to the addendum ("Revision to Addendum 1 for H Wing 2nd Floor – Les Paul Studio (RCNJ #2014-02-01C)") that clarified March 10, 2015 as the date for the bid opening.

In this matter, there is a disagreement among the bidders. Slate claims that the College issued an Addendum No. 1 for the Project and the revision issued by the College was not an additional addendum. CatCord and Brahma contend that the revision issued by the College was another addendum that had to be acknowledged.

I conclude that there was only one addendum issued for the Project (Addendum No. 1) for the bidders to acknowledge and that the March 2, 2015 e-mail and attached Proposal Form does not constitute a separate addendum that requires acknowledgment. The Proposal Form appended to the March 2, 2015 e-mail did not contain any substantive, material changes to the College's bid specifications for this Project. The document only corrected the bid opening date on the Proposal Form to conform to the date that was originally advertised for the bid opening (March 10, 2015). If there were material changes to the Project specifications, the College would have issued an addendum to all bidders in accordance with the Project bid specifications. Again, the mere changing of the date on the Proposal Form to match the originally advertised bid opening date did not change any of the substantive requirements for the Project and therefore, cannot be construed as an addendum. Slate returned the correct Proposal Form with its bid submission on the designated due date, March 10, 2015. Slate met the legal requirements for acknowledging Addendum No. 1 and its bid cannot be deficient for failing to acknowledge the revision to Addendum No. 1.

As a result, the protest made by CatCord and Brahma regarding this issue is rejected.

#### **Use of White-Out in Brahma's Proposal Form and DPMC Form 701**

CatCord contends that Brahma's bid is non-responsive because Brahma used white-out on two different forms (Proposal Form and DPMC Form 701). Brahma responded that the mere fact of using white-out in the bid documents does not render its bid non-responsive.

In reviewing Brahma's bid, it is clear that white-out was utilized on page 1 of its Proposal Form under Alternate No. 1 to eliminate writing in the "ADD SUM OF \$ \_\_\_\_\_" area. Also, there is white-out used on the DPMC Form 701 in the section of the document where the

bidder is to provide the numerical amount of uncompleted work on contracts. As a result, it must be determined if such variations constitute material defects to Brahma's bid that would render it non-responsive.

While Brahma did use white-out on the original bid submission, Brahma enclosed a complete copy of its bid which is identical to the original version containing the white-out. The copy did not contain white-out. Brahma's bid was submitted to the College in a sealed envelope. It was opened by the College at the time of the public opening. It is clear Brahma's bid was not altered following the public opening.

Although there are not any specific cases related to utilization of white-out by bidders analogous to the facts in this matter, it is useful to examine a case involving the crossing out of a line item in a public bid. In Turner Construction Company v. New Jersey Transit Corp., 296 N.J.Super. 530 (App. Div. 1997), the Appellate Division upheld a contract award made by New Jersey Transit Corp. that was challenged by an unsuccessful bidder. One of the allegations made by the unsuccessful bidder was that the successful bidder failed to initial a cross-out of an item in its lump-sum bid price as required by New Jersey Transit Corp. In adjudicating this issue, New Jersey Transit found the deficiency to be minor and waivable. The Appellate Division found that "the cross-out was a minor deficiency which could be waived." Turner Construction Company, 296 N.J.Super. at 537. In this matter, Brahma used white-out on two different forms. It is apparent that these are modifications that could be construed as defects. As such, the two part test in Meadowbrook and Township of River Vale would be applied to determine if these modifications are material defects that would disqualify Brahma's bid. Brahma was responsive in filling in the deduct sum for Alternate No. 1 after apparently seeking to enter an amount under Alternate No. 1 as an add sum. The section was whited out with a blue pen line drawn over it clearly indicating its intentions to submit a deduct sum for Alternate No. 1. The correction made by Brahma was a valid and binding action made by an officer of Brahma who was authorized to act in such a manner and sign the Proposal Form. In making the modification, Brahma's pricing for Alternate No. 1 and its overall lump sum bid were still valid.

With regard to the second white-out item for the amount of uncompleted work on contracts on DPMC Form 701, it appears as though the amount of "\$106,315" was whited out and the number of "\$1,063,155" inserted. The new amount is clearly written on the form and there is no ambiguity in reading the document. Clearly, there is no issue with Brahma's ability to perform the Project work in conjunction with its DPMC aggregate amount, which is \$10,000,000. First, this modification made by Brahma does not deprive the College of its assurance that Brahma would enter into a contract and guarantee and perform it in accordance with the bid specifications. Brahma is bound by its bid and bid prices and the College is able to rely on this bid and has assurances of what Brahma's intentions were regarding its bid. Therefore, Brahma could not disavow its bid and bid prices based on these minor defects. Concerning the second part of the test, if Brahma is bound by its bid and bid prices and cannot avoid its bid, it is in the same position as every other bidder. Further, CatCord and all other bidders for the Project are not disadvantaged from these variations. In comparison to the factual circumstances in Turner Construction Company, the white-out corrections made by Brahma are of a technical and inconsequential nature that can be waived by the College. Acceptance of Brahma's bid does not undermine the underlying competitive bidding process and the other bidders for the Project would not be disadvantaged from the minor variations. See e.g. Muirfield Canst. Co., Inc. v. Essex County

Improvement Authority, 336 N.J. Super. 126, 136-137 (App. Div. 2000). Therefore, I find that the waiver of the minor deviations regarding the white-out on the Proposal Form and DPMC Form 701 would be appropriate under Section IB2.7 of the Project bid specifications, which permits the College to waive any immaterial defects in the bid or the bidding process.

Catcord's argument that such deviation represents a material defect is denied.

### **Bond Amount Not Listed in Slate's and Brahma's Bids**

CatCord contends that the bids of Slate and Brahma are non-responsive because they did not list an actual numerical amount on the bid bond as required by the bid documents. Both Slate and Brahma argue that they met the bid bond requirements by clearly inserting the language of "10% of total bid amount on their bid bonds," which complied with the bid specifications.

There is a general provision in the State College Contracts Law (N.J.S.A. 18A:64-67) that addresses bid guaranties and reads in pertinent part:

There may be required from any person bidding on any purchase, contract or agreement, advertised in accordance with law, that the bid be accompanied by a guaranty payable to the State college that, if the purchase, contract or agreement is awarded to him, he will enter into a contract therefor. The guaranty shall be in the amount of 10% of the bid but not in excess of \$20,000.00, except as otherwise provided herein, and may be given, at the option of the bidder, by certified check cashier's check or bid bond.

The statute does not specify the language to be included in a bid bond or require bidders to sign bid bonds.

The College's bid specifications required bidders to submit security to secure a remedy if their bid was accepted but they refused to sign a contract and provide the required contract bonds if awarded the contract. IB7.1 of the Project bid specifications requires bid security that can be submitted either by means of a Bid Bond or a certified check equal to ten percent (10%) of the total amount of the bid proposal. In addition, under IB 7.1, a Consent of Surety was required if Bid Bonds were submitted as security. Further, IB7.2 requires that an attorney-in-fact who signs a bid bond must file a certified power-of-attorney with the College. The College also identified and provided the one page bid bond form which was included in the Project bid documents.

New Jersey courts uniformly hold that bid security requirements are material bid requirements in a statutory public bidding context so that a failure to provide bid security where it is required is a bid deficiency which cannot be waived. However, in some cases courts have held that technical deficiencies in bid security which was submitted can be waived because the deficiency was not material. In other cases, courts have held that technical deficiencies cannot be waived. See Hillside v. Sternin, 25 N.J. 317 (1957) (failure to submit a certified check for 10% of the bid amount as required could not be waived); P. Michelotti & Sons v. Fair Lawn, 56 N.J. Super 199 (App. Div. 1959), app. dismissed, 31 N.J. 556 (1960) (submission of uncertified check for 10% of the bid amount where a certified check was required could be waived); Tp. of Hanover v. Inter.

Fidelity Ins. Co., 122 N.J. Super 544 (App. Div. 1973) (submission of a bid bond in the amount of \$12,000 where the amount should have been \$13,885 did not render bid invalid); Tp. Of River Vale v. H.J. Longo Const. Co., 127 N.J. Super 207 (Law Div. 1974) (bidder submission of bid bond where certified check was required could be waived); Marvec Allstate, Inc., 148 N.J. Super 481 (App. Div. 1977) (bidder submitted bid bond in the amount of \$20,000 where amount of security required was \$122,000, cure after bid opening allowed)<sup>2</sup>; Stano v. Soldo Const. Co., 187 N.J. 524 (App. Div. 1983)(submission of copy of bid bond rather than original may be waived); Prismatic Dev. v. Somerset County, 236 N.J. Super 158 (App. Div. 1989), cert. den., 118 N.J. 205 (1989) (court appeared to agree that the failure to provide a consent of surety may be waived); Pucillo & Sons v. Belleville, 249 N.J. Super 536 (App. Div. 1991) (“consent” or commitment of surety to provide contract bonds which capped the amount to less than the amount required was a material deviation); DeSapio Const. v. Clinton, 276 N.J. Super. 216 (Law Div. 1994) (consent of surety which only said that surety “would not anticipate any difficulty providing [contract] bonds...subject to satisfaction evidence of financing” was a material defect because it was not an unconditional undertaking to provide the contract bonds.); Meadowbrook Carting Co. v. Island Heights, 138 N.J. 307 (1994) (failure to submit consent of surety was a material defect, reviewing cases). I am informed that there are not any cases that specifically address the issue raised by CatCord, but they do indicate that some but not all deficiencies in bid security which is submitted can be waived.

The College’s intent in requiring a certified check or a bid bond is to have some security for a remedy if the contract is awarded to a bidder and it refuses to sign the contract and provide the required contract bonds. A bidder might provide the security itself by a certified check, or it can elect to have a third party surety guarantee the remedy so that the College can look to a third party surety for relief. Based on this intent and practice, the bid security requirement would seem to be satisfied where a bidder submits a bid bond and the surety is liable on the bid bond which it signed.

Both Brahma and Slate submitted bid bonds that indicated that the bid amount was for ten percent (10%) of the bid rather than putting in the actual amount in numbers. I find that ten percent (10%) amount prescribed on the respective bid bonds meets the requirement of the State College Contracts Law and is not a defect. Also, both bidders met the other requirements for the bid security by submitting a consent/agreement of surety and a power of attorney executed by the surety.

As a result, I find that the bid bonds submitted by Brahma and Slate are enforceable against the surety, and that they met the College’s intent for bid surety either through a bid bond or a check. Even if it was determined that the insertion of the language indicating the bond amount is for ten percent (10%) of the bid was a material defect, based on the foregoing analysis, I conclude that the bid bonds are acceptable under the Meadowlands and River Vale two part test. First, if the bid bonds are enforceable against the surety, the College has the intended assurance of the remedy required if a contract award is made to either Brahma or Slate. Second, if the bid bonds are enforceable against the surety, Brahma or Slate have no potential advantage over other bidders because they provided surety required in the form of an enforceable bid bond. For these reasons, I conclude that Catcord’s protest should be denied.

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<sup>2</sup>The Marvec decision was disapproved by In re Route 280 Contract, 89 N.J.1 (1982).

### **Slate's Failure to Include the Disclosure of Investment Activities in Iran in its Bid**

In its March 10, 2015 protest letter, Catcord claims that Slate failed to include a completed and signed Disclosure of Investment Activities in Iran Certification with its bid. Catcord alleges that this is a deficiency that warrants the rejection of Slate's bid. Brahma makes the same claim against Slate in its letters of March 31, 2015 and April 21, 2015. Slate responded by stating that it satisfied this requirement by providing the required form after the bid opening.

Public Law 2012, c. 25 prohibits a bidder or any person or entity proposing to enter into a contract with a State agency<sup>3</sup> from engaging in certain activities with Iran. The law was adopted in New Jersey to implement the federal law (the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010) passed to expressly authorize state and local governments to prohibit contracting with certain companies that do business in Iran. See N.J.S.A. 52:32-55.

Under the law, the New Jersey Department of Treasury (hereinafter referred to as "Treasury") develops a list, to be updated every 180 days, that identifies persons or entities engaging in certain investment activities in Iran that are prohibited from entering bidding or entering into a contract with a State agency. See N.J.S.A. 52:32-57. A copy of Treasury's list identifying persons/entities that would be prohibited from bidding or entering into contracts with State agencies is appended hereto as Exhibit 15. Also, the most current list is available on Treasury's website: <http://www.state.nj.us/treasury/purchase/pdf/Chapter25List.pdf>.

The Project bid documents set forth the requirements for the law prohibiting investment activities in Iran. IB6.6 states, "Pursuant to P.L. 2012, c.25, any bidder or business entity which, at the time of bid or award of this Contract, is identified on a list created by N.J. Department of Treasury pursuant to this act as a person or entity engaging in investment activities in Iran as described in this act, shall be ineligible to, and shall not bid on or be awarded a contract for this Project." In addition, this requirement was reiterated in the College's Addendum No. 1, which included a Disclosure of Investment Activities in Iran form. However, in the College's Bid Cover Sheet, the Disclosure of Investment Activities in Iran form was not identified as a document that had to be returned with the bid.

Although Slate failed to timely submit a completed and signed disclosure certification with its bid, Slate can be deemed in compliance with P.L. 2012, c.25 (N.J.S.A. 52:32-55, *et seq.*). Slate did not have any investment activities with Iran at the time of the bid opening which the College was able to confirm by checking the Treasury list (Exhibit 15). Further, none of the barred persons/entities on the Treasury list have any ownership in Slate.

Slate's failure to provide the Disclosure of Investment Activities in Iran Certification was a defect which falls into the category of minor, inconsequential and technical, and qualifies for waiver in accordance with existing case law. See: Meadowbrook, 138 N.J. at 314; Terminal Construction Corp., 67 N.J. at 411. The College would not be deprived of an assurance that a contract would be entered into by the bidder. Slate submitted a signed bid which is binding by its terms and bid security. Therefore, Slate could not avoid its obligation to sign a contract based upon failure

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<sup>3</sup>A State College is not specifically defined as a State agency in the applicable statute, N.J.S.A. 52:32-56a.

to include the Disclosure of Activities in Iran Certification in its bid. Moreover, a cure would not have given Slate a competitive advantage because it could not avoid its obligation to sign a contract based upon its initial failure to include the Disclosure of Activities in Iran Certification in its bid.

I conclude that Slate's failure to include a Disclosure of Investment Activities in Iran Certification with its bid submission does not constitute a material defect to reject the bid and that the post-bid cure made by Slate was appropriate under the circumstances.

Therefore, the protest made by Catcord and Brahma regarding this issue is rejected.

### **Conclusion**

Based upon the written submissions from CatCord, Slate and Brahma, an examination of the bids and a review of the College's bid specifications and forms, it is my determination that Slate is the lowest responsible bidder for the Project and its bid conforms to the College's bid specifications. As a result, the protests filed by CatCord against Slate and Brahma, and by Brahma against Slate, are denied.

This bid protest decision is being issued in accordance with IB2.8 of the Project bid specifications and is a final decision of the Contracting Officer as that term is defined in the State College Contracts Law, N.J.S.A. 18A:64-53(b).

You are advised that the undersigned Contracting Officer has been delegated the authority to award this construction contract to "the lowest responsible bidder, whose bid, conforming to the invitation to bids, will be the most advantageous to the State college" pursuant to N.J.S.A. 18A:64-76.1(b). This Contract shall be awarded immediately because a delay in award will result in substantial cost to the College and because public exigency mandates that substantial completion of this project be achieved on or before August 1, 2015. Notice of the award of the Contract shall be provided to all bidders, and shall be appealable to the Superior Court of New Jersey, Appellate Division, pursuant to N.J.S.A. 18A:3B-6(f) and N.J. Court Rule 2:2-3(a)(2).

The College appreciates all contractors' interest in and participation in competitive bidding on this Project.

Sincerely,



Richard M. Roberts  
Associate Vice President for Administration and Finance/Contracting Officer