

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	Case No. 2011-3
)	
)	ORDER
IN RE:)	
)	
Protest of Monroe Construction Co., LLC;)	
Appeal of Monroe Construction Co., LLC)	

This case is before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for administrative review by Monroe Construction Company, LLC (Monroe). Monroe protested the University of South Carolina's intended award of a construction contract to Rodgers Builders, Inc. (Rodgers). The CPOC conducted a hearing and issued a decision on February 14, 2011, denying Monroe's protest. In the hearing before the Panel, Monroe was represented by Katherine B. Barroll, Esquire, and D. Ryan McCabe, Esquire. Rodgers was represented by Boyd B. Nicholson, Esquire. The University of South Carolina (USC) was represented by George W. Lampl, III, Esquire. The Chief Procurement Officer for Construction (the CPOC) was represented by Molly R. Crum, Esquire.

Findings of Fact

This protest involves a construction contract at USC to upfit laboratory, office, and support spaces on the first floor of the Horizon I project (the Project). The IFB called for two base bids, and the dispute in this case involves Base Bid 2. Base Bid 2 sought a contractor to

[p]rovide general construction, mechanical, electrical, and plumbing at existing 5 Story Building as required to upfit 22,670 s.f. First Floor for use as labs, offices, and support spaces with 2,500 s.f. of laboratory and office space (Rooms 114A - 117B, 118B and 199B) left as shell space for future expansion.

The IFB specified that bidders should designate subcontractors for the following categories: Mechanical, Plumbing, and Electrical. The IFB provided that bids failing to list the

subcontractors as required by law would be rejected. In addition to the relevant provisions of the Procurement Code, the IFB required bidders to comply with the Davis Bacon Act¹ and sections 40-11-340 and -410 of the South Carolina Code of Laws.²

The plumbing work to be performed on the Project was detailed in Division 15 of the Project Manual and included on several drawings. One drawing in particular, entitled “Enlarged First Floor Lab Plumbing Plan, Base Bid 1” and numbered P7.10, showed all piping going into the labs, including specialty gas or process pipes. The highlighted box on the drawing indicated that at least some of the process piping, marked in blue on the drawing, would be provided by separate contract.

USC received nineteen bids on the project. Rodgers submitted the low bid for Base Bid 2. Sumwalt Associates, Inc., and Monroe were the second and third low bidders, respectively. Of those nineteen bidders, only Monroe listed both a plumbing subcontractor and a pressure and process piping subcontractor under the category of “Plumbing” on the bid form. USC posted a notice of intent to award the Base Bid 2 contract to Rodgers Builders on December 3, 2010. Monroe protested the intent to award on December 13, 2010.

USC’s Motion to Dismiss Appeal Issues as Untimely

At the beginning of its hearing, the Panel heard argument from the parties on USC’s motion to dismiss two issues from the appeal for lack of jurisdiction. First, USC argued that Monroe’s appeal letter raised an issue regarding whether or not the Project’s bid form satisfied the subcontractor listing requirements of section 11-35-3020³ of the Procurement Code and that

¹ The Davis Bacon Act governs the prevailing wage rates to be paid on construction projects which are federally funded or assisted.

² These two provisions are part of the State’s licensing requirements for contractors (the Contractor’s Licensing Act). Section 40-11-340 defines the qualifications for acting as a sole prime contractor. S.C. Code Ann. §40-11-340 (2011). Section 40-11-410 lists and describes the license classifications and subclassifications regulated by the State. S.C. Code Ann. § 40-11-410 (2011).

³ Section 11-35-3020(b)(i) provides in pertinent part:

this issue was raised for the first time on appeal. Second, USC argued that Monroe's appeal letter raised an issue regarding whether USC had an obligation to investigate when Monroe alleged a violation of section 40-11-200(B)⁴ of the Contractor's Licensing Act had occurred and that this issue was also raised for the first time on appeal. In response, Monroe asserted that the Panel should hear the issue of whether the bid form satisfied section 11-35-3020 because the Panel was already convened for a hearing and because the bidding public and agencies needed guidance on the subcontractor listing requirements, especially since the determination of which specialties to list on the bid form is not a protestable issue. As to USC's duty to investigate whether a violation of section 40-11-200(B) had occurred, Monroe asserted that this was not a new issue because the allegation that USC had failed to investigate was implicit in its initial protest letter when it cited the statutory provision.

A party bringing a protest of an intended award under the Procurement Code must meet the requirements of section 11-35-4210(1)(b) to confer jurisdiction on the CPO and, by extension, the Panel. S.C. Code Ann. § 11-35-4210(1)(b). Section 11-35-4210(1)(b) establishes that a protest must be brought within ten days of the posting of the intent to award. *Id.* The

The governmental body, in consultation with the architect-engineer assigned to the project, shall identify by specialty in the invitation for bids all subcontractors who are expected to perform work for the prime contractor to or about the construction when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid. In addition, the governmental body, in consultation with the architect-engineer assigned to the project, may identify by specialty in the invitation for bids a subcontractor who is expected to perform work which is vital to the project. The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 11-35-4210 or another provision of this code.

S.C. Code Ann. § 11-35-3020(b)(i) (2011).

⁴ This provision provides:

(B) It is a violation of this chapter for an awarding authority, owner, contractor, or an agent of an authority, owner, or contractor to consider a bid, sign a contract, or allow a contractor to begin work unless the bidder or contractor has first obtained the licenses required by this chapter. Bids or contracts submitted by contractors may not be reconsidered or resubmitted to an awarding authority, contractor, or owner if the contractor was not properly licensed at the time the initial bid or contract was submitted.

S.C. Code Ann. § 40-11-200(B) (2011).

protest must be in writing and “set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided.” S.C. Code Ann. § 11-35-4210(2)(b) (2011). A party may amend an initial protest of an intended award as long as it does so within fifteen days after the posting of the intended award. *Id.*

The Panel has consistently held that the issues to be decided by the CPO and the Panel are established by the protest letter, and that issues raised for the first time in an appeal letter are untimely under the time constraints of S.C. Code Ann. section 11-35-4210. *See In re: Protest of Volume Services*, Panel Case No. 1994-8 (August 31, 1994) (“The letter to the Panel cannot add issues. If new issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of subsection[s] (1) and (2).”); *In re: Protest by J & T Technology, Inc.*, Panel Case No. 1987-3 (July 13, 1987) (“The protestant cannot alter or modify its grievance as the protest develops except as permitted by § 11-35-4210.”); and *In re: Protest of DP Consultants, Inc.*, Panel Case No. 1998-6 (“The protest letters establish the issues of the case, and any issues not established in the protest letter are untimely filed under the time constraints of S.C. Code § 11-35-4210.”)

A review of Monroe’s initial protest letter reveals that Monroe did not cite section 11-35-3020 in its protest letter, nor did it allege that USC had failed to list any required subcontractors on the bid form. Rather, Monroe asserted that the bid form, Project specifications, and drawings required bidders to list both a plumbing and a pressure and process piping subcontractor on the bid form. Therefore, the Panel concludes that Monroe’s challenge in its appeal letter that the bid form did not comply with section 11-35-3020 is an issue raised for the first time on appeal and must be dismissed for lack of jurisdiction.⁵

⁵ During the hearing, the Panel also observed that even if Monroe had raised an issue regarding the sufficiency of the bid form with regard to section 11-35-3020 in its protest letter, it would have been an untimely protest of the

The Panel also finds that Monroe's allegation that USC had a duty to investigate an alleged violation of section 40-11-200(B) of the Contractor's Licensing Act was also raised for the first time on appeal. Although Monroe did cite section 40-11-200(B) in its protest letter, Monroe never suggested that USC had a duty to investigate whether a violation of that statute had occurred. Therefore, the Panel also dismisses that issue as being untimely under section 11-35-4210(1)(b) and Panel precedent.⁶

Conclusions of Law

Having granted USC's motion to dismiss the two appeal issues discussed above, the Panel conferred with the parties to determine if any issues remained for the Panel to hear. Monroe asserted that Rodgers' responsibility was still in question. The CPOC agreed in part, suggesting that the scope of work included by the category of "Plumbing" on the bid form needed to be addressed as well as the issue of whether USC had fulfilled its duties under the Procurement Code in determining that Rodgers was a responsible bidder.

The Panel will first address the issue of what work USC intended to include under the "Plumbing" category of the bid form. Monroe has maintained from the start that bidders were required to list both a plumbing subcontractor and pressure and process piping subcontractor on the bid form under the "Plumbing" category. Mr. Frank Kerr, a Monroe employee who was involved in preparing Monroe's bid, testified that he looked at the plumbing drawings, especially

solicitation itself. See S.C. Code Ann. § 11-35-4210(1)(a) (2011) ("a prospective bidder . . . aggrieved in connection with the solicitation of a contract shall protest . . . within fifteen days of the date of the issuance of the Invitation for Bids . . ."). However, a careful reading of the statutory provision governing construction bids makes it clear that the determination of which subcontractors to include in the list is not a protestable issue. S.C. Code Ann. § 11-35-3020(b)(1) (2011). Therefore, the Panel suggests that bidders who are concerned about the inclusion or exclusion of subcontractors on the bid form should be certain to ask questions at the appropriate time during the bid process.

⁶ The Panel also notes that it is not the State entity charged with the authority to enforce this particular provision of the South Carolina Code of Laws. Indeed, on at least one occasion, the Panel held an appealed protest in abeyance while the Contractor's Licensing Board determined whether a bidder was properly licensed at the time it bid on a project. See *In re: Protest of Roofco, Inc.*, Panel Case 2000-14 (March 23, 2000) (granting a continuance until the Contractor's Licensing Board held a hearing to determine whether a bidder was properly licensed to bid on a project).

the drawing marked P7.10, to determine the scope of work for the “Plumbing” category on the bid form. Because that drawing showed general plumbing work as well as specialty pressure and process piping work, he listed both a plumbing subcontractor and a pressure and process subcontractor on Monroe’s bid form. However, Ms. Regina Floyd, an Architect involved with the Project who prepared the bid form, testified that the “Plumbing” category was intended to include work that could be performed by a subcontractor holding a general plumbing license as defined by section 40-11-410(f). Ms. Floyd also testified that it was standard practice to show process piping on the plumbing drawings for purposes of coordination of work and that other types of work unrelated to plumbing were also included on the drawing relied upon by Monroe. She also testified that she did not ask for bidders to list a pressure and process piping subcontractor on the bid form because that work was not expected to exceed three percent of the prime contractor’s total base bid. Neither Monroe nor any other bidder sought clarification of the plumbing scope of work, nor did any bidder ask what was meant by “Plumbing” on the bid form.⁷ When the bids were submitted, Monroe was the only bidder to interpret “Plumbing” to require the listing of both a plumbing subcontractor and a pressure and process piping subcontractor. Therefore, the Panel finds that USC intended to include only work which could be performed by a subcontractor holding a general plumbing license under the “plumbing” category on the bid form.

The Panel now must decide whether USC properly determined Rodgers to be a responsible bidder. A responsible bidder is one who “has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith

⁷ The Panel has previously expressed concern about bidders who recognize a potential ambiguity in the solicitation requirements, but fail to protest those requirements or ask questions seeking clarification at the appropriate time. *See In re: Protests of Qualis Health, et al.*, Panel Case 2010-4, n. 5 (August 30, 2010). It is too late to address ambiguity in a solicitation’s specifications once bids have been received and a notice of intent to award has been posted.

performance which may be substantiated by past performance.” S.C. Code Ann. § 11-35-1410(6) (2011). The State must determine responsibility prior to the award of any contract. S.C. Code Ann. § 11-35-1810(1) (2011). Moreover, the Panel has held that if a bidder’s responsibility is challenged, “[t]he protesting bidder must prove the determination of responsibility is clearly erroneous, arbitrary, capricious, or contrary to law.” *In re: Protest of Brantley Construction Co., Inc.*, Panel Case 1999-3 (June 25, 1999) (citing S.C. Code Ann. § 11-35-2410).⁸

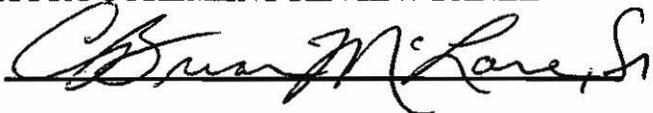
Rodgers listed Hill Plumbing as its plumbing subcontractor on its bid form. Ms. Floyd testified that she checked the licenses of Rodgers and Hill Plumbing prior to award and determined that Hill Plumbing possessed a valid plumbing license, which is all that was required by the bid form. The Panel finds that this inquiry satisfied the requirements of the Procurement Code with regard to responsibility and that Monroe failed to show that USC’s determination of responsibility, which was implicit in the intended award, was “clearly erroneous, arbitrary, capricious, or contrary to law.”

Therefore, for the reasons stated above, the Panel denies Monroe’s protest and upholds the decision of the CPOC.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:



C. BRIAN MCLANE, SR., CHAIRMAN

This 26 day of April, 2011.
Columbia, South Carolina

⁸ Monroe argued that section 11-35-2410’s “clearly erroneous” standard of review does not apply to findings of responsibility because that section specifically lists only findings of *nonresponsibility*. However, the *Brantley Construction* case clearly applies the “clearly erroneous” standard to a finding of responsibility implicit in an intended award. In addition, the Panel more recently applied that standard to an implicit finding of responsibility in *In re: Protest of CollegeSource, Inc.*, Panel Case No. 2008-4 (January 8, 2009).

