

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	Case No. 2011-3
)	
)	ORDER
IN RE:)	MOTION TO DISMISS AND
)	MOTION TO QUASH SUBPOENA
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). Monroe is represented by Katherine B. Barroll, Esquire, and D. Ryan McCabe, Esquire. Rodgers is represented by Boyd B. Nicholson, Esquire. Hill Plumbing & Electric Company (Hill Plumbing) is represented by Hugh M. Claytor, Esquire. The University of South Carolina (USC) is represented by George W. Lampl, III, Esquire. The State Engineer and Chief Procurement Officer for Construction (the CPOC) is represented by Molly R. Crum, Esquire. On April 4, 2011, with the consent of the parties, the Panel Chairman heard argument by telephone conference call on a motion to dismiss an appeal issue for lack of jurisdiction and a motion to quash a subpoena issued to Mr. Francis L. Hill, Jr., and Hill Plumbing. After hearing the arguments of the parties, the Chairman then ruled on the motions on behalf of the Panel.

Findings of Fact

The underlying protest involves a construction project (the Project) at USC to upfit laboratory, office, and support spaces on the first floor of the Horizon 1 building. The Project solicitation documents and bid form provided for two base bids, Base Bid 1 and Base Bid 2. On

their bid forms, bidders were asked to name subcontractors for the following categories: Mechanical, Plumbing, and Electrical. On the date the bids were due, USC had received nineteen bids. Rodgers was determined to be the low bidder on Base Bid 2, and USC posted an intent to award the Base Bid 2 contract to Rodgers on December 3, 2010. Monroe timely protested the intended award on December 13, 2010.

In its protest letter, Monroe alleged that Rodgers' bid was "nonresponsive and disqualified because Ro[d]gers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Ro[d]gers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications." Monroe asserted it was "the lowest bidder that identified a properly licensed subcontractor . . . for the specialty piping work."¹ Monroe also complained that even though it had "advised USC's procurement officer for this project of the specialty license requirement" on bid opening day, "USC issued a notice of award of the bid to a contractor that listed a subcontractor for this part of the work that does not have the required specialty license." Finally, Monroe cited a provision from the Contractor's Licensing Act, which it argued "makes it a criminal offense for the University to even consider a bid if the work is not to be performed by a properly licensed contractor."²

¹ The specialty piping work Monroe refers to is pressure and process piping work, which requires a "pressure and process piping" license. A "pressure and process piping" license is a subclassification of a mechanical contractor's license, as is a "plumbing" license. See S.C. Code Ann. § 40-11-410(5)(f) & (g) (2011) (statutory provisions describing work authorized to be performed under various license classifications and subclassifications). For ease of reference, this order uses the terms "plumbing license" and "pressure and process piping license" to refer to these two subclassifications of the mechanical contractor's license.

² The provision quoted by Monroe 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.

The CPOC conducted a hearing and ultimately denied Monroe's protest, finding that Rodgers' bid was responsive on its face because it listed Hill Plumbing as its plumbing subcontractor on its bid form and because Hill Plumbing possessed a valid plumbing license. Moreover, the CPOC found that Rodgers was also a responsible bidder because USC had a reasonable basis for excluding pressure and process piping work from its meaning of "plumbing" on the bid form and because Hill Plumbing possessed a valid plumbing license. Although Hill Plumbing did not appear at the CPOC hearing, it was stipulated by the parties that neither Hill Plumbing nor Rodgers possessed a valid pressure and process piping license.

Monroe timely appealed the CPOC's decision. In its appeal letter, Monroe asserts that Hill Plumbing improperly offered to perform the process and pressure piping work as well as plumbing work in its sub-bid to Rodgers and other bidders. Monroe also contends that its notification to USC on bid opening day regarding the requirement of listing a licensed process and pressure piping subcontractor on the bid form "placed the University on inquiry notice that Hill Plumbing had bid beyond the scope of its license."

At Monroe's request, the Panel's attorney prepared a subpoena to Mr. Hill and Hill Plumbing on March 10, 2011. The subpoena compelled Mr. Hill's attendance at the Panel's scheduled hearing on April 13, 2011, in Columbia, South Carolina. The subpoena also requested the production of

Copies of your complete file materials, including but not limited to all correspondence, facsimiles, e-mails, notes, bid submittals, or price quotes, any and all other materials relating to bids submitted to anyone relating to the plumbing work, including the process piping work, for the Horizon I First Floor Laboratory Upfit project on the campus of USC in Columbia, South Carolina.

Through counsel, Mr. Hill and Hill Plumbing filed a motion to quash the subpoena on March 23, 2011. Additionally, on March 29, 2011, the CPOC filed a motion to dismiss as untimely any appeal issue challenging the scope of Hill Plumbing's sub-bid.

Conclusions of Law

I. The CPOC's Motion to Dismiss Issue as Untimely

The CPOC asserts that Monroe's initial protest letter challenged Rodgers' bid for its failure to list a pressure and process piping subcontractor under the bid form's plumbing category. In its appeal letter, however, the CPOC contends that Monroe has impermissibly re-characterized or interpreted its protest letter in an effort to raise a new issue: that Hill Plumbing improperly offered to perform work outside the scope of its plumbing license in its sub-bid. In response, Monroe argues that the issue is not a new one because its protest letter asserted that neither Rodgers nor Hill Plumbing had the required pressure and process piping license and that the citation of section 40-11-200(B) of the Contractor's Licensing Act was sufficient to place the parties on notice that if neither Rodgers nor Hill Plumbing possessed the proper license, then Rodgers must have had the bid of a subcontractor who did have that license when it submitted its bid on the Project.

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 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.”)

In the instant case, Monroe’s protest letter complained of Rodgers’ action in listing a plumbing contractor that did not possess the pressure and process piping license on its bid form under the category for plumbing. Nothing in Monroe’s protest letter suggested that Hill Plumbing had acted improperly or bid outside the scope of its license. Furthermore, read in the context of its protest letter, Monroe’s citation of the section from the Contractor’s Licensing Act only placed the parties on notice that Monroe believed Rodgers and USC had violated that section, not Hill Plumbing. Monroe could have amended its protest letter to allege improper bidding on the part of Hill Plumbing, but it failed to do so within the time constraints of section 11-42-4210(2)(b). Therefore, the allegations raised in Monroe’s appeal letter regarding Hill’s sub-bid are untimely and are hereby dismissed for lack of jurisdiction.

II. Hill's Motion to Quash

Hill Plumbing has moved to quash the subpoena issued to it and its registered agent, Mr. Francis L. Hill, Jr., on the grounds that the evidence sought is not relevant to the issues to be decided by the Panel and that the evidence sought includes confidential and trade-secret information to which Monroe is not entitled.

The Panel has the authority to issue subpoenas at a party's request under S.C. Code Ann. section 11-35-4410(4)(a)(ii) (2011). The Panel has also entertained motions to quash or modify a subpoena upon a party's application. S.C. Code Ann. § 11-35-4410(4)(b) (2011); *see also In re: Petition for Administrative Review GTECH Corp.*, Case No. 2002-4 (quashing several subpoenas on grounds of relevance and undue burden). This practice is consistent with Rule 45(c) of the South Carolina Rules of Civil Procedure. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, South Carolina Rules of Evidence.

Because the Panel has dismissed the appeal issues relating to Hill Plumbing's sub-bid for lack of jurisdiction, the evidence sought by the subpoena is clearly irrelevant to the issues remaining before the Panel, and the subpoena is hereby quashed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 

C. BRIAN MCLANE, SR., CHAIRMAN

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

