

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Appeal by Cannon Construction)	
Company (Bid Protest))	Case No. 2011-9
)	
State Project No. H59-6022-JM-B:)	
Tri-County Technical College)	
Industrial Arts, Phase B Building)	
Renovations)	
)	

This case came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for administrative review by Cannon Construction Company (Cannon). Cannon protested Tri County Technical College's (Tri County's) finding that Cannon was non-responsible in regard to a renovation project at the school. The Chief Procurement Officer for Construction (the CPOC) issued a decision on October 25, 2011, denying Cannon's protest. Cannon requested further review by the Panel. In the hearing before the Panel, Cannon was represented by Thomas H. Coker, Jr., Esquire, and Robert DeWitt Thomas, Esquire. The Chief Procurement Officer for Construction (the CPOC) was represented by Molly R. Crum, Esquire. Representatives from Tri County attended the hearing, but did not participate.

Findings of Fact

The underlying facts of Cannon's protest, most of which appear either in the procurement file or presented to the CPOC in his hearing, are not in dispute. Tri-County Technical College (Tri-County) conducted this solicitation to procure construction services for a renovation project at its Industrial Arts Center. Record at PRP40 – PRP41. The Invitation for Bids (IFB) included a bid form which required the listing of specified subcontractors along with their South Carolina license numbers. Record at PRP44. Pursuant to the bid form, general contractors were required

to list a qualified mechanical subcontractor. *Id.* The IFB also contained a form explaining the requirements for listing subcontractors on the bid form. Record at PRP46. Paragraph 3 of the instructions provides: “Bidder must only insert the names of subcontractors who are qualified to perform the work of the listed specialties as specified in the Bidding Documents and South Carolina Licensing Laws.” *Id.*

The solicitation was posted on September 1, 2011, and established an opening date of September 27, 2011. Record at PRP40 – PRP41. On September 27, 2011, thirteen bids were opened. Record at PRP48 – PRP54. Twelve of the bidders listed Comfort Systems USA (Comfort Systems) as the mechanical subcontractor, and one listed S.M. Lawrence as the mechanical subcontractor.¹ *Id.* Cannon was the apparent low bidder. Record at PRP48. Upon conducting a responsibility determination, however, Tri-County’s procurement officer determined that the license number given by Cannon for Comfort Systems, SC #M10701,² was not a valid South Carolina license number. Record at PRP55. Tri-County’s procurement officer then followed up with Cannon regarding the invalid license number, and she requested that Cannon provide her with Comfort Systems’ sub-bid. *Id.* Comfort Systems’ sub-bid was printed on letterhead listing the name Comfort Systems USA and an Asheville, North Carolina address. Record at PRP57. The sub-bid contained no reference to an entity named S.M. Lawrence. *Id.*

After receiving Comfort Systems’ sub-bid, Tri-County’s procurement officer contacted Danny Dillow, who had prepared it. Record at PRP55. Mr. Dillow advised her that he had inadvertently dropped one number from Comfort Systems’ license and that the correct license number was SC #107071. *Id.* However, when Tri-County checked the corrected license number on the website of the South Carolina Department of Labor, Licensing, and Regulation (LLR), it

¹ This bidder, Hogan, was found non-responsive because it did not list a structural framing subcontractor.

² In his order, the CPOC notes that South Carolina licenses do not have an alphabetical prefix, but that it is a common practice to attach the letter “M” to a license with a mechanical classification. Record at PRP5.

discovered that SC #107071 was issued to S.M. Lawrence out of Jackson, Tennessee, not Comfort Systems. *Id.* This discovery prompted Tri-County to contact Mr. Dillow again and ask him “where the bid was prepared and where the job would be run from.” *Id.* Mr. Dillow advised that the bid, which was sent to all thirteen bidders on the project, was prepared in Asheville, North Carolina, and that the job would be run from that office. *Id.*

In addition to the inquiries described above, Jim McVey of the Office of State Engineer contacted LLR’s Gary Wiggins on behalf of Tri-County. *Id.* Mr. Wiggins informed Mr. McVey that bids may be submitted only by the entity named on the license. *Id.*; *see also* Record at PRP59. Therefore, Mr. Wiggins concluded that Comfort Systems did not have the right to offer a bid because it was not a licensed entity. Record at PRP59. Based on all of this gathered information, Tri-County determined that Cannon and the other eleven bidders who listed Comfort Systems USA as their mechanical subcontractor were non-responsible. Record at PRP55. On October 3, 2011, Tri-County posted a “no award” notice of intent to award. Record at PRP56.

Cannon protested Tri-County’s finding of non-responsibility on October 7, 2011, asserting that its bid did list a properly licensed mechanical subcontractor and that the CPOC should allow it to correct the clerical mistake on its bid that created the appearance that the mechanical subcontractor listed on its bid was not licensed. Record at PRP26 – PRP27. The CPOC conducted an administrative review and issued a decision on October 25, 2011, denying Cannon’s protest and holding that Tri-County’s finding of non-responsibility was not “clearly erroneous, arbitrary, capricious, or contrary to law.” Record at PRP4 – PRP9.

During the Panel’s hearing, Cannon presented one witness, Mr. Hank Cannon. Mr. Cannon is Cannon’s founder and testified that Cannon has participated in public construction

projects for the past five to six years. Mr. Cannon attended the pre-bid conference for Tri-County's renovation project and helped prepare Cannon's bid. Mr. Cannon testified that Cannon received a sub-bid from Comfort Systems which listed a South Carolina license number of #M10701. Mr. Cannon testified that subcontractors usually list their license numbers on sub-bids as a matter of convenience and that he accepted the license number given by Comfort Systems as accurate. Mr. Cannon admitted that he did not confirm the license number with Comfort Systems prior to entering it on Cannon's own bid form. Mr. Cannon testified that he later learned that the license number Cannon listed for its mechanical subcontractor, Comfort Systems, was not a valid South Carolina license number. After learning that the license number was invalid, Mr. Cannon testified that Cannon sent a copy of Comfort Systems' sub-bid to Tri-County when requested to do so. Mr. Cannon also testified that he considered Comfort Systems and S.M. Lawrence to be the same company and that he could not distinguish between the two. Finally, Mr. Cannon admitted that he did not send a written request to Tri-County asking to be allowed to amend Cannon's bid to reflect the correct license number and the correct name of the entity named on the license prior to his protest on October 7th.

Conclusions of Law

At the beginning of the Panel hearing, Cannon's counsel stated that the only issue for the Panel to determine in its review was whether or not Cannon should have been permitted to amend its bid both to reflect S.M. Lawrence, not Comfort Systems, as the offered mechanical subcontractor and to provide S.M. Lawrence's correct South Carolina license number. In support of its position, Cannon argued that because all twelve responsive bidders listed the same mechanical subcontractor, no prejudice would result if it were permitted to amend its bid.³

³ In support of its position, Cannon cites the state supreme court case of *Martin Engineering, Inc., v. Lexington County School District One*, 365 S.C. 1, 615 S.E.2d 110 (2005), for the proposition that "[w]hen no unfair advantage

Although the CPOC's administrative review focused on issue of whether Tri-County's finding of non-responsibility was "clearly erroneous, arbitrary, capricious, or contrary to law,"⁴ the CPOC did not object to the Panel limiting its inquiry to the narrow issue framed by Cannon. Therefore, the Panel agreed to hear testimony and legal argument regarding the sole issue of whether or not Cannon should have been allowed to amend its bid. After Cannon presented the testimony of its sole witness and rested its case, the CPOC moved for a directed verdict, which the Panel treats as a motion to dismiss for failure to meet the burden of proof. *In re: Protest of MTC Service Maintenance*, Panel Case No. 1997-2 (February 28, 1997), and *In re: Protest of PS Energy*, Panel Case No. 2002-9 (July 3, 2002). For the reasons discussed below, the Panel agreed and granted the CPOC's motion for directed verdict.

Under the Procurement Code, the State must unconditionally accept bids in construction procurements "without alteration or correction, *except as otherwise authorized in this code.*" S.C. Code § 11-35-3020(b) (2011) (emphasis added). The correction of "inadvertently erroneous" bids is addressed by section 11-35-1520(7) of the Procurement Code, which provides in pertinent part:

After bid opening, changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition must not be permitted. After opening, bids must not be corrected or withdrawn except in accordance with the provisions of this code and the regulations promulgated pursuant to it. Except as otherwise provided by regulation, all decisions to permit the correction . . . of bids . . . after award but before performance, must be supported by a written determination of

is given to a bidder, a bidder should be provided the opportunity to do the work at the low bid price." As an initial matter, the Panel notes that this case is not binding authority inasmuch as it arises under Lexington School District One's procurement code, not the state procurement code, and does not involve a decision of the Panel. Furthermore, in that case, the bidder recognized its mistake immediately after the bids were opened and requested to be allowed to correct it. The Panel finds those facts to be distinguishable from the instant case in that Cannon did not immediately recognize that there was a mistake regarding Comfort Systems' license number and did not request to correct its bid until after Tri-County posted the "no award" notice.

⁴ This quoted language is from section 11-35-2410 of the Procurement Code and provides the standard of review for a finding of non-responsibility under section 11-35-1810. See S.C. Code Ann. §11-35-2410(A) (2011) and S.C. Code § 11-35-1810(1) (2011).

appropriateness made by the chief procurement officers or head of a purchasing agency.

S.C. Code Ann. § 11-35-1520(7) (2011). The correction of bids is also governed by regulation 19-445.2085, which establishes the following procedure:

A bidder . . . must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder's . . . mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officer or head of a purchasing agency, or the designee of either.

S.C. Code of State Regulations R 19-445.2085(A) (2011).

The Panel has interpreted these provisions in the past and has held that an inadvertent mistake in a bid must be evident from the bid documents themselves and correctable from the information contained therein without consulting the bidder. *See In re: Protest of Brantley Construction Co.*, Panel Case No. 1994-6 (June 14, 1994) (in situation where bidder's alleged mistake was underlining "add to" instead of "deduct from" on one item in its bid, the Panel found that the bid could not be corrected under the Procurement Code and the governing regulation because the mistake could only be identified and corrected by contacting the bidder, which would inject the potential for compromising the integrity of the sealed bid process); *In re: Protest of Miller's of Columbia*, Panel Case No. 1989-3 (April 24, 1989) (where bidder failed to indicate four required unit prices on its bid even though an overall lot price was given, a mistake which was clearly evident on the face of the bid, the procurement officer could not correct the bid by filling in the unit prices without contacting the bidder, a practice not allowed by the Procurement Code).⁵ Thus, in order to establish that a correction should have been allowed, a

⁵ *Miller's of Columbia* also argued, similarly to Cannon's argument in the instant case, that no prejudice would result from allowing the correction because its overall price for the lot would not change. In response to this argument, the Panel observed the following:

bidder must prove that the mistake is evident from the bid document itself and that the correction is one that could be made from the information already available to the procurement officer.⁶

In the case currently before the Panel, Mr. Cannon admitted that he did not question the license number provided to him by Comfort Systems. Moreover, an examination of Cannon's bid and Comfort Systems' sub-bid confirms that the license number submitted for Comfort Systems is identical on both documents. In addition, Mr. Cannon testified before the Panel that he only became aware that there was a problem with the license number when he was contacted by Tri-County and asked to provide Comfort Systems' sub-bid. Therefore, the Panel finds that Cannon has failed to prove that the typographical mistake regarding the license number is evident from the bid document itself.⁷

In summary, the Panel finds that the typographical mistake is not clearly evident from the bid document itself, as required by the Procurement Code and Panel precedent, and that Cannon is therefore not entitled to amend its bid to reflect the correct South Carolina license number and named entity.

While Miller's argument has appeal in the private sector, this case arises in the public forum. Of equal, if not more, concern to getting the lowest price is promoting confidence in the procurement process, ensuring fair and equitable treatment of all bidders, fostering effective broad-based competition and providing safeguards for maintaining a procurement system of quality and integrity with clearly defined rules of ethical behavior for all parties to the procurement process. [Citations omitted.] *The stated goals of the Procurement Code are served by consistently enforcing the rules.* Neither the cost differential nor sympathy for a vendor in one case can shape rules that must apply to all cases.

Panel Case No. 1989-3 at page 5 (emphasis added).

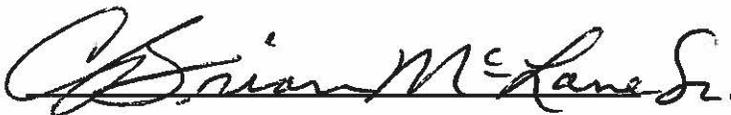
⁶ By way of example, the controlling regulation mentions the extension of unit prices or the correction of addition errors as the types of corrections allowable under section 11-35-1520(7) when such correction would cause the bidder to have the low bid. S.C. Code of State Regulations R 19-445.2085(B) (2011).

⁷ Although not necessary to its decision, the Panel notes that Cannon also failed to prove that the procurement officer could have resolved the confusion surrounding the license number and which entity was actually named on that license by using the information already provided in the bid document. The Panel also takes this opportunity to remind prime contractors that they are obligated to determine the responsibility of their subcontractors under regulation 19-445.2125(G)(1). S.C. Code of State Regulations R 19-445.2125(G)(1) (2011). Because each subcontractor listed must be properly licensed to perform designated specialties, the Panel urges prime contractors to confirm their subcontractors' licenses prior to submitting bids on state projects.

For the reasons discussed above, the Panel grants the CPOC's motion for directed verdict and denies Cannon's protest.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 

C. BRIAN MCLANE, SR., CHAIRMAN

This 17th day of January, 2012.

Columbia, South Carolina