

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE: Appeal by M.A.R. Construction	)	
Company, Inc., and	)	Case No. 2013-4A and
Appeal by Burkwood Construction, Inc.	)	Case No. 2013-4B
	)	
State Project No. J12-9720-AC	)	
S.C. Department of Mental Health	)	
Bryan Psychiatric Roof Replacement	)	
	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) pursuant to requests for further administrative review under sections 11-35-4210(6) and 11-35-4410 of the Consolidated Procurement Code (the Procurement Code). M.A.R. Construction Company, Inc. (MAR), and Burkwood Construction, Inc. (Burkwood), each appealed the April 8, 2013, decision of the Chief Procurement Officer for Construction (the CPOC) granting several grounds of protest filed by MAR and TQ Constructors, Inc. (TQ). The protests challenged an intended award to Burkwood. The Panel conducted a hearing on the appeals on May 23, 2013. In the hearing before the Panel, MAR was represented by Brian P. Robinson, Esquire. M. Alan Peace, Esquire, represented Burkwood, and John E. Cuttino, Esquire, represented TQ. The South Carolina Department of Mental Health (DMH) was represented by R. Alan Powell, Esquire. Keith C. McCook, Esquire, represented the CPOC.

**Findings of Fact**

**I. Facts Related to the Solicitation and Contained in the Procurement File**

The appeals before the Panel involve DMH’s solicitation of bids for Phase IV of the Bryan Psychiatric roof replacement. The bid form required bidders to list subcontractors for several different specialties, including “Roof (steel deck) Assembly” and “Electrical.” Record at

PRP 70 (MAR's bid form); PRP82 (TQ's bid form); and PRP85 (Burkwood's bid form).<sup>1</sup> The bid form also included a document entitled "INSTRUCTIONS FOR SUBCONTRACTOR LISTING," which contained the following clauses:

1. Section 7 of the Bid Form sets forth a list of subcontractor specialties for which [B]idder is *required to identify by name* the subcontractor(s) Bidder will use to perform the work of each listed specialty. Bidder must identify only the subcontractor(s) who will perform the work and no others.

\* \* \* \*

3. 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.

\* \* \* \*

7. Bidder's failure to *insert a name* for each listed specialty subcontractor will render the Bid non-responsive.

Record at PRP71; PRP86 (emphasis added).

In addition to the bid form and the instructions above, the bidding documents also included "STANDARD SUPPLEMENTAL INSTRUCTIONS TO BIDDERS" that also addressed subcontractor listing requirements. Section 2.22 of the supplemental instructions provided:

*Delete Section 4.1.6 and substitute the following:*

4.1.6 Pursuant to Title 11, Chapter 35, Section 3020(b)(i) of the South Carolina Code of Laws, as amended, Section 7 of the Bid Form sets forth a list of subcontractor specialties for which Bidder is required to list only the subcontractors Bidder will use to perform the work of each listed specialty. Bidder must follow the Instructions in the Bid Form for filling out this section of

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<sup>1</sup> Subcontractors were to be listed in a table contained in Section 7 of the bid form. The table had three columns with the following headings, left to right: (1) SUBCONTRACTOR SPECIALTY By License Classification and/or Subclassification (Completed by Owner); (2) SUBCONTRACTOR'S PRIME CONTRACTOR'S NAME (Must be completed by Bidder) BASE BID; and (3) SUBCONTRACTOR'S PRIME CONTRACTOR'S SC LICENSE NUMBER. Record at PRP70, PRP82, and PRP85. DMH, the owner in this solicitation, identified and filled in five subcontractor specialties, including "Roof (steel deck) Assembly" and "Electrical." *Id.*, PRP82, and PRP85. The spaces provided for bidders to enter the requested information in the rows below the other two columns were relatively small. *Id.*, PRP82, and PRP85.

the Bid Form. Failure to properly fill out Section 7 may result in rejection of Bidder's bid as non-responsive.

Record at PRP191. Furthermore, Section 2.33 of the supplemental instructions listed several "reasons for which the Owner will reject Bids," and one of the listed reasons was "[f]ailure to list qualified Subcontractors as required by law." Record at PRP192.

Seven bidders bid on the project, including the parties currently before the Panel: MAR, TQ, and Burkwood. On February 4, 2013, DMH sent a letter to TQ informing it that its bid had been rejected for two reasons. Record at PRP94 – PRP95. First, DMH found that TQ's bid was non-responsive because TQ had failed to list a name for the electrical subcontractor it intended to use to perform the work specified. Record at PRP94. In reaching this finding, DMH concluded that although TQ had listed a license number for an electrical subcontractor, section 11-35-3020(b) of the Procurement Code required the listing of a name. *Id.*

Second, DMH found that TQ was a non-responsible bidder "[g]iven the ambiguity in listing the name" of "Roofing Systems" as its "Roof (steel deck) Assembly" subcontractor and because the license number listed for the subcontractor "yields a classification not sufficient for the specialty roofing license required."<sup>2</sup> Record at PRP95. DMH found that the listing of "Roofing Systems" created an ambiguity because running that name in the South Carolina Department of Labor, Licensing and Regulation's (LLR's) LicenseeLookup search engine returned seven companies with the words "Roofing Systems" in their names, but none of those companies matched the license number<sup>3</sup> also listed on TQ's bid. *Id.* However, DMH also found that running the listed license number in the search engine revealed the license holder to be

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<sup>2</sup> The parties stipulated before the CPOC that the work specified for the "Roof (steel deck) Assembly" actually did not require a specialty roofing license, but rather a General Contractors – Building license. Therefore, the only issue before the Panel with regard to the finding of non-responsibility concerns the listing of "Roofing Systems" as a subcontractor for the "Roof (steel deck) Assembly" work.

<sup>3</sup> The license number listed was G12175, which is a General Contractor's license.

Bonitz Contracting Company, Inc. (Bonitz). *Id.* Furthermore, because two other bidders had also listed some variation of “Roofing Systems” in conjunction with the same license number, DMH “concluded that [TQ] intended to use Bonitz . . . for the Roof (steel deck) Assembly.” *Id.* MAR also listed “Roofing Systems” and Bonitz’s license number on its bid form. Record at PRP70. DMH also found MAR to be a non-responsible bidder for the same reasons that TQ was non-responsible. Record at PRP92 – PRP93.

## **II. The Parties’ Stipulation of Facts**

Prior to the Panel’s hearing, MAR, TQ, and Burkwood entered into a stipulation of facts regarding the solicitation. The Panel hereby adopts that stipulation of facts and recites it verbatim below:

1. All parties filed protests in the appropriate time frame.
2. All parties perfected their protests.
3. All parties attended the hearing before the Chief Procurement Officer.
4. All parties preserved their appeals/protest to the Procurement Review Panel.
5. TQ was the apparent low bidder.
6. MAR was the second apparent low bidder.
7. Burkwood was the third apparent low bidder.
8. Both MAR and TQ listed the “Roof (steel deck) Assembly” subcontractor as “Roofing Systems.”
9. Roofing Systems is a division of Bonitz Contracting Company, Inc.
10. Roofing Systems is not a separate legal entity from Bonitz Contracting Company, Inc.
11. TQ and MAR listed the general contractor’s license number for Bonitz Constructing Company, Inc. as the license number for the “Roof (steel deck) Assembly subcontractor on their bids.
12. Burkwood listed “Needham Roof” as the “Roof (steel deck) Assembly subcontractor and listed the LLR contractor license number for its subcontractor for Needham Roof Systems, Inc. on its bid.
13. TQ omitted the name of its subcontractor for the category labeled “Electrical”.
14. TQ did provide an LLR contractor’s license number for its subcontractor for the category labeled “Electrical”.
15. All parties stipulate that Bonitz is properly licensed.
16. The Department announced its intent to award the contract to Burkwood.
17. MAR protested the award.

18. TQ protested the award.
19. The license number that TQ and MAR listed for the "Roof (steel deck) Assembly" subcontractor, when input into the LLR license lookup search engine, brings up the name Bonitz Contracting Company, Inc.
20. The documents contained in Pages 67 through 205 of the Record of Cases 2013-4A/4B are admitted into evidence. Documents pages 1 through 66 are part of the record to be considered by the Panel.

Stipulation of Facts before the South Carolina Procurement Review Panel, date-stamped May 22, 2013.

### **III. Testimony Received by the Panel**

In addition to the parties' stipulation of facts, the Panel received the testimony of three witnesses. MAR first called Joseph Guido, an architect with CDA Architects who was involved with putting together the bid package for this project. Mr. Guido also participated in the bid opening and prepared the Bid Tabulation Form, but testified that he was not responsible for determining responsiveness. Nonetheless, Mr. Guido testified that he did check the subcontractors' names and license numbers provided by the bidders on the search engine maintained by LLR after the bid opening. Mr. Guido testified that Bonitz was the name returned by the LLR search engine when he checked the license number provided by TQ and MAR for the subcontractor listed as "Roofing Systems." Mr. Guido stated that he thought at the time that he could not contact the bidders to clarify who the subcontractor was, although he admitted that it was a common practice for prime contractors to provide abbreviated names for the subcontractors listed on their bid forms. He also testified that he was not aware at the time that Roofing Systems was a division of Bonitz and that, to him, the two names appeared to be completely different.

With regard to the missing name for TQ's electrical subcontractor, Mr. Guido testified he noticed the omission as he was reading out the bids at the opening. He acknowledged that TQ's

representative, Ms. Davis, was present at the opening and that she immediately told him the omission was a mistake. He also recognized that TQ had provided a license number for an electrical subcontractor. However, he also testified that he did not know how to address the situation at the bid opening. After opening, Mr. Guido testified that when he checked the license number on the LLR search engine it returned M & M Electrical as the name of the license holder. Finally, Mr. Guido admitted that an LLR licensing number is unique and ultimately might prove more useful than a name for the purposes of determining the identity of listed subcontractors.

The Panel also heard the testimony of MAR's president, Michael Rozbitsky, a general contractor with over 40 years of experience. Mr. Rozbitsky testified that he has participated in hundreds of bid openings and that it is common for prime contractors to be filling in the subcontractor listing forms up to the minute of the bid deadline because subcontractors often do not submit information until the last minute. He also confirmed that it is customary for prime contractors to list subcontractors by abbreviated names or names they are known by in the industry. In this case, Mr. Rozbitsky knew that Roofing Systems was part of Bonitz and had performed this type of roofing work in the past. Mr. Rozbitsky also noted that none of the parties' bid forms listed full legal names for their subcontractors.

TQ called Sharon Davis, a project administrator for TQ, to testify before the Panel. Ms. Davis testified that she has over 30 years of experience in the construction industry and that she was present to deliver TQ's bid for the project in question. Ms. Davis confirmed that bid day is always hectic and that she was waiting for numbers and subcontractor information in the final minutes before the bids were due. She testified that TQ's estimator provided her with the name Roofing Systems and the license number listed on TQ's bid. She also explained that she

neglected to write in M & M Electrical's name on the bid form because she received a phone call while she was in the process of filling out a new subcontractor listing sheet to correct a spelling error on TQ's original sheet. When the phone call ended, she had only two minutes until the bids were due and simply forgot that she had not filled in the name of TQ's intended electrical subcontractor. When Mr. Guido read out the bids and indicated that TQ had not listed a name for its electrical subcontractor, Ms. Davis immediately realized her mistake and brought it to Mr. Guido's attention.

## **Conclusions of Law**

### **I. Responsiveness**

MAR appeals the CPOC's decision finding that TQ's bid was responsive despite failing to list a name for its intended electrical subcontractor. MAR argues that the controlling statutory provision clearly and unambiguously requires the listing of a subcontractor's name and that it was error for the CPOC to impose another meaning. MAR asserts, therefore, that TQ's bid was non-responsive and should have been disqualified.<sup>4</sup>

Burkwood has also appealed this portion of the CPOC's ruling and agrees that TQ's bid should have been disqualified for failing to list a name for its electrical subcontractor. In addition, Burkwood argues that MAR and TQ were also non-responsive in listing Roofing Systems, which Burkwood describes as a "non-existent entity," as a subcontractor on their respective bid forms.

The solicitation in this case was conducted under the competitive sealed bidding procedures of section 11-35-1520 of the Procurement Code, subject to the exceptions set forth in section 11-35-3020. *See* S.C. Code Ann. § 11-35-3015(2)(b) (2011) (requiring that competitive

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<sup>4</sup> In essence, MAR requests that the Panel uphold DMH's original determination that TQ's bid was non-responsive.

sealed bidding, as provided in section 11-35-1520, be used in the construction of design-bid-build projects); and § 11-35-3020 (2011) (“The process of competitive sealed bidding as required by 11-35-3015(2)(b) must be performed in accordance with the procedures as outlined in Article 5 of this code subject to the following exceptions[.]”). To be considered for an award, a bidder must be responsive, S.C. Code Ann. § 11-35-3020(c)(i) (2011), and the Procurement Code defines a responsive bidder as one “who has submitted a bid . . . which conforms in all material aspects to the invitation for bids.” S.C. Code Ann. § 11-35-1410(7) (2011). The determination of responsiveness is made solely from the information appearing in the bid documents. *See In re: Protest of Two State Construction Co.*, Panel Case No. 1996-2 at 5 (April 1, 1996) (“The Panel agrees with Two State that a bid must be found responsive on its face and cannot be changed after bid opening.”).

In the construction context, responsiveness must also be determined in light of the subcontractor listing requirements, which provide:

(b) Bid Acceptance. Instead of Section 11-35-1520(6), the following provision applies. Bids must be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The governmental body’s invitation for bids must set forth all requirements of the bid including, but not limited to:

(i) 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. . . . A bidder in response to an invitation for bids *shall set forth in his bid the name of only those subcontractors to perform the work as identified in the invitation for bids*. If the bidder determines to use his own employees to perform a portion of the work for which he would otherwise be required to list a subcontractor and if a bidder is qualified to perform that work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid and not subcontract that work except with the approval of the governmental body for good cause shown.

(ii) Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive.

S.C. Code Ann. § 11-35-3020(b) (2011) (emphasis added). In other words, section 11-35-3020(b)(i) requires a bidder to list by name the subcontractor it intends to use for each specialty identified by the governmental body in its invitation for bids, and section 11-35-3020(b)(ii) warns a bidder that its bid will be rejected as non-responsive if the bidder fails to complete the list provided in the invitation for bids. The Panel finds that the bid form and instructions to bidders in this case comported with these statutory provisions and that the bid form identified "Electrical" as one of the specialties for which a bidder was to list a subcontractor name. Moreover, TQ has stipulated that its bid form omitted the name of its electrical subcontractor. Therefore, considering only the face of the bid – as it must in determining responsiveness – the Panel concludes that TQ's bid was non-responsive because it did not list a name as required and that DMH acted properly in disqualifying TQ's bid for that reason.<sup>5</sup>

Although DMH did not specifically address responsiveness when disqualifying TQ and MAR's bids for listing "Roofing Systems" on their bid forms, the CPOC discussed that issue in his order. In light of its holding that section 11-35-3020(b)(i) requires the listing of a name for each subcontractor specialty identified, the Panel agrees with the CPOC and finds that TQ and MAR's bids are clearly responsive because each lists a name in the space provided on the bid

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<sup>5</sup> In his order, the CPOC thoroughly discussed the Procurement Code's subcontractor listing requirements in light of the underlying policy goal of preventing bid shopping and bid peddling. After this discussion, the CPOC found that TQ provided a unique identifier by listing the license number of its intended electrical subcontractor and that, therefore, TQ's bid was responsive. The Panel is mindful of that policy, but finds that it was error for the CPOC to rely on rules of statutory construction to excuse TQ's oversight when section 11-35-3020(b)(i) expressly and unambiguously calls for a *name* to be listed and section 11-35-3020(b)(ii) provides that failure to complete the list "renders the bidder's bid unresponsive." See *Storm M.H. ex rel. McSwain v. Charleston County Board of Trustees*, 400 S.C. 478, 488, 735 S.E.2d 492, 498 (2012) ("Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009)."). Moreover, the Panel is not persuaded that an express *statutory* requirement can be waived as a minor informality or irregularity under section 11-35-1520(13). The legislature has amended section 11-35-3020 on numerous occasions; if it intended for either a name or a license number to satisfy the subcontractor listing requirement, it certainly would have so provided.

form for “Roof (steel deck) Assembly.” Furthermore, the Panel is not persuaded by Burkwood’s assertion that “Roofing Systems” is a non-existent entity because it appears that prime contractors usually do not list a subcontractor’s full legal name in the small space provided on the subcontractor listing form. For the purposes of determining responsiveness, the Panel holds that listing a shortened or commonly known form of a subcontractor’s name is sufficient under section 11-35-3020(b)(i).

## **II. Responsibility**

On appeal, Burkwood has also challenged the CPOC’s finding that MAR and TQ were responsible in listing “Roofing Systems” as a subcontractor on their respective bid forms, arguing that allowing such a listing “afford[ed] an unfair competitive advantage” that “affect[ed] the bidders’ prices for this project.” The Panel disagrees and affirms the ruling of the CPOC for the reasons explained below.

Under the Procurement Code, a bidder must be both responsive and responsible to be eligible for award. S.C. Code Ann. § 11-35-3020(c)(i) (2011) (providing the procedures for posting notice of the intended award to the “lowest responsive and responsible bidder”), and § 11-35-1810(1) (2011) (requiring a determination of responsibility for every contract let by the State). The Procurement Code defines a responsible bidder as “a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance.” S.C. Code Ann. § 11-35-1410(6) (2011). In contrast to responsiveness, which must be determined from the four corners of the bid itself, the procurement officer making a responsibility determination may consider any source of information and may also contact the bidder to request any necessary information. S.C. Code of State Regulations Reg. 19-445.2125(B) (2011). In reviewing a

written determination of non-responsibility, the reviewing body, whether the CPOC or the Panel, will not overturn it “unless [it is] clearly erroneous, arbitrary, capricious, or contrary to law.” S.C. Code Ann. § 11-35-2410(A) (2011).

In the instant case, the CPOC found that DMH confused responsiveness and responsibility when it stated that “the ambiguity in listing the name for this subcontractor” was one of the reasons<sup>6</sup> for finding TQ and MAR non-responsible. This confusion was confirmed by Mr. Guido, who testified that that DMH thought it could not contact either MAR or TQ to clarify the relationship between “Roofing Systems” and Bonitz despite knowing that the license number provided belonged to Bonitz and concluding that MAR and TQ intended to use Bonitz as the roofing subcontractor. Contacting MAR and TQ would have revealed that “Roofing Systems” is a division of Bonitz and not a separate legal entity, thus removing the stated reason for finding MAR and TQ non-responsible. The CPOC found that DMH’s failure to contact the bidders for additional information when clearly authorized by the Procurement Code to do so in a responsibility determination was “clearly erroneous” and “contrary to law.” The Panel agrees and, in the absence of any showing that allowing the listing created an unfair competitive advantage, upholds this portion of the CPOC’s order.

Therefore, for the reasons stated above, the Panel reverses the decision of the CPOC finding TQ’s bid responsive despite failing to list a name for its intended electrical subcontractor and affirms the CPOC’s findings that MAR and TQ were responsive and responsible bidders with regard to their listing of “Roofing Systems” as a subcontractor on their respective bid forms.

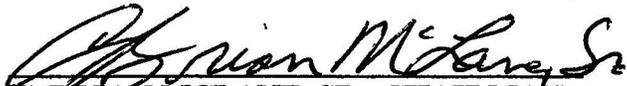
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<sup>6</sup> As noted above, *supra* note 2, the parties stipulated before the CPOC that the other reason given, lack of a specialty roofing license, was an error because the specified work required a general contractor’s license. In addition, the parties stipulated before the Panel that Bonitz is properly licensed to perform the work specified for the project.

The Panel remands this matter back to the CPOC for award in accordance with the Procurement Code and consistent with the findings herein.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY:   
**C. BRIAN MCLANE, SR., CHAIRMAN**

This 10<sup>th</sup> day of June, 2013.

Columbia, South Carolina