

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
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IN THE MATTER OF: BID PROTEST)
USC BEAUFORT CAMPUS FACILITIES)
IMPROVEMENTS)
STATE PROJECT H36-9502-04-DS)
BRANTLEY CONSTRUCTION CO., INC.)
vs.)
UNIVERSITY OF SOUTH CAROLINA)
HEARING HELD MARCH 19, 1999)
_____)

**BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION**

DECISION

POSTING DATE: APRIL 30, 1999

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Brantley Construction Co., Inc. (Brantley) for an administrative review on the USC Beaufort Campus Facilities Improvements (Project) for the University of South Carolina (USC). On March 19, 1999 a hearing was held before the Chief Procurement Officer, with all parties present and represented by counsel.

NATURE OF THE PROTEST

Brantley contends in its Letter of Protest that the apparent low bidder for the construction of the Project, Patterson Construction, Inc. (Patterson) should be ruled non-responsive for three reasons:

- 1) Brantley contends that, because section 04520 of the Technical Specifications requires a subcontractor for masonry restoration work, the prime contractor cannot self-perform this work; accordingly, Brantley argues that Patterson is non-responsive because Patterson listed itself for the masonry restoration work;
- 2) Brantley argues that Patterson is non-responsive because section 04520 of the Technical Specifications requires that the subcontractor listed for masonry restoration must be a specialty contractor and Patterson is not a specialty contractor; and,
- 3) Patterson is not an approved installer for the injection grout listed in section 04520 of the Technical Specifications, nor did it list an approved installer as required.

Patterson maintains that its bid, as submitted, was responsive to the Invitation for Bids and that it is qualified and capable of performing the masonry restoration work required by the Project plans and specifications.

USC supports Patterson's position and further maintains that in evaluating Patterson's bid, USC investigated Patterson's past performance and made a proper determination that Patterson was both responsive and responsible. USC argues that it is entitled to award the contract to Patterson as the lowest responsive and responsible bidder.

FINDINGS OF FACT

1. On January 21, 1999 USC received bids for the Project. Three bids were received.
2. The Standard Bid Form (SE-330) required the bidders to list subcontractors for "Masonry Restoration/Application."
3. Article 9.1.7 of the Standard Form of Agreement Between Owner and Contractor (AIA 101) includes the SE-330 as part of the Contract Documents.
4. Patterson listed itself to perform the Masonry Restoration/Application work.
5. On January 22, 1999, USC posted the Notice of Intent to Award the construction contract to Patterson.
6. On January 29, 1999, Brantley protested the Notice of Intent to Award.
7. Technical Specification section 04520 (Masonry Restoration) states, in paragraph 1.07A:
 - A. *Restoration Specialist: Work must be performed by a subcontractor employing personnel skilled in the restoration processes and operations indicated.*
8. Masonry restoration work is lawfully performed in South Carolina by entities possessing a Masonry (MS) specialty license.
9. Patterson possesses an unlimited General Contractor's license for the Building Classification. This classification of license allows the Patterson to perform certain types of specialty work, including Masonry.

DISCUSSION

Motion to Dismiss

USC entered a motion to dismiss Brantley's first issue of protest. USC argues that § 11-35-3020 of the Consolidated Procurement Code (Code) allows Patterson to list itself to perform subcontracted work for which it is otherwise qualified. USC argues that USC properly found Patterson capable of performing that work. USC argues that the wording of the Invitation for Bids takes precedence over the details of the Technical Specifications.

Brantley argued that this and other related sections of the Technical Specifications established a requirement that the performer of this element of work possess a high degree of experience and competence and that the wording in the Technical Specifications are superior to the general wording of the Invitation for Bids. Therefore, Brantley contends that Section 04520 of the Technical Specifications requires that this work be subcontracted to a qualified firm and cannot be performed by the prime contractor.

The motion by USC was taken under advisement.

CLAIMANT'S POSITION

Brantley withdrew the third element of its protest, related to Patterson's status as an approved installer of a specific injection grout material. Testimony and evidence were offered solely on the issue of Patterson's responsiveness to the Invitation for Bids (IFB) and his qualifications to perform the masonry restoration work.

Brantley contends that a plain reading of paragraph 1.07A of Section 04520 of the Technical Specifications requires that the masonry restoration work must be performed by a subcontractor, rather than by the prime contractor. Brantley stated that he was aware of his right to list himself as the performer of the masonry restoration work, but felt that he did not meet the requirements of the Technical Specifications. Brantley argues that by listing itself as the performer of masonry restoration work instead of listing a subcontractor as required by the Specifications, Patterson submitted a non-responsive bid and should not be awarded the Project.

Brantley further contended during testimony that Patterson did not have the experience to qualify as a "restoration specialist" and was therefore unqualified to do the work.

RESPONDENT'S POSITION

Patterson's position is that both the Code and IFB allows it to list itself as the performer of subcontract specialty work, and that the language of the Technical Specifications is subordinate to that of the IFB.

Patterson further argued during testimony that the experience of its masonry superintendent and its prior corporate experience qualifies the firm as a restoration specialist with respect to the work required for this Project.

USC testified that the quality of the masonry restoration work was a particular concern and USC wanted the work to be performed by personnel experienced in unreinforced masonry restoration. USC testified that they understood the word "specialist" to mean a firm that has experience and that the language of paragraph 1.07A was not intended to compel the use of a subcontractor. USC argues that its finding of responsiveness with respect to Patterson's bid is correct and in accordance with state law. USC further testified that USC investigated Patterson's experience in similar work, with positive results. USC accordingly found Patterson to be a responsible bidder in accordance with state law.

USC thereupon renewed its motion to dismiss, which was continued under advisement pending a review of the record.

DISCUSSION

The issues raised by this protest go to the heart of the relationship between the State and its construction contractors and, further, how that relationship is defined in the several components which collectively form the Contract Documents.

Issue Number 1

The first principle of that relationship is that it is the right and duty of the contractor to establish its means and methods of completing the Project. The "means and methods" includes the contractor's right to determine if, and to whom, it will subcontract. The statutory underpinning for the contractor's free right to choose his subcontractors is found in § 11-35-3020(2)(b) of the Code, which states in relevant part,

- (i) *The using agency, 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 to 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....Any bidder in response to an invitation for bids shall set forth in his bid the name of only those subcontractor(s) that will perform the work as identified in the invitation for bids. **If the bidder determines to use his own employees to perform any portion of the work for which he would otherwise be required to list a subcontractor and if the bidder is qualified to perform such work under the terms of the invitation for bids, the bidder shall list himself in the appropriate place in his bid....**[Emphasis added]*

The sole purpose of this statute is to require the bidder to identify, prior to award, those subcontractors who will be performing significant portions of the work, thereby preventing bid shopping to the disadvantage of the subcontractors and affording the State the opportunity to identify and evaluate the qualifications of those who propose to do work for the State. Beyond that purpose, the language of the statute is clear and unambiguous—the bidder has the unilateral right, limited solely by his qualifications, to allocate the work to his best advantage and to perform any portion of the work that otherwise might be performed by a subcontractor.

Brantley contends that Patterson's bid was non-responsive because the wording of Section 05420 of the Technical Specifications requires this element of work to be subcontracted. The result is an apparent conflict between two components of the Contract Documents. Article 1.2.3 of the Supplementary Conditions-Part I, which are part of the Contract Documents, addresses the issue of conflicts among the several components of the Contract Documents by establishing an order of precedence. This article says in relevant part:

"The following principles shall govern the settlement of disputes which may arise over discrepancies in Contract Documents:...and (d) as between the Contract and the Specifications, requirements of the Contract shall govern."

To the extent the language of Section 05420 of the Technical Specifications may be read to conflict with the Standard Bid Form, then the contract language of the Standard Bid Form, which responds to the statutory rights of the prospective contractor, is superior to that of the Technical Specifications. Brantley made no effort to seek guidance from USC to resolve the difference. Brantley testified that he was aware of his right to self-perform, but assumed the Technical Specifications vitiated this right, and further that he felt unqualified to self-perform in any event.

While the Standard Bid Form for this Project clearly contemplated the subcontracting of certain elements of work, it expressly allowed a Prime Bidder to list itself or a subcontractor (or a combination) to perform any element of the work on the subcontractor's list. Patterson chose to list himself to perform the masonry restoration work. The CPOC finds that Brantley's contention that the wording of Section 05420 of the Technical Specifications requires this element of work to be subcontracted is without merit.

The second principle is one of bid responsiveness. A bidder's failure to failure to submit a properly completed subcontractor listing form, using properly licensed firms, has been consistently found by both the CPOC and the Procurement Review Panel (Panel) to be grounds for rejection of a bid for non-responsiveness.¹ Based on the evidence Patterson possesses the contractor's licenses required for it to legally perform masonry restoration work.

Accordingly, the CPOC finds that, on Brantley's first protest issue, Brantley has failed to meet its burden of proof by the greater weight or preponderance of the evidence. Brantley's protest on this issue is denied.

Issue Number 2

The third principle is one of bidder responsibility, which was not identified as such by Brantley, but is implicit in the wording of his contention that Patterson is not a restoration specialist as required by Section 05420 of the Technical Specification. The issue of responsibility is inherent in the statute paragraph quoted above. In order to list himself as a self-performer of specialty work, a prime bidder must be "*...qualified to perform such work under the terms of the invitation for bids.*"

For the State to determine that a contractor is "*...qualified to perform...*", the State must make an affirmative determination of responsibility as required by § 11-35-1810 of the Code and Regulation 19-445-2125. Just as the bidder has the right to determine how he will perform the work, the State has the right to establish and judge the technical knowledge and experience qualifications of those with whom it will contract. These technical qualifications are typically defined in the relevant sections of the Technical Specifications, as they were in this case.

¹ See In re: Protest of Two State Construction Co., Case 1996-2 in which the Panel affirmed the CPOC's ruling that S. C. Code Ann § 11-35-3020(2)(b) may be reasonably interpreted to require the listing of the general contractor if the general contractor will perform a portion of the work.

Under the language of § 11-35-3020(2)(b) prior to 1993, the bidder was required to develop the list of subcontractors based on the value of their bids and then identify the designated subcontractors. Under this version of Section 11-35-3020, the Panel has held that if a bidder chose to list itself for a category on the subcontractor's list, then the subcontractor's listing requirement would necessitate an examination of extrinsic evidence to determine whether or not the prime bidder possessed the qualifications to do the work. In Two States, (page 6) the Panel examined the impact of the 1993 amendments to the Procurement Code and reaffirmed its position that, in a protest, an evaluation of the contractor's ability to do subcontract work would require an examination of evidence beyond the bid documents to prove the contractor's ability to perform. This is what USC did.

Brantley asserted that Patterson did not possess the trained personnel or expertise to meet the standard of "restoration specialist". No evidence was submitted by any party that would aid the CPOC in establishing an objective definition of the term other than "a firm that has experience in the work." Based on the evidence and testimony presented, the CPOC finds that USC made a determination of Patterson's responsibility to perform the Project's Masonry Restoration/Application work as required by statute. See § 11-35-1810. Determinations of responsibility are considered final and conclusive, in accordance with § 11-35-2410 of the Code, unless they are clearly erroneous, arbitrary, capricious or contrary to law. The CPOC further finds that Brantley failed to prove by the preponderance of the evidence that USC's determination of responsibility was clearly erroneous, arbitrary, capricious or contrary to law. Accordingly, this second issue of protest is denied.

CPOC FINDINGS

On Element 1 of Brantley's claim of non-responsiveness, the CPOC finds that the requirements of Technical Specification Section 05420 are subordinate to the statutory language of the Standard Bid Form and that Patterson properly exercised the discretion afforded it under law. The CPOC finds that Patterson's bid, as submitted and read on its face, was fully responsive to the IFB's requirements for completion of the Bid Form.

On Element 2 of Brantley's claim of non-responsiveness, the CPOC finds that the determination of Patterson's qualifications to perform as a specialty contractor is an issue of responsibility and that USC properly made that determination as required by § 11-35-1810 of the Code.

On Element 3 of Brantley's protest that Patterson is not an approved installer for the injection grout listed in section 04520 of the Technical Specifications, the CPOC finds that, based on its own motion to withdraw, Brantley's protest of non-responsiveness on this issue is denied and dismissed with prejudice.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the University of South Carolina's motion to dismiss the protest of non-responsiveness by Brantley Construction Company, Inc. is sustained.

It is the decision of the Chief Procurement Officer for Construction that the University of South Carolina performed a determination of responsibility of Patterson Construction, Inc. with respect to Patterson's capability to self-perform the Masonry Restoration/Application work, reaching a conclusion that was reasonable and not erroneous, arbitrary, capricious, or contrary to law.

Accordingly, the protest by Brantley Construction, Inc. is denied. The University of South Carolina is hereby authorized to proceed with the award of the Contract to the lowest responsive and responsible bidder, consistent with the University's programmatic needs.



Michael M. Thomas
Chief Procurement Officer
for Construction

April 30, 1999
Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.