

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1996-2

In re:)
)
Protest of Two State Construction Co.;)
)
Appeal by Two State Construction Co.)

ORDER

This case came before the South Carolina Procurement Review Panel (Panel) on February 28, 1996, on the appeal of Two State Construction Co., who filed an appeal of the decision by the Chief Procurement Officer (CPO) denying Two State Construction Co.'s protest.

Present and participating in the hearing before the Panel were Two State Construction Co. represented by Charles W. Surasky, Esq.; R. W. Allen & Associates represented by John Dean Marshall, Jr., Esq.; and Office of General Services of the Budget and Control Board represented by Delbert H. Singleton, Jr., Esq. The Department of Mental Health represented by Alan Powell, Esq. was present but did not participate.

FINDINGS OF FACT

The S. C. Department of Mental Health (DMH) issued an Invitation For Bids (IFB) for construction on the "Aiken/Barnwell Mental Health Center Project" (Project). Bids were received from five bidders, and were opened on December 12, 1995. [Record p. 47]. After tabulation of the base bids and the three alternates, R. W. Allen & Associates, Inc. (Allen) is the lowest bidder at \$2,832,500.00, and Two State Construction Company, Inc. (Two State) is the second lowest bidder at \$2,874,800.00. [Record p. 47]. The solicitation documents contain a requirement to list subcontractors in specified areas, including Masonry Work.

For the subcontractor on Masonry Work, Allen listed "R. W. Allen/Keith Nichols, Masonry". [Record p. 47]. Mr. Allen Carter, an employee of General

Services' Office of State Engineer, testified that he opened the bids at bid opening and he accepted Allen's bid as stating that Allen would provide a portion of the work and a subcontractor would provide a portion of the work. However, a question was raised by a Two State representative concerning the form of Allen's response, so Mr. Carter testified that he requested an explanation from Allen. Allen submitted letters by fax clarifying its intention to provide a small amount of the materials required by the subcontractor. [Record p. 49-50]. Mr. Carter further testified that there was little time delay from when the question arose and the response was given.

On December 13, 1995, DMH issued a Notice of Intent to Award the contract to Allen. [Record p. 45]. Two State protested the intent to award to Allen on December 27, 1995. [Record p. 28-35]. The CPO conducted a hearing and issued a decision which Two State appeals to the Panel by letter dated February 6, 1996.

CONCLUSIONS OF LAW

Unfair and Unequal Enforcement

Two State contends that because its dual subcontractor listing on a bid in a prior procurement was determined nonresponsive, it would be unfair and unequal enforcement not to find Allen's bid nonresponsive in this case. General Services made a motion to exclude as irrelevant and untimely the portions of Two State's protest that involve a prior procurement. The Panel granted General Services' motion. The Panel cannot consider a prior procurement that was not protested to the Panel. Two State apparently was found nonresponsive for listing two subcontractors for one area of work. Since Two State did not protest that decision, it is final. Two State did not protest the decision, and the Panel did not make a decision on that case. The Panel cannot now look at that

case, and the Panel is not bound by the decision of nonresponsiveness made by the procurement officer in that case. The panel considers the decision of the procurement officer and the CPO, but the Panel is not bound by their decisions.¹ The Panel finds that Two State's involvement in a prior procurement is not relevant to this case.

Responsiveness of Allen's Bid

The protestant, Two State, alleges that Allen is nonresponsive for failure to comply with S. C. Code Ann. section 11-35-3020(2)(b). This Code section requires the IFB for construction to identify by specialty all areas of work by subcontractors expected to perform work where the subcontractor's contracts are expected to exceed 3% of the prime contractor's total base bid. S. C. Code Ann. section 11-35-3020(2)(b)(i) provides in pertinent part, as follows:

Any bidder in response to an invitation for bids shall set forth in his bid the name of each subcontractor so 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 and not subcontract any of that work except with the approval of the using agency for good cause shown.

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

The main purpose of the subcontractor listing requirement is to prevent a general contractor from bid shopping.

¹ The Panel notes that both parties cite to and provide copies of federal procurement decisions. Significant differences exist between the laws and practices of the federal procurement system and the South Carolina Procurement Code and state procurement practices. Just as the decisions of the CPO are considered by the Panel, the decisions of the Comptroller General can be considered. However, the Panel is charged with applying the South Carolina Procurement Code to the facts of the case as presented at the Panel's *de novo* hearing.

Two State argues that S. C. Code Ann. section 11-35-3020(2)(b) prohibits a general contractor from listing both itself and a subcontractor for any significant part of the work. Two State argues that Allen's bid of "R. W. Allen/Keith Nichols" for the masonry area of work to be performed, in using the virgule, or diagonal line symbol ("/"), can only be interpreted as alternative sources, which is prohibited by the statute. Allen argues that the statute and procedure established by General Services, allows the listing of multiple entities for a single subcontractor specialty, where in fact, more than one entity will provide the labor and material required by that particular specialty. Allen further argues that the language of the statute that states, "if the prime contractor determines to use his own employees to perform any portion of the work..., the prime contractor shall indicate this in his bid and not subcontract any of that work...", appears to require the contractor to list himself along with the subcontractor, if the listed specialty work is being done by both [emphasis added].

The Panel finds that S. C. Code Ann. section 11-35-3020(2)(b) does not prohibit listing both the general contractor and the subcontractor for a specialty area if both are providing a portion of the specialty work. In fact, the statute may reasonably be interpreted to require the listing of the general contractor along with the subcontractor if the general contractor will perform a portion of the work. Allen listed itself and the subcontractor because it was providing some of the materials being used by the masonry subcontractor. To interpret the statute to disallow the listing of both a general contractor and subcontractor might discourage the use of smaller subcontractors who may not be able to complete all portions of the specialty area requirements of the IFB without the assistance of the general contractor. This is clearly not the purpose of the listing requirement. The listing requirement intends to protect the subcontractor from

bid shopping by the general contractor, as well as to inform the procuring entity who will be performing significant portions of the work under the contract.² The language of the statute does not prohibit a general contractor from listing both itself and a subcontractor for one area of subcontractor specialty as listed in the IFB.

Two State also argues that Allen's bid is nonresponsive under S. C. Code Ann. section 11-35-3020(b)(ii), which states that the "failure to complete the list renders the bidder's bid unresponsive." Allen did not leave a blank and provided the requested information so Allen "completed" the bid. The Panel finds that subsection (ii) is not applicable to the facts of this case.

Responsiveness of Bid at Time of Opening

Two State further contends that a bid must be determined responsive at the time of bid opening, on the face of the bid, and nonresponsive bids cannot be cured after bid opening. Two state argues that Allen's letters clarifying its intentions are immaterial and should not be considered after bid opening because Allen's bid is nonresponsive on its face, and the State acknowledged this by asking Allen for clarification on its bid. Allen argues that the Procurement Code "clearly authorizes the consideration of extrinsic evidence". Allen also points out that there is no evidence that Allen was attempting to bid shop, which goes to show that extrinsic evidence should be considered to protect against penalizing bidders that have not attempted to bid shop.

The Panel agrees with Two State that a bid must be found responsive on its face and cannot be changed after bid opening. Mr. Carter found the bid of Allen responsive on its face. Mr. Carter testified that he did not have a question

² The Panel suggests that additional instructions in the FIB, possibly requiring notation of the percentage of work to be done by each party of a multiple listing in one area of specialty, would further the purpose of the statute and provide useful information concerning a multiple listing.

about the responsiveness of Allen's bid. Two State's representative at the bid opening questioned the responsiveness of Allen's bid. Once Allen's bid has been challenged as nonresponsive, Allen may provide extrinsic evidence to prove its responsiveness. A challenge to a subcontractor listing can be a catalyst for looking beyond the four corners of the bid document. If a listing is questioned, information can be provided to respond to the challenge. However, only facts established prior to bid opening can be used to explain bid responsiveness. A bid cannot be changed after bid opening, but its responsiveness can be explained.

Under the Consolidated Procurement Code, prior to the 1993 amendments, the subcontractors listing required the general contractor to determine which subcontractors would perform work worth 2% or more of the base bid amount, and those subcontractors were required to be listed. Under that law, prior Panel cases involving the subcontractor's listing requirement necessitated a look at extrinsic evidence to determine if a bidder was capable of performing work without subcontracting, or to show the cost of the work in determining if the percentage required for listing subcontractors was met. The language of the statute requiring subcontractor listing, although amended, still contemplates the necessity of inquiry beyond the four corners of the document, if challenged. For example, the statute requires a general contractor to list itself if it intends to complete the work normally subcontracted. The listing of the general contractor as doing the work is accepted on the face of the document. However, the contractor's ability to do the work, if challenged, would require evidence beyond the bid documents to prove the contractor's ability to perform.

The Panel emphasizes that the procuring agency must be able to make a determination of responsiveness from the face of the bid documents. Once that determination is made, it can be challenged. The procuring agency cannot seek

bid clarification on which it intends to base its decision of responsiveness. Mr. Carter made a determination of responsiveness in this case. That determination of responsiveness was then challenged. The procuring agency may not seek clarification before making a determination of responsiveness, but must find a bid nonresponsive if it feels clarification of the bid is needed. That determination of responsiveness is then open to challenge, which may lead to the consideration of extrinsic evidence beyond the face of the document.

In this case, Mr. Carter made a determination of responsiveness, which was then verbally challenged, to which Mr. Carter responded by requesting further information. Mr. Carter took additional steps to answer Two State's question of Allen's responsiveness, which gives the appearance of seeking clarification that would indicate nonresponsiveness. The facts of this case, based on Mr. Carter's unrefuted testimony, support the finding that Mr. Carter made a determination of responsiveness based on the face of the bid. No facts were presented to indicate the bid was changed in any way after the bid opening. A potential problem arises due to Mr. Carter's request for clarification of Two State's challenge to Allen's responsiveness. A better practice might be to allow the issue of responsiveness to be addressed through the formal protest process. A challenge to the responsiveness of a bid usually comes in the form of a formal protest pursuant to the provisions of the Consolidated Procurement Code. However, the Panel hesitates to require a challenge to be in the form of a written protest, as the exchange of additional information may provide answers that would avoid a protest. But, the Panel must warn that a party's rights are only protected by following the formal protest procedures established by the Code, and procuring agencies should be wary of creating the appearance of seeking clarification.

Attorney's Fees

Allen requests attorney fees and costs for having to defend Two State's protest. Under S. C. Code Ann. section 11-35-4330 allows for attorney's fees to be awarded if a protest is found to be frivolous. Allen bases this motion largely on its arguments concerning the precluding effect of the South Carolina Supreme Court's decision in William C. Logan & Associates v. Leatherman, 351 S.E.2d 146 (1986). Two State's protest seeks to have Allen's bid declared nonresponsive, and the contract awarded to the lowest responsive, responsible bidder, which would be Two State. Allen argues that the 1986 South Carolina Supreme Court decision in Logan does not allow the reaward of the contract for violation of the subcontractors listing requirement. Allen further argues that because Logan does not allow the remedy requested, Two State's protest fails as a matter of law, and is frivolous.

Although Logan does deal with very similar issues, it can be distinguished, and has been distinguished in prior Panel decisions. The Panel held in Case No. 1987-8, J. A. Metze & Sons, that Logan "determined that a reaward of the contract was too harsh a remedy when the contract had been executed and work had begun". The Panel based that and other decisions on the holding in Logan, which contains qualifying language. Logan finds that "reaward of the contract was excessive in relation to the violation, *especially considering the rights and liabilities of FMC*", the procuring agency of the State. [Emphasis Added]. FMC had entered a contract which did not contain a cancellation clause, so cases in which the State has not already entered a contract and faces possible liability for cancellation of a contract, are distinguishable from the Logan decision. The contract has not been entered into in this case, and the Panel finds that the South Carolina Supreme Court's decision in Logan is distinguished based on the facts of this case.

Two State's appeal raises issues that have not been previously determined by the Panel. Therefore, Two State's protest is not frivolous, and the Panel denies Allen's motion to find it frivolous.

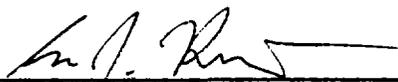
Motion To Dismiss

Allen made a motion to dismiss the protest at the end of Two State's presentation of its case. Two State stipulated that Allen would present testimony that Allen did not intend to bid shop, and Two State could not refute that. The Panel grants Allen's Motion to Dismiss and denies Two State's protest.

For the foregoing reasons, the Panel dismisses and denies Two State's protest for failure to carry its burden of proof by a preponderance of the evidence. The CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

April 1, 1996.