



Masonry Restoration/Application work. [Record p. 40] On January 22, 1999, USC posted the Notice of Intent to Award the construction contract to Patterson. [Record p. 35]. On January 29, 1999, Brantley Construction Co., Inc. (Brantley) protested the award to Patterson based on Patterson's failure to name a specialty subcontractor, rather than itself, for the "Masonry Restoration/Application" listing. [Record p. 14]. The CPO denied Brantley's protest. Brantley appeals the issue that Patterson, which listed itself on the subcontractor listing form for "Masonry Restoration/Application", is not a "restoration specialist" as required by the IFB specifications.

#### CONCLUSIONS OF LAW

Patterson and General Services raise the issue of what the standard of review should be in this case. Patterson and General Services contend that the appealed issue is not an issue of nonresponsiveness, which has been established to require proof by a preponderance of the evidence. Patterson and General Services argue that the appealed issue is an issue of responsibility, which requires a different standard of proof under S. C. Code Ann. Section 11-35-2410. The determination of responsibility is required by S. C. Code Ann. Section 11-35-1810(2), which states "[r]esponsibility of the bidder or offeror shall be ascertained for each contract let by the State...." The determination of responsibility is "final and conclusive unless [it is] clearly erroneous, arbitrary, capricious, or contrary to law" as stated in S. C. Code Ann. Section 11-35-2410. Patterson and General Services contend that the real issue in this case is the determination of responsibility made by the state, and thus Brantley must prove

the state's determination that Patterson is a responsible bidder is clearly erroneous, arbitrary, capricious, or contrary to law.

Prior Panel cases concerning subcontractor listing requirements have been addressed in terms of responsiveness, rather than responsibility, based on statutory language which is no longer in the Code.<sup>1</sup> The Panel acknowledges that the subcontractor listing requirements contain elements of both responsiveness and responsibility. S. C. Code Ann. Section 11-35-3020(2)(b)(ii) provides that "failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive." Completion of the list is based on the bid documents alone. S.C. Code Ann. Section 11-35-3020(2)(b)(i) clearly allows a bidder to list itself "[i]f 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...." If a bidder lists itself, rather than a subcontractor, to perform the required work, the bidder is responsive on the face of the bid. However, the bidder's ability to do the work may be questioned, and to verify the bidder's capability, one must look beyond the bid documents.

Because the state is investigating the bidder's ability to perform, the state is no longer determining responsiveness of the bid, but deciding the responsibility of the bidder. S. C. Code Ann. Section 11-35-1410(6) defines a responsible bidder as "a person who has the capability in all respects to perform

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<sup>1</sup> Former S. C. Code Ann. Section 11-35-3020(2)(b)(ii), stated that "failure to list subcontractors in accordance with this section and any regulations which may be promulgated by the board shall render the prime contractor's bid unresponsive". The current amended Section 11-35-3020(2)(b)(ii) makes it clear that responsiveness is determined by completion of the subcontractor list.

fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." The bidder's ability to perform the contract requirements is at the center of the state's determination of responsibility. In challenging a competing bidder's ability to self perform as indicated by listing itself on the subcontractor listing form, a bidder is challenging the state's determination of responsibility. Therefore, the standard of proof is determined by S.C. Code Ann. Section 11-35-2410. The protesting bidder must prove the determination of responsibility is clearly erroneous, arbitrary, capricious, or contrary to law as stated S. C. Code Ann. Section 11-35-2410.

In this case, regardless of whether the issue is one of responsiveness or responsibility, Brantley failed to meet the burden of proof. Mr. Sidney Brantley testified as to his understanding of the term specialist, and counsel for Brantley argued the term should be considered in its ordinary meaning, such as found in the dictionary. The Panel need look no further than the IFB to ascertain the meaning of "restoration specialist". The IFB after listing "restoration specialist", continues by explaining what is meant by the term in the context of the IFB. The IFB defines "restoration specialist" as "a subcontractor employing personnel skilled in the restoration processes and operations indicated". Brantley argued that Patterson's personnel are not skilled in the required adhesive injection and grouting processes, specifically use of Jahn products and working with cracks larger than 3/8 inches. Brantley did not prove that Patterson does not employ personnel skilled in the process of injection adhesive and grouting. Neither did

Brantley prove that the state's determination that Patterson can perform the restoration processes required by the IFB, and thus is a responsible bidder, is erroneous, arbitrary, capricious or contrary to law.

Brantley argues that a "restoration specialist" is recognized in the construction industry as indicated by companies holding themselves out to the public as restoration specialists, who concentrate their work in the area of restoration. Brantley contends that Patterson, a general building contractor with a license that includes masonry, is not a restoration specialist (as commonly understood) for the purpose of this solicitation's requirements. Brantley argues that Patterson is not "skilled in the restoration processes and operations indicated" as required by the IFB specification, specifically the specifications for injection adhesive and grouting.

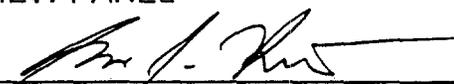
Patterson contends that the experience of two of its masonry employees, as well as prior experience of the company, qualifies it as a restoration specialist with respect to the work required in the IFB. USC contends that it investigated Patterson's experience with similar work and made the determination that Patterson is able to perform the work required by the IFB. In this case, Mr. Dinos Liollo, the project architect, testified that he assisted USC in determining the qualifications of Patterson to do the masonry restoration, and his investigation turned up glowing recommendations for Patterson's restoration work. Mr. Liollo testified that his investigation into Patterson's qualifications show that Patterson is skilled in masonry restoration, including the process of injection grouting, which meets the requirements of the IFB specifications. Mr. Edwin Patterson

testified about several restoration projects involving Patterson's experience in masonry, including use of grouting processes. Mr. Patterson also testified that he has employees skilled in the processes specified in the masonry restoration section of the IFB, and he considers Patterson a restoration specialist within the meaning of the IFB.

Based on the evidence in this case, the Panel finds that Brantley has not carried its burden of proof, and Brantley's appeal is dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY: 

Gus J. Roberts, Chairman

Columbia, SC

June 25, 1999.