STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION**
IN THE MATTER OF: BID PROTEST	)	**DECISION**
COMPLETE BUILDING CORPORATION	)	**CASE NO. 2011-013**
v.	)	
COLLEGE OF CHARLESTON	)	**POSTING DATE: FEBRUARY 4, 2011**
5 COLLEGE WAY RENOVATIONS STATE PROJECT NO. H15-9641-PG	)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request by Complete Building Corporation (Complete Building), under the provisions of section 11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review of the 5 College Way Renovations bid ("the Project"), for the College of Charleston (College). On January 26, 2011, pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review by hearing. At the hearing, Victor Apat, Complete Building's president, represented Complete Building, and Scott Bradley, project coordinator for the College, and John Cordray, the College's Director of Physical Plant, represented the College. Present as a witness was Phil Gerald, project manager for the Office of State Engineer (OSE). During the hearing, the CPOC received Exhibits 1 through 11 into evidence, heard oral arguments, and took testimony from all parties. This decision is based on the testimony and evidence presented at the hearing and applicable law.

NATURE OF THE PROTEST

Complete Building's statement of protest is attached. [Ex. A]

FINDINGS OF FACT

The following dates and facts are relevant to the protest:

1. On November 4, 2010, College advertised for bids to construct the Project. Pursuant to this advertisement, bidders were to submit their bids on or before December 2, 2010. [Hearing Ex. 11]

2. The solicitation documents and bid form provided for two base bids. The scope of work for base bid two was essentially identical to the scope of base bid one except that the HVAC system for base bid two was to be a geothermal system rather than a conventional system. [Hearing Ex. 10]

3. Pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(i), the bid form included in the solicitation documents required bidders to list for each base bid the subcontractor they intended to use to perform heating, ventilation, and air conditioning (HVAC) work.[1] [Hearing Ex. 11]

4. By the time for receipt of bids, College received five bids. Complete Building submitted a low bid of $656,900 on base bid one and a low bid of $738,769.

5. College determined to award a contract for the scope of work in base bid 2.

6. On or before December 8, 2010, College determined that Complete Building's listed subcontractor for the HVAC work of base bid two did not possess a mechanical contractor's license in the correct licensing group to perform the work. [Hearing Ex. 5] This same day the College notified Complete Building of its determination and that as a result of that determination, the College would not consider Complete Building's bid.

7. On December 8, 3010, College posted a Notice of Intent to Award a contract to NBM

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[1] The solicitation documents also required bidders to list for each base bid the subcontractors they intended to use to perform the electrical work, masonry work, plumbing work, and fire alarm work.

Construction Co., Inc. (NBM), the second low bidder on base bid two.[2] [Hearing Ex. 12]

8. On Monday, December 20, 2010, the CPO received Complete Building's protest of the College's Notice of Intent to Award a contract to NBM.

DISCUSSION

At issue in this protest is the College's determination of non-responsibility for one of the subcontractors Complete Building listed on its bid form pursuant to the requirements of the solicitation. Such a determination is the equivalent of a determination that Complete Building is a non-responsible bidder.

A determination of responsibility is required by S.C. Code Ann. § 11-35-1810, which states "[r]esponsibility of the bidder or offeror shall be ascertained for each contract let by the State..." A procurement officer's determination of non-responsibility is final and conclusive unless it is "clearly erroneous, arbitrary, capricious, or contrary to law." See S.C. Code Ann. § 11-35-2410(A). The Contractors Licensing Act requires a contractor to possess the proper license at the time of bidding. SC Code Ann §§ 40-11-30 and 200. The South Carolina Procurement Review Panel has determined that possession of the proper contractor license, either by the bidder or one of the bidder's listed subcontractors, is an issue of responsibility. Protest of Burkwood Construction Company, Inc., Case No. 1997-8; Protest of Roofco, Inc., Case No. 2000-14(I). If, at the time of bidding, one of Complete Building's listed subcontractors did not possess the proper license (i.e. license classification and subclassification and license group) for performing the HVAC work on this project then neither that listed subcontractor nor Complete Building are responsible bidders.[3]

The protestant has the burden of proving upon the preponderance of the evidence that the College's determination of non-responsibility is "clearly erroneous, arbitrary, capricious, or contrary to law." Protest of Brantley Construction Co., Inc., Case No. 1999-3. In other words, the College's determination regarding responsibility is a matter of discretion that cannot be overturned absent a showing by Complete Building that it is "clearly erroneous, arbitrary,

[2] Though the Notice of Intent to Award does not state that the College is making an award for base bid two, the listed contract price corresponds to NBM's bid for base bid two set forth in the bid tabulation, which was provided to bidders.

capricious, or contrary to law." See Protest of CollegeSource, Inc., Case No. 2008-4. Since agency decisions regarding responsibility are a matter of business judgment, Complete Building must demonstrate a lack of reasonable or rationale basis for the responsibility determination. See Protest of Value Options, et al., Case No. 2001-7.

At issue in this case is the responsibility of the subcontractor that Complete Building listed on its bid form for HVAC work, Endless Air, Inc. (Endless Air). It appears that shortly after bid opening, the second low bidder on base bid two, NBM, contacted the College to question Endless Air's ability under the Contractor Licensing Act to perform the HVAC work, and provided the College with a copy of Endless Air's sub-bid. [Testimony of Mr. Bradley] As a result, the College reviewed Endless Air's sub-bid and determined it exceeded the license group limitation of Endless Air's mechanical contractor's license.[4] [Hearing Ex. 1]

At the time of bidding, Endless Air possessed a group 4 mechanical contractor's license with an air conditioning subclassification. A group 4 mechanical contractor's license prohibits a contractor possessing such a license from offering to perform work in excess of $125,000.

After reviewing Endless Air's sub-bid and consulting with the staff of the Contractor's Licensing Board, the College determined that Endless Air's sub-bid exceeded $125,000 and therefore, pursuant to the Manual for Planning and Execution of State Permanent Improvement Projects, Part II, that Complete Building was a non-responsible bidder.[5] On December 8, 2010, the College

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[3] SC Code Ann § 11-40-200(B) precludes an owner or contractor from even considering the bid of an entity or individual that does not possess the proper license subclassifications at the time of bidding.

[4] On December 8, 2010, Complete Building supplemented the information in the College's hands by providing a post bid opening document purported to be prepared by Endless Air explaining its intended bid for base bid two. [Hearing Ex. 2] Complete Building sought to introduce this letter in the hearing as proof of the matters stated therein. However, Endless Air was not present at the hearing. Therefore, the contents of the letter constitute hearsay and the letter cannot be used to prove the truth of the matter stated therein. Even if this letter was not hearsay, Endless Air's sub-bid must stand on its own as written without post bid opening clarifications. Moreover, what Endless Air actually intended its sub-bid to say is not at issue, the issue is whether the College's interpretation of Endless Air's sub-bid, as submitted, was reasonable.

[5] Section 6.1.16(B) of the Manual is a provision that sets forth the requirement of project owners to comply with certain provisions of the Contractor's Licensing Act in Title 11, Chapter 40 of the South Carolina Code of Laws. At the hearing, Complete Building argued that this section of the Manual does not address bidding beyond a contractor's license limit. Contrary to Complete Building's assertion; however, this section of the Manual does address license limits providing in part that "If the Agency determines that a prospective contractor or one of his/her listed subcontractors does not have the proper license and **license limitations**, the Agency must declare the prospective contractor is [sic] non-responsible." [emphasis added] Even if Complete Building's argument respecting the language of the Manual was correct, the College must still comply with the requirements of State law. See generally, Unisys Corporation v. South Carolina Budget and Control Board, et al., 346 S.C. 158, 551 S.E.2d 263 (2001).

sent Complete Building a notice of this determination. [Hearing Ex. 5] On that same day, the College posted its Notice of Intent to Award a contract to NBM.

The copy of Endless Air's sub-bid entered into evidence by Complete Building contains the following language:

> **We purpose to install complete and operational HVAC SYSTEMS as per all general notes on drawing's M0.00, M2.1, M2.2, M3.0, M4.01,M4.03 AND SPECIFICATION 23000 . With 3 addendums noted for the sum of BASE BID 1. $86,170.00 AND BASE BID 2 .FOR THE SUM OF $146,038.00 . General Contractor IS PROVIDING GEOTHERM WELL DRILLING THEN A SUM OF $68,000.00 would be deducted from BASE BID 2.**

[Hearing Ex. 1] It is apparent that this language, which is quoted exactly as it appears in Endless Air's sub-bid, was hastily prepared and is poorly worded. However, despite the various periods inserted therein, everything in this quote prior to the words "General Contractor" in the last sentence appears to be part of a single sentence. Any other interpretation renders Endless Air's sub-bid indecipherable. Reading this as one sentence, Endless Air appears to offer to provide the HVAC system for base bid two for the price of $146,038. It also appears that the last sentence is an offer by Endless Air to reduce its sub-bid price if the general contractor performs the well drilling instead of Endless Air. Because Endless Air included the word "then" after the statement "**General Contractor IS PROVIDING GEOTHERM WELL DRILLING**," the reader naturally reads this sentence as though it begins with the word "If" and that it was inadvertently omitted. Such an interpretation is supported further by the "would be" language, which reads as an offer to deduct from base bid two contingent upon some event. Therefore, this sentence reasonably reads: "If general contractor is providing geotherm well drilling, then a sum of $68,000.00 would be deducted from base bid 2." In other words, Endless Air's sub-bid for base bid two is $146,038 unless the general contractor provides the geothermal well drilling.

In contrast, Complete Building argues that the concluding sentence of Endless Air's sub-bid should not be read as an if/then provision. In this regard, Complete Building asserts that this sentence clearly is not an offer by Endless Air to reduce its sub-bid price if the general contractor performs the well drilling but instead is a clear statement that Endless Air was not offering to

perform the well drilling because it was to be performed by the general contractor. Complete Building further argues that this concluding statement indicates that Endless Air's sub-bid price for base bid two was $78,038 ($146,038 less $68,000 in well drilling cost), never $146,038. If, considering the poor grammar of the entire sub-bid, one assumes that Endless Air inadvertently inserted the word "that" and the "would be" language into the last sentence, Complete Building's interpretation is plausible. However, the question facing the CPOC is not whether Complete Buildings interpretation of Endless Air's sub-bid is plausible or reasonable. The CPOC must determine whether the College's interpretation of Endless Air's bid was reasonable.

In support of its argument that Endless Air did not submit a sub-bid of $146,038 for base bid two, Complete Building provided a portion of its bid preparation documents showing that it used a price of $78,038 for the HVAC work and a price of $51,000 for well drilling. [Hearing Exhibits 4 and 6] This same documentation indicated that Complete Building intended to use Endless Air to perform the HVAC work and Nelson Mitchum drilling to drill the wells for the HVAC system. Complete Building also submitted into evidence its record of a telephone sub-bid it received from Nelson Mitchum Drilling on the day of bid opening in the amount of $51,000. [Hearing Ex. 3]. However, the question that faced the College was not how Complete Building chose to divide up its scope of work but whether Endless Air exceed the scope of its license in **its sub-bid.**

Complete Building argues that the College's interpretation of Endless Air's sub-bid is not plausible because the stated scope of work in the first sentence of Endless Air's sub-bid does not include well drilling. In this regard, Complete Building points out that the work of well drilling is located in Division 2, Section 02552 of the Project Specifications not in Section 23000, the Section which Endless Air proposed to perform in its sub-bid to perform. However, this argument fails because there is no Section 23000 in the Project specifications leaving open the question regarding what scope of work Endless Air was offering to perform.[6]

Based on the forgoing, the CPOC finds the College's interpretation of Endless Air's sub-bid as an offer to install for the price of $146,038 a "complete and operational" HVAC system, including the wells necessary for that system to operate, to be a reasonable interpretation and one

[6] The specifications for the HVAC system are located in Division 15 of the Project specifications. [Hearing Ex. 10] This division, which also includes plumbing systems, starts with Section 15050 and ends with Section 15990.

that was not clearly erroneous.[7] Since Endless Air could not legally offer to perform work in excess of $125,000 and the College reasonably concluded Endless Air was offering to perform work in excess of that amount based on the sub-bid, the College's determination that Endless Air was a non-responsible sub-bidder was not clearly erroneous nor was it clearly contrary to law.

DECISION

It is the decision of the Chief Procurement Officer for Construction that Complete Building has failed to prove upon the preponderance of the evidence that the College of Charleston's determination regarding Endless Air's responsibility was "clearly erroneous, arbitrary, capricious, or contrary to law." Moreover, Complete Building has failed to prove upon the preponderance of the evidence that the College of Charleston's determination regarding Complete Building's responsibility as a result of listing Endless Air as its HVAC subcontractor for base bid two was "clearly erroneous, arbitrary, capricious, or contrary to law."

For the foregoing reasons, the Protest is dismissed.

John St. C. White

John St. C. White
Chief Procurement Officer for Construction

4 Feb 2011

Date

Columbia, South Carolina

[7] While Complete Buildings argument's for a different interpretation may be plausible, the question before the CPOC is not whether there are other plausible interpretations but whether the College's determination was clearly erroneous. Where a document is capable of more than one reasonable interpretation and the College's interpretation is reasonable, it is not clearly erroneous. See generally, Leventis v. S.C. Department of Health and Environment, 340 S.C. 118, 530 S.E.2d 643 (Ct. App. 2000).

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2010)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: www.procurementlaw.sc.gov

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars ($250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2010 S.C. Act No. 291, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

Complete
BUILDING
CORPORATION

December 13, 2010

State Engineer
1201 Main Street, Suite 600
Columbia, SC 29201

Attn: Mr. John White, State Engineer

Re: College of Charleston project Number – H15-9641-PG

Dear Mr. White,
Please accept this letter as Complete Building Corporations formal protest of the award of the above referenced project to NBM Construction Company. Our protest is based on the following:

The owners rejection and subsequent award is based on Chapter 6 of the Manual of Planning and Execution of the State Permanent Projects Part II of 12 Dec 2008 and more specifically that a "sub-contractor submitted a bid exceeding his/her State of South Carolina LLR Limits for the licenses for which it was issued." Section 6.1.16, Determination of Bidders Responsibility paragraph "B" notes "if the agency determines that a prospective contractor or one of his/her listed subcontractors does not have the proper license and license limitations, the Agency must declare the prospective contractor is non-responsible." Our subcontractor, Endless Air Inc. submitted a bid of $86,170.00 for base bid 1 and $78,038.00 for base bid 2 which is under their South Carolina license limit of $125,000.00. A copy of their bid is attached for your review. The confusion surrounds the issue of well drilling which Endless Air provided a $68,000.00 bid. This bid was provided for informational purposes only as we were having difficulty obtaining other well drilling prices. The bid from Endless Air indicates the "general contractor is providing the Geotherm well drilling." An additional letter is also provided by Endless Air confirming their well drilling bid was for informational purposes only. Prior to the bid time and prior to receiving Endless Air's bid we subsequently received a well drilling bid from Nelson Mitchum Drilling which was lower than Endless Airs guidance bid and was the bid we used to create our bid for Base Bid 2. A copy of Nelson Mitchum's bid is attached for your review. We have contacted the SC LLR and spoke with Mr. Gary Wiggins who confirmed that Endless Air did not bid beyond its license limits based on the deduct offered for the well drilling. In addition, Complete Building Corporation did not utilize a bid beyond their license limits in the submission of our bid to the owner and Endless Air is properly licensed for the scope of work they bid. The issue of bidding beyond a license limit is not addressed in the code section 6.1.16 and is thus not a reason for rejection. Accordingly, since Complete Building Corporations intended contract with Endless Air

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Inc is well below the license limit; Complete Building Corporation did not utilize Endless Air in its bid for well drilling; and Endless Air Inc is properly licensed by SC LLR to perform the intended work, the rejection should be overturned, our bid should be declared responsible and we request relief in the form of contract award for this project.

Thank you for your time and I look forward to a positive response to this protest.

Your Truly,

Victor Apat
President

Cc: file
Sent regular mail, certified mail (return receipt), faxed (803-737-0639) & emailed to protest-ose@mmo.sc.gov #70070710000483538559
Phil Gerald
John A. Cordray, Jr.
Scott Bradley
Mark Mason, Esquire

Attachments:
Endless Air Inc Bid
Nelson Mitchum Drilling Bid
Affidavit of Victor Apat
Copy of base bid 2 estimate