

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
))
))
IN THE MATTER OF: BID PROTEST)
))
MATRIX CONSTRUCTION CO., INC.)
))
V.)
))
TRI-COUNTY TECHNICAL COLLEGE)
))
INDUSTRIAL ARTS, PHASE B)
BUILDING RENOVATIONS)
PROJECT H59-6022-JM-B)
_____)

**BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION**

DECISION

CASE NO. 2012-011

**POSTING DATE:
MARCH 23, 2012**

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Matrix Construction Co., Inc. (Matrix), under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on the Industrial Arts, Phase B – Building Renovations bid (“the Project”) for Tri-County Technical College (Tri-County). Matrix protests Tri-County’s posting of a Notice of Intent to Award a contract to Melloul-Blamey Construction SC LTD (Melloul-Blamey). Pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review without a hearing. This decision is based on that review and the applicable law and precedents.

NATURE OF THE PROTEST

Matrix’s letter of protest is hereby incorporated by reference and is attached as Ex. 1.

RELEVANT FACTS

1. Tri-County advertised for bids for the project on January 23, 2012. [Ex. 2]
2. The solicitation required each bidder to list on his bid form the subcontractors he intended to use on his base bid for the subcontractor specialties of Electrical, Plumbing, Heating, Air Conditioning, Structural Framing, Fire Sprinkler, and Masonry. [Ex. 3] The solicitation also had subcontractor listing requirements for Alternates 1 & 2 for the following subcontractor specialties:

Alternate 1: Electrical, Fire Sprinkler, Heating, Air Conditioning, and Masonry;

Alternate 2: Electrical, Heating, Air Conditioning, Structural Framing, and Fire Sprinkler.

3. On February 3, 2012, Tri-County issued Addendum #1,¹ which modified the solicitation requirements for subcontractor listing to require bidders to list on their bids their subcontractors for the following subcontractor specialties:

Base Bid: Electrical, Plumbing, Heating, Air Conditioning, Structural Framing, Fire Sprinkler, and Masonry;

Alternate 1: Electrical, Structural Framing, Heating, and Air Conditioning;

Alternate 2: Electrical, Heating, Air Conditioning, Structural Framing, and Fire Sprinkler;

Alternate 3: Structural Framing. [Ex. 4]

4. On February 10, 2012, Tri-County issued Addendum #3, which modified the solicitation requirements for subcontractor listing to require bidders to list on their bids their subcontractors for the following subcontractor specialties:

Base Bid: Electrical, Plumbing, Heating, Air Conditioning, Structural Framing, Fire Sprinkler, and Concrete;

Alternate 1: Electrical, Structural Framing, Heating, Air Conditioning, and Plumbing;

Alternate 2: Electrical, Concrete, Heating, Air Conditioning, Structural Framing, and Fire Sprinkler;

Alternate 3: Structural Framing, and Electrical. [Ex. 5]

5. Concurrent with or sometime after issuing Addendum #3, but before issuing the final addendum, Tri-County distributed a notice to all plan holders of record. This notice stated that according to the Department of Labor, Licensing, and Regulation (LLR) any bidder listing himself for the subcontractor specialty of Structural Framing would be required to possess a Structural Framing license independent of a General Contractor-Building license. [Ex. 6] Similarly, this notice advised bidders that according to LLR any bidder listing himself for the subcontractor specialty of Concrete would be required to possess a Concrete license independent of a General Contractor-Building license.

6. On February 16, 2012, Tri-County issued Addendum #4, which modified the solicitation requirements for subcontractor listing to require bidders to list on their bids their subcontractors for the following subcontractor specialties:

¹ In its letter of protest, Matrix asserts that "OSE" issued the various bid forms and documents at issue in this dispute; however, Tri-County or Tri-County's Architect acting on behalf of Tri-County issued these forms and documents.

Base Bid: Electrical, Plumbing, Heating, Air Conditioning, and Fire Sprinkler;

Alternate 1: Electrical, Heating, Air Conditioning, and Plumbing;

Alternate 2: Electrical, Fire Sprinkler, Heating, and Air Conditioning;

Alternate 3: Electrical. [Ex. 7]

This modification to the solicitation removed any requirement that bidders identify on their bids by name, the entities they intended to use to perform the work of Concrete and Structural Framing.

7. By the time for receipt of bids, Tri-County received seven bids. [Ex. 8]

8. Melloul-Blamey submitted the apparent low bid. [Ex. 8 & 9]

9. On February 29, 2012, Tri-County posted a Notice of Intent to Award a contract to Melloul-Blamey. [Ex. 10]

10. On March 8, 2012, Matrix protested Tri-County's intended award.

DISCUSSION

In its letter of protest, Matrix questions the modifications Tri-County made to the solicitation documents that removed the listing requirements for the subcontractor specialties of Concrete and Structural Framing from the bid form.² This protest, in its entirety is likely a result of the changes in the bid form regarding subcontractor listing. Had none of the first three bid forms required a listing for the subcontractor specialties of Concrete or Structural Framing, it is unlikely anyone would have conceived of the idea of protesting the ability of a contractor possessing an unlimited General Contractor-Building (BD5) license to bid this project as a sole prime contractor. Nonetheless, to the extent that Matrix is protesting this modification to the solicitation requirements, Matrix's protest fails.

The Procurement Code states:

A prospective bidder ... who is aggrieved in connection with the solicitation of a contract shall protest ... within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue." SC Code Ann § 11-35-4210(1)(a).

² It is not clear whether Matrix is actually protesting this change to the solicitation but for purposes of this decision, the CPOC assumes Matrix is protesting Addendum #4.

Tri-County issued the last amendment to the solicitation, Addendum #4, on February 16, 2012. The fifteenth day after Tri-County issued this Addendum was March 2, 2012. Matrix did not deliver its letter of protest to the CPOC until March 8, 2012. Therefore, to the extent Matrix is protesting the solicitation, Matrix's protest is untimely. However, even if Matrix timely protested Addendum #4, Tri-County's decision regarding which subcontractor specialties to identify in the bid form for purposes of the anti-bid shopping provisions of the Procurement Code was not protestable. SC Code Ann § 11-35-3020(b)(i). For the forgoing reasons, the CPOC review of Matrix's protest is limited to the subcontractor listing requirements set forth on the bid form actually used by the bidders, the bid form that was a part of Addendum #4.

In addition to Matrix's objection to the changes to the solicitation, Matrix argues that Tri-County cannot award a contract to any bidder other than Matrix because none of the other six bidders is responsible.³ 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 responsibility is final and conclusive unless it is "clearly erroneous, arbitrary, capricious, or contrary to law." *S.C. Code Ann. § 11-35-2410(A)*. The South Carolina Procurement Review Panel has held that the protestant has the burden of proving that the procurement officer's determination is "clearly erroneous, arbitrary, capricious, or contrary to law." *Protest of Brantley Construction Co., Inc.*, Case No. 1999-3.

A responsibility determination is a determination that the bidder has the ability to perform. *See S.C. Code Ann. Regs. 19-445.2125(A)(1)*. Possession of the proper contractor's license, either by the bidder or one of the bidder's **listed subcontractors**, is an issue of responsibility. *Protest of Brantley Construction Co., Inc.*, 1999-3 (where the State is investigating the bidder's ability to perform it is deciding an issue of responsibility); *Protest of Roofco, Inc.*, Case No. 2000-14(I) (stating that "the lack of a proper license to do the work solicited in a state contract will always render a bidder nonresponsible."). If, at the time of bidding, a **subcontractor listed** on a bidder's bid does not possess the proper license for performing the work for which the subcontractor was listed, then neither the listed subcontractor nor the bidder are responsible bidders. S.C. Code Ann. § 40-11-200(B)⁴; *See also, Protest of Burkwood*

³ Matrix's letter of protest primarily focuses on Melloul-Blamey but notes that the second low bidder and all other bidders are equally unqualified as Melloul-Blamey.

⁴ This Section reads "[i]t is a violation of this chapter for an awarding authority, owner, contractor...to consider a bid, sign a contract, or allow a contractor to begin work unless the bidder or contractor has first obtained the licenses required by this chapter. Bids or contracts submitted by contractors may not be reconsidered or resubmitted to an awarding authority, contractor, or owner if the contractor was not properly licensed at the time the initial bid or contract was submitted."

Construction Company, Inc., Case No. 1997-8 (affirming its prior decisions that the State cannot accept a bid where the low bidder **listed** a subcontractor who could not perform the work specified by the bid).

Matrix argues that to bid this work, “bidders had to have the proper license to self perform Concrete and Structural Framing or had to have agreements with subcontractors with the CT and SF classifications at the time that the bids were received.” However, the solicitation did not require bidders to name on their bids subcontractors for the specialty of Concrete (CT) or Structural Framing (SF). Therefore, unlike listed subcontractors, there was no requirement that bidders have an agreement with any subcontractor to perform the work of these specialties at the time of bid opening, at the time of award, or at any time prior to the start of the work of these specialties. Nor is it necessary for the CPOC to enquire into whether Melloul-Blamey intends to self perform the Concrete and Structural Framing work as Matrix requests. Melloul-Blamey submitted a bid stating Melloul-Blamey would perform the work of the Project in accordance with the requirements of the solicitation, which includes complying with South Carolina law. Tri-County did not have a duty to enquire as to whether each bidder actually intended to do what he said in his bid he would do and the CPOC will not assume such a duty where Tri-County had none.⁵ Holding a bidder to the terms of his bid is a matter of contract administration not award.

Matrix asserts that Melloul-Blamey cannot supervise the Concrete and Structural Framing. This assertion can be interpreted in one of two ways: 1) that Melloul-Blamey, not possessing a Concrete and Structural Framing license subclassification, cannot supervise an unlicensed subcontractor in the performance of this work, or 2) Melloul-Blamey cannot supervise all of the work of the project by acting as a sole prime contractor and subcontracting the work for which it is not licensed to licensed subcontractors.

It is true that a contractor cannot supervise an unlicensed subcontractor in the performance of work for which the contractor is not licensed. SC Code Ann § 40-11-270(A) & (C). However, if Matrix is claiming that Melloul-Blamey cannot supervise unlicensed subcontractors in the performance of Concrete and Structural Framing, this is nothing more than a restatement of the argument that “bidders had to have the proper license to self perform Concrete and Structural Framing or had to have agreements with subcontractors with the CT and SF classifications at the time that the bids were received.” The CPOC’s response to this argument is set forth above and the CPOC need not restate it here.

⁵ If the bid is not a sufficient statement of intent to be bound by the requirements of the solicitation, further enquiry will not provide any assurance either.

To the extent that Matrix's protest can be construed to be a protest of Melloul-Blamey's ability to bid as a sole prime contractor, the CPOC notes that the Contractors Licensing Act places limitations on a contractor's ability to bid the Project as a sole prime contractor when the work includes work outside of his license. Title 40, Chapter 11, Section 340 of the South Carolina Code of Laws, as amended, provides as follows:

"An entity licensed under the classifications or subclassifications in Sections 40-11-410(1), (2), or (3) may act as a sole prime contractor on a project if **forty percent** or more of the work as measured by the total cost of construction falls under one or more of the licensee's license classification or subclassifications." (*emphasis added*)

Melloul-Blamey is licensed under the classifications in SC Code Ann § 40-11-410(1); therefore, under normal circumstances 40% of the licensed work of the Project would have to fall under Melloul-Blamey's BD5 license in order for Melloul-Blamey to bid as sole prime contractor. If you accept Matrix's argument that the BD5 license does not include Concrete and Structural Framing, then it does not appear that 40% of the licensed work falls under the BD5 license.⁶ However, it does not appear that 40% of the licensed work falls under any license classification or subclassification much less a license under SC Code Ann § 40-11-410(1), (2), or (3).⁷ Indeed, most of the work requires a license issued pursuant to SC Code Ann § 40-11-410(4). For a contractor possessing one of these licenses to act as a sole prime contractor, at least 51% of the licensed work must fall under the contractor's license. SC Code Ann § 11-35-340. Therefore, under Matrix's argument, no one license classification or subclassification allows a contractor to act as sole prime contractor on this project. However, the Contractor Licensing Board's policy provides that under these circumstances any BD5 may bid as sole prime contractor. [Ex. 11] Therefore, Melloul-Blamey was qualified to bid this Project as a sole prime contractor and to subcontract that portion of the work outside the scope of the BD5 license.

Finally, Matrix asks the CPOC to provide an interpretation of the Contractors Licensing Act. Specifically, Matrix asks the CPOC to state that the Office of State Engineer "is in agreement with the South Carolina LLR's interpretation of the South Carolina Code Section 40-11-410." Matrix attaches to its letter of protest a notice disseminated by Tri-County purporting to state LLR's

⁶ For purposes of this analysis, the CPOC utilizes the Project estimate prepared by the Project Architect. For the reasoning behind using this approach, see the CPOC's decision in The Matter of J.C. Wilkie Construction, LLC v. South Carolina Department of Mental Health, Case No. 2009-011. The architects estimate is attached as Ex. 12.

⁷ Matrix's own license combination of a BD5 and CT does not cover 40% of the licensed work. Moreover, it is not clear, using the architects estimate, that a license combination of BD5, CT, and SF covers 40% of the licensed work.

interpretation of parts of Section 40-11-410. However, this document is not on LLR letterhead nor did LLR issue this document. Therefore, this document is simply hearsay and is not evidence of LLR's interpretation of SC Code Ann § 40-11-410.⁸ If Matrix wants an official interpretation of SC Code Ann § 40-11-410, Matrix should direct its request to the body charged with interpreting the Contractors Licensing Act, the Contractors Licensing Board, not the CPOC. The CPOC's interpretation of parts of SC Code Ann § 40-11-410 in question is not necessary to determine whether Tri-County's intended award to Melloul-Blamey is contrary to the requirements of the Procurement Code. Tri-County properly determined that Melloul-Blamey could bid the project as a sole prime contractor and had no duty under the Procurement Code to determine whom Melloul-Blamey intended to use to perform the work of Concrete or Structural Framing or their responsibility since the solicitation did not require bidders to name their subcontractors for these specialties in their bids.

DETERMINATION

The CPOC finds that Tri-County properly determined that Melloul-Blamey could legally bid the Project as a sole prime contractor and that Tri-County's determination of responsibility was not "clearly erroneous, arbitrary, capricious, or contrary to law."

For the forgoing reasons, the protest is denied.


John St. C. White
Chief Procurement Officer for Construction
23 March 2012
Date

Columbia, South Carolina

⁸ In 2008, The Contractor Licensing Board's administrator (now retired) issued a document purporting to be an interpretation of the Board regarding the ability of a BD5 to perform concrete work. This document appears to contradict the alleged LLR interpretation attached to Matrix's protest. [Ex. 13]

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised March 2012)

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 2011 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." 2011 S.C. Act No. 73, 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, an incorporated 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).