

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION

IN THE MATTER OF:

DETERMINATION

TYLER CONSTRUCTION GROUP, INC.

CASE NO. 2008-0017

V.

UNIVERSITY OF SOUTH CAROLINA

POSTING DATE: MAY 27, 2008

BYRNES 4th FLOOR RENOVATION
USC PROJECT CP000238411

This matter came before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Tyler Construction Group, Inc., under the provisions §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on the Byrnes 4th Floor Renovation bid (“the Project”) for the University of South Carolina (USC). Tyler protests USC’s posting of a Notice of Intent to Award a contract to Monroe Construction Company. [A copy of this protest is attached as Exhibit “A”]. Pursuant to S.C. Code Ann. §11-35-4210(3) (Supp. 2006), the CPOC conducted an administrative review without a hearing. This decision is based on that review and the applicable law and precedents.

FINDINGS OF FACT

On April 17, 2008, USC advertised for bids on the project. The Bid Form required bidders to submit bids on a base bid and one bid alternate. This alternate was an add alternate. The Supplemental Instructions to Bidders (Form 00201-OSE) included in the Bidding Documents required that in cases where bid alternates are included, the award shall be made to the responsive and responsible bidder submitting the lowest bid for the base and all alternates combined.

On May 9, 2008 USC received and opened two bids for the subject project. One bid was submitted by Monroe, the other by Tyler. Both bidders were responsive and responsible. Monroe was low bidder on the base and Tyler was low bidder on the base and alternate combined. [A copy of the bid tabulation is attached as Exhibit “B”]. In evaluating bids, USC determined that funds were sufficient to permit the award of the Base Bid scope of work only.

On May 14, 2008, USC posted a Notice of Award to Monroe. Subsequently, USC realized it failed to award in accordance with the Instructions to Bidders. On May 16, 2008, USC sent a letter to the CPOC requesting that he cancel the Notice of Award for administrative error on the part of the agency in accordance with the provisions of SC Regulation 19-445.2085(C)(7). [A copy of this letter is attached as Exhibit "C"]. On May 20, 2008, Tyler submitted a protest to the CPOC protesting USC's failure to follow the Instructions to Bidders in making an Award to Monroe.

DETERMINATION

Instructions to Bidders are complementary with the General Conditions of the Contract for Construction and are designed to be used together with the Project Manual for competitively bid projects. The instructions are intended for use by bidders as well as owners and are binding on both bidders and the agencies. *See e.g. Protest of Cannon Associates Inc.; Appeal by Kingsmore Construction*, Case No. 2000-13. Section 5.4.2 of the Supplemental Instructions to Bidders on this project provides as follows:

“5.4.2 EVALUATION OF BID ALTERNATES. In order to establish a clear and definitive basis of award when the Bidding Documents include Bid Alternates, the following process shall be used.

5.4.2.1 When, and only when Bid Alternates are included in the Bid Documents, the Apparent Low Bidder will be determined by combining each Bidder's Base Bid amount and the total amount for all Bid Alternates. The Bidder who bids the lowest total price for the Base Bid and Bid Alternates, shall be deemed the apparent low bidder.

5.4.2.2 Provided that the Agency determines the Apparent Low Bidder to be both responsive and responsible, the Agency shall have the right to award a contract to the Apparent Low Bidder based on any combination of Bid Alternates or no Alternates, unless otherwise specifically provided in the Bidding Documents.”

Based on these Instructions, Tyler was the “Apparent Low Bidder.” Moreover, USC found Tyler's bid to be responsive and Tyler to be responsible. Therefore, USC should have awarded the contract to Tyler rather than Monroe.

For the foregoing reason, Tyler's protest is granted and this matter is remanded to the University of South Carolina to make an award in accordance with the Supplemental Instructions to Bidders.


John St. C. White
Chief Procurement Officer for Construction


Date

Columbia, South Carolina

STATEMENT OF THE RIGHT TO APPEAL

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

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

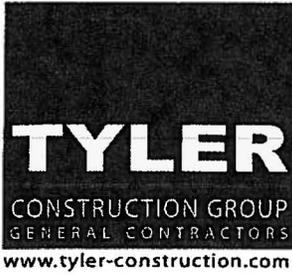
(6) Finality of Decision. A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of posting of the decision in accordance with Section 11-35-4210(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.

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 66.1 of the 2005 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(4). . . . 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." 2005 S.C. Act No. 115, Part IB, § 66.1. 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). Copies of the Panel's decisions are available at <http://www.procurementlaw.sc.gov>.



5/20/2008

Re: Byrnes Center Fourth Floor Renovation
H27-1773

Attn: Linda Jackson
USC ; Construction and Planning
743 Greene St.
Columbia, SC 29208

Dear Linda:

We protest the award of the this project to Monroe Construction based on supplemental Instruction to Bidders 5.4.2.1. of the OSE-201 Manuel for the evaluation of bid alternates.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles P. Tyler".

Charles P. Tyler
President

Cc: protest-ose@mmo.sc.gov

THIS IS CERTIFIED TO BE A TRUE COPY



Byrnes Center Fourth Floor Renovation
 Bids Due @10:00am on Friday, May 9, 2008
 743 Greene Street, Columbia, SC 29208 Conference Room #63

| BIDDER | BID SEC BOND | ADD ACKD #1 & #2 | Subcontractors | ALT#1 | BASE BID | TOTAL |
|--------------------------|--------------------|------------------|--------------------------|--------------------|----------|-------|
| Accent Contracting | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| Boykin Contracting | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| Carolina Wrecking | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| First Class Construction | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| Ideal Construction | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| BIDS OPENED BY: | <i>[Signature]</i> | | WITNESSED BY: | <i>[Signature]</i> | | |

1 of 2

NOI Wed @ 4:30
 14/MAY/08

THIS IS CERTIFIED TO BE A TRUE COPY



Byrnes Center Fourth Floor Renovation
 Bids Due @10:00am on Friday, May 9, 2008
 743 Greene Street, Columbia, SC 29208 Conference Room #53

| BIDDER | BID SEC BOND | ADD ACK'D #1 & #2 | Subcontractors | ALT#1 | BASE BID | TOTAL |
|------------------------|--------------|-------------------|--------------------------|--------------------------|--------------|---------|
| Monroe Construction | ✓ | ✓ | | + \$17,500.00 | \$398,140.00 | 415,640 |
| | | | Interior Walls & Ceiling | HESTER DRY WAL | | |
| | | | HVAC | WOB BLACKSTONE | | |
| | | | Electrical | CUMMINGS ELEC. | | |
| Precision Walls, Inc. | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| Preferred Construction | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| THS Constructors, Inc. | NO | BID | | | | |
| | | | Interior Walls & Ceiling | | | |
| | | | HVAC | | | |
| | | | Electrical | | | |
| Tyler Construction | ✓ | ✓ | | + \$12,000.00 | 401,000.00 | 413,000 |
| | | | PRECISION WALLS | Interior Walls & Ceiling | | |
| | | | W.B. THOMASSON | HVAC | | |
| | | | ENERGY PRO | Electrical | | |
| BIDS OPENED BY: | [Signature] | | WITNESSED BY: | [Signature] | | |

RECEIVED

MAY 16 2008

OFFICE OF STATE ENGINEER



UNIVERSITY OF
SOUTH CAROLINA

EXH. C

May 16, 2008

John White, State Engineer
State Engineer's Office
1201 Main Street, Suite 601
Columbia, South Carolina 29201

Subject: Request for Cancellation of Notice of Award
Byrnes 4th Floor Renovation
USC Project CP000238411

Dear John:

In accordance with State Regulation 19-445.2085.C I respectfully request the cancellation of a Notice of Intent to Award posted in favor of Monroe Construction Company, LLC on May 14, 2008. The basis for this request is subparagraph (7), administrative error on the part of the agency. The circumstances of this error are as follows:

1. On May 9, 2008 USC received and opened two bids for the subject project. One bid was submitted by Monroe Construction Company and the other by Tyler Construction.
2. The Bid Form required bidders submit bids on a Base Bid and one Bid Alternate.
3. Both bids were found to be responsive and responsible.
4. Monroe Construction's Base Bid was lower than that of Tyler Construction.
5. The total bid (Base plus Alternate) submitted by Tyler Construction was lower than that of Monroe Construction.
6. The Supplemental Instructions to Bidders (Form 00201-OSE) included in the Bidding Documents was the 07/01 edition, which requires that in cases where bid alternates are included, the award shall be made to the responsive and responsible bidder submitting the lowest bid for the Base and all Alternates combined. In this case, that bidder was Tyler Construction.
7. In evaluating bids the University determined that funds were sufficient to permit the award of the Base Bid scope of work only.
8. The award as posted considered only the Base Bid amounts, not the Total Bid amounts as required by the Bidding Documents.

We regret that this error occurred and that bidders were inadvertently misled as to the true low bidder for this project. The staff members associated with this event have been counseled about the need to review all bidding documents to ensure full compliance with all aspects of the bid and award process as defined in the bidding documents before making an award. We hope that the ongoing transition to the 2008 bidding documents will eliminate the confusion that led to this unfortunate error. We wish to proceed with this contract as soon possible and would appreciate your earliest possible attention to this request.

If you have any questions or would like to see any of the project documents, please let me know.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael M. Thomas". The signature is fluid and cursive, with a long horizontal flourish at the end.

Michael M. Thomas, PE, CBO
Interim Director of Campus Planning and Construction
University of South Carolina