STATE OF SOUTH CAROLINA	)	**BEFORE THE CHIEF PROCUREMENT**
COUNTY OF RICHLAND	)	**OFFICER FOR CONSTRUCTION**
	)	
	)	
	)	
IN THE MATTER OF: BID PROTEST	)	**DECISION**
	)	
LIDE STUDENT HOUSING	)	
RENOVATION RE-BID—	)	
STATE PROJECT H21-9523-LC	)	
	)	**POSTING DATE:**
CLAYTON CONSTRUCTION	)	**MARCH 27, 2007**
COMPANY, INC.	)	
vs.	)	
LANDER UNIVERSITY	)	
	)	

This matter is before the Chief Procurement Officer for Construction ("CPOC") pursuant to a request from Clayton Construction Company, Inc. ("Clayton") under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on Lide Student Housing Renovation Re-Bid ("the Project") for Lander University ("Lander"). Pursuant to S.C. Code Ann. §11-35-4210(3) (Supp. 2006), the CPOC conducted an administrative review. This decision is based on that review and the applicable law and precedents.

NATURE OF THE PROTEST

On January 11, 2007, Lander advertised for bids to construct the project. The bid form required all bidders to list five subcontractors, one of which was the fire alarm subcontractor, on their bids. On February 7, 2007, Lander opened bids for construction of the Project. The low bidder, Tyler Construction Company, Inc. ("Tyler"), listed "Jack Thompson," (Jack Thompson Electric, Inc., hereinafter "Thompson") a licensed mechanical contactor with an electrical classification ("licensed electrical contractor"), in the space on the bid form for listing the fire alarm subcontractor. Lander's project manager, Jeff Beaver, considered Tyler's

listing of an electrical contractor in the space for the fire alarm subcontractor to be problematic and contacted Tyler with his concerns. Mr. Beaver also contacted Clayton, the second low bidder, with his concerns. After conducting an investigation, Mr. Beaver determined that a bidder could properly list a licensed electrical contractor on the bid form as a fire alarm subcontractor. On February 9, 2007, Lander posted a Notice of Intent to Award a contract to Tyler. On February 14, 2007, Clayton protested, by letter, the Notice of Intent to Award on the grounds that Tyler's bid was non-responsive because Tyler listed an electrician in the space on the bid form for listing the fire alarm subcontractor.

DISCUSSION

PROTESTANT'S POSITION

On March 13, 2007, Clayton's attorney, Warren Clayton, submitted a memorandum in support of Clayton's protest of the award to Tyler. In his memorandum, Clayton clarifies that he is not disputing that Thompson is a properly licensed electrical contractor but that as a licensed electrical contractor, Thompson could not, under the Alarm System Business Act, S.C. Code Ann. § 40-79-5 et. seq. (Supp. 2006), perform fire alarm work on this project because the work did not include the three elements of designing, installing, and servicing a fire alarm system. Clayton also argues that Section 16721 Part 1.5(H) of the specification required the fire alarm subcontractor to have a fire alarm contractor's license issued under the Alarm System Business Act. Clayton raises two additional and new issues in his memorandum arguing that:

1) Thompson, was not a factory authorized installer and could not comply with requirements in the bid documents that a "factory-authorized installer" perform the fire alarm work; and

2) Thompson was not approved by Underwriters Laboratories (UL) to provide a UL certification on fire alarm systems and therefore could not provide a UL certificated system as required by the bid documents.

RESPONDENT'S POSITION

In a letter dated February 23, 2007, Tyler asserts that S.C. Code Ann. § 40-11-410(5)(d) (2001) permits contractors holding a mechanical contractor's license with an electrical classification to design, install, and service fire alarm systems. On March 21, 2007, Tyler's attorney, Daniel Brailsford, filed a reply to Clayton's March 13 memorandum. In the reply, Tyler argues that as a licensed electrical contractor, Thompson is qualified to bid on and perform fire alarm system work on this project, and, therefore, Tyler could properly list Thompson as the fire alarm subcontractor on his bid. Tyler also asserts that there is nothing in the law or the bid documents that precludes Thompson from acting as the fire alarm subcontractor on this project and that where necessary, Thompson could properly subcontract for services to comply with the technical specifications of the bid documents.

CPOC FINDINGS

The CPOC requested an OSE project manager investigate the circumstances of this procurement and collect written materials pertinent to this protest. After reviewing the report of the project manager and reviewing the relevant documents, the CPOC finds that the issue of whether a bidder can properly list an electrical contractor in the space on the bid form for listing the fire alarm subcontractor is not one of non-responsiveness as indicated in Clayton's protest letter but one of responsibility. In Re: Protest of Brantley Construction Co., Inc., Procurement Review Panel Case No. 1999-3. The CPOC further finds that Clayton's position that the Alarm System Business Act prohibits the listing of a licensed electrical contractor as the fire alarm subcontractor on this project is unfounded.

Licensed Electrical Contractors Properly

Licensed to Perform Fire Alarm Work on Project

Clayton's protest letter, by protesting Tyler's listing of an electrician in the fire alarm subcontractor's space on the bid form, contests whether any licensed electrical contractor can properly be listed as a fire alarm subcontractor on the bid form. In his memorandum, Clayton expounds his argument that a licensed electrical contractor does not hold the proper license for fire alarm work on this project. Clayton Argues that while S.C. Code Ann. § 40-11-410(5)(d) (2001) does allow electrical contractors to perform fire alarm work, the scope of this provision is limited by the exemptions provision of the Alarm System Business Act. The exemption provision of the Alarm System Business Act states that the provisions of the act do not apply to "a mechanical contractor who holds an electrical contractor's license and designs, installs, and services a fire alarm system." S.C. Code Ann. § 40-79-310(5) (Supp. 2006) (emphasis added). Clayton asserts that the use of the word "and" in the sequence of "designs, installs, and services" is inclusive and means that a licensed electrical contractor can only offer to perform and perform fire alarm work that includes all three functions listed in the sequence. Clayton further asserts that an electrical contractor will not be performing all three of these functions on this project and, therefore, a bidder could not list a licensed electrical contractor in the space for the fire alarm subcontractor on the bid form.

When asked how the South Carolina Contractor's Licensing Board applied the electrical contractors exemption in S.C. Code Ann. § 40-79-310(5) (Supp. 2006), the Licensing Board's administrator, Michael Anderson, responded that a licensed electrical contractor can perform any one of the three elements of designing, installing, and servicing alarm systems and does not have to perform all three. Therefore, the CPOC finds that the Fire Alarm System Business Act does not prohibit a licensed electrical contractor, and as such, Thompson, from

offering to perform and performing work as the fire alarm subcontractor on this project.

Clayton also argues that even if the Fire Alarm System Business Act does not prevent a licensed electrical contractor from acting as a fire alarm subcontractor on this project, Section 16721 Part 1.5 (H) of the specifications does. This specification requires the contractor to submit certain information in accordance with a State Fire Marshal Regulation. This information is information that the contractor is to submit as a part of the shop drawing submittal process outlined in Article 3 of the General Conditions of the Contract for Construction. Among the required information is the "name, address, telephone number and license number of the SC fire alarm contractor installing the system." Section 16721 Part 1.5 (H)(5). Clayton argues that this provision specifically requires the fire alarm subcontractor to be a contractor licensed under the Fire Alarm System Business Act.

According to the South Carolina Deputy Director for Fire and Life Safety and Acting State Fire Marshal, John Reich, the intent of the State Fire Marshall requirements set forth in Section 16721 Part 1.5 (H) of the specifications is to enable a review of the fire alarm system shop drawings submitted by the contractor during the course of the project. This provision's requirement that the contractor include the license number of the "SC fire alarm contractor" with the fire alarm system submittals is not intended to limit the type of licensure required to install the fire alarm system to one issued under the Alarm System Business Act. This provision is intended to assure the fire marshal that the installer of the fire alarm system is properly licensed under South Carolina Law. As previously noted, both the Fire Alarm System Business Act and S.C. Code Ann. § 40-11-410(5)(d) (2001) allow licensed electrical contractor's to install fire alarm systems. Thompson is a licensed electrical contractor permitted by South

Carolina Law to perform fire alarm work; therefore, Tyler could properly list Thompson as the fire alarm subcontractor under this provision.

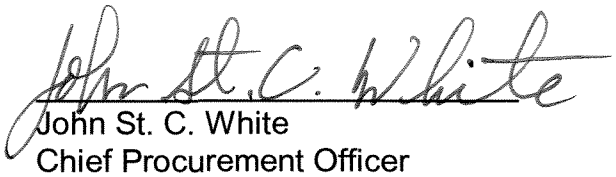
Clayton's Protest Not Sufficient To Provide
Notice of Additional Issues Raised in Memorandum

Clayton submitted his memorandum on March 13, 3007. Pursuant to S.C. Code Ann. § 11-35-4210(2)(b) (Supp. 2006), Clayton had until February 26, 2007, to amend his protest to add any issues not covered in his protest letter. In his memorandum, Clayton raises two -additional issues not apparent in his protest letter. Clayton argues that Thompson is a non-responsible fire alarm subcontractor because Thompson cannot, using his own forces, comply with some of the technical specifications for the fire alarm system contained in the bid documents. A letter of protest "must set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided." SC Code Ann. § 11-35-4210(2)(b) (Supp. 2006). The CPOC finds that Clayton's letter of protest was not sufficient to place Lander, Tyler, or the CPOC on notice of these additional issues and because Clayton raised these issues after the time for doing so, the CPOC may not consider them.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the bid submitted by Tyler Construction Co., Inc., is responsive; that a fire alarm system project does not have to include the three elements of system design, installation, and servicing in order for a licensed electrical contractor to bid the work; and that Tyler Construction Co., Inc., could properly list Jack Thompson Electric, Inc., a licensed electrical contractor, as his fire alarm subcontractor on his bid.

For the foregoing reasons, Protest denied.



John St. C. White
Chief Procurement Officer
for Construction

March 27, 2007
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 www.state.sc.us/mmo/legal/paneldec.htm