

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
)	
IN THE MATTER OF: BID PROTEST)	DECISION
)	
CCTV ADDITIONS)	
STATE PROJECT N12-9530-RC-C)	POSTING DATE: June 23, 2003
)	
BUILDING TECHNOLOGIES)	
ALLIANCE, INC.)	
vs.)	
SOUTH CAROLINA DEPARTMENT OF)	
JUVENILE JUSTICE)	
_____)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Building Technologies Alliance, Inc. (BTA) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for administrative reviews on the contract for construction of CCTV Additions (Project) for the South Carolina Department of Juvenile Justice (DJJ). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and determined that mediation was not appropriate. A decision on the request for administrative review is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

The DOT solicited bids for the Project. Included in the Bidding Documents for each Project was a Bid Bond Form (SE-335) [Exh. 1] issued by the Office of State Engineer. BTA submitted a bid for the Project, providing another form of Bid Bond. The DJJ ruled BTA’s bid non-responsive. BTA protests the ruling by DJJ.

FINDINGS OF FACT

1. On March 12, 2003 the Project was authorized for public bidding, including advertisement in *South Carolina Business Opportunities* (SCBO). The Invitation for Bids included SCBO Standard Note 2, which states in relevant part:

Note 2: The Bidding Documents for this Project shall be a part of this Invitation for Construction Bids, the same as if incorporated herein. Bid Security and Performance and Labor and Material Payment Bonds shall be as stated in the Bidding Documents. [emphasis added]

2. The Bidding Document for the Project included Form 00201-OSE, which states in paragraph 4.2:

4.2.1...The Bid Security shall be one of the following:

4.2.1.1. Written on SE-335, Bid Bond, made payable to the Agency; or,...

3. On May 1, 2003 DJJ received bids for the Project. BTA submitted a bid and included a Bid Bond using a bond form (A310) [Exh. 2] published by the American Institute of Architects (AIA).
4. On May 6, 2003 DJJ issued a Notice of Intent to Award to another firm. Attached to the Notice was a bid tabulation declaring BTA's bid to be non-responsive.
5. On May 19, BTA submitted a written protest, stating in part:

The standard AIA form bond is substantively the same as the State form and provides the State the same protection. Further, this difference also qualifies as a minor 'informality and irregularity,' as contemplated by Section 11-35-1520(3). The difference in the bid form should have been waived or BTA should have been given the opportunity to cure this difference.

DISCUSSION

BTA's protest argues first, that the A310 form submitted is equivalent to the form required by the Bidding Documents. BTA also asserts that the use of one form in place of another qualifies as a minor informality, and is therefore eligible for waiver or cure. This issue has been recently settled by the South Carolina Procurement Review Panel¹, which held that the terms of a bid bond are material to the responsiveness of a bid and the use of a bid bond form other than that called for in the Bidding Documents is not subject to cure under Subparagraph (1)(c) of §11-35-3030. This provision of the Code requires automatic rejection of bids failing to comply with the bid security requirements of the Invitation, with only two exceptions. Neither of these exceptions applies to the instant case.

BTA argues that the two bond forms are "...substantively the same as the State form and provides the State the same protection." The CPOC disagrees. The basic requirement for Bid Security is stated in §11-35-3030 of the Code and bidders' compliance is essential to the integrity of the public bidding process. The terms of the Bid Bond have direct and material effects on the rights of the State to protect its interests and also on the relative competitive position of the bidders.

¹ See *In re: Protest of Accent Contracting, Inc., Appeal by Accent Contracting, Inc.*, Panel Case 2002-2.

The requirements for Bid Security for the Projects were stated in the Invitations for Construction Bids, including a listing of three acceptable alternatives. BTA failed to comply, submitting a Bid Bond with terms and conditions at substantial variance with the requirements of the Bidding Documents.

1. The amount of compensation due the State for BTA's failure to enter into a contract and the conditions under which the compensation becomes due are materially different. Specifically,

- The SE-335 is a Penal Sum bond with a prompt payment requirement as stated in the "Condition of the Obligation":

Payment under this Bond shall be due and payable in full upon default of Principal and within 30 days....

This point is further clarified in paragraph 4.2.4 of 00201-OSE, to wit:

The Bidder shall forfeit to the Agency as liquidated damages the amount of the Bid Security if the Bidder fails to:...

The duty to pay the Penal Sum is triggered by the Bidder's failure to enter into a contract as required by the Bidding Documents, regardless of the State's actions with respect to other bidders.

- The A310 limits the surety's obligation to "...the difference...between the amount specified in the bid and such larger amount for which the Obligee may...contract with another party..." and there is no commitment to prompt payment.

In addition, the duty to pay is triggered by the Bidder's failure to enter into a contract combined with the award of a contract to another bidder. Arguably, the language of the A310 would render the surety's obligation null and void in situations where there was only one bidder or the State was otherwise unable to enter into a contract as a result of the solicitation effort.

2. The process of resolution of disputes arising from the Bid Bond is materially different in the two bond forms.

- The SE-335 commits the surety to the disputes resolution process specified in the Code and, ultimately, to the jurisdiction of South Carolina courts.

- The A310 is silent on the issue of dispute resolution and the choice of forum. This is consistent with the general nature of this form, which is intended for broad application to a variety of jurisdictions and both public and private contracts.

The CPOC finds that DJJ acted properly in declaring BTA's bids to be non-responsive.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the bid submitted by Building Technologies Alliance, Inc. in response to the solicitations for the construction of CCTV Additions was non-responsive to the requirements of the Invitations for Construction Bids and are hereby rejected. Absent a timely appeal of this decision in accordance with §11-35-4210(6) of the Code the South Carolina Department of Juvenile Justice is hereby authorized to proceed with the award of the contract for this project, consistent with the Department's programmatic needs.

IT IS SO ORDERED



Michael M. Thomas
Chief Procurement Officer
for Construction

June 23, 2003

Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

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 calendar 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:

<http://www.state.sc.us/mmo/legal/lawmenu.htm>

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] 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." 2002 S.C. Act No. 289, Part IB, §66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."



EXH. /

AIA Document A310

Bid Bond

KNOW ALL MEN BY THESE PRESENTS, that we **Acoustics, Incorporated**
PO Box 242507
Charlotte, NC 28224

as Principal, hereinafter called the Principal, and **Great American Insurance Company**
a corporation duly organized under the laws of the State of OHIO

as Surety, hereinafter called the Surety, are held and firmly bound unto
South Carolina Department of Juvenile Justice

as Obligee, hereinafter called the Obligee, in the sum of **Five Percent (5%) of Amount of Bid-----(\$-----)**

for the payment of which sum well and truly to be made, the said Principal and the said Surety, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a bid for **N12-9530-RC-C**

NOW, THEREFORE, if the Obligee shall accept the bid of the Principal and the Principal shall enter into a Contract with the Obligee in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bond or bonds, if the Principal shall pay to the Obligee the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the Obligee may in good faith contract with another party to perform the Work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect.

Signed and sealed this **1st** day of **May**, 2003

BY: Susan L. Misiek
(Witness)

BY: Jan M. Rustberg
(Witness)

Acoustics, Incorporated

W. Stan [Signature]
(Principal) (Seal)
BY: Vice President
(Title)

Great American Insurance Company

(Surety) (Seal)
BY: Teresa C. Schuit
Teresa C. Schuit/Attorney-in-fact (Title)



SE-335 Bid Bond

KNOW ALL PERSONS BY THESE PRESENTS THAT

(Insert full name and address or legal title of Bidder)

hereinafter referred to as "Principal," and

(Insert full name and address of principal place of business of Surety)

a corporation duly organized and existing under the laws of the State of _____, with its principal office in the City of _____, and authorized to transact business in this State, hereinafter called the "Surety", are jointly and severally held and firmly bound unto

(Insert full name of Agency)

hereinafter referred to as "Obligee", the sum of \$ _____, being the sum of the Bond to which payment the Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS SUCH that whereas the Principal has submitted to Obligee the accompanying bid incorporated by reference herein, dated as shown, to enter into a contract in writing for

(Insert the State Project Number and Name as found on the SE-330, Bid Form)

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that default of Principal shall occur upon the failure of the Principal to deliver, within the time required by the Bidding Documents (or any extension thereof agreed to in writing by Obligee), the executed Agreement required by the Bidding Documents and any performance and payment Bonds required by the Bidding Documents. This obligation shall be null and void if the Obligee shall accept Principal's Bid and Principal delivers, within the time required by the Bidding Documents (or any extension thereof agreed to in writing by Obligee), the executed Agreement required by the Bidding Documents and any performance and payment Bonds required by the Bidding Documents; or all Bids are rejected by Obligee; or Obligee fails to issue a Notice of Intended Award to Principal within the time specified in the Bidding Documents (or any extension thereof agreed to in writing by Principal). Payment under this Bond shall be due and payable in full upon default of Principal and within 30 calendar days after receipt by Principal and Surety of written notice of default from Obligee, which notice will be given with reasonable promptness, identifying this Bond and the Project and including a statement of the amount due. Surety waives notice of and any and all defenses based on or arising out of any time extension to issue the Notice of Intended Award agreed to in writing by Obligee and Principal. Any dispute, suit, action or proceeding arising out of or relating to this Bond shall be governed by the Dispute Resolution process defined in the Bidding Documents and the laws of the State of South Carolina. Surety shall cause to be attached to the Bond a current and effective Power of Attorney evidencing the authority of the officer, agent or representative who executed this Bond on behalf of Surety to execute, seal and deliver such Bond and bind the Surety thereby.

IN WITNESS WHEREOF, Surety and Principal, intending to be legally bound hereby, subject to the terms stated above, do each cause this Bid Bond to be duly executed on its behalf by its authorized officer, agent or representative.

DATED this _____ day of _____, _____ BOND NUMBER _____

PRINCIPAL

(Principal's Name)
BY: _____
(Signature and Title)
ATTEST: _____
(Signature and Title)

SURETY

(Surety's Name)
BY: _____
(Signature and Title)
(Attach Power of Attorney)
ATTEST: _____
(Signature and Title)