

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT)
OFFICER FOR CONSTRUCTION)

IN THE MATTER OF: BID PROTEST)

DECISION)

FURNISH AND INSTALL RADIO)
FREQUENCY SHIELDED ROOM)

SOLICITATION 5375)

POSTING DATE: December 22, 2005)

LINDLER CONSTRUCTION CO., INC.)

vs.)

CLEMSON UNIVERSITY)
_____)

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Lindler Construction Co., Inc. (“Lindler”) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review on the October 21, 2005 solicitation of “Furnish & Install Radio Frequency Shielded Room” (“the Work”) by Clemson University (“Clemson”). Pursuant to §11-35-4210(3) of the Code, the CPOC conducted an administrative review. A decision is issued based on that review and the applicable law and precedents.

NATURE OF THE PROTEST

Clemson solicited bids for the Work in the October, 24, 2005 issue of *South Carolina Business Opportunities* (“SCBO”). [Exh. 1]. On November 4, 2005 Clemson posted a Notice of Intent to Award a contract to Braden Shielding Systems (“BSS”) in the amount of \$104, 248. [Exh. 3]. On November 14, 2005 Lindler protested the Notice of Intent to Award. The basis for the protest was that BSS is not a licensed South Carolina contractor. [Exh. 4].

DISCUSSION

PROTESTANT’S POSITION

In a letter dated November 18, 2005 Lindler supplemented its protest of the award to BSS. [Exh. 4] Lindler asserts that:

1. The Work constitutes an “improvement to real property” within the meaning of §40-11-20(8) of the S.C Code of Laws (annotated);

2. The improvements to real property are “general construction” as defined in §40-11-20(8) of the S.C Code of Laws (annotated);
3. The value of the improvement exceeds \$5,000, the threshold established in §40-11-30 of the S.C Code of Laws (annotated) for requiring such work to be performed by a SC licensed contractor;
4. BSS does not possess a SC license to perform General Construction and cannot legally offer to perform or perform, such work, pursuant to §40-11-30.
5. State Regulation 19-445.2125(A) includes, as one element of bidder responsibility, the ability to “legally contract with the State.”

Lindler seeks a determination from the CPOC that by virtue of items 1 through 4, BSS is non-responsible; that the Notice of Intent to Award should be set aside; and that the contract be awarded to Lindler.

RESPONDENT’S POSITION

Clemson set forth its position in two communications. The first is an email dated November 14, 2005, where Mr. Boleman (the Clemson Procurement Director) argues that the requirement for a contractor’s license applies only to work considered to be “construction.” Mr. Boleman further asserted that Clemson does not consider the work to be construction. [Exh. 6] In a letter dated November 22, 2005. [Exh. 7] Clemson stated it considers the Work to be specialized “equipment” that requires on-site assembly and testing by the manufacturer. In material attached to Exh. 7, Clemson states that the scope of supply is limited to the shielded enclosure within an existing room. The general nature of this type of enclosure is described in more detail in Exh. 10.

CPOC FINDINGS

The CPOC requested that two OSE Project Managers investigate and report on the circumstances of this procurement. Their investigation included numerous phone calls and other communications, the collection of written materials and a personal interview with Clemson procurement and end users. After receiving their report and reviewing the relevant documents, the CPOC finds, by the greater weight or preponderance of the evidence, that the position advanced by Lindler is the stronger.

The sole protest issue before the CPOC is whether the work as solicited requires the performer(s) to have some form of South Carolina's contractor's license. Considered in isolation the removable enclosure described in Exh. 10 is arguably not an "other public improvement of any kind to any public real property" within the meaning of §11-35-310(7). This is certainly Clemson's view. While Clemson now wishes to maintain that the scope of the Work is limited to the furnishing and erection of a standard pre-fabricated metal enclosure, the solicitation documents clearly say otherwise.¹

First, the scope of the Work as defined in the specifications includes a fixed fire extinguishing system that employs pressurized tanks of an inerting gas (rather than water) to control fires, presumably to protect the electronic components inside the enclosure. [Exh. 8, ¶12] The intended supplier and installer of this system is Automatic Protection Systems, Inc. ("APS"). The design and installation of fixed fire extinguishing systems is regulated by the Office of State Fire Marshal ("OSFM"). State Regulation 71-8307 governs the licensing requirements for the installation and maintenance of such systems. Regulation 71-8307.4A states in relevant part:

Each firm installing or servicing fixed fire extinguishing systems...shall be licensed.

APS does not possess a license from the OSFM to install or service fixed fire extinguishing systems. BSS does not possess a license from the OSFM to install or service fixed fire extinguishing systems [Exh. 11]². Neither firm can legally offer to perform or perform this aspect of the Work. The lack of appropriate licenses to perform the requested work renders the BSS bid non-responsive.

Second, the scope of the Work as defined in the specifications includes work involving connections to the building electrical, HVAC and fire alarm systems. [chiefly, Exh. 8, ¶¶ 6-9, 11 and 12] Clemson indicated verbally to the CPOC [communication from Mr. Boleman] that it was their intent that Clemson forces would perform the electrical and HVAC work. This intent is not supported by the solicitation specification, which states in paragraph 14:

The chamber provider will provide all materials, tools, and labor for the installation and testing of the chamber and deliver the chamber as a completed

¹ As below, Clemson's now-stated position is not supported by its own characterization of this procurement as "minor construction."

² That BSS and APS are not licensed by SFM was verified telephonically by the Office of State Engineer.

unit. Clemson University will provide storage space for materials and a fork lift for material movements.

The clear language of this paragraph is that the “chamber provider” do all of the work necessary to completely erect the shielded enclosure and make it operational. Any other interpretation (i.e., omitting the cost of this work) would impose a substantial financial risk to a bidder. Whether BSS (or any other bidder) accepted this risk is not relevant. The specifications require the contractor to perform this work. BSS does not possess a South Carolina specialty contractor’s license that allows it to perform electrical, HVAC or fire alarm system work. The lack of appropriate licenses to perform required work renders the BSS bid non-responsive.

Finally, the as-issued specifications were submitted to Mr. Ron Galloway, Executive Director of the South Carolina Contractors’ Licensing Board. Mr. Galloway’s response was unequivocal. His position is that the Work described in the specifications requires a General Contractor’s license to legally bid the work. [Exh. 9] While the CPOC is not formally bound by the interpretations of the Contractors’ Licensing Board (the “CLB”) with respect to procurement matters, the CPOC traditionally gives great weight and deference to the opinions of the CLB in the interpretation and application of the statutes related to contractors’ licensing. In this case, the CPOC sees no reason to disagree with the position taken by Mr. Galloway. The lack of appropriate licenses to perform required work renders the BSS bid non-responsive. Accordingly, Lindler's protest seeking that BSS be declared non-responsive is

GRANTED

During the CPOC’s administrative review, other irregularities came to light. The solicitation was, at Clemson’s request, issued as a “Minor Construction” procurement. This action was improper. “Minor Construction” is limited to work whose total price is under \$25,000, which under the Code, is awarded by a substantially simplified “small purchase” process. [See section 8.4 of the *Manual for Planning and Execution of State Permanent Improvements-Part II*]. The value of this contract exceeded the small purchase limit by several-fold. The CPOC notes other apparent irregularities in the bidding process. For instance, Clemson was unable to provide the CPOC with a tabulation of the bids received or the identity of the individuals who performed and witnessed the bid opening, because “it was not collected.” [Exh. 6] The CPOC finds this entire solicitation process to be fatally flawed by Clemson’s administrative errors in the preparation of ambiguous specifications; by its use of a simplified bidding process legally inapplicable to a contract of this value; by its failure to require and verify appropriate licensure of the bidders; and by its self-

confessed mishandling of the bid opening process. Having previously vacated the Notice of Intent to Award, and pursuant to Regulation 19-445.2065 of the Code, the CPOC hereby orders all bids for Solicitation 5375 rejected.

DECISION

It is the decision of the Chief Procurement Officer for Construction that the bid submitted by Brandon Shielding Systems in response to Clemson University Solicitation 5375 is non-responsive and the Notice of Intent to Award is hereby canceled. Solicitation 5375 is hereby canceled. Clemson University may proceed with a re-solicitation for its intended scope of work only after a review of the revised contract documents by the Office of State Engineer.

Michael M. Thomas

Michael M. Thomas
Chief Procurement Officer
for Construction

December 22, 2005

Date

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4210, 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>

FILING FEE: Pursuant to Proviso 66.1 of the 2004 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." 2004 S.C. Act No. 248, 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).