

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
)
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)
IN THE MATTER OF: BID PROTEST)
STUDENT ACTIVITIES CENTER)
STATE PROJECT H18-9551-RC)
WILKS ROBINSON CONST., INC.)
vs.)
FRANCIS MARION UNIVERSITY)
_____)

**BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION**

DECISION

POSTING DATE: July 19, 2005

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Wilks Robinson Construction, Inc. (“WRC”) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code (“the Code”), for an administrative review on the Student Activities Center project (“the Project”) for Francis Marion University (“FMU”). Pursuant to §11-35-4210(3) of the Code, the CPOC evaluated the issues for potential resolution by mutual agreement and requested the OSE Project Manager to discuss the applicable law and processes with WRC, in an attempt to resolve the protest. This effort failed and a decision is issued without a formal hearing after a thorough review of the bidding documents and the applicable law.

NATURE OF THE PROTEST

WRC submitted a bid for the construction of the Project. After opening and reviewing the bids, FMU declared WRC’s bid non-responsible for failure of have a current licensing to perform specialty roofing at the time WRC submitted a bid to perform such work. WRC protests FMU’s declaration

FINDINGS OF FACT

1. On June 2, 2005 FMU issued Addendum 1 to the Bidding Documents, which required, among other items, that the bidders provide a membrane roof over a portion of the structure. [Exh. 1]
2. On June 8, 2005 FMU received and opened bids for the construction of the Project.
3. Bids were received using the State’s SE-330, Bid Form. This form included the requirement for bidder’s to identify the performer(s) of the roofing work for the Project.

4. WRC submitted a bid for the construction of the Project, using form SE-330. [Exh. 2]
5. On page BF-1 of the Bid Form, WRC acknowledged receipt of Addendum 1 to the Bidding Documents.
6. On page BF-2 of the Bid Form, WRC listed itself as the performer of the Project roofing work.
7. On June 17, 2005 FMU notified WRC that FMU had determined WRC's bid to be non-responsible and that their bid was rejected. [Exh. 3]
8. On June 21, 2005 WRC protested FMU's rejection to the State Engineer. [Exh. 4]

DISCUSSION

PROTESTANT'S POSITION

WRC's initial protest asserted that WRC had complied with the project requirements as stated on the Bid Form, and more specifically, WRC had listed all primary subcontractors. WRC contended that the listing of a "subcontractor specialty" was not required on the Bid Form and that any errors were minor informalities, subject to correction or waiver. In support of this final argument, WRC cited section 6.14 of the *Manual for Planning and Execution of State Permanent Improvements—Part II*.

Subsequent to discussions with the OSE Project Manager, WRC submitted additional argument. [Exh. 5] WRC argued that the value of the membrane roofing, estimated to be "in the ballpark of \$6,000" was *de minimus* relative to the value of the remainder of the roofing, and further, since only one space in the Bid Form was provided for roofing, they complied with the bidding requirements.

RESPONDENT'S POSITION

FMU's position is clearly stated in Exh. 3. As support for that decision FMU provided a memorandum from Mr. R. Michael Parrott, the FMU project manager, to Mr. Jeff Sherer, a representative of the design firm. [Exh. 6]. This memorandum directs Mr. Sherer to estimate the cost of the roofing work in question. In response, Mr. Parrot received a memorandum from Ms. Jumaane Torrence, who established an estimate of \$6,600 to \$7,900 for the membrane roofing. [Exh. 7]

CPOC FINDINGS

FMU has made a determination of non-responsibility. Such determinations are subject to review under the standards established in §11-35-2410 of the Code, which states in relevant part:

The determinations required by...Section 11-35-1810(2) (Responsibility of Bidders and Offerors, Determination of Nonresponsibility)...shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.

The statutory standard of review sets a high bar for any protestant, and WRC has failed to meet its burden of proof.

- The Bidding Documents included the requirement for a membrane roof over a portion of the building. WRC does not contest this.
- The installation of membrane roofing requires a specialty license from the Contractor's Licensing Board, if the value of such roofing exceeds \$5,000.

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter. §40-11-30 of the SC Code, 1976 Ann.

WRC does not have a license to install membrane roofing whose value exceeds \$5,000. [Exh. 6, Parrott conversation with Mr. Ron Galloway, Executive Director, SC Contractor's Licensing Board]

- The value of the membrane roofing for the Project exceeded \$5,000. [Exh. 7] WRC, in effect concedes this point by maintaining it did not intend to self-perform the membrane roofing work. [Exh. 5]
- WRC listed itself on the Bid Form as the sole performer of all roofing work for the Project, including the membrane roofing. [Exh. 2]
- The ability to legally perform work is one required element in the determination of responsibility as set forth in SC Regulation 19-445.2125A(4).

The CPOC finds that Francis Marion has made a determination of responsibility as required by law and that the determination is not clearly erroneous, arbitrary, capricious, or contrary to law. Accordingly,

PROTEST DENIED

DECISION

It is the decision of the Chief Procurement Officer for Construction that the protest of Wilks Robinson Construction, Inc. is denied and that Francis Marion University may proceed with the award of the contract for construction to the lowest responsive and responsible bidder, consistent with its programmatic needs.

Michael M. Thomas

Michael M. Thomas
Chief Procurement Officer
for Construction

July 19, 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).