

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE CHIEF PROCUREMENT)
OFFICER FOR CONSTRUCTION)

IN THE MATTER OF:)
BID WITHDRAWAL)
AND CANCELLATION OF AWARD)

DETERMINATION

CLEMSON UNIVERSITY)
INSTITUTE OF PACKAGING DESIGN)
& GRAPHICS)
STATE PROJECT H12-9849-GW)

CASE NO. 2008-003B

POSTING DATE:
NOVEMBER 16, 2007

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from THS Constructors, Inc. (THS) under the provisions SC Code Ann §11-35-1520(7) and SC Regulation 19-445.2085(A) to withdraw its bid on the Institute of Packaging Design & Graphics Bid ("the Project") for Clemson University (Clemson). Because Clemson has posted a Notice of Intent to Award a contract to THS, any decision to allow THS to withdraw its bid will necessarily require a determination pursuant to Regulation 19-445.2085(C)(8) that cancellation of the award is clearly in the best interest of the State.

CPOC FINDINGS

On August 23, 2007, Clemson advertised for bids to construct the Institute of Packaging Design and Graphics (the project). Clemson's solicitation required each bidder to list on their bids the subcontractors they would use for the heating, ventilation, and air conditioning (HVAC) work and for the plumbing work. On September 18, 2007, Clemson opened bids for construction of the Project. THS submitted the low bid and Melloul-Blamey submitted the second low bid.

THS listed Southern Piping Co. (Southern) on the line in its bid for listing the HVAC subcontractor and on the line in its bid for listing the plumbing subcontractor. On September 20, 2007, prior to the award, THS e-mailed Clemson's project manager, Mr.

Paul Borick, a letter requesting permission to substitute replacement subcontractors for Southern for both the HVAC and the plumbing under three provisions of the Consolidated Procurement Code:

1) Section 11-35-3020(2)(b)(iii)(bb), which allows substitution "upon a showing satisfactory to the using agency by the contractor that the scope of work bid by a listed subcontractor did not include a portion of the work required in the plans and specifications, and *the exclusion is not clearly set forth in the listed subcontractor's original bid . . .*;"

2) Section 11-35-3020(2)(b)(iii)(cc), which allows substitution "upon a showing satisfactory to the using agency by the contractor that within four working days of the bid opening that the subcontractor was listed as a result of inadvertent clerical error;" and

3) Section 11-35-3020(2)(b)(iii)(hh), which allows substitution "upon mutual agreement of the contractor and subcontractor."

In support of its request, THS stated that it listed Southern in its bid for both the HVAC and the plumbing because it thought Southern's bid day quote included both HVAC and Plumbing. THS further stated that after the bid opening, it was advised that Southern's quote included only the HVAC work, not the plumbing. THS's request identified proposed substitute subcontractors, subcontractors that had submitted bids to THS on bid day. Clemson took no formal action on THS's request.

On September 21, 2007, Clemson posted a Notice of Intent to Award a contract to THS. On September 28, 2007, Melloul-Blamey's attorney, Mr. John T. Crawford, Jr., mailed a letter to Mr. Borick, protesting Clemson's award to THS. Melloul-Blamey protested the award on the grounds that THS's bid was non-responsive. Melloul-Blamey contended that THS's listed subcontractor for both HVAC and plumbing, Southern, did not bid or intend to perform the plumbing. Melloul-Blamey also argued that THS should not be allowed to provide substitute subcontractors to Southern for either the HVAC or the plumbing and that to do so will promote bid shopping, the very thing the subcontractor listing requirement in the procurement code is intended to prevent.

On October 29, 2007, pursuant to S.C. Code Ann. §11-35-4210(4) (Supp. 2006), the CPOC conducted an administrative review by hearing. Evidence presented at the hearing showed that Southern did not bid plumbing, THS mistakenly believed that Southern's bid included plumbing and as a result of this mistake, THS used Southern's HVAC bid price as its price for both HVAC and plumbing, and listed Southern as its subcontractor for both the HVAC and plumbing work.

On November 8, 2007, the CPOC posted his decisions denying Melloul-Blamey's protest on the merits. However, in footnote three to the decision, the CPOC noted that Clemson could not properly grant THS's request to make a substitution.¹ On November 12, 2007, Clemson sent THS a letter denying its request for substitution, presenting THS with the decision to either honor its bid as submitted or request permission to withdraw its bid as inadvertently erroneous. On November 15, 2007, THS submitted to Clemson's procurement officer a request to withdraw its bid pursuant to SC Code § 11-35-1520(7) and SC Regulation 19-448.2085. A copy of this letter is attached as Exhibit "A".² THS's request contains facts supporting its request that are consistent with the testimony and evidence presented at the hearing.

DETERMINATION

After award but before performance, a bidder may only withdraw an inadvertently erroneous bid upon a written determination by the appropriate chief procurement officer (CPO) that under the facts withdrawal is appropriate and that cancellation of award is

¹ THS has complained that the CPOC's decision strongly suggests that THS intentionally shopped bids. The CPOC disagrees with THS regarding any such inference. To be clear, the evidence and testimony at the hearing did not in any way support any suggestion that THS shopped bids, intended to shop bids, or intended to violate the Procurement Code nor does the CPOC believe that THS intended to do any of these things. To the contrary, the evidence showed and the CPOC believes that THS made an honest mistake and tried to resolve its mistake through means it (apparently at the suggestion of others whose authority it had reason to accept) believed to be appropriate under the Procurement Code. Unfortunately for THS, its honesty, motives, and intent were not relevant to resolution of the issue being discussed in footnote three of the decision.

² In the opening sentence of the last paragraph on page four of the letter, THS suggest that it has had previous conversations with the CPOC and John McEntire, Clemson's representative, concerning withdrawal of its bid on whether or not Clemson would make a claim on its bid bond. While THS may have had such conversations with Clemson, they have not had such conversations with the CPOC. The CPOC has made no prior representations, direct or indirect, to either Clemson or THS regarding whether the facts of this case support withdrawal of THS's bid without forfeiture of the bid bond.

clearly in the best interest of the State. SC Code Ann § 11-35-1520(7); SC Regulation 19-445.2085(A) and (C)(8).

Section 11-35-1520(7) states in part that:

“withdrawal of inadvertently erroneous bids after award... but before performance, may be permitted in accordance with regulations promulgated by the board. ... Except as otherwise provided by regulation, all decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts, after award but before performance, must be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency.”

In accordance with Section 11-35-1520(7), the board adopted Regulation 19-445.2085. Regulation 19-445.2085(A) states that:

“A bidder or offeror must submit in writing a request to either correct or withdraw a bid to the procurement officer. Each written request must document the fact that the bidder’s or offeror’s mistake is clearly an error that will cause him substantial loss. All decisions to permit the correction or withdrawal of bids shall be supported by a written determination of appropriateness made by the chief procurement officers or head of a purchasing agency, or the designee of either.”

Section 11-35-1520(7) requires a bid to be “inadvertently erroneous” in order to withdraw the bid after award. Inadvertent means “1. Not duly attentive, 2. Accidental; unintentional.” *The American Heritage Dictionary*, Second College Edition (1985). Error means “1. An act, assertion, or belief that unintentionally deviates from what is correct, right, or true... 4. A mistake. *Id.* These two terms describe THS’s circumstances. In the rush of preparing its bid, THS misinterpreted Southern’s proposal to include plumbing despite the fact that Southern’s proposal clearly indicated otherwise. As a result of its inattention in reading Southern’s proposal, THS listed Southern for both HVAC and plumbing. Regulation 19-445.2085(A) further requires the bidder’s error to be one that will cause the bidder “substantial loss.” Here, THS’s mistake will cost THS in excess of \$200,000.³

³ None of the other five bidders listed Southern for either HVAC or plumbing. Four of the five other bidders listed Benjamin’s Heating & Air for HVAC and all five listed Sareault Plumbing for the plumbing. Both of these subcontractors provided bid day proposals to THS. Sareault proposed to perform the plumbing work for \$206,469.72. Southern’s proposed to perform only the HVAC work for \$959,000.00. Thus, to add plumbing to Southern’s bid would add over \$200,000 to THS’s cost.

In a bid mistake case, the United States District Court for the District of South Carolina held that “A contract may be rescinded for unilateral mistake... when the mistake is accompanied by circumstances which would make it a great wrong to enforce the agreement and the nonmistaken party may be returned to the *status quo ante*.” National Fire Insurance Company of Hartford v. Brown & Martin, 726 F. Supp 1036, 1039 (D.S.C. 1989), affirmed 907 F.2d 1139 (4th Cir. 1990). While the Court’s holding was based on common law, not statutory and regulatory law, the Court relied on the fact that the contractor would suffer a substantial loss if it was not allowed to withdraw its bid after award but before performance.⁴ The Court in Brown & Martin also held that under such circumstances, the contractor could withdraw its bid without forfeiting its bid bond. In this case, Clemson has not detrimentally changed its position in reliance on THS’s bid. Upon withdrawal of the bid and cancellation of the award, Clemson will be in the exact same position it was in before posting the Notice of Intent to Award. On the other hand, to require THS to honor its mistaken bid (including using Southern for both HVAC and plumbing) will cause THS substantial loss. Under the circumstances, it is appropriate to allow THS to withdraw its bid without forfeiting its bid bond.

Cancellation of award pursuant to Regulation 19-445.2085(C)(8) is appropriate when it is legally proper to allow the contractor to withdraw its bid as inadvertently erroneous. The withdrawal essentially renders the award null and void since there is no longer a bid on which to make an award. Moreover, cancellation of award will allow Clemson to proceed with award to the next lowest responsive and responsible bidder in a timely manner. The CPOC notes that Clemson is receiving pressure from a donor who has agreed to make a substantial donation to this project contingent on meeting certain deadlines. While the agreement contemplates delays resulting from State Procedures, there is some risk that the donor might become dissatisfied with the extent of delay and decide to withdraw his donation. A loss of this donation would be a major detriment to this project. Under the circumstances, it is in the best interest of the State to cancel the Notice of Intent to Award.

⁴ Brown & Martin made a \$68,900 mistake in submitting a low bid of \$588,912.

For the foregoing reasons, the CPOC hereby determines that it is appropriate to allow THS to withdraw its bid as inadvertently erroneous without forfeiting its bid bond and to cancel the Notice of Intent to Award a Contract to THS.


John St. C. White, P.E.
Chief Procurement Officer for Construction

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4410, subsection (1)(b) states:

(1) Creation. There is hereby created the South Carolina Procurement Review Panel which shall be charged with the responsibility to review and determine de novo:

(b) requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures.

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



VIA E-MAIL
VIA FACSIMILE
VIA CERTIFIED MAIL

pborick@clemson.edu
864-656-0167

November 15, 2007

Mr. Paul Borick
Project Manager
Construction Services
Clemson University
Gentry Hall
Clemson, SC 29634-5952

Re: Institute of Packaging Design and Graphics Construction Project
State Project No. H12-9849-GW
Withdrawal of Bid

Dear Mr. Borick:

We are in receipt of the November 12, 2007 letter from Clemson University that was signed by John McEntire for Mr. Copeland. In that letter, we are advised that the request for substitution of subcontractors contained in our September 20, 2007 that requested the substitution of the HVAC and plumbing subcontractor listed in our bid was denied based upon the State Engineer's decision in the matter of the bid protest of Melloul-Blamey Construction SC, Ltd. (Case No. 2008-003) issued on November 8th. In Mr. Copeland's letter, it was requested that we consider our options as directed by the State Engineer's decision and advise you by noon on November 16th. The purpose of this letter is to advise you and the State Engineer of our decision.

The State Engineer's decision stated that THS Constructors had two choices under the circumstances: either (1) to honor the bid as submitted without any substitution for the HVAC and plumbing subcontractor that was listed in our bid or (2) request permission to withdraw the bid. As a result of the events that occurred after bid opening, THS is no longer in a position to be able to honor the bid as submitted because the Southern Piping proposal was withdrawn on September 20th and Southern Piping will not perform the HVAC or the plumbing for this project. As a result, the purpose of this letter is to request permission to withdraw the bid in accordance with South Carolina Code § 11-35-1520(7) and South Carolina Code Ann. Regulation 19-445-2085 for the reasons cited in this letter.

As you know, THS Constructors submitted a bid on September 18, 2007 in the amount of \$5,045,000.00 for the construction of this project. In bid document, we listed Southern Piping for both the plumbing and the mechanical as shown on Page BF-2 of the bid form. As you know

THS Constructors, Incorporated

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from conversations that we had shortly after the bid opening and from the testimony that was given at the bid protest hearing, we discovered after the bids were submitted to Clemson that Southern Piping apparently had not intended to include plumbing in its proposal. We then advised you in our September 20, 2007 letter that our estimator had interpreted Southern Piping's proposal to include both the plumbing and the HVAC work for the project and that we did not determine that it was not Southern Piping's intent to only perform the HVAC until after the bids were submitted.

Although we still feel that our interpretation of the Southern Piping proposal was reasonable under the circumstances, we can also understand why someone else might consider that an error on our part. This error was clearly inadvertent and resulted from several different factors. First, there was a relatively small amount of time in which to evaluate the mechanical and plumbing bids prior to a submission of the overall bid for the project which occurred at 2:00 p.m. on September 18, 2007. As shown during the bid protest hearing, the bids for the HVAC and plumbing were received only minutes before the time that the bids had to be submitted to Clemson. All of these bids were received by fax. Southern Piping's bid was received at approximately 1:12 p.m., Benjamin Heating & Cooling's bid was received at approximately 1:15 p.m. and Sareault Plumbing's bid was not received until 1:39 p.m. Keep in mind these are the times shown on the fax copies of these bids but as Tony Warren testified, there was some time delay between the times shown on the faxes and the time that he received them for review. Mr. Warren only had a few minutes prior to submitting the bid to Clemson in which to not only review and analyze the bids for the HVAC and plumbing but also to review other bids for other trades. In those last few minutes prior to bid time, Mr. Warren came to the conclusion that Southern Piping had submitted bids for both the HVAC and plumbing.

Mr. Warren came to this conclusion for several reasons. First, the Southern Piping bid form indicated that all site utilities were excluded except for plumbing out to 5 feet beyond the perimeter of the building. Second, Southern Piping's bid was \$959,000.00 which was approximately \$184,464.00 higher than the bid submitted by Benjamin for HVAC only. If Mr. Warren had recognized that the Southern Piping bid was only for the HVAC portion of the work, he certainly would have used the Benjamin Heating & Cooling bid rather than the Southern Piping bid. Third, the Southern Piping bid was just about the same amount as the combination of the Benjamin Heating & Cooling bid for HVAC and the Sareault Plumbing bid for plumbing. If you compare the Southern Piping bid amount of \$959,000.00 with the combined price of Benjamin and Sareault for both HVAC and plumbing of \$962,205.00, then the combined price of Benjamin and Sareault was only \$3,205.00 higher than what Mr. Warren thought the Southern Piping figure would have been for both HVAC and plumbing. Obviously, if Mr. Warren had thought that the Southern Piping bid was for HVAC only, he would have never listed Southern Piping for both plumbing and mechanical.

As was pointed out during the bid protest hearing, if you look at the bid tabulation sheet that was prepared by Clemson, it is clear that there had to be some type of clerical or inadvertent error or mistake on the part of THS Constructors. This is illustrated, in part, by the fact that all five of the other general contractors who submitted bids listed Sareault Plumbing for the plumbing category and four out of the other five listed Benjamin's Heating & Air for the mechanical portion of the project. No other general contractor listed Southern Piping for either

plumbing or mechanical in their bid documents. If this were error on the part of THS, then it is our opinion that it was clerical error but in any case if it were error, it was inadvertent in this case.

Shortly after the bid opening, THS did contact Southern Piping to try and verify that their proposal included both HVAC and plumbing. Southern Piping then advised that it was their intention that their proposal was only to cover the HVAC portion of the project. Southern Piping also admitted to THS that their proposal could be misinterpreted to include plumbing. After THS learned of the error that occurred in either Southern Piping's proposal or THS's interpretation of the proposal, we immediately contacted you and Mr. McEntire to advise that a mistake had occurred for the reasons that I described in this letter. At that point in time, it is my understanding that either you or someone else from Clemson contacted the State Engineer's office to determine if there was some means available under the procurement code for substituting subcontractors where an error like this occurs. The directions received from the State Engineer's office were to submit the letter that THS sent on September 20, 2007 requesting the substitution of Benjamin's Heating & Cooling for the HVAC portion and Sareault Plumbing for the plumbing portion of the work in lieu of using Southern Piping.

We did receive indications that these substitutions would be approved but we were also advised that we would have to have a written withdrawal from Southern Piping of its bid before the substitution would be approved. In addition, we were also advised that the State Engineer's office was insisting that Southern Piping's bid be withdrawn before that office would authorize the issuance of the Notice of Intent to Award the contract. In compliance with this request, we did follow through and obtained the agreement of Southern Piping to withdraw its bid because of the mistake or misinterpretation and that was completed by the afternoon of September 20, 2007. The notice of intent to award was issued the day after we provided you with a copy of the letter agreement from Southern Piping withdrawing their bid.

Under the circumstances we were quite surprised and disappointed to learn that the State Engineer decided that substitution that we requested was not allowable in this case. This is particularly disturbing since THS was indirectly taking directions from the State Engineer's office on how to comply with the requirements under the procurement code for substituting the subcontractors under the circumstances. What we find somewhat frustrating is the fact that now the State Engineer is taking the position that even though we followed their directions that somehow we violated the procurement code in trying to make the substitutions. In essence, we were told to make the request for substitutions prior to the Notice of Intent to Award being issued and the State Engineer's decision now says that we should have not made the request until after the Notice was issued or until after the contract was actually awarded. We feel that we followed the directions that we were provided in trying to comply with the procurement code and now we are being told that those directions from the State Engineer's office were wrong.

Although, it has nothing to do with our request to withdraw our bid, we also take strong exception to inferences in the State Engineer's decision implying that THS was involved in any bid shopping on this project. There is no evidence to support that kind of statement or implication and we take great offence to it.

In any case, as a result of following the directions from the State Engineer's office, we are no longer in a position to use Southern Piping to do the HVAC and plumbing work for this project. As you know, THS allowed Southern Piping withdraw its bid on September 20, 2007 as we had been instructed to do. We have recently contacted Southern Piping and they are not interested in performing the HVAC or the plumbing for this project. As a result, THS does not have either a bid for HVAC or plumbing at this point in time that it can accept from Southern Piping which makes it impossible for THS Constructors to perform the contract using the subcontractor listed in our bid for the mechanical and plumbing portions of the project.

Even if Southern Piping would agree to perform the HVAC for its original bid and then agree to perform the plumbing, we have no idea how much Southern Piping's price for the plumbing on this project would be. Therefore, it is impossible at this point in time to determine whether THS could even do the job without being allowed to substitute the listed subcontractor. However, if Southern Piping were to perform the plumbing work at the same price that was submitted by Sareault Plumbing of \$206,469.72, then THS would start out in a negative financial position on this project from the very outset and would undoubtedly sustain a significant financial loss.

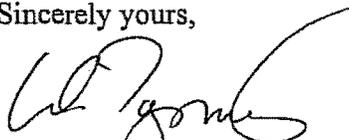
The State Engineer's decision cited a court decision in the case of National Fire Ins. Co. of Hartford v. Brown and Martin Co as a case to look at to determine whether there is sufficient cause to allow withdrawal of the bid. In that case, the court held that under South Carolina law that a contractor is entitled to withdraw its bid without any penalty where: (1) the error is so substantial that enforcement would work a great wrong and (2) notice was given before the mistaken party has substantially changed its position. In this case, the events that have transpired have made it impossible for THS to have Southern Piping perform the HVAC and plumbing for this project since the State Engineer's office insisted on the withdrawal of Southern Piping's bid. Even if Southern Piping was willing to perform the HVAC and plumbing, then THS would incur substantial financial losses on the project if it were forced to Southern Piping. The second criteria allowing for the withdrawal of a bid under the National Fire case is also satisfied in that THS immediately notified Clemson University of the mistake and then proceeded to follow the directions the State Engineer's office which ultimately were apparently wrong according to the recent decision of the State Engineer. In any case, the bids for all the other general contractors are still effective and there is nothing preventing Clemson from issuing a contract to one of the other five general contractors who submitted bids for this project and proceeding on with the project.

It is our understanding from our conversations with both you and John McEntire that if THS decide to withdraw its bid that the 5% bid bond would be returned to THS and that Clemson University would not make any claim against the bid bond. We obviously feel that this is the fair thing to do in light of the inadvertent error that occurred in connection with listing Southern Piping in our bid and the untenable position of not being able to get Southern Piping to do either the HVAC or the plumbing as a result of the requirement to have their bid withdrawn. It is unfortunate that it now appears that both Clemson University and THS Constructors will suffer as a result of the events that have taken place. Although we do not agree with the State Engineer's decision, we have decided not to appeal that decision primarily because we feel that the potential costs associated with appealing the decision would be disproportionate to any

benefit that we might otherwise receive. We have also decided not to appeal the decision since that appeal process might also result in the project being delayed which would not be in Clemson University's best interest either.

If you have any questions with regard to this request to withdraw the bid on this project, please do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'W. Tony Masters', written in a cursive style.

W. Tony Masters
Director of Purchasing

cc: Mr. T. Howard Suitt
Mr. John St. C. White
Mr. Gary Wolford
Keith C. McCook
Robert A. deHoll