

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
))
))
IN THE MATTER OF: BID PROTEST)
))
HENDRICK CONSTRUCTION, INC.)
))
V.)
))
COLLEGE OF CHARLESTON)
))
GRICE MARINE LABORATORY)
COMPLEX STRUCTURAL & ENVELOPE)
REPAIR)
PROJECT H15-9645-PG)
_____)

**BEFORE THE CHIEF PROCUREMENT
OFFICER FOR CONSTRUCTION**

DECISION

CASE NO. 2013-004

**POSTING DATE:
SEPTEMBER 21, 2012**

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Hendrick Construction, Inc. (Hendrick), under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on the Grice Marine Laboratory Complex Structural and Envelope Repair bid (“the Project”) for the College of Charleston (the College). Hendrick protests the College’s posting of a Notice of Intent to Award a contract to NBM Construction Company, Inc. (NBM). Pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review. This decision is based on the evidence and applicable law and precedents.

NATURE OF THE PROTEST

A copy of Hendrick’s protest letter is incorporated herein by reference and attached hereto as Exhibit A.

RELEVANT FACTS

1. The College advertised for bids for the project on August 2, 2012. [Ex. B]
2. The general description of work on the bid form included in the solicitation stated, “Base Bid work includes structural repairs/modifications, removal and reinstallation/replacement of mechanical, electrical, and plumbing work...” [Ex. C]
3. The bid form included in the solicitation required bidders to list subcontractors they would use on the project to perform the work requiring a contractor’s license with 1) a Mechanical classification, 2) an

Electrical subclassification, and 3) a Plumbing subclassification. [Ex. C] Electrical and Plumbing are subclassifications of the Mechanical classification. S.C. Code Ann. § 40-11-410(5).

4. The plans and specifications do not include any work requiring a contractor's license with a Mechanical classification other than work falling within the scope of the Electrical and Plumbing subclassifications.¹ [Ex. D]

5. Addendum Number 1 included answers to questions asked at the pre-bid meeting. [Ex. E] This Addendum reflects that bidders asked several questions concerning the scope of work as it relates to the listing for specialty subcontractors. These questions and answers as they appear in this Addendum are as follows:

5. Q. Is any mechanical/electrical/plumbing work required on the interior of the 1930's building?

A. Yes.

34. Q. It appears that the 1930's building is heated and cooled by window units. Are any modifications occurring to the air conditioning and heating system?

A. No modifications to the HVAC system are included in this scope.

6. By the time for receipt of bids, College received seven bids. [Ex. F]

7. On the line in its bid for listing the licensed subcontractor it intended to use to perform that portion of the work requiring a contractor's license with the "Mechanical" classification, Hendrix listed "N/A". Two other bidders also listed "N/A" on this line in their bid, one bidder left this line blank, and one bidder listed "None". Only two bidders listed a licensed contractor on this line in their bids. [Ex. C and Ex. G]

8. Hendrick submitted the apparent low bid but the College determined Hendrick's bid to be nonresponsive because Hendrick inserted "N/A" in the space for listing the subcontractor to perform the

¹ This is supported by a document submitted by the project engineer to the CPOC in response to this protest. [Ex. J] While this document argues in support of the intended award, it also notes that other than Electrical and Plumbing, there is no Mechanical work in the project that requires a license. Specifically this note states there is mechanical demolition and possibly some minor replacement. However, the plans and specifications only indicate demolition of heating system hot water piping with no indication of Air Conditioning, Heating, Packaged Equipment, Lightning Protection Systems, Pressure and Process Piping, or Refrigeration systems repair, replacement, or work. Nonetheless, ADC's document states that the total cost for demolition and minor replacement of these systems is less than \$5,000. Neither demolition nor Mechanical type work under \$5,000 requires a contractor's license.

scope of work in the Project requiring a contractor's license classification of Mechanical.² [Ex. C and Ex. H³]

9. On August 28, 2012, the College posted a Notice of Intent to Award a contract to NBM. [Ex. I]⁴

DISCUSSION

By listing Mechanical as a subcontractor specialty on the bid form, the College required bidders to list the subcontractor they intended to use to perform the work requiring a contractor's license with a Mechanical classification. At issue in this solicitation is whether Hendrick, by inserting "N/A" into the space for listing a subcontractor to perform this work, submitted a responsive bid.

A responsive bidder is a bidder "who has submitted a bid ... which conforms in all material aspects to the invitation for bids." S.C. Code Ann. § 11-35-1410(7). The Consolidated Procurement Code (Code) mandates the subcontractors listing requirements of the bid form and this requirement is therefore, a material requirement of the invitation for bids. S.C. Code Ann. § 11-35-3020(b). The Code states that a bidder's "[f]ailure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive." S.C. Code Ann. § 11-35-3020(b)(ii). A bid will also be unresponsive if it is contrary to the purpose of the subcontractor listing provisions of the Code, which is to prevent bid shopping after bid opening. *Ray Bell Construction Company, Inc. v. The School District of Greenville County*, 331 S.C. 19, 501 S.E.2d 725 (1998). Therefore, if a bidder completes the list provided in the invitation for bids in such a manner as to allow him to shop subcontractor bids after bid opening, his bid is nonresponsive. *Id* at 731.

In South Carolina, the Mechanical Contractors license is a license classification that encompasses several subclassifications. S.C. Code Ann. § 40-11-410(5). A contractor's license does not just have a Mechanical classification. His license always includes the various Mechanical subclassifications for which he is licensed. For example, one of the bidders determined to be nonresponsive listed Triad Mechanical Contractors, Inc., for the portion of the work requiring a Plumbing license. Triad's license has a Mechanical classification with the subclassifications of Air Conditioning, Heating, and Plumbing. [Ex. K]

² The College determined all but two bids to be nonresponsive.

³ The College submitted two bid tabulations to the CPOC. Exhibit H is an unsigned bid tab indicating Hendrick and four other bidders were nonresponsive. Ex. I is the official signed bid tab (signed five days after bid opening) which does not indicate that any bidder is nonresponsive.

⁴ This Notice does not include a posting date in the space provided on the form to do so. It is not clear if the mailed notice included the posting date as required by S.C. Code Ann § 11-35-3020(c). The CPOC had to determine the posting date through enquiries into the facts.

There are other subclassifications within the Mechanical classification which are not included on Triad's license and Triad may not perform work within the scope of these subclassifications.⁵

An examination of the invitation for bids reveals that the scope of work for the project includes electrical and plumbing work falling under the Mechanical subclassifications of Electrical and Plumbing but does not include work falling under any other subclassification of Mechanical. Furthermore, the invitation for bids, in addition to a listing requirement for Mechanical, includes a separate listing requirement for the subclassifications of Electrical and Plumbing. If the term "Mechanical" as it appears under the subcontractor listing requirement of the bid form, means work coming under the Mechanical classification within the scope of the Project, this work can only be Electrical and Plumbing and the listing requirement is redundant. The only other possible interpretation, is that the bid form requires bidders to list a subcontractor to perform work that is not in the Project. Certainly, the College did not intend bidders to list their licensed Electrical and Plumbing contractors twice. Therefore, it is apparent that the Mechanical listing requirement is a listing for work that is not within the scope of the Project.

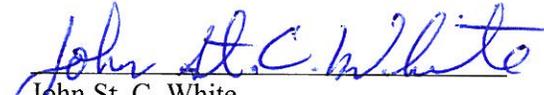
Based on the foregoing, the CPOC finds that Hendrick, by inserting "N/A" into the space provided for the Mechanical listing complied with the requirement of law that he "complete the list provided in the invitation for bids." The CPOC further finds that the scope of work for the Project does not include work falling under the Mechanical classification other than work covered by the other subcontractor listing requirements of Electrical and Plumbing also found on the bid form. Hendrick's bid is responsive to the listing requirements for Electrical and Plumbing. Because there is no other Mechanical work to shop bids over, Hendrick's listing for Mechanical does not promote bid shopping. Therefore, with respect to the subcontractor listing requirements of the invitation for bids, Hendrick's bid is responsive.⁶

⁵ The subclassifications under the Mechanical Classification are Air Conditioning, Heating, Packaged Equipment, Electrical, Lightning Protection, Plumbing, Pressure and Process Piping, and Refrigeration.

⁶ While not at issue in this protest, the CPOC notes that at least with respect to Mechanical work other than that requiring a subclassification of Electrical or Plumbing, Hendrick is a responsible bidder. Responsibility is the ability to perform the work within the scope of the project. See S.C. Regs. 19-445-2125. Work outside the scope of the project is not proper factor for determining responsibility.

DETERMINATION

Hendrick submitted a bid responsive to the subcontractor listing requirements of the invitation for bids and Code. The protest is therefore granted and this matter is remanded to the College of Charleston to award in accordance with the requirements of the Code.



John St. C. White

Chief Procurement Officer
For Construction



Date

Columbia, South Carolina

EXHIBIT LIST

Hendrick Construction v. College of Charleston Case NO. 2013-004

EXHIBITS

Exhibit A – Protest letter

Exhibit B – SCBO Ad.

Exhibit C – Hendrick Bid

Exhibit D,01 – Grice Project Manual

Exhibit D, 02 – Grice Drawings

Exhibit E – Addendum Number 1

Exhibit F – Executed Bid Tabulation

Exhibit G, 01 – BID Carolina Restoration and Waterproofing

Exhibit G, 02 – BID Linden Construction

Exhibit G, 03 – BID Midwest Maintenance

Exhibit G, 04 – BID NBM

Exhibit G, 05 – BID Palmetto Construction

Exhibit G, 06 – BID Strickland Waterproofing

Exhibit H – College Notated Bid Tab

Exhibit I – Intent to Award

Exhibit J – ADC Response to Protest

Exhibit K – Triad License

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised July 2012)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.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 83.1 of the 2012 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...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 financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, an incorporated 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).

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1105 Pendleton Street, Suite 202, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.