STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION**
IN THE MATTER OF: BID PROTEST	)	**DECISION**
MONROE CONSTRUCTION COMPANY	)	**CASE NO. 2011-011**
v.	)	
UNIVERSITY OF SOUTH CAROLINA	)	**POSTING DATE: FEBRUARY 14, 2011**
HORIZON 1 FIRST FLOOR LABORATORY UPFIT STATE PROJECT NO. H27-6071-LC	)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request by Monroe Construction Company (Monroe), under the provisions of section 11-35-4210 of the South Carolina Consolidated Procurement Code (Code), for an administrative review of the Horizon 1 First Floor Laboratory Upfit bid (the Project), for the University of South Carolina (USC). On January 27, 2011, pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review by hearing. At the hearing, attorneys D. Ryan McCabe and Katherine B. Barroll represented Monroe, attorney Boyd B. Nicholson, Jr., represented Rodgers Builders, Inc. (Rodgers), and attorney George W. Lampl, III represented USC. Appearing as witnesses were Eric Monroe, Monroe's President, Frank Kerr, estimator for Monroe, Terry Horomanski, Rodgers' Senior Vice President for Construction Operations, Thomas N. Opal, Senior Project Manager for USC, Kay Keilser, Procurement Specialist/Contract Administrator for USC, Lind Jackson, Contract Administrator for USC, and Regina R. Floyd, architect with Watson Tate Savory Liollio. During the hearing, the CPOC received Exhibits 1 through 11 into evidence, heard oral arguments, and took testimony from all parties. This decision is based on the testimony and evidence presented at the hearing and applicable law.

NATURE OF THE PROTEST

Monroe's statement of protest is attached as Exhibit A and incorporated herein by reference.

FINDINGS OF FACT

The following dates and facts are relevant to the protest:

1. On September 13, 2010, USC advertised for bids to construct the Project. [Hearing Ex. 2] Pursuant to this advertisement, bidders were to submit their bids on or before October 12, 2010. The date for receipt of bids was subsequently changed by addenda to October 19, 2010. [Hearing Ex. 5]

2. The solicitation documents and bid form provided for two base bids. [Hearing Ex. 3]

3. Pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(i), the bid form included in the solicitation documents required bidders to list for each base bid the mechanical, plumbing, and electrical subcontractors they intended to use on the project. [Hearing Ex. 3]

4. By the time for receipt of bids, USC had received nineteen bids. [Hearing Ex. 6]

5. Rodgers submitted a low bid of $3,149,000 for base bid two. Monroe submitted the third low bid of $3,230,000 for base bid two.[1] [Hearing Ex. 6]

6. On December 3, 3010, USC posted a Notice of Intent to Award a contract to Rodgers for base bid two. [Hearing Ex. 7]

7. On December 13, 2010, Monroe protested USC's Notice of Intent to Award a contract to Rodgers because Rodgers' listed plumbing subcontractor, Hill Plumbing and Electric Company, Inc. (Hill) was not a licensed pressure and process piping contractor.

MOTIONS

At the beginning of the hearing and again at the close of Monroe's case-in-chief, USC and Rodgers moved to dismiss Monroe's protest. First, they argued that Monroe, by the terms of its protest, was only protesting the responsiveness of Rodgers' bid and that an examination of Rodgers' bid shows that it is responsive on its face. Second, they argued that a protest issue regarding Rodgers' responsibility is untimely because Monroe did not raise it in its protest letter and therefore failed to put the parties on notice. Finally, they argue that even if Monroe's protest letter is found to sufficiently raise a protest regarding Rodgers' responsibility, then Monroe's protest should be dismissed because an examination of the facts shows that Rodgers and his listed subcontractors were responsible.[2]

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[1] Sumwalt Associates, Inc. (Sumwalt) was the second low bidder on base bid two. Sumwalt was notified of the hearing but declined to attend.

[2] At issue is the responsibility of Rodger's plumbing subcontractor which effects Rodger's responsibility.

After examining Mr. Monroe during the hearing, USC and Rodgers also moved to dismiss Monroe's protest on the ground that Monroe no longer had standing.

Motion Regarding Responsiveness

Monroe's protest alleges that by failing to list a mechanical contractor with a pressure and process piping subclassification along with a mechanical contractor with a plumbing subclassification in the space on the bid form for listing the plumbing subcontractor, Rodgers and all other bidders except Monroe were nonresponsive.[3] However, USC and Rodgers argue that Rodgers' bid was responsive on its face and therefore this allegation should be dismissed.

Prior to 1993, the Procurement Review Panel (Panel) issued a number of orders stating that a failure to list subcontractor in the manner required by law rendered a bid non-responsive.[4] In doing so, the Panel relied on SC Code Ann § 11-35-3020(2)(b)(ii) which stated that "failure to list subcontractors in accordance with this section ... shall render the prime contractor's bid unresponsive."

In 1993, the General Assembly amended § 11-35-3020(2)(b)(ii) to state, "Failure to complete the list provided in the invitation for bids renders the bidder's bid unresponsive." Thus, under the current statute, as long as the bidder lists a subcontractor in each space for listing a subcontractor, his bid is responsive. Protest of Brantley Construction Co., Inc., Case No. 1999-3. Here Rodgers listed Hill in the space on the bid form for listing the plumbing subcontractor(s). Therefore, the CPOC agrees with USC's and Rodgers' motion and finds that Rodgers' bid was responsive. Accordingly, the CPOC dismisses Monroe's protest on the issue of responsiveness.

Motions Regarding Responsibility

First, USC and Rodgers argue that Monroe does not protest USC's determination that Rodgers was a responsible bidder and as a result, the CPOC cannot entertain any argument to the contrary that Monroe presented at the hearing. "A protest ... must set forth both the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided." *SC Code Ann § 11-35-4210(2)(b).* While the specificity of a protest is not to be judged on highly technical or formal standards, the protest must "alert the parties to the general nature of the grounds for protest." Protest of Sterile Services Corporation, Case No. 1983-17; See also, Protest of the Megg Corporation of Greenville, Case No. 1992-9.

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[3] Monroe is the only bidder of nineteen that listed both a licensed plumbing contractor and a licensed process piping contractor in the space on the bid form for listing the plumbing subcontractor. All other bidders listed only a licensed plumbing contractor.

[4] In Re. Protest of ECB Construction Co., Inc., Case No. 1989-7; In Re. Protest of Tricon Associates, Inc., Case No. 1991-11; In Re. Protest of Pizzagalli Construction Company, Case No. 1991-8; In Re. Protest of Delta Industrial Electric Co., Inc., Case No. 1992-8(I).

Monroe's protest letter included the following statements:

> Rogers' [sic] bid is nonresponsive and disqualified because Rogers [sic] listed Hill ... as the plumbing subcontractor and neither Rogers [sic] nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications.
>
> ***
>
> Sumwalt Associates had the next apparent Base Bid 2 low bid at $3,178,000 but its bid suffers from the same defect as Rogers' [sic] does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license.
>
> ***
>
> Monroe was the lowest bidder that identified a properly licensed subcontractor ... for the specialty piping work.
>
> ***
>
> S.C. Code 40-11-200(B) makes it a criminal offense for the University to even consider a bid if the work is not to be performed by a properly licensed contractor.[5]

While Monroe never used the word "responsibility" in its letter of protest, all of these statements above make it clear that Monroe was protesting that Hill was not properly licensed to perform pressure and process piping work and Rodgers was not licensed to perform that either. Possession of the proper license is a responsibility issue. Therefore, the CPOC finds that Monroe's letter is sufficient to alert the parties that Monroe was protesting both Rodgers' and Hill's responsibility because they lack the appropriate license to perform all of the alleged plumbing work. Indeed, all parties were fully prepared to present testimony, other evidence, and arguments on the merits of Monroe's protest at the hearing. Since the parties cannot claim that the protest letter failed to notify them that the issue was over licensure and consequently responsibility, USC's and Rodgers' motions to dismiss this issue as untimely are denied.

Second, USC and Rodgers also contended that a hearing on the issue of responsibility, if raised, was not necessary because an examination of the facts shows that Rodgers and his listed subcontractors were

[5] While the law clearly says that it is improper for a owner to award a contract to improperly licensed contractor, it is far from clear that the law makes the violation of this requirement a criminal offense. Instead of criminal penalties, the law provides for civil penalties. See SC Code Ann § 40-11-110.

responsible.[6] However, the CPOC declines to rule on USC's and Rodgers' motion in this regard. Since the issue of Rodgers' responsibility depended on the evidence presented in the hearing, the CPOC has addressed the merits of Monroe's protest in this decision instead.

Motion Regarding Standing

During the course of the hearing, USC examined Mr. Monroe on the question of whether USC asked him to hold his bid open beyond the sixty day time period specified in the solicitation documents. Mr. Monroe confirmed that Monroe had indeed received such a request and failed to provide a response to USC. Since Monroe failed to respond in the affirmative that it would honor its bid beyond the sixty day period, USC and Rodgers argued that Monroe was neither an actual bidder nor aggrieved, and consequently Monroe lacks standing to bring this protest. At the close of the hearing, the CPOC asked all parties to submit written briefs on the issue.

The Code provides only an "actual bidder ... aggrieved in connection with the intended award or award of contract" has the right to protest the award. S.C. Code Ann § 11-35-4210(1)(b). No one argues that Monroe did not actually submit a bid on this project. Therefore, Monroe is an actual bidder since its failure to respond to USC's request does not change its pre-existing status of being an actual bidder. At most, one may argue that Monroe is no longer aggrieved; however, even this position must fail. While Monroe may have ultimately failed to show that it is aggrieved by USC's responsibility determination, this is not because Monroe failed to respond to USC's request. USC's request was sent out as a result of Monroe's protest which was filed on December 13, 2010, five days prior to the date bids were due to expire. On December 16, USC sent out an email requesting that certain bidders (the lowest) extend their bids an additional sixty days. [Brief of USC] Monroe was one of these bidders. By Monroe's own admission, Monroe did not respond to this request.

USC's request to bidders to extend the date they would hold their bids open was based on Section 6.1.11 of the Manual for Planning and Execution of State Permanent Improvements, Part II (the "Manual"). This section of the Manual provides:

> If the Agency desires to extend the bid acceptance period beyond the time given in the Bid Form (SE 330), then before the expiration of that period, it should obtain a written extension of bid prices(s) from all bidders. A bidder does not have to agree to hold its bid price beyond the bid acceptance period. However, the Agency should consider for award only the bids of those bidders who provide a written extension of their bids before the expiration of the original bid acceptance period. If the Agency fails to obtain a written extension of at least one bid before the expiration of the acceptance period, it will have to re-bid the project before it can award a contract.

This provision is itself based on SC Code Ann Reg. 19-445.2065(C) which provides:

[6] At issue is the responsibility of Rodger's plumbing subcontractor, which effects Rodgers' responsibility.

> Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for re-advertisement.

While these provisions taken together may preclude an award to a bidder who has declined to extend its bid, it is not clear that it requires a protestant, who is clearly seeking award under the terms of its protest, to take an additional step of responding to a general request to hold bids open a longer period than specified when that request is sent out in response to that same protest.

Here Monroe filed its bid protest, arguing that the Project be awarded to Monroe. The very act of filing a protest meant that there was no way an award could be finalized prior to the expiration of the time for holding bids open set forth in the solicitation. Therefore, it is logical to conclude Monroe intended to hold its bid beyond this date. Moreover, it is reasonable to assume Monroe intended to hold its bid open as long as it took for its protest to reach a final conclusion. If Monroe changes its mind, the appropriate and logical course would be to withdraw its protest. Monroe has not done so.

Based on the forgoing, the CPOC finds that it was not necessary for Monroe to respond to USC's request that it hold its bid open an additional sixty days to preserve its standing. Accordingly, the motion to dismiss for lack of standing is denied.

DISCUSSION

In the solicitation documents for the Project, USC required bidders to list the subcontractors they planned to use on the project to perform the work of three different subcontractor specialties - mechanical, plumbing, and electrical. This requirement was imposed in compliance with the provisions of S.C. Code Ann § 11-35-3020(2)(b)(ii) which provides as follows:

> The governmental body, in consultation with the architect-engineer assigned to the project, shall **identify by specialty** in the invitation for bids **all subcontractors** who are expected to perform work for the prime contractor to or about the construction **when those subcontractors' contracts are each expected to exceed three percent of the prime contractor's total base bid**. ... The determination of which subcontractors are included in the list provided in the invitation for bids is not protestable pursuant to Section 11-35-4210 or another provision of this code. A bidder in response to an invitation for bids shall set forth in his bid the name of only those subcontractors to perform the work as identified in the invitation for bids.

[emphasis added] Since the Code does not define what a subcontractor specialty is, the scope of any particular subcontractor specialty an agency chooses to list on the bid form is really a matter of the intent of the agency.

In compliance with the requirements of S.C. Code Ann § 11-35-3020(2)(b)(ii), USC identified on the bid form by specialty the subcontractors whose contracts USC expected to exceed three percent of a prime

bidder's total base bid. At issue in this protest is the identified subcontractor specialty entitled plumbing. In the space for providing the name of the subcontractor(s) it intended to use for the "plumbing subcontractor specialty" (hereafter referred to as "plumbing"), Rodgers listed only Hill, a licensed plumbing contractor.[7] Neither Hill nor Rodgers are licensed pressure and process piping contractors. In the space for providing the name of the subcontractor(s) it intended to use for "plumbing ," Monroe, in contrast, listed both Walker White, Inc., a licensed plumbing contractor, and Douglas Fluid & Integration Technology, LLC (Douglas), a licensed pressure and process piping contractor.

Monroe's protest is couched in terms of the licensure requirements of the Licensing Act. Monroe challenges USC's decision to award a contract to Rodgers on the grounds that Rodger's only listed subcontractor for "plumbing," Hill, was not licensed to perform pressure and process piping work and, by extension, if Hill is not a responsible subcontractor, Rodgers is not a responsible bidder. In short, Monroe protests USC's determination that Rodgers was the lowest responsible bidder.

The Contractors Licensing Act requires a contractor to possess the proper license at the time of bidding. SC Code Ann §§ 40-11-30 and 200. The Panel has determined that possession of the proper contractor license, either by the bidder or one of the bidder's listed subcontractors is an issue of responsibility. Protest of Burkwood Construction Company, Inc., Case No. 1997-8; Protest of Roofco, Inc., Case No. 2000-14(I). If, at the time of bidding, a subcontractor listed on bidder's bid did not possess the proper license for performing the work for which the subcontractor was listed, then neither the listed subcontractor nor the bidder are responsible bidders.[8]

The protestant has the burden of proving upon the preponderance of the evidence that USC's determination of responsibility is "clearly erroneous, arbitrary, capricious, or contrary to law." Protest of Brantley Construction Co., Inc., Case No. 1999-3. In other words, USC's determination regarding responsibility is a matter of discretion that cannot be overturned absent a showing by Monroe that it is "clearly erroneous, arbitrary, capricious, or contrary to law." See Protest of CollegeSource, Inc., Case No. 2008-4. Since agency decisions regarding responsibility are a matter of business judgment, Monroe must demonstrate a lack of reasonable or rationale basis for the responsibility determination. See Protest of Value Options, et al., Case No. 2001-7.

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[7] The Contractor's Licensing Act divides licenses into categories and subcategories. Plumbing is a subclassification of a mechanical contractor's license, as is heating, air conditioning, electrical, pressure and process piping, etc. For ease of reference, the CPOC refers to mechanical contractor's license with a plumbing subclassification as a plumbing license and a pressure and process piping subclassification as a pressure and process piping license. Similarly, the CPOC refers to a contractor possessing a plumbing license as a licensed plumbing contractors etc.

[8] SC Code Ann § 11-40-200(B) precludes an owner or contractor from even considering the bid of an entity or individual that does not posses the proper license subclassifications for the work at the time of bidding.

Monroe did not argue that Hill could not legally perform the work of a licensed plumbing contractor. Monroe simply argued that the scope of "plumbing" on the bid form includes the work of a licensed pressure and process piping contractor and that Hill is not legally qualified to perform this work. Because USC determined what the scope of each subcontractor specialty was based on its own intended meaning for each specialty and then chose which ones to list on the bid form, Monroe is for all intents and purposes arguing over USC's intent. Therefore, this argument only holds water if USC's intended meaning for the term "plumbing" included the work of both a licensed plumbing contractor and a licensed pressure and process piping subcontractor.

Monroe does argue that its interpretation of the meaning for the term "plumbing" is supported by Division 15 of the Project specifications and the plumbing sheets in the drawings. However, the question before the CPOC is not whether Monroe's interpretation has support within the record. Given that the validity of USC's responsibility determination turns on the meaning of the term "plumbing," the questions before the CPOC are 1) is USC's intended meaning of the term "plumbing" "clearly erroneous, arbitrary, capricious, or contrary to law," 2) did bidders have a reasonable understanding of USC's intended meaning and, 3) was USC's responsibility determination consistent with its intended meaning for the term "plumbing?"

USC presented testimony and arguments showing that its intended meaning of the term "plumbing" was coextensive with the scope of work a licensed plumbing subcontractor could perform under the express terms of the Contractor's Licensing Act (Licensing Act), not Monroe's understanding of the term. See S.C. Code Ann § 40-11-410(5)(f). Moreover, USC presented testimony and evidence that the Project architect's pre-bid project estimate projected that pressure and process piping constituted less than 3% of the total estimated construction cost; therefore, USC, in consultation with its architect, decided not to list the pressure and process piping subcontractor specialty on the bid form. [Testimony of Ms. Floyd and Hearing Ex. 11]

Monroe does not dispute USC's position that the term "plumbing" covers the work of installing potable water and sanitary waste systems, which requires only a plumbing contractor's license. All agree this is a reasonable position. Monroe simply argues that in this case, it is unreasonable for USC to exclude pressure and process piping from this definition. USC disagreed with Monroe's position, and, in support of its position that its intended meaning for the term "plumbing" was reasonable, pointed to the Contractor's Licensing Act, which includes the installation of potable water and sanitary waste systems in the plumbing license but excludes pressure and process piping. See S.C. Code Ann § 40-11-410(5)(f) & (g). Moreover, USC noted that eighteen of the nineteen bidders on the Project shared its interpretation of the scope of "plumbing" and filled out their bid accordingly by listing a licensed plumbing subcontractor but not a licensed pressure and process piping subcontractor in the space for listing the plumbing

plumbing subcontractor. Indeed, the record indicates that bidders understood USC's intended meaning for the term "plumbing ."

Moreover, despite Monroe's arguments otherwise, there is evidence that Monroe had reason to know of USC's intended meaning for the term "plumbing." USC's closing arguments made reference to its course of practice on multiple projects in the Horizon I building.[9] This course of practice shows that USC has applied a consistent definition of the term "plumbing" across all projects on the Horizon I building, and that bidders had a consistent and compatible understanding of that definition.

The Horizon I Building is a multi-floor building that USC is up-fitting with laboratory space floor by floor.[10] USC previously let projects to up-fit the second and third floors respectively. These two previous projects were similar to the current Project in the following ways:

- they all involved up-fitting the floor space as laboratories,
- they all required potable water and sanitary waste plumbing,
- they all required pressure and process piping work,
- the bid forms for all three required bidders to provide the name of the subcontractor they intended to use to perform the work of "plumbing,"
- the specifications for both the potable water and sanitary waste plumbing and the pressure and process piping for all three were in Division 15 of the Project specifications
- the drawings for all three included both the potable water and sanitary waste plumbing and pressure and process piping in the plumbing drawing sheets.

Despite all these similarities, bidders, including Monroe, uniformly excluded pressure and process piping from the scope of "plumbing" and did not list a subcontractor with a pressure and process piping license subclassification on their bids in those projects. As to the up-fitting of the second floor of Horizon I, USC determined Monroe to be a responsible bidder and awarded a contract to Monroe despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid. As with the second floor up-fit, USC also determined Monroe to be a responsible bidder and awarded a contract to Monroe for the up-fitting of the third floor despite the fact that Monroe did not list a licensed pressure and process piping subcontractor on its bid.

Therefore, on three projects to up-fit the Horizon I Building with laboratory space, 28 of 29 responsive bids (including two of Monroe's bids) did not include the pressure and process piping subcontractor work in the scope of "plumbing." (By way of explanation, there were four responsive bids on the second floor

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[9] The previous projects on the Horizon I building came under the jurisdiction of the Office of State Engineer (OSE), and OSE has project files for each of the projects. The CPOC takes notice of these records for the purposes of this decision.

[10] While not defined in the dictionary, up-fitting is commonly understood within the construction and real estate industries to mean fitting out an existing architectural shell to accommodate a tenant's specific needs.

floor portion, six responsive bids on the third floor portion, and 19 responsive bids on this project for the first floor.) Bidder understanding of USC's intent regarding the scope of "plumbing" was consistent.[11] On three projects to up-fit the Horizon I Building with laboratory space, USC applied a consistent meaning to the term "plumbing," made its responsibility determinations consistent with that interpretation, and made contract awards accordingly. USC's intended meaning for the term "plumbing" and bidders' interpretation of that term were compatible. Clearly, USC's decision to award a contract to Rodgers in this case was not arbitrary or capricious but was consistent with USC's prior practice and bidders' understanding on previous projects. Moreover, Monroe clearly knew of USC's prior intent and practice and this intent and prior practice benefited Monroe on two previous occasions.

Based on the forgoing, the CPOC finds that USC's intended meaning for the term "plumbing" was reasonable, and was not clearly erroneous, arbitrary, capricious, or contrary to law; that bidder's consistently had an understanding of the meaning of this term compatible with USC's intended meaning; and USC applied its intended meaning for this term reasonably and consistently in making its responsibility determination. Moreover, the CPOC finds that USC's application of the scope of "plumbing" was not clearly erroneous, arbitrary, capricious or contrary to law. Therefore, USC's decision that Rodgers', having listed for "plumbing" a subcontractor with a plumbing license, was a responsible bidder was not clearly erroneous, arbitrary, capricious or contrary to law.[12]

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[11] Indeed, Monroe's interpretation in this case is not necessarily inconsistent. Monroe simply chose to provide additional superfluous information regarding their intended licensed pressure and process piping subcontractor believing that despite past familiar practice USC's intended meaning for the term "plumbing" had changed.

[12] Ultimately Monroe was left arguing that because it had a different understanding of the meaning of the term "plumbing" than USC intended, USC had a duty to make its intended meaning clearer to Monroe and because USC did not make it clearer to Monroe, Monroe's definition should control as against the understanding of eighteen other bidders. In other word, Monroe argues that the term is at a minimum ambiguous; however, a claim of ambiguity is an untimely protest of the solicitation.

Even assuming Monroe could show an ambiguity existed sufficient to protest the award, Monroe's arguments concerning USC's intended meaning also fail because Monroe did not show and cannot show any harm as a result of its alleged misunderstanding. USC did not throw out Monroe's bid as non-responsive for listing a licensed process and pressure piping subcontractor in addition to a licensed plumbing subcontractor for "plumbing." Its misunderstanding simply resulted in Monroe providing superfluous information. Moreover, Monroe was not the low bidder and Monroe does not and reasonably cannot argue that its misunderstanding of the intended meaning of the term "plumbing" caused it to have a higher bid price than it would have had otherwise. Monroe's misunderstanding had no impact on the scope of work for the Project; it only affected which subcontractors Monroe listed and which it did not. In short, Monroe cannot argue that, but for its misunderstanding, it would have been the low bidder. Therefore, Monroe suffered no harm from its alleged misunderstanding of USC's intent and USC's actions made in accordance with that intent.

DECISION

It is the decision of the Chief Procurement Officer for Construction that Monroe has failed to prove upon the preponderance of the evidence that the USC's determination regarding Rodger's responsibility was "clearly erroneous, arbitrary, capricious, or contrary to law."

For the foregoing reasons, the Protest is dismissed.

John St. C. White
Chief Procurement Officer for Construction

14 Feb 2011
Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW
Protest Appeal Notice (Revised October 2010)

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: 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 83.1 of the 2010 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 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." 2010 S.C. Act No. 291, Part IB, § 83.1. 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).

EXH. A

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RECEIVED
DEC 13 2010
OFFICE OF STATE ENGINEER

December 13, 2010

VIA FACSIMILE 737-0639 & HAND DELIVERY
Mr. John St. C. White, P.E.
State Engineer and Chief Procurement Officer for Construction
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Protest of intent of the University of South Carolina to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia. South Carolina (Project No. H27-6071-LC),

Dear Mr. White:

On behalf of Monroe Construction Company ("Monroe"), this firm protests and requests an administrative review pursuant to S. C. Code §11-35-4210(4) of the attached University of South Carolina's December 3, 2010 notice of intent to award to Rogers Builders, Inc. ("Rogers") a construction contract for the Horizon 1 First Floor Laboratory Upfit in Columbia, South Carolina (Project No. H27-6071-LC), based on Rogers' Base Bid 2 of $3,149,000. Rogers' bid is nonresponsive and disqualified because Rogers listed Hill Plumbing and Electric Company Inc. ("Hill") as the plumbing subcontractor and neither Rogers nor Hill has the required specialty license to perform the specialty plumbing work set forth in Section 15213 of the Project Specifications. Hill has PB5 and HT5 licenses.

Sumwalt Associates had the next apparent Base Bid 2 low bid at $3,178 ,000 but its bid suffers from the same defect as Rogers' does because Sumwalt also listed Hill as the plumbing subcontractor and neither Sumwalt nor Hill have the required pressure and process piping license. See attached affidavit of Eric Monroe.

Monroe was the lowest bidder that identified a properly licensed subcontractor (Douglas Fluid Integrated Technologies) for the specialty piping work. Its bid for the Base bid 2 was $3,230,000.

Section15213 of the Project Specifications includes installation of a piping system to transport, nitrogen and argon gasses and compressed air. Installation of piping to transport these gasses requires a specialty license, i.e. a pressure and process piping license. Pressure and process piping "includes the installation, maintenance, repair, alteration, or extension of a system

of piping, tubing, vessels, containers, pumps, apparatus, and appurtenances in connection with pressure piping used for circulation, transporting, holding, or processing of gas, vapor, fluid, liquid, semi-liquid, or any combination of these." See S.C. Code 40-11-410(g). These do not come under the exception for "boilers, boiler piping, piping used to convey potable water, sanitary sewage, liquefied petroleum, manufactured or natural gas or refrigeration, air conditioning and comfort heating piping" that do not require a pressure and process piping license. *Id.*

On October 19, 2010, Monroe specifically advised USC's procurement officer for this project of the specialty license requirement, the same day bids were opened, of the requirement for a specialty license. See e-mail attached to Mr. Monroe's affidavit. Notwithstanding that advance notice, USC issued a notice of award of the bid to a contractor that listed a subcontractor for this part of the work that does not have the required specialty license

S.C. Code 40-11-200 (B) makes it a criminal offense for the University to even consider a bid if the work is not to be performed by a properly licensed contractor:

> (B) It is a violation of this chapter for **an awarding authority**, owner, contractor, **or an agent of an authority**, owner, or contractor **to consider a bid**, sign a contract, or allow a contractor to begin work unless the bidder or contractor has **first obtained** the licenses required by this chapter. **Bids or contracts submitted by contractors may not be reconsidered or resubmitted to an awarding authority**, contractor, or owner **if the contractor was not properly licensed at the time the initial bid** or contract **was submitted.** (emphasis added).

Monroe is the lowest responsive bidder and should be awarded the bid.

Yours very truly,

Katherine B. Barroll

Katherine B. Barroll

KBB/ash

cc: Monroe Construction Company