

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1994-12

In re:)
)
Protest of Triad Mechanical Contractors;) **ORDER**
Appeal by Triad Mechanical Contractors)
_____)

This case came before the South Carolina Procurement Review Panel (Panel) for hearing on September 13, 1994, on the appeal of Triad Mechanical Contractors of a decision by the Chief Procurement Officer (CPO) denying Triad's protest.

Present and participating in the hearing before the Panel were Triad Mechanical Contractors represented by George W. Lampl, III, Esquire, and Office of General Services represented by Delbert Singleton, Esquire. Representatives of Trident Technical College and C.R. Hipp Construction Company, Inc. were in attendance, but did not present a case.

FINDINGS OF FACT

Trident Technical College (TTC) issued an Invitation For Construction Bids for an energy conservation project replacing an existing electric heating system with a gas-fired hydronic heating system, named "Building 700/800 Heating System Modifications Project". (Record p. 64). The architect/engineer for the project is Engineering Associates, Inc. TTC held a mandatory prebid conference on June 23, 1994. Addendum #1, issued June 28, 1994, lists the attendees of the prebid conference, and provides a revised form. (Record p. 26-27). Addendum #2 was issued June 30, 1994, and provides:

1. Testing and balancing of the new water system will be performed by this contractor as indicated on Section 15030. The owner will not provide testing and balancing.

2. Initial chemical treatment for the new water system shall be provided by this contractor. Subsequent water treatment will be provided by owner or by owner under separate contract. A water treatment report shall be submitted to the engineer with the closing documents.
(Record p. 28-29).

The Bid Tabulation, dated July 7, 1994, shows five bidders submitted bids, and reveals, in pertinent part:

<u>Bidder</u>	<u>Addendum Acknowledged</u>	<u>Price</u>
B&W Mechanical	1, 2	\$94,049.00
C. R. Hipp, Inc.	NONE	\$92,700.00
Triad Mechanical	1, 2	\$96,439.00

(Record p. 30)

As indicated in the Bid Tabulation, C.R. Hipp Construction Co., Inc. (C.R. Hipp) did not acknowledge Addendum #1 and #2 in the appropriate place on the bid form. (Record p. 32). The Bid Tabulation also indicated that B&W Mechanical did not list subcontractors as required. Subsequently, TTC found B&W Contractors nonresponsive for failure to list subcontractors. Once B&W Contractors was declared nonresponsive, Triad Mechanical Contractors (Triad) became the second lowest responsive bidder.

Instructions to Bidders paragraph 3.4.4 states, "each Bidder shall ascertain prior to submitting a Bid that the Bidder has received all addenda issued, and the Bidder shall acknowledge their receipt in the Bid." (Record p. 67). Also, Supplementary Instructions to the Instructions to Bidders in paragraph 3.4.5 provides, in pertinent part:

3.4.5 Bids on which all addenda are not acknowledged shall be rejected as unresponsive, except for the following:
... .2 The addendum clearly would have had no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders.

... (b) 'Trivial or negligible effect' shall be interpreted to mean an increase of the base bid not exceeding 1 percent. There is no percentage limit if the addendum decreases the contract cost. The value of the addendum shall be as determined by the Architect or the agency's procurement officer. (Record p. 24).

One percent (1%) of C.R. Hipp Construction Company's base bid is \$927.00.

By Notice of Intent to Award, posted July 11, 1994, TTC indicated its intent to award the contract to C. R. Hipp (Record p. 58). Triad protested the Intent to Award by letter dated July 13, 1994. (Record p. 4-5). The CPO held a hearing August 12, 1994, and posted his decision on August 22, 1994.

CONCLUSIONS OF LAW

The issue in this case is whether C.R. Hipp's failure to acknowledge Addendum #2 is able to be waived under the Consolidated Procurement Code and bid documents. Paragraph 3.4.4 of the Instructions to Bidders provides that the bid itself must indicate the addendum has been received. See also, Case No. 1989-20, In re Protest of General Sales.¹

S.C. Code Ann. Section 11-35-1520(13) allows the waiver of minor informalities and irregularities in bids. The Code provides, in pertinent part:

A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders.

¹ Addendum # 1 is not at issue. Addendum # 1 does not modify the requirements of the RFP, so failure to acknowledge it is waived under S.C. Code Ann. Section 11-35-1520(13) and the bid documents.

Code Section 11-35-1520(13) provides examples of minor informalities, which include the following:

(d) failure of a bidder to acknowledge receipt of an amendment to a solicitation, but only if

(i) the bid received indicates in some way that the bidder received the amendment, such as where the amendment added another item to the solicitation and the bidder submitted a bid, thereon, provided that the bidder states under oath that it received the amendment prior to bidding and that the bidder will stand by its bid price or,

(ii) the amendment has no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders, such as an amendment correcting a typographical mistake in the name of the governmental body

The Panel finds that C.R. Hipp's bid does not indicate that the bidder received the amendment. C.R. Hipp contends that its listing of subcontractors for testing and balancing proves it received Addendum #2. However, as the addendum indicates, testing and balancing are required in the bid under Specification Section 15030, and therefore use of a testing and balancing subcontractor could be in response to the bid requirements and not Addendum #2. The bid itself does not reflect C.R. Hipp's receipt of Addendum #2, and therefore the failure to acknowledge the addendum is not waived under S.C. Code Ann. Section 11-35-1520(13)(d)(i).

Next the addendum is examined to determine if it has "no effect or merely a trivial or negligible effect on price, quality, quantity, delivery or the relative standing of bidders." Similar language to S.C. Code Ann. Section 11-35-1520(13)(d)(ii) is found in the bid documents under paragraph 3.4.5 of the Supplementary Instructions. Paragraph 3.4.5.2(b) defines "trivial or negligible effect" as "an increase of the base bid not exceeding 1 percent". Therefore, the

Panel must determine if the cost of Addendum #2 is more or less than \$927.00, the one percent (1%) threshold.

There is no dispute that the bid specifications, prior to Addendum # 2, require that the system be flushed, and a pot feeder be provided. The second item of Addendum # 2 added the requirement of initial chemical treatment with a final written report.

Triad argues that the estimate of Airion Associates indicates that the requirements of Addendum #2 cost \$1166.00. (Record p. 60). John McMullen, who prepared the estimate of Airion Associates, testified that the \$1166.00 includes \$366.00 for chemicals, \$200.00 for a shot feeder, and \$600.00 for start-up and certification. McMullen further testified that the \$200.00 shot feeder, also referred to as a pot feeder or pipe feeder, is required by the bid, while the remaining items are new requirements of Addendum #2, costing \$966.00. Del Laquiere, president of Triad, testified about the process used to perform the work of Addendum #2, and the cost of the process to Triad. Laquiere testified that the initial chemical treatment required by Addendum # 2 would cost approximately \$1850.00, which includes Airion Associates' estimate for the chemicals and certification, as well as Triad's cost for additional equipment, labor, and profit margins.

Al Hitchcock, vice president of C.R. Hipp, testified that Hipp's approximate cost of the initial chemical treatment required by the second item of Addendum # 2, is approximately \$350.00. Hitchcock testified that the system is required to be flushed under the specifications, so that the addition of the chemicals would not take much additional labor. Hitchcock testified, based on C.R. Hipp's estimate sheet for the bid, that Addendum #2 costs \$374.00, which includes \$24.00 labor and \$350.00 for the subcontractor for the initial chemical treatment and report. C.R. Hipp introduced two quotes from chemical companies that estimate the cost

of initial chemical treatment as required by Addendum # 2, at \$431.00 and \$329.95.

Theodore Velissaios, with Engineering Associates, the project architect/engineer, testified that he made the determination that C.R. Hipp's failure to acknowledge Addendum # 2 was waivable and C.R. Hipp was responsive. Velissaios testified that, based on his experience, he estimated the cost of the initial chemical treatment at about \$600.00, which is less than one percent (1%) of C.R. Hipp's base bid. Velissaios testified that he has 32 years experience, with approximately ten projects a year that use a similar type of system. The estimate of \$600.00 for the requirements of Addendum # 2 was reviewed by two other employees of Engineering Associates, as well as the Engineer in charge of the project, according to Velissaios. The bid documents provide that the value of the addendum is to be determined by the project architect, and TTC relied on Engineering Associates' estimate and determination of responsiveness.

Triad has the burden to prove by a preponderance of the evidence it's issue of protest. The issue of this case boils down to the cost of item two of Addendum # 2, and whether it is more than \$927.00, one percent (1%) of C.R. Hipp's bid. If the cost of Addendum # 2 is more than \$927.00, than C.R. Hipp's failure to acknowledge the Addendum is not trivial or negligible and cannot be waived, resulting in C.R. Hipp's bid being nonresponsive.

The Panel finds that Triad has not proven by a preponderance of the evidence that item two of Addendum # 2 costs more than the threshold \$927.00. Triad primarily relies on the estimate of McMullen for Airion Associates for \$966.00. However, Velissaios testified that the \$600.00 charge for startup and certification was high. Velissaios, based on 32 years experience, estimated \$600.00 as the total cost of item 2 on Addendum # 2. Hitchcock also testified

that Airion Associates' estimate was high. McMullen testified that part of the \$966.00 was for the cost of employees traveling from Greenville to TTC on at least two occasions, and that Airion Associates did not always have the lowest price.

Triad also testified about the additional cost of labor, equipment and profit margin of about \$884.00, for a total estimated cost of item two on Addendum # 2 of \$1850.00. However, Hitchcock testified, and the Panel agrees, that the system is required to be flushed under the specifications, so that the additional requirement of initial chemical treatment does not require much more labor. C.R. Hipp estimated only \$24.00 in additional labor prior to submission of its bid.

The Panel finds that the preponderance of the evidence shows the value of item two on Addendum # 2 is less than one percent of C.R. Hipp's base bid. Therefore, the addendum has a "trivial or negligible" effect and C.R. Hipp's failure to acknowledge Addendum # 2 is waived under S. C. Code Ann. Section 11-35-1520(13)(d)(ii).

For the foregoing reasons, the Panel finds that Triad did not carry its burden of proof and therefore Triad's protest is denied, and the CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Gus J. Roberts, Chairman

Columbia, S.C.

Oct. 13, 1994.