

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	CASE NO. 2002 - 2
In re:	)	
Protest of Accent Contracting, Inc.	)	
	)	ORDER
Appeal by Accent Contracting, Inc.	)	
	)	

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On January 28, 2002, this matter came before the South Carolina Procurement Review Panel ("Panel") by way of an appeal letter from Accent Contracting, Inc. ("Accent") requesting the administrative review of a decision by the Chief Procurement Officer for Construction ("CPOC") that found Accent non-responsive to State Projects U12-D037-BC and U12-D038-BC. On March 26, 2002, the Panel received a Motion for Summary Judgment from the CPOC as well as a Motion to Dispense with a Hearing. The Panel considered the CPOC's Motion for Summary Judgment without a formal hearing on April 29, 2002.

**FINDINGS OF FACT**

On November 16, 2001 Indefinite Delivery Contracts for Statewide Construction for the South Carolina Department of Transportation ("DOT") in the Southern Region and the Northern Region ("Projects") were authorized for public bidding and advertised in South Carolina Business Opportunities ("SCBO"). On December 18, 2001, DOT received bids for the Projects. The bidding documents for the two Projects were identical in all material respects. On December 18, 2001, Accent submitted Bid Bond Form 674 with its bids instead of Bid Bond Form SE-335 as stated in the bidding documents. On December 19, 2001, Accent delivered bid bonds using SE-335.

On December 21, 2001, DOT formally declared Accent's bids to be non-responsive and posted the Notices of Intent to Award. On January 4, 2002, Accent submitted a written protest for the Projects. On January 18, 2002, the CPOC posted the decision denying Accent's Protest. On January 28, 2002, the Panel received Accent's request for administrative review. On March 26, 2002, the Panel received the CPOC's Motion for Summary Judgment and Motion to Dispense with a Hearing. On April 5, 2002, the Panel received Accent's Reply In Opposition to Motion for Summary Judgment and Motion to Dispense with a Hearing.

**CONCLUSIONS OF LAW**  
**MOTION FOR SUMMARY JUDGMENT**

The CPOC submitted a Motion for Summary Judgment on the issues addressed in Accent's appeal. The Panel will address each issue of Accent's appeal separately in this Order and rule on the Motion thereafter.

**MOTION TO DISPENSE WITH A HEARING**

The CPOC submitted a Motion to Dispense with a Hearing and among other points argued that where the facts are not in dispute and the legal issues are very simple, the CPOC would urge the Panel to dispense with a [costly] hearing and decide the legal issue.

Accent's Reply asserted that in cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses. Further, Accents argued that facts are in dispute and, therefore, summary judgment without a hearing would be unfair and imported. However, Accent failed to refer to what specific facts are in dispute and did not make any references as to what facts actually distinguish this case from Protest of Koch Industries, Inc., ("Koch") Case No. 1999-4.<sup>1</sup>

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<sup>1</sup> In *Koch* the Panel stated, "As the facts are not in dispute and the issue raised is a legal issue, the Panel did not conduct a hearing but issues this decision based on the record." The issues in *Koch* surrounded the application of a statute, as does the present case.

The Panel finds that there are no facts in dispute in the present case and that the relevant issues raised deal with the legal issue surrounding the application of a statute, specifically Section 11-35-3030(1)(c) of the Procurement Code. Therefore, the CPOC's Motion to Dispense with a Hearing is granted. The Panel issues this decision based on the initial record, the Motions and Reply with attached affidavits, applicable case and statutory law and the Panel's established procedures.

**ISSUE I: Whether or not Section VI, Subsection I of the Instructions To Bidders for Indefinite Delivery Contract Entitled Accent to Submit a Corrected Bid Bond**

Accent conceded that bidders were required to include Bid Bond Form SE-335 in their Bidding Documents for each project and that their surety-bonding agency, Adams Eaddy & Associates ("Adams"), instead issued Bid Bond Form 674. However, Accent argued that when they learned of the mistake, Adams filed the required Form SE-335 with the State office within 24 hours from the time set for the bid opening in accordance with the following instruction to bidders:

- I. Bidders should include all special documents requested to be submitted with the Bid. If these documents are not included with the Bid, the Bidder shall have 24 hours from the time set for the Bid opening to submit these documents or the Bid may be considered non-responsive.

The CPOC argued that the bid bond form initially submitted by Accent deviated substantially from the bid bond form required by the bidding instructions and that Paragraph F of the Bidding Instructions is unequivocal as follows:

- F. Bidders submitting Bid Security not meeting the required amount or surety rating and financial strength shall have one working day from bid opening to cure the deficiency or the bid shall be declared non-responsive.

Further, the CPOC argued that Accent was not entitled to cure the deficiency in their bid pursuant to Paragraph I [special documents] of the Instructions to Bidders because Paragraph F, which essentially includes the statutory requirements set forth in Section 11-35-3030(1)(c) of the Procurement Code, specifically addresses Bid Security and any discrepancy between the corrections allowed by the bidding instructions and the corrections allowed by statute must be resolved by applying the statutory requirement.

Section VI, Subsection F of the Instructions to Bidders precedes Section VI, Subsection I and includes essentially the language found in Section 11-35-3030(1)(c) of the Procurement Code. Section VI, Subsection I refers to special documents which were not included with the bid and Accent did include a bid bond form with their bid. Clearly, Section 11-35-3030(1)(c) addresses when a deficiency in Bid Security may be cured. The Panel finds that Section VI, Subsection I of the Instructions to Bidders did not entitle Accent to submit a corrected bid bond because Section VI, Subsection F and Section 11-35-3030(1)(c) rather than Section VI, Subsection I address the Bid Security Document.

**ISSUE II: Whether or not South Carolina Consolidated Procurement Code §11-35-3030(1)(c)**

**Entitled Accent to Submit a Corrected Bid Bond**

Section 11-35-3030(1)(c) of the Procurement Code provides the following:

Rejection of Bids for Noncompliance with Bid Security Requirements. When the invitation for bids requires security, noncompliance requires that the bid be rejected except that a bidder who fails to provide bid security in the proper amount or a bid bond with the proper rating shall be given one working day from bid opening to cure such deficiencies. If the bidder cannot cure these deficiencies within one working day of bid opening, his bid shall be rejected.

On page three of Accent's appeal letter the portion of 11-35-3030 that is highlighted refers to the proper rating of the surety. [Record p. 3] On its face, Accent's appeal letter appears to assert that the exception under 11-35-3030(1)(c) that applies to their deficiency is the failure to provide a bid bond with the proper rating. However, it is undisputed that Accent's bids were declared non-responsive because Accent's bid securities were not on the proper bid form.<sup>2</sup> [See Affidavit of Suzette Porter pp. 1-2]

Accent's Reply clearly avered that the exception under 11-35-3030(1)(c) that applies to their deficiency is the failure to provide bid security in the proper amount. Accent asserted the following: *The material difference between Form SE-335 and Form 674 is the "required amount" covered. Form 674 requires 50% of the contract to be covered, while Form SE-335 requires 100% to be covered.* (See Reply in Opposition to Motion for Summary Judgment p. 3) If the above interpretation of the bid forms were correct, then Accent's bid would not be eligible for correction in accordance with the Instructions to Bidders. Section VI, Subsection F of the Instructions to Bidders includes the following statement: *Bid security must be at least 80% of the required amount to be eligible for correction.* (See Affidavit of Suzette Porter Attachment A - Instructions To Bidders For Indefinite Delivery Contract 00200-IDC-3) Accent asserts that the bid form they submitted was only 50% of the required amount. (See Affidavit of A. Ben Osteen, Sr. p. 1)

The CPOC argued that Accent's initial bond reflected the correct amount for the bond (\$7,500) and that the terms and conditions of Accent's initial bond form deviated substantially from those found in Form SE-335.

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<sup>2</sup> The rating of Accent's bid bond is not at issue in this case, therefore, the exception allowing one working day from bid opening to cure the deficiency of failing to provide a bid bond with the proper rating is not applicable.

The CPOC argued that the differences between the bid bonds at issue include the form of the bond and the obligation regarding the Payment bond. The CPO pointed out that the original bond submitted by Accent is conditioned on the bidder's execution of a payment bond for 50% of the contract and in contrast, SE-335 ties the surety's obligations solely to the type of payment bond required by the bidding documents...and required a bond for 100% of the amount of the delivery order.

The Panel finds that the original bid submitted by Accent did reflect bid security in the proper amount as evidenced by the "Amount of Bond" line on Form 674 (SEVEN THOUSAND, FIVE HUNDRED AND NO/100) and the "sum of ... being the sum of the Bond" line on Form SE-335 (\$7,500.00). Further, the Panel finds that there are material differences in the terms set forth in these bid forms as evidenced by the different conditions of the obligations. Form 674 on its face states in part the following:

The condition of this obligation is such as to operate as a guarantee that the Principal will fully and promptly execute a contract and cause to be executed bonds acceptable to the Department, all as set forth in the proposal and bid, should the same be accepted, and that not longer than twenty (20) days after the receipt by the principal of contract forms from the Department, he will execute a contract on the basis of the terms, conditions and unit prices set forth in this proposal or bid together with and accompanied by a Performance and Indemnity bond satisfactory to the Department, in the total amount of said contract, and a Payment bond in the amount of 50% of the contract...

Form SE-335 on its face states in part the following:

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, that default of Principal shall occur upon the failure of the Principal to deliver, within the time required by the Bidding Documents..., the executed Agreement required by the Bidding Documents and any performance and payment Bonds required by the Bidding Documents...

SE-660 - South Carolina Contract for the Indefinite Delivery of Construction Services of the Bidding Documents provides in part the following:

ARTICLE 13 - CONTRACTOR'S INSURANCE AND BONDS, Paragraph H (1) ... The Contractor shall provide Performance and Labor and Material Payment Bonds, each in the amount of 100% of the amount of the Delivery Order for each project to be done under the terms of this Contract.

Form 674 expressly requires the execution of a contract and bonds not longer than twenty (20) days after the receipt by the principal of contract forms from the Department. This condition is contrary to Form SE-335 which ties the obligation of the time for executing the agreement and bonds to the Bidding Documents.

Clearly a Payment Bond in the amount of 50% of the contract is a material difference from a Payment Bond in the amount of 100% of the amount of the Delivery Order for each project to be done under the terms of the contract.

South Carolina Consolidated Procurement Code §11-35-3030(1)(c) did not entitle Accent to submit a corrected bid bond because the exceptions set forth therein are not applicable to the facts of this case.

**ISSUE III: Whether Adams Eaddy & Associates Being Allowed to Cure Defects in Other Instances is Relevant to Accent's Current Petition for Administrative Review**

Accent argued that Adams Eaddy & Associates has in other instances inadvertently failed to originally file special documents requested - or accidentally did not complete required forms - for bid packages and was each time afforded the one-day opportunity to cure the defect.

The CPOC contends that even assuming Accent's surety has been allowed to correct similar defects on other state solicitations, this fact is irrelevant and the state is not bound to repeat past errors with each new solicitation.

The Panel finds that other instances involving Adams Eaddy & Associates are outside the jurisdiction of this review process and therefore not relevant. In Protest of Two State Construction Co., Case No. 1996-2, the following was stated: *The Panel cannot consider a prior procurement that was not protested to the Panel. The finds that Two State's involvement in a prior procurement is not relevant to this case.* It follows that the Panel will not consider procurements involving Adams Eaddy & Associates that were not protested.

### CONCLUSION

For the foregoing reasons, the Panel finds that there is no genuine issue of material fact, and that the CPOC is entitled to judgment as a matter of law. The CPOC's Motion for Summary Judgment is granted, Accent's appeal is dismissed and the CPOC's decision is upheld in as much as it is consistent with the Panel's findings herein.

**IT IS SO ORDERED**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY: Willie D. Franks

Willie D. Franks, Vice Chairman

Columbia, South Carolina

May 29, 2002.