

IN RE: )  
)  
)

CASE NO. 2007-4

Appeal of Clayton Construction )  
State Project No.: H21-9523-LC )  
\_\_\_\_\_ )

**AMENDED  
ORDER**

This matter came before the South Carolina Procurement Review Panel for a hearing on June 19, 2007. The Panel heard an appeal by Clayton Construction from the March 27, 2007 Decision of the Chief Procurement Officer for Construction (CPOC). The CPOC conducted an administrative review of an award of a construction contract to Tyler Construction Company and upheld the award. Clayton Construction sought further administrative review of the decision before the Panel.

At the hearing, Clayton Construction was represented by Lewis Warren Clayton, Esquire. Tyler Construction was represented by Daniel Brailsford, Esquire. The CPOC was represented by Keith McCook, Esquire.

### **FINDINGS OF FACT<sup>1</sup>**

On January 11, 2007, Lander University advertised for bids to construct a student housing project. The bid form required all bidders to list five (5) subcontractors they planned to use on the project, one of which was a fire alarm subcontractor. Tyler Construction Company (hereinafter referred to as Tyler) and Clayton Construction Company (hereinafter referred to as Clayton) submitted bids for the project. Tyler listed

---

<sup>1</sup>Most, if not all, of the facts in this matter were undisputed and therefore the parties did not put up any witness testimony.

“Jack Thompson,” a licensed mechanical contractor with an electrical classification (licensed electrical contractor), as its subcontractor to perform the fire alarm work for the project.

Lander’s project manager, Jeff Beaver, contacted both Tyler and Clayton concerning the listing of Mr. Thompson as the fire alarm subcontractor. After further investigating the matter, Mr. Beaver determined that a bidder could list a licensed electrical contractor on the bid form as a fire alarm subcontractor.

On February 9, 2007, Lander posted a Notice of Intent to Award the contract to Tyler, which, was also the low bidder. By letter dated February 14, 2007, Clayton protested the award on the grounds that Tyler’s bid was non-responsive because Tyler listed an electrician on the bid form for the fire alarm subcontractor. On March 13, 2007, Clayton’s attorney submitted a brief in support of the protest letter sent by Mr. Harry Clayton dated February 14, 2007. Attorney Clayton raised two issues in his memorandum not mentioned in Mr. Harry Clayton’s protest letter.

The CPOC conducted an administrative review of the protest filed by Clayton and found, by Decision dated March 27, 2007, that the issue of whether a bidder can properly list an electrical contractor in the space for the listing of a fire alarm subcontractor is not one of non-responsiveness, but one of responsibility. Further, the CPOC found that the Fire Alarm System Business Act does not prohibit a licensed electrical contractor from offering to perform and performing work as a fire alarm subcontractor. Also, S.C. Code Ann. Section 40-11-410(5)(d) permits contractors holding a mechanical contractor’s

license with an electrical classification to design, install and service fire alarm systems. The CPOC did not consider the two additional issues raised in the March 13, 2007 memorandum as they were not timely submitted and the original protest letter was not sufficient to place the parties on notice of the two additional issues raised. Clayton appealed the Decision of the CPOC to the Panel.

### **CONCLUSIONS OF LAW**

Prior to the commencement of the hearing, the attorney for the CPOC made a motion to dismiss that part of Clayton's appeal that raised two additional issues not stated in the original protest letter. By letter dated February 14, 2007, Clayton protested that Tyler's bid should be rejected because, "Tyler Construction listed an electrician under the fire alarm subcontractor's space on the bid form. Therefore, Tyler's bid should be ruled non-responsive...". Clayton's protest letter made no mention that Thompson had to be a factory authorized installer to perform the fire alarm work or that Thompson could not provide a UL certified system as grounds of protest. On March 13, 2007, Clayton's attorney submitted a memorandum in support of protest raising the two new issues not mentioned in the protest letter. The CPOC did not consider the two new issues raised in the memorandum as the original letter of protest was not sufficient to place the parties on notice and that the issues were not timely raised.

Pursuant to SC Code of Laws Section 11-35-4210(2)(a), a protest must be in writing, filed with the appropriate chief procurement officer and set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. The Panel agrees with the CPOC that the two issues raised in the memorandum

were not raised with enough particularity in the original protest letter to give notice of the issues. As to the timeliness issue, SC Code of Laws Section 11-35-4210(2)(b) states that, at any time after filing a protest, but no later than fifteen days after the date of award or notification of intent to award, whichever is earlier, is posted, a protestant may amend a protest that was first admitted within the timeframes established. The notice of Intent to Award in this case was dated February 9, 2007. Clearly, the memorandum dated March 13, 2007 raising additional grounds of protest did not fall within the amendment timeframes of Section 11-35-4210. The Panel therefore agrees with the CPOC that the two new grounds of protest raised in the memorandum were not timely submitted. The Panel granted the CPOC's motion to dismiss consideration of the two additional protest grounds raised by the March 13, 2007 memorandum based upon Section 11-35-4210 and affirms the CPOC's decision not to consider the two issues as being untimely filed and that the original protest letter did not contain enough particularity to give notice of the issues.

The Panel proceeded to hear oral arguments concerning whether Thompson could be listed in the space for a fire alarm subcontractor. No witnesses were presented for testimony at the hearing. Tyler listed Thompson on the bid form as the fire alarm subcontractor. Thompson is a licensed mechanical contractor with an electrical classification. Clayton asserted that the CPOC erroneously interpreted the specifications requiring that a SC fire alarm contractor install the fire alarm system. Clayton references the Instructions to Bidders, Section 16721, Part 1, Section 1.5H5, requiring that, "The name, address, telephone number and license number of the SC fire alarm contractor

installing the system” be provided as support of its argument that Thompson cannot be listed. Clayton agreed that Thompson can perform fire alarm system work with the type of license he has in accordance with state law. Clayton only argued that Thompson cannot perform the fire alarm work on this particular project because the bid form mentioned that the license number of the SC fire alarm contractor installing the system had to be listed and Thompson does not have a separate fire alarm contractor license. In the CPOC’s Decision, the Acting State Fire Marshall opined that the requirements set forth in this section of the bid were to enable a review of the fire alarm system shop drawings submitted by the contractor during the course of the project. The provision was not intended to limit the type of licensure required to install the fire alarm system, but to ensure that the installer of the system is properly licensed under South Carolina law.

SC Code of Laws Section 40-11-410(5)(d) addresses a mechanical contractor with an electrical designation, such as Thompson has, and states that, “This license subclassification includes installing, altering and repairing all lighting on private property, athletic fields, stadiums, parking lots, **and the design, installation, and servicing of fire alarm systems.**” (emphasis added). Thompson is a licensed electrical contractor permitted by SC law to perform fire alarm work. Further, pursuant to the SC Alarm System Business Act, SC Code of Laws Section 40-79-310(5), a mechanical contractor who holds an electrical contractor’s license and designs, installs and services a fire alarm system is excluded from the provision of that particular Act from requiring further fire alarm system licensure. Hence, if a mechanical contractor qualifies for

licensure to perform fire alarm system work pursuant to Section 40-11-410(5)(d), then he is not further required to have a separate fire alarm system license pursuant to the exemption provided in Section 40-79-310. Therefore, the Panel finds Clayton's argument that Thompson is required to have a separate fire alarm system license to be listed in the bid as a subcontractor to perform the fire alarm work is unfounded. There is no mention in the bid form requiring separate licensure by the SC Alarm System Business Act to be a fire alarm subcontractor on the bid and Thompson is properly licensed and allowed, by law, to perform fire alarm system work. The Panel finds that Tyler could properly list Thompson as the fire alarm subcontractor and that Tyler's bid was responsive. The Panel also finds that the decision of the CPOC was not arbitrary or capricious.

### CONCLUSION

The Panel upholds the decision of the CPOC, dismisses the grounds of appeal as raised by Clayton for the reasons stated above and allows performance of the contract to proceed.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL  
BY ITS VICE-CHAIRMAN:



---

Willie Franks  
Vice-Chairman

July 5<sup>th</sup>, 2007