

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	ORDER
IN RE: Appeal by Cannon Construction)	
Company, Inc.)	Case No. 2012-4
(Protest by Matrix Construction Company,)	
Inc.))	
)	
Lander University May Complex Field)	
House; Project H21-N035-MJ)	
)	

This case came before the South Carolina Procurement Review Panel (the Panel) pursuant to a request by Cannon Construction Company, Inc. (Cannon), for further administrative review under sections 11-35-4210 and 11-35-4410 of the Consolidated Procurement Code (the Procurement Code). Cannon appealed the April 6, 2012, decision of the Chief Procurement Officer for Construction (the CPOC) finding that Cannon was a bidder on the May Complex Field House project (the Project) at Lander University (Lander). The CPOC's decision arose out of a protest filed by the next lowest bidder on the project, Matrix Construction Company, Inc. (Matrix). The Panel conducted a hearing on June 13, 2012. In the hearing before the Panel, Cannon was represented by Thomas H. Coker, Jr., Esquire, and Matrix was represented by Robert A. deHoll, Esquire. Douglas L. Bell, Esquire, represented Lander, and W. Dixon Robertson, III, Esquire, represented the CPOC.

Findings of Fact

Prior to the hearing before the Panel, the parties entered into a stipulation of facts. The Panel hereby adopts those stipulations as findings of fact. Where relevant to the issue before the Panel, they are recorded verbatim¹ below from the stipulation presented by the parties:

¹ In reviewing the stipulation, the Panel noted that the parties had, on occasion, referred to the wrong year in reciting the dates for bid submission, posting the notice of intent to award, and the filing of Matrix's bid protest. In reciting the facts from the stipulation, the Panel has changed those year references to reflect the correct year: 2012.

Lander University advertised bids for a project known as the May Complex Field House Construction Project No. H21-N035-MJ, which consists of a 14,400 square foot single-level athletic field house and site work, including a parking lot and site utilities, located on the Lander University campus (the "Project").

The drawings for the Project were dated February 1, 2012 and were prepared for Lander University by DSP Architects, Inc. ("DSP"), Davis & Floyd, Inc., Peritus Engineers & Associates, Inc., and Burdette Engineering, Inc. (Drawings hereinafter referred to as the "Drawings.")

The other major document controlling the construction of the Project was a document which was prepared by DSP, Davis & Floyd, Inc., Peritus Engineers & Associates, Inc., and Burdette Engineering, Inc., entitled "Project Manual & Specifications for May Complex Field House Construction, Greenville, South Carolina, State Project no. H-21-N035-MJ, dated February 1, 2012 (the "Specifications").

Prior to soliciting bids for the Project, Lander University and DSP had a cost estimate prepared by Aiken Cost Consultants of Greenville, South Carolina, which estimated the total construction cost of the Project at \$2,421,246.00, which cost estimate was dated November 4, 2011 ("Project Cost Estimate").

On March 1, 2012, Lander received bids from 13 general contractors that ranged in price from \$1,990,469.00 to \$2,250,000.00.

Cannon Construction Company, Inc. ("Cannon") submitted the apparent low bid of \$1,990,469.00.

On March 2, 2012, Lander University posted a Notice of Intent to award the contract project to Cannon Construction Company.

On March 2, 2012, Matrix sent a letter to Stephen T. Dorn, with DSP Architects, in which Matrix provided four subcontractor bids it had received for the HVAC work for the Project that ranges from \$195,980.00 to \$220,222.00. The letter from Matrix also included a listing from the Contractors' Licensing Board for Metal Works Contracting, LLC showing that Metal Works had a Group 4 mechanical contractor's license as well as [a] page that showed that the Group 4 mechanical contractor license was limited to \$125,000. Matrix's letter requested that Mr. Dorn, as the Project architect, investigate [whether] Metal Works was properly licensed to perform the HVAC work for the Project.

The architect's Project Cost Estimate of the total cost for the HVAC portion of the Project was \$238,497.00.

The solicitation for the Project required each bidder to list on his bid form the subcontractors he intended to use on the Project for subcontractor specialties of "Plumbing – PB," "Heating and Air Conditioning – HT/AC," and "Electrical – EL."

In its bid form, Cannon listed Metal Works Contracting, LLC ("Metal Works") as its heating and air conditioning subcontractor for the performance of heating and air conditioning ("HVAC") portion of the Project.

Metal Works submitted a bid to Cannon of \$124,466.00 for the HVAC portion of the Project.

On March 12, 2012, Matrix protested Lander University's Notice of Intent to award the contract for the project to Cannon.

The primary basis for Matrix's protest was the fact that Metal Works, the subcontractor that Cannon listed in the bid form (SE-330) as being the mechanical subcontractor who would perform the HVAC portion of the Project, did not have the proper license to perform the HVAC

work on the Project at the time the bid was submitted and, therefore, Cannon was not a responsible bidder.

A hearing was held on Matrix’s protest on March 27, 2012 (the “Protest Hearing”) before John St. C. White, Chief Procurement Officer for Construction (“CPOC”). The CPOC issued a decision dated April 6, 2012 in which the CPOC held that the cost of the scope of work for the HVAC portion of the Project exceeded the cost limitation of the mechanical contracting license held by Metal Works. Since Metal Works did not have the proper license to perform the HVAC work, the CPOC held that Cannon Construction was not a responsible bidder since Cannon listed Metal Works as its Heating and Air Conditioning subcontractor for the Project. The CPOC’s decision vacated the intent by Lander University to award . . . the contract for the Project to Cannon.

At the time the bids were submitted, Metal Works possessed a Group 4 mechanical contractor’s license with a sub-classification of air conditioning (AC-4). A Group 4 mechanical contractor’s license allowed Metal Works to perform or offer to perform mechanical contracting work for bids and jobs not [to] exceed \$125,000.00.

Cannon received nine (9) proposals from mechanical contractors for the HVAC portion of the Project. The following is a listing of those mechanical subcontractors, their proposal price, and their mechanical contracting licenses:

<u>Mechanical Contractor</u>	<u>Bids for Project</u>	<u>SC Contractor License Classification</u>
Metal Works	\$124,446.00	AC4
Creighton Laircey	\$214,687.00	AC5
Climate Control	\$219,000.00	AC5, HT5
Thomas Mechanical	\$228,800.00	AC5, HT5, PB5
Horton HVAC & Mechanical	\$237,240.00	AC5, PK5
Jennings-Dill Mechanical, Inc.	\$265,497.00	AC5, HT5, PB5, IP5
Stover Mechanical, Inc.	\$294,800.00	AC5, HT5, PB5
Triad Mechanical, Inc.	\$298,899.00	AC5, HT5
McGee Heating and Air	\$306,000.00	AC5, HT5, EL5

The designation of AC4 stands for a mechanical contractor license with an air conditioning specialty with an upper license limitation for bids and jobs not to exceed \$125,000 per job. The designation of AC5 stands for a mechanical contractor license with an air conditioning specialty with no license limitation on the cost of the work performed by the licensee.

Metal Works submitted a summary of its bid preparation materials to Cannon at the Protest Hearing.

The scope of the work for the HVAC portion of the Project was defined by drawings M-1, M-2, and M-3, and the Specifications.

Specification 15900B entitled "Controls and Instrumentation" provides that the principal electric-electronic temperature control system equipment and materials for the HVAC system were to be manufactured by Johnson Controls, Inc. ("Johnson Controls") and that the control systems were to be erected, assembled, and installed by Johnson Controls' factory-trained mechanics, regularly employed by Johnson Controls.

Metal Works did not receive any proposal from Johnson Controls for the HVAC control systems for the Project prior to submitting its bid to Cannon Construction.

Metal Works did not include any cost in its bid for the Johnson Controls equipment, materials, or systems.

Johnson Controls submitted proposals to some bidders for the HVAC portion of the Project for both equipment and controls. The Johnson Controls' quote for the specified control systems was \$13,316.00

Mr. Jim Baber, the President of Metal Works, testified at the Protest Hearing that he had left out the cost of the Johnson Controls system in his bid. He also testified that if the

\$13,316.00 cost for the Johnson Controls equipment and installation were added to the Metal Works bid of \$124,466.00 that the total costs would have exceeded the contractor license limitation of Metal Works. However, subsequent to Mr. Baber's testimony that the addition of the control costs to the Metal Works' bid would have exceeded the license limit for Metal Works and during the course of the Protest Hearing, Mr. Baber agreed that Metal Works would cause the specified Johnson Controls systems to be installed in accordance with the requirements of the Specifications and still perform the HVAC portion of the Project for its bid amount of \$124,466.00. In addition, Mr. Baber has also testified and the record reflects that Metal Works did include \$14,988 in its bid for overhead costs and profit.

Drawing M-3 contained schedules that specified the HVAC equipment required for the Project.

Drawing M-3 included a schedule for two unit heaters designated as EUH-1 and EUH-2. Metal Works received four proposals that contained quotations for the two unit heaters that ranged from \$1,080.00 to \$1,300.00. The summary of the Metal Works bid does not reflect that the two unit heaters were included in the Metal Works bid.

Specification section 1509B entitled "Seismic Protection for Mechanical Systems" states that mechanical equipment, piping, and components shall be seismically protected in accordance with a 2009 Edition International Building Code, Chapter 16 and ASCE 7, Section 9.6 for Seismic Protection of Mechanical Equipment and Components.

Drawing M-2 contains a detail entitled "Typical Air Handling Unit Installation" and it depicts neoprene seismic isolators for each of the air handling units. Drawing M-3 shows that there were nine air handling units.

Metal Works included no cost in its bid for seismic protection of the mechanical systems. Mathis Plumbing and Heating ("Mathis") and Stiles Heating and Air ("Stiles") provided bids to

Matrix for the HVAC portion of the Project and both subcontractors received proposals for seismic components to be installed for the mechanical equipment. Stiles' quote included a cost of \$1,777.00 in its proposal to Matrix and Mathis included a cost of \$1,625.00 for the seismic components. The architect's Project Cost Estimate estimated that the vibration isolation seismic restraints would cost \$3,102.00.

Mr. Baber has testified and the record reflects that Metal Works included labor costs in its bid for the [P]roject which were provided to Metal Works by another contractor which agreed to provide the labor for the subject project on a fixed price basis.

Specification section 15990B is entitled "Testing/Adjusting/Balancing: Heating/Ventilation/Cooling Systems. Part 1.03A of Specification 15990B requires the installing mechanical subcontractor to perform the duct air leakage testing ("DALT") for the Project. Metal Works included no cost in its bid for the DALT of the Project. Mr. Baber testified in his deposition that he thought that the DALT was to be performed by a Metal Works' subcontractor but that subcontractor's proposal excluded any duct testing.

In his deposition taken on May 23, 2012, Mr. James Baber, President of Metal Works, testified that his bid assumed that the sheet metal duct work and the most installation of the insulation for that duct work required by the Specifications would be installed in his fabrication shop prior to sending the ductwork to the Project for installation. Mr. Baber testified that Metal Works would not install any of the duct[]work or equipment at the Project site. Mr. Baber testified that a subcontractor for Metal Works would install the duct[]work and equipment and the remainder of the insulation for the ductwork at the Project site. Subsection 1.06.B.2.F of Specification 15990B (page 15990B-7) provides that duct work installation had to be approved by the owner/engineer prior to the installation of any insulation. Metal Works did not include any costs for the installation of insulation on the duct work after the installation of the duct work

had been completed at the Project and the Duct Air Leakage Testing had been completed after the installation of the ductwork. Stiles' proposal to Matrix included costs of \$20,700.00 for insulation for the HVAC portion of the Project, and Mathis included costs of \$13,400.00 for the insulation. The Project Cost Estimate estimated that the cost for the duct installation was \$14,276.00. However, Mr. Baber testified at the Protest Hearing and during the course of his deposition that Metal Works would still honor its bid price of \$124,446 to perform the HVAC specified for this project.

Conclusions of Law

Cannon has appealed the CPOC's finding that it was a non-responsible bidder on the Project. In particular, Cannon argues that the CPOC improperly looked behind the amount listed on Metal Works' bid, an amount which was within its Group 4 mechanical contractor's license limits. Cannon also argues that the CPOC injected his own business judgment into the process when deciding whether or not Cannon was a responsible bidder. In response, Matrix, Lander, and the CPOC all contend that the CPOC acted within his statutory and regulatory authority when he considered evidence beyond the face of Metal Works' bid in determining whether that bid exceeded the scope of Metal Works' license. As more fully discussed below, the Panel finds that the CPOC acted properly in reaching his determination regarding Cannon's responsibility.

As an initial matter, the Panel notes that in reviewing a finding of nonresponsibility, it applies a "clearly erroneous" standard of review. In other words, the Panel will not overturn the CPOC's finding of nonresponsibility unless the CPOC's determination was "clearly erroneous, arbitrary, capricious, or contrary to law." S.C. Code Ann. § 11-35-2410(A) (2011).

The Procurement Code defines a responsible bidder as "a person who has the capability in all respects to perform fully the contract requirements and the integrity and reliability which will assure good faith performance which may be substantiated by past performance." S.C. Code

Ann. § 11-35-1410(7) (2011). Responsibility must be ascertained for every contract let by the State, S.C. Code Ann. § 11-35-1810(1) (2011), and a determination of nonresponsibility must be in writing and “made in accordance with regulations promulgated by the board.” S.C. Code Ann. § 11-35-1810(2) (2011). In determining responsibility, the controlling regulation expressly authorizes the procurement officer, or the CPOC in this case, to

obtain and rely on any sources of information, including but not limited to the prospective contractor; knowledge of personnel within the using or purchasing agency; commercial sources of supplier information; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; government agencies; and business and trade associations.

S.C. Code Ann. Regs. 19-445.2125(B) (2011). The regulation also provides that one factor the procurement officer should consider is whether the prospective contractor is “qualified legally to contract with the State.” S.C. Code Ann. Regs. 19-445.2125(A)(4) (2011).

To be “qualified legally” in the context of a public construction project, a contractor or subcontractor must possess the proper contractor’s license to perform the work specified in the solicitation in order to be found responsible. *See In re: Protest of Roofco, Inc.*, Panel Case No. 2000-14(I) (December 5, 2001) (“[T]he lack of a proper license to do the work solicited in a state contract will always render a bidder.”). Furthermore, if, at the time of bidding, a subcontractor listed on a general contractor’s bid does not possess the proper license for performing the work for which the subcontractor was listed, then neither the listed subcontractor nor the general contractor are responsible bidders. S.C. Code Ann. § 40-11-200(B) (2011)²; *see also In re: Protest of Burkwood Construction Co., Inc.*, Panel Case No. 1997-8 (June 11, 1997) (affirming its prior decisions that the State cannot accept a bid where the low bidder listed a subcontractor who could not perform the work specified by the bid).

² “It is a violation of this chapter for an awarding authority, owner, [or] contractor . . . to consider a bid . . . 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.”

It is undisputed in this case that Metal Works had a Group 4 mechanical contractor's license at the time of the bid and that contractors possessing a Group 4 license cannot bid on work exceeding \$125,000.00. Although Metal Works bid of \$124,446.00 for the HVAC work on the Project was technically under that limit, that amount was considerably less than the architect's estimate of \$238,497.00. The Panel finds that this difference warranted further investigation by the CPOC once the issue of Cannon's responsibility was raised by protest, and that his consideration of matters beyond the face of Metal Works' bid was authorized by regulation 19-445.2125(B).³ Therefore, the Panel finds that the CPOC's analysis regarding the "total cost of construction" as a means of determining whether Metal Works' bid exceeded the scope of its license was appropriate. *See* S.C. Code Ann. § 40-11-300(A) (2011) ("The total cost of construction must be used to determine the appropriate license group for a project.")

"Total cost of construction" is defined as "the actual cost incurred by the owner, all contractors, subcontractors, and other parties for labor, material, equipment, profit, and incidental expenses for the entire project." S.C. Code § 40-11-20 (23) (2011). The Panel agrees with the CPOC's assessment that the total cost with regard to Metal Works would be the total cost of the HVAC work as specified by the Drawings and Specifications. The Panel also agrees that total cost must include costs which Metal Works would incur even if it chose not to pass those costs onto Cannon. Even though Metal Works has indicated it would honor its bid price and perform the HVAC work as specified on the Project, it has admitted that it omitted several items from its bid: (1) the Johnson controls and installation by trained Johnson Control employees; (2) the unit heaters specified by Drawing M-3; (3) the seismic components required

³ In addition, the Panel notes that the CPOC serves as the State Engineer and has additional oversight responsibilities with regard to public construction projects, including ensuring that construction projects are conducted in accordance with the "Manual for Planning and Execution of State Permanent Improvements," S.C. Code Ann. § 11-35-830 (2011), and performing an audit function for state agencies that are certified to manage their construction projects. S.C. Code Ann. § 11-35-845 (2011).

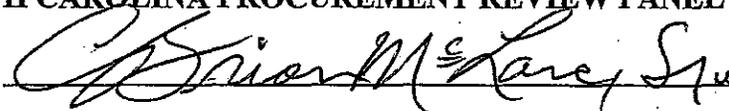
by Specification section 15095B; and (4) duct air leakage testing. In addition, Metal Works proposed installing certain duct work insulation in its shop rather than on the Project site as specified by the Specifications. Based on the record before it, the Panel finds that the total cost of the omitted items ranges from \$29,421.00 to \$37,093.00. The addition of the cost of these omitted items to Metal Works' bid price of \$124,446.00 clearly exceeds the scope of its \$125,000.00 license limitations. Therefore, the Panel finds that the CPOC correctly determined that Metal Works was not a responsible bidder. Because Metal Works was not a responsible bidder, Cannon is also non-responsible.⁴

For the reasons stated above, the Panel finds that the CPOC's determination of nonresponsibility was not "clearly erroneous, arbitrary, capricious, or contrary to law." The Panel hereby upholds his decision vacating the award to Cannon and remanding the solicitation to Lander to determine an award of the contract in accordance with the Procurement Code.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY:



C. BRIAN MCLANE, SR., CHAIRMAN

This 26 day of June, 2012.

Columbia, South Carolina

⁴ The Panel takes this opportunity to remind general contractors that they have an obligation to determine the responsibility of the subcontractors they list on their bid form. S.C. Code Ann. Regs. 19-445.2125(G)(1) (2011). The stipulation of facts shows that Cannon received bids from nine subcontractors, including Metal Works. Metal Works' bid was \$90,241.00 lower than the next lowest bid. Moreover, Metal Works was the only subcontractor with an AC4 license; all the other subcontractors had an AC5, or unlimited, license. These two factors should have prompted Cannon to inquire further about Metal Works' ability to perform the HVAC work as specified.