

STATE OF SOUTH CAROLINA )  
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COUNTY OF RICHLAND ) BEFORE THE SOUTH CAROLINA  
 ) PROCUREMENT REVIEW PANEL  
 ) CASE NO. 1994-6

In re: )  
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Protest of Brantley Construction Co.; ) **ORDER**  
Appeal by Brantley Construction Co. )  
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This case came before the South Carolina Procurement Review Panel (Panel) for hearing on June 1, 1994, on the appeal of Brantley Construction Co. (Brantley) of a decision by the Chief Procurement Officer (CPO) denying Brantley's protest.

Present and participating in the hearing before the Panel were Brantley Construction Co., represented by W. H. Bundy, Jr., Esquire; Hass Construction, Co., represented by Mark McKnight, Esquire; and General Services represented by Delbert Singleton, Esquire. Eugene D. Allen, a representative of South Carolina State University was present but did not participate.

### FACTS

Brantley Construction Co. (Brantley) protests the award of a construction contract by the South Carolina State University (State University) on a project titled "1890 Extension Facilities - Campus Office Facilities Project". State University solicited bids in South Carolina Business Opportunities on January 31, 1994. In response, five bids were received and opened on March 15, 1994.

The Invitation For Bids (IFB) includes requests for Alternate Bids on certain items. Five Alternates are proposed, with instructions that the "State Engineer may determine the bid unresponsive for failure to strike out the appropriate 'add to' or 'deduct from' for each Alternate(s) considered...." (Record p. 48). Alternate No. 2 is set up as follows:

ALTERNATE #2 -Brief Description: Substitute Aluminum Storefront for Rolled Steel Storefront System  
 (Add to) (Deduct from) base bid: \_\_\_\_\_  
 \_\_\_\_\_ Dollars (\$) \_\_\_\_\_).

Brantley's bid for Alternate No. 2 underlined "Add to" and wrote in \$133,400.00. (Record p. 48). Brantley advised State University and the project architect, after the bid opening, that Brantley's Alternate No. 2, listed as a plus, should be a minus.

The State issued a Notice of Intent to Award the contract to Hass Construction Co., Inc. (Hass) for the base bid and Alternates No. 1 and No. 2. (Record p. 61). The Bid Tabulation (Record p. 60) indicates the following bids were submitted by Brantley and Hass:

	<u>Brantley</u>	<u>Hass</u>
Base bid	\$2,509,800.00	\$2,494,000.00
Alternate No. 1	(96,544.00)	(80,000.00)
Alternate No. 2	<u>133,400.00</u>	<u>(110,000.00)</u>
TOTAL	2,546,656.00	2,304,000.00

If Brantley's Alternate No. 2 is changed to a deduction, Brantley's total for the above becomes \$2,279,856.00, the lowest bid. The Bid Tabulation also reflects that Brantley's bid for Alternate No. 2 is the only "add to" bid, while all other alternate bids are for deductions.

By letter dated March 24, 1994, to State University (Record p. 43) and letter dated March 25, 1994, to the CPO (Record p.41), Brantley protested the award of the contract to Hass. The CPO held a hearing on April 14, 1994, and both parties were allowed additional time to submit cases and rulings referred to in the proceeding (Record p. 17-39). The CPO decision was issued April 22, 1994, denying Brantley's request to correct the "clerical error" in it's bid. (Record p. 8-15). The CPO found that the "error is not obvious to the State Engineer (CPOC) by examining the bid document." (Record p. 14).

## CONCLUSIONS OF LAW

Brantley claims that, on Alternate No. 2 of its bid, the "Deduct from" should have been underlined and the underlining of "Add to" is an obvious clerical error, which Brantley should be allowed to correct. Brantley further argues that the "obvious clerical error", if corrected, does not jeopardize the bid process, but saves the State a significant amount of money. Brantley contends that the correction of the error is allowed by the Code.

Brantley presents evidence that it was Brantley's intent, at the time of the bid opening, for Alternate No. 2 to be a deduction and not the addition indicated on the bid form. Brantley's intention to underline the "Deduct from" option is not an issue. The issue before the Panel is whether the South Carolina Consolidated Procurement Code (Code) allows Brantley to correct its mistake.

The Code allows the waiver of informalities or irregularities in certain circumstances. SC Code Section 11-35-1520(13) 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. [Emphasis added]

The correction of Brantley's error makes Brantley, rather than Hass, the lowest bidder, clearly changing the bidders' standing. If the Code only dealt with mistakes as possible informalities, and this Code Section were the only applicable Code Section, then Brantley clearly would not be allowed to change its bid. However, the Code specifically addresses correction of erroneous bids, and therefore that Code section is more appropriate to apply than the waiver of an informality in this case.

SC Code Section 11-35-1520(8) provides, in pertinent part:

Correction or withdrawal of inadvertently erroneous bids before bid opening, withdrawal of inadvertently erroneous bids after award, or cancellation and reaward of awards or contracts, after award but prior to performance may be permitted in accordance with regulations promulgated by the board. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted. [Emphasis added].

Brantley is requesting that its bid be changed to reflect a deduction rather than an addition, which would make Brantley the lowest bidder, and cause the contract to be awarded to Brantley. Cancellation and reaward of the State's intent to award a contract are permitted only in accordance with regulations. The regulation promulgated by the Budget and Control Board that applies directly to this case is Regulation 19-445.2085(B), which provides:

To maintain the integrity of the competitive sealed bidding system, a bidder shall not be permitted to correct a mistake after bid opening that would cause such bidder to have the low bid unless the mistake in the judgment of the procurement officer is clearly evident from examining the bid document; for example extension of unit prices or errors in addition. [Emphasis added]

Since correction of Brantley's mistake would give Brantley the lowest bid, the threshold issue in this case is whether the mistake is clearly evident from examining the bid document. Brantley must prove its mistake is "clearly evident from examining the bid document". The bid document provides for a choice between "Add to" or "Deduct from", and makes it clear one must be chosen. Brantley's bid for Alternate No. 2, which it submitted to the State, marks the "Add to" option.

Brantley's expert witnesses testified that Alternate No. 2 is clearly an item which should be a deduct, because it costs less. Alternate No. 2 requires the bidder to substitute rolled steel storefront with aluminum storefront. Mr. Morgan and Mr. Moss testified that rolled steel must be fabricated by the manufacturer, making it more expensive than aluminum, which can be fabricated at the construction site. By detailing the change, Alternate No. 2 of the bid document is clearly a deduct to these expert witnesses.

Not disputing the experts' testimony, the Panel points out that the expert witnesses are specially qualified to make such a determination by looking at the document. Mr. Morgan also testified that he could not say if the other alternates were clearly deducts. The law requires the mistake to be clearly evident, not to a specialist or expert, but to the procurement officer. If not interpreted this way, the regulation would, in affect, require the procurement officer to be an expert in every area covered by each specification in the bid. The Panel finds that to be an unreasonable interpretation of the requirements of the Code and Regulations. If a specialist or expert, or even the bidder, must be consulted to determine that a mistake has been made, then it is not clearly evident from the bid document that a mistake has been made, as required by the Code.

The integrity of the sealed bid process is placed in danger of being compromised by changing a bid after all sealed bids have been opened.<sup>1</sup> Code Section 11-35-1520(8) provides that "after bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the State or fair competition shall be permitted." The examples provided in Regulation 19-445.2085(B) make it clear the type of correction that will be allowed. An

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<sup>1</sup> See, Case No. 1992-1, In re: Protest of Weaver Construction Company, Inc.; Case No. 1991-20, In re: Protest of United Testing Systems, Inc.; Case No. 1989-3, In re: Protest of Miller's of Columbia, and cases cited therein.

extension of unit prices or errors in addition can be determined by any procurement officer, without consulting anyone else, from examining the bid document. This standard cannot be met in this case. The underlined "Add to" can only be considered a mistake after inquiry to the contractor or an expert in the specific area considered in Alternate No. 2. The bid document itself does not clearly reveal the mistake.

The Panel finds that Brantley's mistake is not clearly evident from the bid document itself, as required by the Code, and therefore Brantley is not allowed to correct its mistake, making it the lowest bidder, and requiring reaward of the contract. The Panel upholds the decision of the CPO, as far as it is consistent with this opinion, and denies the protest of Brantley for the foregoing reasons.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

  
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Gus J. Roberts, Chairman

Columbia, S.C.

June 14, 1994.  
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