

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1983-4

IN RE:)

PROTEST BY BROWN AND MARTIN)
CO., INC.)
_____)

O R D E R

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Determination issued by the Chief Procurement Officer for Construction and a Request for Review of that Determination.

FINDINGS OF FACT

On or about April 26, 1983, Sumter Area Technical College received Bids for the construction of a Wastewater Treatment Plant Operator Training Facility. The apparent low bidder was the Protestant, Brown and Martin Co., Inc. of Sumter, South Carolina. On the bid form, however, the Protestant, Brown and Martin Co., Inc., listed only three (3) subcontractors. Those three (3) subcontractors were for the electrical work, the plumbing work, and for the heating, ventilating and air conditioning work. The Protestant's bid was \$329,888.00.

Section 11-35-3020(2)(b)(i) of the Code of Laws of South

Carolina (1976) requires every contractor bidding on a State construction contract to list subcontractors whose dollar bid amount exceeds 2 1/2% of the total bid being submitted where the general contractor's bid is \$3,000,000.00 or less. On May 10, 1983, the Chief Procurement Officer for Construction issued a Decision finding that the bid submitted by Brown and Martin Co., Inc. was unresponsive due to its failure to comply with Section 11-35-3020(2)(b)(ii) of the South Carolina Code. By letter dated May 20, 1983, legal counsel for the Protestant, Brown and Martin Co., Inc., filed a written Request for Administrative Review with the Procurement Review Panel. At the hearing, all parties were present, including the contracting authority and the second low bidder. All parties were represented by counsel.

The Protestant, Brown and Martin Co., Inc., has alleged and argued that the Determination of the Chief Procurement Officer for Construction which ruled its bid unresponsive is incorrect on the ground that an inadvertent failure to list all subcontractors is not such a material deviation as to require that the prime contractor's bid be declared unresponsive. The Protestant additionally alleged that the requirement of subcontractor listing was ambiguous. The Protestant also asserted that the requirements of Federal Law override the provisions of Section 11-35-3020(2)(b)(i-ii) of the South Carolina Code.

The President of the Protestant corporation, Mr. Pringle Boyle, testified that he had not been aware of the Procurement Code requirement for subcontractor listing. Mr. Boyle further testified that Charles Holladay, the Secretary of the corporation, had prepared

the bid and had inadvertently omitted listing the roofing subcontractor, among others. There was further testimony that the roofing contractor was in fact H. L. Gainey Roofing Company and that the amount of the roofing subcontract was \$25,233.00. Mr. Boyle stated also that if his bid was found to be responsive that the H. L. Gainey Roofing Company would do the roofing work under the subcontract bid price quoted.

The project architect, Charles McCreight of the firm Demosthenes, McCreight & Riley in Sumter, South Carolina, testified on behalf of the contract awarding authority, Sumter Area Technical College. It was Mr. McCreight's testimony that it was apparent at the bid opening on April 26, 1983, that the Protestant, Brown and Martin Co., Inc., had failed to comply with the subcontractor listing requirements of the Bid Documents and the South Carolina Code. Mr. McCreight further testified that immediately following the bid opening Mr. Sam Harper of the State Engineer's Office had asked that he telephone the Protestant for an explanation concerning the failure to list the roofing subcontractor. As a result of Mr. Harper's request, Mr. McCreight then phoned Mr. Charles Holladay, the Secretary of the Protestant's corporation, and Mr. Holladay informed Mr. McCreight that he had read the requirements contained in the Bid Documents pertaining to subcontractor listing whose dollar bid amounts exceeded 2.5% of the total bid, but that he did not understand the requirement and did not feel it important. Additionally, Mr. McCreight testified that he had asked Mr. Holladay for the roofing price and that Mr. Holladay had quoted a sum of \$25,233.00. Also, Mr. McCreight stated that he asked Mr. Holladay for the sub-

contract amount of the structural steel being utilized in the project and that Mr. Holladay stated that this sum was \$14,415.00. Mr. McCreight testified that the amount of each of these subcontracts exceeds the 2.5% statutory listing requirement or \$8,247.00 in this case. Mr. McCreight testified that he met with Charles Holladay on Wednesday, April 27, 1983, at approximately 11:20 a.m., and that Mr. Holladay reiterated that he had not felt that it was important to list subcontractors. Mr. McCreight testified that Mr. Holladay stated that the omission was his fault and that Mr. Holladay realized that he should have listed all subcontractors whose bids exceeded 2.5% of the Protestant's bid. When questioned on the Bid Documents, the architect, Mr. McCreight, testified that in his opinion the Bid Documents were not ambiguous.

Mr. Thomas E. Morgan, Director of Construction Grants Administration Section of the South Carolina Department of Health and Environmental Control, testified that it was his function to review Bid Documents in connection with federally funded projects, such as the project in issue, to determine that those Bid Documents comply with all federal regulations. This responsibility has been delegated to the State by the federal government. Mr. Morgan testified that he had reviewed and approved the subject Bid Documents prior to their use in connection with this project. Testimony was further received that the Bid Documents were not in conflict with federal regulations and it was noted that federal regulations generally provide that a bid may not be rendered unresponsive for failure to list subcontractors. However, federal regulation provides that this is not the case if State law requires such a listing. Mr.

Morgan stated that State law did require the listing of subcontractors and that it was clearly stated in the Advertisement for Bids that a failure to list subcontractors would render the bid of the prime contractor unresponsive.

The Protestant, Brown and Martin Co., Inc., submitted a base bid in the amount of \$329,888.00 which was received by Sumter Area Technical College on April 26, 1983, for the construction of the cited project. Testimony demonstrates that the Protestant, Brown and Martin Co., Inc., failed to list its subcontractors as required by the Bid Documents and by State law. The President of Brown and Martin Co., Inc. testified that it had in fact a subcontractor for the roofing portion of the construction, the H. L. Gainey Roofing Company from Sumter, South Carolina, and that the subcontract amount was \$25,233.00, an amount in excess of 2 1/2% of the Protestant's bid.

The Advertisement for Bids on the Wastewater Treatment Plant Operator Training Facility for Sumter Area Technical College, at Page 00001-3, contained the following provision relating to subcontractor listing:

"(i) Any bidder or offerer in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and/or install a portion of the work in an amount that exceeds the following percentages:

Prime contractor's total bid up to three million dollars - two and one-half percent (2 1/2%).

Prime contractor's total bid is three million dollars - two percent (2%).

Prime contractor's total bid is over five million dollars - one and one-half percent (1 1/2%).

(ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.

(iii) No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown."

The bid form itself utilized by each contractor bidding on the job contained the following provisions concerning subcontractor listing:

The undersigned bidder is aware that the South Carolina Consolidated Procurement Code requires that "Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds the following percentages:

- Prime contractor's total bid up to three million dollars.....2-1/2%
- Prime contractor's total bid is three million to five million dollars.....2%
- Prime contractor's total bid is over five million dollars.....1-1/2%"

Classes of work not listed hereinbelow will be performed by the general (prime) contractor himself, or by subcontractors whose aggregate prices do not exceed the percentages of the prime contractor's bid set forth in the Code.

The following subcontractors are listed pursuant to the requirements of the Code:

Subcontractor/ Supplier for:	Name, Address and Contractor's License No.
1. _____	_____
2. _____	_____
3. _____	_____
4. _____	_____
5. _____	_____

Section 4.1.8 of the Instructions to Bidders (Supplement) also provided that the bid include a list of subcontractors whose prices exceeded 2 1/2% of the prime contractor's bid.

The South Carolina Code requires, under Section 11-35-3020 (2)(b)(i), that all Invitations for Bids must set forth the requirement that any bidder must set forth in his bid the name and location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about construction and who will specifically fabricate and install a portion of the work in an amount exceeding 2 1/2% of the prime contractor's total bid up to three million dollars. This provision was complied with by the contracting authority. Section 11-35-3020(2)(b)(ii) states that a failure to list subcontractors in accordance with this Section shall render the prime contractor's bid unresponsive. The testimony clearly reveals that the Protestant, Brown and Martin Co., Inc., failed to list its roofing subcontractor, H. L. Gainey Roofing Company of Sumter, South Carolina. There was further testimony by the Director of Construction Grants Administration Section of the South Carolina Department of Health and Environmental Control that the Bid Documents are not in conflict with federal regulations. Assuming 40 C.F.R. Section 35-938-4(h)(6) applies to this procurement, the Advertisement for Bids unambiguously stated that failure to list the required subcontractors would render the bid unresponsive.

The Protestant's bid has been declared unresponsive by Section 11-35-3020(2)(b)(ii) of the South Carolina Code. Protestant may not cure such deficiency after bid opening. State Budget and Control Board Regulation 19-445.2080 provides for correction of

minor or immaterial variations from the exact requirements of the Invitation for Bids where certain conditions are met. However, the South Carolina Legislature, in Section 11-35-1410(7) of the South Carolina Code, has defined a "responsive bidder" as a person who has submitted a bid which conforms in all material aspects to the Invitation for Bids. By declaring a bid which fails to list required subcontractors unresponsive in Section 11-35-3020(2)(b)(ii), the Legislature has made it clear that failure to list those subcontractors is a material variance from the requirements of South Carolina law. Since only immaterial variations may be cured, Protestant may not now alter its bid.

Therefore, it is the finding of the Procurement Review Panel that the omission of a subcontractor required to be listed under Section 11-35-3020(2)(b)(i) is a material deviation from the requirements of the Invitation to Bid and renders the bid of the Protestant, Brown and Martin Co., Inc., unresponsive as required under Section 11-35-3020(2)(b)(ii).

CONCLUSIONS OF LAW

1. Under the requirements of Section 11-35-3020(2)(b)(ii), a failure to list subcontractors in accordance with the requirements of the South Carolina Consolidated Procurement Code, Section 11-35-3020(2)(b)(i), shall render the prime contractor's bid unresponsive.

2. Under the requirements of the Advertisement for Bids and the bid form itself, a bidder is required to list all subcontractors who will perform work or render service to the prime contractor to or about construction and who will specifically fabricate and install

a portion of the work in an amount that exceeds 2 1/2% of the prime contractor's total bid up to three million dollars.

3. The Advertisement for Bids states that a failure to list subcontractors will render the bid of the prime contractor unresponsive.

4. Federal regulation does not prohibit declaring a bid unresponsive for a failure to list subcontractors when a subcontractor listing is adopted pursuant to State law.

5. Section 11-35-40(3) of the South Carolina Consolidated Procurement Code states:

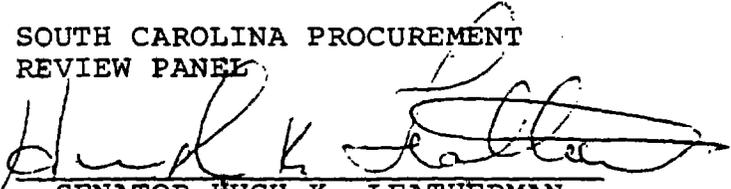
(3) Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance or contract funds, the governmental body shall also comply with such federal law and authorized regulations as are mandatorily applicable and which are not presently reflected in the code. Notwithstanding, where federal assistance or contract funds are used in a procurement by a governmental body as defined in Section 11-35-310(18), requirements that are more restrictive than federal requirements shall be followed.

6. Under the case as presented, the bid of the Protestant, Brown and Martin Co., Inc., must be declared unresponsive as a matter of law.

It is the Decision of the Procurement Review Panel that the failure, whether inadvertent or otherwise, to list a subcontractor as required by law under the South Carolina Consolidated Procurement Code may not be subject to waiver or correction and that a finding that such a bid is unresponsive is mandatory under South Carolina law.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL


SENATOR HUGH K. LEATHERMAN,
CHAIRMAN