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MICHAEL B. SPICER
INFORMATION TECHNOLOGY MANAGEMENT OFFICER
(803) 737-0600
FAX: (803) 737-0639

Protest Decision

Matter of: LCM Builders, Inc.

Case No.: 2017-134

Posting Date: March 22, 2017

Contracting Entity: Clemson University

Solicitation No.: 83154369

Description: Gutter and Downspout Replacement

DIGEST

Protest of an award alleging that the apparent successful bidder is not properly licensed to perform the requested work is granted. LCM Builders' (LCM) letter of protest is included by reference. [Attachment 1]

AUTHORITY

The Chief Procurement Officer¹ conducted an administrative review pursuant to S.C. Code Ann. §11-35-4210(4). This decision is based on the evidence and applicable law and precedents.

¹ The Materials Management Officer delegated the administrative review of this protest to the Chief Procurement Officer for Information Technology.

BACKGROUND

<i>Event</i>	<i>Date</i>
Solicitation Issued	01/13/2017
Intent to Award Issued	02/01/2017
Protest Received	02/09/2017

ANALYSIS

This Invitation for Bids was issued by Clemson University (Clemson) to acquire services to replace gutters and downspouts on several buildings located at Pee Dee research and education center in Florence SC. Bids were received from Cole's Sheet Metal and Welding (\$90,876.00), LCM (\$113,000.00), and Summit BSR Roofing (\$139,000). Clemson issued a statement of award to the lowest bidder, Cole's Sheet Metal & Welding, LLC (Coles), on February 15, 2017. LCM filed a timely protest alleging that Coles is not properly licensed to perform the required work.

Title 40, Chapter 11 of the South Carolina Code treats licensing for commercial contractors. Section 40-11-20 includes the following definitions:

(8) "General construction" means the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete paving, or improvement of any kind to real property.

(9) "General contractor" means an entity which performs or supervises or offers to perform or supervise general construction.

Section 11-40-30 requires a contractor's license for anyone to perform construction work in excess of \$5000:

No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

There are limited exceptions to the license requirement, none of which are relevant here. S.C. Code Ann. § 40-11-360 (2011).²

The solicitation including removal and replacement of approximately 4,120 linear feet of commercial grade gutters and approximately 2,155 linear feet of commercial grade downspouts, and painting the new materials. This work plainly meets the statutory definition of general construction, since it involves “installation, replacement, or repair of a building...or improvement of any kind to real property.” Because the bid requires general construction and the cost of the contract is well above the \$5,000 threshold, a contractor’s license is required. It is undisputed that Cole’s Sheet Metal and Welding does not have a license issued by the Contractor’s Licensing Board.

Contracts may only be awarded to bidder who is responsible. S.C. Code Ann. § 11-35-1520(10). A responsible offeror is defined in Section 11-35-1410(6) as:

“Responsible bidder or offeror” means 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.

The factors to be considered in making a determination of responsibility are found in Regulation 19-445.2125(A) State Standards of Responsibility:

Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has:

² The South Carolina Department of Labor, Licensing and Regulation (LLR), through its Contractors Licensing Board, regulates and licenses contractors. It has published a list of work for which no specialty license is required. (Attachment 2) The list includes “commercial gutters,” with the following disclaimer:

ALTHOUGH NO SPECIFIC LICENSE IS REQUIRED TO PERFORM THE FOLLOWING WORK, PORTIONS OF THE WORK MAY REQUIRE A GENERAL CONTRACTOR OR A MECHANICAL CONTRACTOR LICENSE WITH THE APPROPRIATE CLASSIFICATION(S) PURSUANT TO SC CODE ANN. § 40-11-410 WHEN THE TOTAL COST OF CONSTRUCTION IS GREATER THAN \$5000.

Attachment 2 does not exempt commercial gutters from otherwise applicable licensing requirements. It merely advises that none of the specialty license subclassifications in Section 40-11-410(4) is required to perform guttering work.

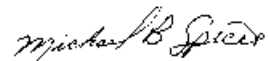
(4) qualified legally to contract with the State....

Since Cole's does not have a contractor's license, and one is required for performing the contract, it is not legally qualified to contract with the State. Cole's is not a responsible offeror and thus is not eligible for award.

DECISION

For the foregoing reasons the protest of LCM Builders, Inc. is granted.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

Attachment 1

LCM Builders, Inc.
Roofing and General Contractor



Ph: 800-329-8338

PO Box 299
Peachland, NC 28133
fax: 877-382-9238

February 9, 2017

RE: Solicitation #: 83154369
Description: Gutter & Downspout Replacement
Formal Protest of Award

Dear Ms. Pitts & Chief Procurement Officer-- Materials Management Office,

Please be advised that LCM Builders, Inc. (LCM) issues this formal protest of the Gutter & Downspout Replacement Solicitation number 83154369 as awarded to Cole's Sheet Metal & Welding on Feb. 1st, 2017.

The following is quoted from The Statement of Award (as can be seen in Attachment "A")

Solicitation #: 83154369
Issue Date: 1/13/17
Closing Date: 1/26/17
Description: Gutter & Downspout Replacement
Awarded To: Cole's Sheet Metal & Welding
5108 S Irby St, PO Box 26
Effingham, SC 29541
Evaluated Amount: \$90,876.00
Contract Amount: \$90,876.00

GROUND: Cole's Sheet Metal & Welding is not a properly licensed contractor under the laws of the state of South Carolina and that this work is required to be done by a licensed contractor.

All bids for this work were well above the \$5,000.00 threshold
Bids listed below (see Attachment B):

Cole's Sheet Metal & Welding \$90,876.00
LCM Builders, Inc. at \$113,000.00
Summit BSR Roofing (Frizzell Const. Co., Inc.) at \$139,000.00

There are no proper exemptions to The South Carolina's Licensing Act in this work.

From South Carolina Code of Laws Title 40 - Professions and Occupations

CHAPTER 11---Contractors---ARTICLE 1

SECTION 40-11-360

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Formal Protest of Award to Solicitation # 83154369
Page 2

"The South Carolina Contractor's Licensing Act requires general and mechanical construction to be performed by licensed contractors. Both the owner and the contractor are subject to penalties for violations of the law. Work performed on projects is exempt from this requirement only for the following reasons:

- (1) The total cost of construction is less than \$5,000.00;
- (2) The property will be used solely by the owner and his immediate family as a residence for a period of at least two years;
- (3) For nonresidential projects, work performed by the owner is limited to nonstructural and nonmechanical portions of the project, or;
- (4) The project is a farm building or portable storage building less than five thousand square feet used only for livestock or storage.

All other work must be performed by properly licensed contractors.

Exempt 1. does not apply:

The bid provided by Cole's Sheet Metal & Welding is \$90,876.00

Exempt 4. does not apply:

The facility is not a farm it is listed in the specifications as a research and education center.

From Addenda 4 (Attachment "C")(underlines added) See page 2 quoted below

III. SCOPE OF WORK / SPECIFICATIONS

Clemson university seeks to replace gutters and downspouts on several buildings located at Pee Dee research and education center in Florence SC.

It is LCM's contention that the work encompassed in these specifications is covered under the SC Code of Laws Title 40 as quoted on the following page.

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Roofing and General Contractor



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Formal Protest of Award to Solicitation # 83154369
Page 3

From South Carolina Code of Laws Title 40 - Professions and Occupations

CHAPTER 11---Contractors---ARTICLE 1

SECTION 40-11-410. License classifications and subclassifications.

The following license classifications are in effect:

- (5) "General Contractors-Building" which includes commercial, industrial, institutional, modular, and all other types of building construction, including residential structures. This license classification includes all work under the subclassifications of Wood Frame Structures-Class II, Interior Renovation, Masonry, Pre-engineered Metal Buildings, General Roofing, and Structural Shapes.

The scope of this project includes non-typical steel gutter installed on buildings used (possibly owned) by Clemson University. The work will include fabrication of custom metal shapes. This type of gutter cannot be extruded on site like typical residential gutter. Due to the type of steel, 22 gauge, and the number of mechanical expansion joints required a sheet metal mechanic and specialty tools will be required to form the gutter. Also included in this project is removal of a portion of the current building's damaged trim and new metal fabricated and installed along the rake end sections. Some Painting will also be required.

Scope for this project is finalized in Addenda #4 (see Attachment "C") pages 3 through 5 and outlines work to be done in addition to the gutter installation (underline added). The pertinent sections are quoted below:

- f) Paint existing eave trim, new gutters and downspouts in matching color.
- g) Eave trim, gutters and downspouts shall be painted with a fluoropolymer (polyvinylidene fluoride or PVDF) paint such as Kynar paint. Paint color shall be off-white and should match existing paint as closely as possible.

Additional work is also addressed in Addenda 5 (see Attachment "D") (highlights added)

Question: Addendum 4 specifies to paint the rake edges in connection with installing new gutters/downspouts. Some sections of the rake edge metal has rusted through with holes in the metal while other sections have surface rust. Should a unit cost be provided to replace the rusted rake end sections?

ANSWER: Yes! It's only a strip of 22 gauge metal trim that 8 inches

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Formal Protest of Award to Solicitation # 83154369
Page 4

wide and 20 feet long.

STANDING: LCM has standing to make this protest as it bid the work and was the second lowest bidder.

PROTEST TIMING/POST AWARD PROTEST: An actual bidder (as LCM was), an offeror, or subcontractor may protest to the CPO within 10 days. S.C. Code § 11-35-421 (1)(a).

TIMELY WITHIN 10 ALLOTTED DAYS: The bid tabulation was posted 8 days ago, so this intent to protest is timely. (see below email called out with >> showing dates of bid opening and when the results posted)

RELEVANT DATES

Solicitation was bid on 1/26/17

Results of bidding and Notice of Award were issued on 2/1/17

Protest emailed to CPO & Chief Procurement Officer-- Materials Management Office on 2/9/17

Below is a quoted email from Ms. Pitts showing that the bid tabulation (see Attachment B) for solicitation number 83154369 was released on 2/1/2017

>>On Wed, Feb 1, 2017 at 4:10 PM, April Pitts <apitts@clems.on.edu> wrote:
>>I am writing in response to your Freedom of Information Act (FOIA) request
>>which I received via e-mail on 2/1/17. Your request asks for the "bid tab" on
>>solicitation #83154369 which closed on 1/26/17 at 11:00 am EST. The requested
>>document is attached.

>>Thanks,
>>April Pitts
>>**April Pitts**

>>[CLEMSON UNIVERSITY](#)
>>Senior Procurement Specialist
>>Procurement and Business Services
>>108 Perimeter Road, Clemson, SC 29634
>>[864.656.1773](tel:864.656.1773) Office
>>[Procurement and Business Services website](#)
>>[Current Bid Opportunities](#)

LCM Builders, Inc.
Roofing and General Contractor

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Formal Protest of Award to Solicitation # 83154369
Page 5

PROPER AUTHORITY TO RECEIVE PROTEST:

This Protest will be sent to both Ms. Pitts as pre-bid CPO and to the Chief Procurement Officer-- Materials Management Office per written instructions found in The Statement of Award (refer Attachment A) (Highlights added).

Ms. Pitts has acted as Chief Procurement Officer for this bid during the pre-bid stage and she posted/mailed the bid tab and The Statement of Award.

The Statement of Award directs protests to be sent to:

Chief Procurement Officer-- Materials Management Office
1201 Main Street, Suite 600
Columbia, SC 29201
E-mail: protest-mmo@mmo.state.sc.us
Facsimile: [803-737-0639](tel:803-737-0639)

In addition a portion of the Attributes tab at Attribute 21 from the bid submittal website reads,

“Any protest for this solicitation must be addressed to the Chief Procurement Officer, Materials Management Office, and submitted in writing (a) by email to protest-mmo@mmo.state.sc.us, (b) by facsimile at 803-737-0639, or (c) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201.”

PRELIMINARY REQUEST FOR RELIEF

As this protest is both timely and by an authorized aggrieved party an automatic stay of procurement (see below) during the protest procedure is requested to be granted unless a written determination is made that the award, without further delay, is needed to protect the State's best interests.

S.C. Code § 11-35-4210 (7)
Per Article 17

Legal and Contractual Remedies

- (6) Automatic Stay of Procurement During Protests. In the event of a timely Protest pursuant to subsection (1), the State shall not proceed further with the solicitation or award of the contract until ten days after a decision is posted by the appropriate chief procurement officer, or, in the event of timely appeal to the Procurement Review Panel, until a decision is rendered by the panel except that solicitation or award of a protested contract is not

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Roofing and General Contractor



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Formal Protest of Award to Solicitation # 83154369
Page 6

stayed if the appropriate chief procurement officer, after consultation with the head of the using agency, makes a written determination that the solicitation or award of the contract without further delay is necessary to protect the best interest of the State.

RELIEF REQUESTED:

LCM initially requests that contract not be issued even though award was made to Cole's Sheet Metal & Welding as they do not hold the required license.

LCM Builders, Inc. also requests in the event it is found that Cole's Sheet Metal & Welding did submit a bid on a project for which they did not hold the correct license as required by South Carolina, that LCM be awarded this project without prejudice.

LCM reserves its statutory right to amend this protest once within 15 days of notice of intent to award which was presumed to have been issued at the same time as The Statement of Award on Feb. 1, 2017.

We are also sending a cc'd copy the General Contractor's Licensing Board and our attorney on this and all future emails.

Respectfully,
Lynn Moore

Lynn Moore, CAPS
President
LCM Builders, Inc.
[800-329-8338](tel:800-329-8338)
<http://lcmbuilders.com>

CC: Roger Lowe, Administrator SC Department of Labor,
Licensing and Regulation roger.lowe@llr.sc.gov

Steven Bimbo, Attny sbimbo@slk-law.com
Chief Procurement Officer-- Materials Management Office
E-mail: protest-rmmo@mmo.state.sc.us
April Pitts apitts@clemson.edu

Attachment 2



South Carolina Department of Labor, Licensing and Regulation
SOUTH CAROLINA CONTRACTOR'S LICENSING BOARD
PO BOX 11329, COLUMBIA S.C. 29211-1329
Tel No.: (803) 896-4686 • Fax No.: (803) 896-4814



NO SPECIFIC LICENSE REQUIRED

ALTHOUGH NO SPECIFIC LICENSE IS REQUIRED TO PERFORM THE FOLLOWING WORK, PORTIONS OF THE WORK MAY REQUIRE A GENERAL CONTRACTOR OR A MECHANICAL CONTRACTOR LICENSE WITH THE APPROPRIATE CLASSIFICATION(S) PURSUANT TO SC CODE ANN. § 40-11-410 WHEN THE TOTAL COST OF CONSTRUCTION IS GREATER THAN \$5000.

- ASBESTOS REMOVAL (DHEC)
- BACKFLOW PREVENTER (DHEC)
- BILLBOARDS/SIGNS (see below)
- COMMERCIAL CARPET INSTALLATION
- CLEANING DUCTS
- CLEANING STORM DRAINS
- CLEANING WATER/SEWER LINES
- CLEANING TANKS
- CLEARING
- COMMUNICATIONS (telephone/data)
- COMMUNICATION TOWERS (see below)
- COMMUNICATION CABLE TRENCHING
- CONVEYORS
- CRANES (assembly, maintenance or transportation)
- DEBRIS REMOVAL
- DEMOLITION (DHEC)
- ELEVATORS (LLR- Elevators)
- EQUIPMENT
- EXTERIOR RECREATIONAL SURFACES
- EXTERIOR SIDING (see below)
- FENCING
- FIBERGLASS WORK
- FIRE SUPPRESSION SYSTEMS (Fire Marshal)
- GENERATORS
- GOLF COURSE BRIDGES (Carts only)
- GOLF COURSE CONSTRUCTION
- GRUBBING
- **COMMERCIAL GUTTERS**
- HAULING
- IRRIGATION (Local Building Official)
- LANDSCAPING
- LOCKERS
- LOW VOLTAGE CABLE WIRING AND INSTALLATION
- MACHINERY
- PILE DRIVING (unless water activity)
- POOL PAINTING (inside of pool)
- PRESSURE VESSELS
- SCALES (Dept of Agriculture)
- SCAFFOLDING - NONPERMANENT
- SCORE BOARDS
- SEPTIC TANKS (DHEC)
- TURBINES
- VENTILATION SYSTEMS - UNTEMPERED (i.e. industrial plants)
- WELDING
- WELL DRILLING (LLR-Environmental)

Billboard/Sign Construction - may require "Electrical" license. Internal electrical work to the sign/billboard does not require an "Electrical" license, however, the final connection to the power source does.

Communications Towers - require a "Structural Framing" license classification. If a building is needed in connection with the tower, a "Building" license classification shall be required. If a concrete slab or foundation is needed, a "Concrete" classification shall be required.

Exterior Siding (commercial) - If related repair work is performed on a commercial structure, then a licensed building general contractor must do the work.

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised November 2016)

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 111.1 of the 2016 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. The Request for Filing Fee Waiver form is attached to this Decision. If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1205 Pendleton Street, Suite 473, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this

_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.