

hearing, the parties submitted into evidence 29 exhibits. This decision is based on the evidence and applicable law and precedents.

NATURE OF THE PROTEST

MAR's protest is attached hereto as Exhibit A and TQ's protest is attached hereto as Exhibit B. Both MAR and TQ protest DMH's determination that they were not responsible bidders for listing Roof Systems as the subcontractor for the subcontractor specialty of Roof (steel deck) Assembly.¹ In addition, TQ protests DMH's determination that its bid was not responsive because TQ provided only the contractor's license number for the subcontractor it intended to use for the subcontractor specialty of "Electrical."

FACTS

On December 6, 2012, DMH solicited bids to construct the Project. By the deadline for receiving bids, DMH received seven bids, including bids from MAR and TQ. Joseph Guido, the project architect, opened the bids on behalf of DMH, reviewed the bids for responsiveness, confirmed bidder and listed subcontractor licensure, and made a recommendation for award to DMH. Jim Berry, with DMH, testified that the responsiveness and responsibility determination was his alone, but it was clear from the testimony and other evidence that he based his determination on Mr. Guido's research and recommendation.

¹ The Consolidated Procurement Code requires the agency to identify in the solicitation documents, by "specialty," all subcontractors the agency expects to perform work exceeding three percent of the prime contractor's bid. Additionally, the agency may identify by "specialty" any other subcontractors they feel are critical to the project. The Procurement Code does not define what a subcontractor "specialty" is. However, State law does define contractor and subcontractor "specialties" in its licensing laws found in Title 40 of the South Carolina Code of Laws as amended. While the licensing law and the Procurement Code are independent of one another, there is no other source in the law for defining subcontractor "specialties." Therefore, the State Bid Form is based on the use of the "specialties" set forth in the licensing law. In other words, if the work is not covered by a license classification or subclassification set forth in the licensing law, the work is not considered the work of a "specialty." The form requires the agency to identify the subcontractor specialty by "License Classification and/or Subclassification." The subcontractor specialty of "Roof (steel deck) Assembly" identified in the bid form at issue in this case is not a license classification or subclassification set forth in the licensing law and, as a result, there was confusion among DMH, CDA, and the bidders as to what type of license the subcontractor they listed for this work was required to have. Listing only subcontractor specialties identified in the licensing law would have avoided this confusion and, perhaps, avoided this protest. However, no one protested this defect in the solicitation documents.

RESPONSIVENESS

With one exception, DMH found all bids to be responsive. [Ex. 17] That one exception was TQ's bid. TQ failed to write any name on the line in the bid form for naming the subcontractor it intended to use to perform the subcontractor specialty of "Electrical." TQ did write M-2309 on the line for providing the license number of this subcontractor. This license number belongs to M&M Electrical Contractors of Columbia, Inc. However, because TQ failed to write a name in addition to the license number on the bid form, DMH determined TQ's bid to be nonresponsive.

RESPONSIBILITY

Both MAR and TQ wrote the name "Roofing Systems" on the line in the bid form for naming the subcontractor they intended to use to perform the work of "Roof (steel deck) Assembly." [Exhibits 1 and 2] Moreover, both bidders wrote the license number G-12175 on the line in the bid form for providing this subcontractor's license number. However, when reviewing bidder responsibility for DMH, Mr. Guido could not find the name "Roofing Systems" in association with license number G-12175 on the Department of Labor, Licensing and Regulations (LLR) website for searching licenses. Instead, Mr. Guido determined license number G-12175 is the number for a license belonging to Bonitz. Finally, Mr. Guido determined this license was a General Contractors – Building license, not a Specialty Roofing license. As a result of Mr. Guido's research, DMH determined MAR and TQ to be nonresponsible bidders because of 1) "the ambiguity in the listing [of] the name for this subcontractor" and 2) the license of the listed entity was not a Specialty Roofing license. [Exhibits 4 and 5]

On February 8, 2013, DMH posted a Notice of Intent to Award a Contract to Burkwood Construction, Inc. [Ex. 16] On February 12, 2013, MAR submitted a letter to the CPOC protesting the intended award. On February 18, 2013, at 4:53:37 PM, TQ sent an email to the CPOC with the subject line "Protest of TQ Constructors, Inc., Project Number J12-9720-AC." This email stated that a letter of protest was attached but there was no attachment to the email. The following day, the CPOC received a hard copy of the letter of protest.²

² The email received within ten days of posting was a sufficient statement of protest to meet the ten-day deadline for protesting.

ISSUES

- I. Are the responses of MAR and TQ to the listing requirements for “Roof (steel deck) Assembly” responsive and is Roofing Systems responsible?
- II. Is a bid that provides only the license numbers of listed subcontractors responsive to the requirements of the solicitation and S.C. Code Ann. § 11-35-3020(b)?

DISCUSSION

All the issues of protest involve the Procurement Code’s subcontractor listing rules. These rules appear in paragraphs (b)(i) and (b)(ii) of Section 11-35-3020. In essence, these rules require that the solicitation identify, by specialty, those categories of subcontractors who are expected to perform a certain percentage of the work and that the bidders list the subcontractor they intend to use for each category so identified.³ These rules take on meaning only when read in conjunction with the Procurement Code’s subcontractor substitution restrictions, which appear in Section 11-35-3021. In essence, these rules prohibit a contractor, during performance, from using any subcontractors other than those listed to perform work falling within a category identified in the solicitation. For either of these rules to work, award must be conditioned on bidders properly listing subcontractors for the categories identified. Accordingly, the Procurement Code makes a bidder non-responsive for failure to comply with the listing rules. The policy reasons for these rules are discussed below.

Both protests are directed at an award and involve issues of responsiveness. As a general rule, an agency must award a contract only to the lowest responsive and responsible bidder. S.C. Code Ann. § 11-35-3020(c)(i). In other words, an agency cannot award to a nonresponsive bidder. A bid is responsive if it “conforms in all material aspects to the invitation for bids” Section 11-35-1410(7). Accordingly, while an agency must reject a bid that deviates from any solicitation requirements that are essential, an agency must waive, or allow the correction of, a deviation from any solicitation requirements that are immaterial. S.C. Code Ann. § 11-35-1520(13).⁴

³ Outside the special rules for construction subcontractor listing, bidders are not required to identify their proposed subcontractors. In addition, bidders are generally responsible for determining the responsibility of the subcontractors they intend to use. The state may, but is not required, to determine a subcontractor’s responsibility directly. S.C. Code Ann. Regs. § 19-445.2125(G).

⁴ If a bid fails to conform and the nonconformance is not material, “[t]he procurement officer shall either give the bidder an opportunity to cure [the nonconformity] or waive any such deficiency when it is to the advantage of the

In the context of the subcontractor listing requirement, “[f]ailure to complete the [subcontractor] list provided in the invitation for bids renders the bidder’s bid unresponsive.” S.C. Code Ann. § 11-35-3020(b)(ii). Whether a failure to list exactly as required is material – such that rejection is required – must be analyzed in the light of the purpose underlying the requirement. Ray Bell Const. Co., v. School District of Greenville Cnty, 331 S.C. 19, 501 S.E.2d 725 (S.C. 1998) (“We find allowing the subcontractor listing requirements to be waived *in this case* would frustrate the purpose of the legislature in enacting the statute. *Therefore*, Kahn’s failure to properly list subcontractors as required by section 11-35-3020 was a material violation of the bidding requirements and was not waivable by District. Kahn’s bid was therefore unresponsive.”) (emphasis added). The purpose of the subcontractor listing and substitution rules “is to prevent bid shopping and bid peddling” of subcontracts after bid opening.⁵ *Id.* at 730. Accordingly, an agency must reject any bid that lists subcontractors in such a manner as to permit that bidder to shop bids among subcontractors after bid opening. However, the underlying policy goal of the statute is satisfied when the bidder provides sufficient information on its bid listing form to prevent anyone other than the listed entity from performing the work (even if such an entity does not exist). For example, consider the following hypothetical. A general contractor, bidding as GenCon, writes the name “Catawba” on its bid for the category identified as “Heating and Air Conditioning.” No licensing number or other information is provided. On its face, the name Catawba is not unique; many business names could include the word Catawba. Without more information, such a listing provides the possibility that GenCon could shop bids among multiple entities, as long as their name includes “Catawba”. However, if GenCon had also provided “12345” as Catawba’s contractor’s license number, bid shopping is prevented because each contractor’s license number is unique to one entity. Therefore, GenCon would be responsive to the subcontractor listing requirement. Even if no such subcontractor exists, the result is the same because GenCon would be unable to use anyone to perform the heating-and-air

State.” S.C. Code Ann. § 11-35-1520(13). An immaterial nonconformity or “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” *Id.* For a thorough discussion of materiality, see *Protest of National Computer Systems, Inc.*, Case No. 1989-13.

⁵ “Bid shopping is the use by the general of one subcontractor’s low bid as a tool in negotiating lower bids from other subcontractors. Bid peddling, conversely, is the practice whereby subcontractors attempt to undercut known bid prices of other subcontractors in order to get a job. In most circumstances, bid peddling is simply a response of competing subcontractors to the bid shopping activity of a general, and insofar as a solution to this problem is concerned, bid shopping and peddling may be treated as one.” Thomas P. Lambert, Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 UCLA L.Rev. 389, 394 (1970).

work other than an entity with a license number of 12345 and with “Catawba” in its name.⁶ Restating the rule in light of the policy, a bidder has materially complied with the subcontractor listing requirement, i.e., the bidder is responsive, if the bidder provides sufficient information in its bid to prevent anyone other than a listed subcontractor from performing the work for which the subcontractor is listed.

Both protests also involve issues of responsibility. As noted above, an agency must award a contract only to the lowest responsive and responsible bidder. S.C. Code Ann. § 11-35-3020(c)(i). In other words, an agency cannot award to a nonresponsive bidder. Where responsiveness involves a bid’s conformance with the solicitation’s requirements, responsibility involves the bidder’s capability to perform the work, and a bidder is responsible only if it has the ability to perform the work. *See* S.C. Code Ann. Regs. 19-445.2125(A)(1).

As a rule, responsiveness is determined on facts as they exist at the time of opening.⁷ In contrast, responsibility is determined on facts as they exist at the time of award.⁸ As a rule, responsiveness is determined from the bid documents.⁹ In contrast, responsibility is determined on any facts available to the agency.¹⁰ A simple example illustrates the difference. A bidder’s bid that provides all the information requested and takes no exceptions to the solicitation is responsive. However, if the agency receives notice from a third party, moments before posting award, that the bidder has subsequently filed for bankruptcy, the agency could rightfully determine the bidder nonresponsive.

In order to be responsible, a bidder must be capable of performing. S.C. Code Ann. § 11-35-1410(6) (“Responsible bidder or offeror’ means a person who has the capability in all respects to perform fully the contract requirements . . .”). A bidder is not capable of performing

⁶ Obviously, if a bidder lists a non-existent subcontractor and cannot either substitute a real subcontractor or self-perform, the bidder cannot perform the work on which it has bid. A bidder incapable of performing the work is non-responsive, a determination that can be made other than from information appearing on the face of the bid.

⁷ *Protest of Two State Const.*, Case No. 1996-2 (“The Panel agrees with Two State that a bid must be found responsive on its face and cannot be changed after bid opening. . . . The Panel emphasizes that the procuring agency must be able to make a determination of responsiveness *from the face of the bid documents*.”). *Cf. Protest of Brantley Constr.*, 1999-3 (“If a bidder lists itself, rather than a subcontractor, to perform the required work, the bidder is responsive on the face of the bid. However, the bidder’s ability to do the work may be questioned, and to verify the bidder’s capability, one must look beyond the bid documents.”).

⁸ S.C. Code Ann. Regs. § 19-445.2125(D) (“Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.”).

⁹ S.C. Code Ann. § 11-35-1410(7) (providing that, in order for the bidder to be responsive, the bid itself must conform to the solicitation).

¹⁰ S.C. Code Ann. Regs. § 19-445.2125(B) (“In determining responsibility, the procurement officer may obtain and rely on any sources of information . . .”).

if the licensing laws prohibit it from performing, that is, if the bidder is not properly licensed. S.C. Code Ann. Regs. § 19-445.2125(A)(4) (“Factors to be considered in determining whether the state standards of responsibility have been met include whether a prospective contractor has: (4) qualified legally to contract with the State . . .”). Perhaps unique to the Contractor’s Licensing Act, the licensing laws prohibit a contractor from performing work if, *at the time it submitted its bid* to perform the work, the contractor was not properly licensed to perform that work. E.g., S.C. Code Ann. § 40-11-30 (“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.”) (emphasis added). Accordingly, in the context of licensing, the responsibility determination depends, in part,¹¹ on whether the entity was licensed *at the time its bid was submitted*. If, at the time of bidding, a subcontractor listed on a bidder’s bid does not have the ability to perform the work for which the subcontractor is listed, then the bidder is offering to contract for work it cannot lawfully perform and, accordingly, is nonresponsible. Protest of Burkwood Construction Company, Inc., Case No. 1997-8; Protest of Roofco, Inc., Case No. 2000-14(I). Therefore, an agency must reject a bidder who lists a subcontractor that does not have, at the time of bidding, a license required by law.¹²

I. Are the responses of MAR and TQ to the listing requirements for “Roof (steel deck) Assembly” responsive and is Roofing Systems responsible?

DMH determined MAR and TQ to be nonresponsible bidders because of 1) “the ambiguity in the listing [of] the name for this subcontractor” and 2) the license of the listed entity was not a Specialty Roofing license. [Exhibits 4 and 5] Regarding the second reason identified, all parties agreed at the hearing that the work of “Roof (steel deck) Assembly” required a

¹¹ A bidder licensed at the time of bidding, but not at the time of award, would also be non-responsible. Obviously, an agency cannot award a contract to a contractor lacking a license required by law.

¹² On a private job, perhaps the result might be different. In a private job, the contractor may not be prohibited from substituting a different subcontractor. Regardless, the status of the subcontractor’s license becomes irrelevant for purposes of determining the bidder’s responsibility if the law does not require that the subcontractor be licensed to perform the work. The licensing laws expressly contemplate such circumstances exist. S.C. Code Ann. § 40-11-70(C) (“Licensees may utilize the services of unlicensed subcontractors to perform work within the limitations of the licensee’s license group and license classification or subclassification; provided, the licensee provides supervision. The licensee is fully responsible for any violations of this chapter resulting from the actions of unlicensed subcontractors performing work for the licensee.”).

General Contractors – Building license, not a Specialty Roofing license, as was previously thought. Since all the prime bidders possessed this license, the listed subcontractor was not required to possess any contractor’s license. S.C. Code Ann. § 40-11-270(C). For these reasons, DMH abandoned any claim of nonresponsibility based on listing a subcontractor that did not possess a Specialty Roofing license. As a result, licensure is not an issue in these aggregated protests.

Regarding the first reason for rejection, DMH’s determined that MAR and TQ were nonresponsible bidders due to the ambiguity in their subcontractor listing for the work of “Roof (steel deck) Assembly”. The agency’s analysis is flawed;¹³ ambiguity in a subcontractor listing goes to responsiveness, not responsibility. Ambiguity in a bid as to the identity of a subcontractor is not determinative of responsibility because the determination of responsibility is not limited to information provided in the bid. In other words, the ambiguity can be cleared up before responsibility is determined, such that the determination is based on the actual facts, not the ambiguity. To illustrate, consider a bidder that fails to provide information required by the solicitation, information necessary for determining responsibility. For example, if the solicitation required that the bidder submit a copy of each subcontractor’s official license. The bidder is not automatically nonresponsible simply because it fails to include the required document. Rather,

¹³ From the testimony provided by Mr. Guido and the OSE project manager, Allen Carter, it is apparent that there was a misunderstanding as to whether they were dealing with a responsiveness issue or a responsibility issue. While they addressed the issue as one of responsibility, they thought their ability to acquire additional facts was as limited as it would be for a responsiveness determination. Their misunderstanding is understandable. In *Protest of Two State Construction Co.*, Case No. 1996-2, the Panel explained that “a bid must be found responsive on its face and cannot be changed after bid opening.” However, the Panel goes on to state that “[o]nce [a bidder’s] bid has been challenged as nonresponsive, Allen may provide extrinsic evidence to prove its responsiveness” and that “the contractors’ ability to do the work, if challenged, would require evidence beyond the bid documents to prove the contractor’s ability to perform.” The CPO agrees with the latter of these two statements. The former must be considered in light of the rules surrounding subcontractor listing at the time that order was issued. *Two States* was issued before the Panel published its opinion in *Protest of Brantley Constr.*, Case No. 1999-3. Prior to *Brantley*, the Panel had treated a bidder as nonresponsive if it listed a subcontractor that was not properly licensed. Determining whether a listed subcontractor is, in fact, properly licensed necessarily required research into facts beyond the face of the contractor’s bid. In the *Brantley* opinion, the Panel changed direction in recognition of a statutory change and, since then, treated the question of a subcontractor’s licensure as an issue of responsibility. This change eliminates the necessity for the strained approach taken in *Two States* where it provides that “[a] challenge to a subcontractor listing can be a catalyst for looking beyond the four corners of the bid document.” The better approach, as outlined in this opinion and *Two States*, is to limit responsiveness determinations to the four corners of a bidder’s bid. Given the change taken in *Brantley*, the strained approach is no longer necessary. Once a responsiveness determination is made, the agency has every reason to consider responsibility – including the licensing of listed subcontractors. The procurement laws now expressly contemplate that such information will be acquired during a responsibility determination. S.C. Code Ann. Regs § 19-445.2125(B) (“In determining responsibility, the procurement officer may obtain and rely on any sources of information . . .”).

the law expressly contemplates that the agency may subsequently request the information. In contrast, responsiveness is determined on the facts as they exist at opening, and a bidder is responsive to the subcontractor listing requirement if the bidder provides sufficient information in its bid to prevent anyone other than a listed subcontractor from performing the work for which the subcontractor is listed.

Both MAR and TQ listed a name and a license number in the space on the bid form for listing the subcontractor they intended to use to perform the work of “Roof (steel deck) Assembly.” By itself, the listing of the name “Specialty Roofing” is not a unique identifier¹⁴ but the name in combination with a license number is unique. There is only one entity with this combination of name and license number, or there is none. Either way, MAR or TQ’s listing does not allow bid shopping or bid peddling. Only the listed entity may perform the work of “Roof (steel deck) Assembly.” Therefore, MAR and TQ’s bids, at least with respect to this listing, are responsive.

Once a bid has been determined responsive and low, the agency must determine the bidder’s responsibility before it can make an award. In determining responsibility, the agency is free to contact bidders and others to obtain any information necessary to determine responsibility. This includes obtaining information to confirm that the listed subcontractors are real and are capable of performing the work for which they are listed. If the listed subcontractors are real and capable of performing the work for which they are listed (and the bidder is responsible in his own right) the bidder is a responsible bidder. If the listed subcontractors are not real or are not capable of performing the work for which they are listed (for example, if they lack a necessary license), the bidder is not responsible.

The un-refuted evidence at the hearing showed that MAR listed a real entity for the work of “Roof (steel deck) Assembly.” This evidence showed that the listed license number for this work is the number of the license belonging to Bonitz. This evidence also showed that Roofing Systems and Bonitz are the same legal entity.¹⁵ [Testimony of Steve Jordan, Vice President for Bonitz] Before it made its determination, DMH either had these facts in hand¹⁶ or they were

¹⁴ According to the LLR website, there are seven licensed contractors with the words “Roofing Systems” in their names.

¹⁵ Having listed Bonitz, MAR or TQ, if awarded the contract, must use Bonitz to perform the work of “Roof (steel deck) Assembly.”

¹⁶ Both MAR and TQ presented evidence of letters they sent to DMH notifying DMH of these facts. [Exhibits 6 and 15] Examination of these letters indicates that DMH received at least one these letters the day before DMH posted

easily available. Failure to consider such essential information would be arbitrary. Likewise, failure to request such information would be arbitrary. Failure to request such information due to an erroneous belief that doing so is precluded by law is contrary to law. The information DHM had, or should have had, irrefutably demonstrates that the entity listed is a real entity; therefore, the determination of responsibility was either clearly erroneous, arbitrary, or contrary to law.

Finally, Burkwood argued at the hearing that MAR and TQ were nonresponsible because listing a subcontractor by a name other than the exact name appearing on the subcontractor's license violates the provision of the licensing law requiring bidders to bid in the exact name appearing on their license. S.C. Code Ann. § 40-11-370. This provision does not apply to the subcontractor listing requirements of the Procurement Code where a party other than the licensee is inserting the subcontractors' names, usually in an abbreviated form, into the bid.¹⁷

II. Is a bid that provides only the license number of a listed subcontractor responsive to the requirements of the solicitations and S.C. Code Ann. § 11-35-3020(b)?

Paragraph (b)(i) of Section 11-35-3020 provides that “[a] bidder ... shall set forth in his bid **the name** of only those subcontractors to perform the work as identified in the invitation for bids.” [emphasis added] The very next paragraph, paragraph (b)(ii), states that “[f]ailure to complete the [subcontractor] list provided in the invitation for bids renders the bidder’s bid nonresponsive.” Consistent with these requirements, the bid form instructs bidders to identify listed subcontractors by name. Given the usefulness of a licensing number in both identifying and determining the licensing status of a subcontractor, the form also requests (but does not require¹⁸) a license number for each listed subcontractor.

In its bid, TQ entered a contractor’s licensing number with respect to the subcontractor specialty of “Electrical” but did not include a name. Even in the absence of a name, the identity of the subcontractor is clear. A license number is unique to one entity and one entity only. When TQ provided the license number M-2309 on the line for listing the subcontractor it intended to

Notice of Intent to Award. [Exhibit 15] The testimony did not reveal whether DMH considered the information contained in this letter before posting the Notice of Intent to Award.

¹⁷ If this provision did apply to the subcontractor listing, DMH would have had to reject every bid received on this project. Nevertheless, bidders that do not provide sufficient information regarding the identity of their listed subcontractors risk finding themselves ineligible for award.

¹⁸ As noted above, a subcontractor need not always be licensed.

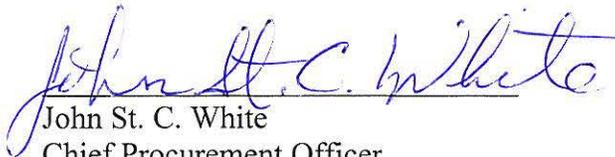
use to perform the work of “Electrical,” TQ provided a unique identifier that identified the subcontractor as M&M Electrical Contractors of Columbia, Inc., the entity to whom the license number belongs.

TQ’s listing of information unique to one entity for the specialty of “Electrical” satisfies the anti-bid shopping purpose of the listing law. TQ listed only one license number, not multiple numbers. Having listed only the license number of M&M Electrical Contractors of Columbia, Inc., TQ must use M&M Electrical Contractors of Columbia, Inc. and no other to perform the work of the specialty “Electrical.” There is no way for TQ to shop bids. Because the failure to write in the subcontractor’s name, in addition to the license number, did not either undermine the anti-bid shopping policy or have any effect on price, quality, quantity, delivery, or performance of the work, the failure is a minor informality. As such, the agency was obligated to either waive the nonconformity or give TQ an opportunity to cure it. In short, providing a subcontractor’s license number in the bid listing form is the equivalent of providing a subcontractor’s name.

DECISION

The CPOC finds that TQ’s subcontractor listing for the subcontractor specialty “Electrical” was responsive and that DMH’s determination that MAR and TQ are nonresponsive because of “the ambiguity in the listing [of] the name for this [Roof (steel deck) Assembly]subcontractor” was clearly erroneous, arbitrary, or contrary to law.

For the foregoing reason, the protests are granted as outlined above. DMH is instructed to proceed in a manner consistent with this decision and the Consolidated Procurement Code, which, presumably, will involve posting an intent to award to the lowest responsive and responsible bidder.


 John St. C. White
 Chief Procurement Officer
 For Construction

8 April 2013
 Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised January 2013)

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 83.1 of the 2012 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
1105 Pendleton Street, Suite 202, 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

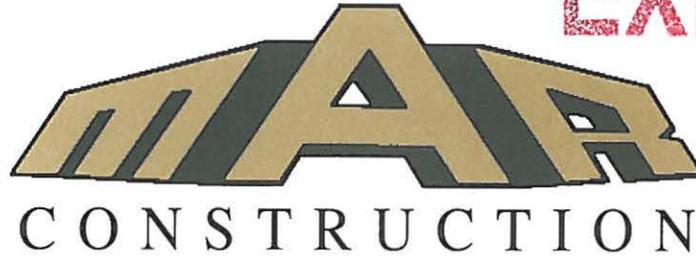
My Commission expires: _____

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.



February 12, 2013

John White, PE
Chief Procurement Officer
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, SC 29201

RECEIVED
FEB 13 2013
OFFICE OF STATE ENGINEER

RE: Bid Protest – MAR Construction Company, Inc.
State Project No. J12-9720-AC
South Carolina Department of Mental Health – Bryan Psychiatric Roof
Replacement, Phase IV

MAR Construction Company, Inc. submitted a bid to the South Carolina Department of Mental Health on a project entitled Bryan Psychiatric Roof Replacement, Phase IV, State Project J12-9720-AC on January 29, 2013. MAR was notified by letter dated February 4, 2013 that the Department of Mental Health considered its bid to be non-responsive. MAR answered that letter on February 7, 2013 by a letter sent by e-mail to Mr. James Berry. However, the Department of Mental Health published its notice of intent to award the contract to another on Friday, February 8, 2013. Pursuant to S.C. Code Ann. § 11-35-4210, kindly consider this letter to be the required notice of protest to the Department of Mental Health's decision to award the project to another. The grounds for the protest are as set forth below, but MAR reserves the right to argue any other grounds to the State Engineer/Chief Procurement Officer that may arise before a hearing on the matter is held.

The bid form contained a Subcontractor Specialty listing section. The subcontractor listing requires the bidder to list "Roof (steel deck) Assembly." MAR listed "Roofing Systems," the same subcontractor it used for the identical work on Phase III of the Project. Roofing Systems is a division of Bonitz Contracting Co. The Department of Mental Health had no difficulty determining who "Roofing Systems" is, as born out by the Department's letter of February 4, 2013, because MAR also included the license number when it listed Roofing Systems. Everything in the description for steel deck is included within the licensure of Roofing Systems, a Division of Bonitz Contracting Co.

141 Riverchase Way, Lexington, South Carolina 29072
(803) 796-8960 Facsimile (803) 796-4400

www.marconstruction.com

The steel deck assembly is described under Division 5, Structural Steel, Section 53110, Steel Deck Assemblies, of the specifications. The steel deck assembly is defined in Section 53110.1.3, System Description, as

The integrally engineered and integrally tested structural roof deck assembly shall consist of fluted rib-pattern sections, each with its protective coating(s), as specified; rigid thermal insulation panels; high-density, fire resistive roofing substrate panels; special screw fasteners, joint reinforcement tape, compression devices, and composite termination members, to be assembled on the jobsite in accordance with the project plans, specifications, and manufacturer's recommendations.

There is nothing in this description that includes any roofing installation requiring a specialty roofing license as required by the South Carolina Code of Laws.

Section 531103.1.2(B) includes language indicating that the steel deck roof includes "i. Asphalt architectural shingles," "j. Special approved fasteners of asphalt architectural shingles," and "k. Sheet metal flashings and trim including ice and water shield material as specified." However, those items are not "(steel deck)", which is what the listing asked for. Roofing Systems, as a division of Bonitz, is licensed to install even those parts of the roof if those items are included in the description. Therefore, listing Roofing Systems covers both the detailed description in Section 1.3 and the more general description in Section 1.2.

The Department also relies upon an argument that "[d]ue to the PVC membrane finish on the flat roof areas in this project, the listed firm performing roofing will require a Specialty Roofing license," which Bonitz does not have. However, this argument presupposes that the Department asked for a listing of the roofing contractor, not the steel deck contractor. There are a couple of reasons why the Department would have asked for the steel deck contractor and not the roofing contractor.

The steel deck assembly is a proprietary deck. The bid documents listed two approved assemblies in Section 531103.1.3(B) 2: Perform-A-Deck Integral Roof Deck Assembly by Martin Fireproofing Corporation and Loadmaster Pyro Span (22 gauge) P-100 Insulated Nailable Roof Deck Assembly. Each of these suppliers requires a certified installer or they will not warrant their assembly. Therefore, it is reasonable for the Department of Mental Health to require the bidder to list his steel deck subcontractor.

The steel deck with asphalt shingles comprises 93.2% of the deck, while the membrane roofing comprises only 6.8%. It is not reasonable for the Department of Mental Health to ask for a listing of the 6.8% while ignoring the 93.2%. A reasonable contractor, reading the specifications and the bid form, would list the 93.2% as requested and not the 6.8% that is not requested.

If the intent of the listing was to list the roofing contractor, or a combination of contractors who would install both the steel deck and the architectural shingles and other

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OFFICE OF STATE ENGINEER

roof, it was incumbent upon the Department of Mental Health to make that clear. The fact that the bid documents were at the least latently ambiguous and possibly misleading is established by the fact that "three of the seven bidders listed 'Roofing Systems' or a version thereof."

MAR is the lowest responsible bidder. The project should be awarded to MAR.

Sincerely,



Howard Morrow
Vice President

Cc: Brian P. Robinson - Bruner, Powell, Wall & Mullins, LLC

301

Singh, Anastasia

From: Friedman, Danya B. <DFriedman@TurnerPadget.com>
Sent: Tuesday, February 19, 2013 9:14 AM
To: Singh, Anastasia
Subject: RE: Protest of TQ Constructors, Inc., Project Number J12-9720-AC
Attachments: doc.pdf

Thank you Anastasia for letting me know. Attached please find the whole document.

EXHIBIT

B



Danya B Friedman
 Secretary
 PO Box 1473 | Columbia, SC 29202
 1901 Main Street, Suite 1700 | Columbia, SC 29201
 803-227-4259 | Fax 803-400-1455
 dfriedman@turnerpadget.com
[vCard](#) | [Location](#)

From: Singh, Anastasia [<mailto:asingh@mmo.sc.gov>]
Sent: Tuesday, February 19, 2013 8:50 AM
To: Friedman, Danya B.
Subject: FW: Protest of TQ Constructors, Inc., Project Number J12-9720-AC

Good morning Dayna.

We did not receive the attachment.

Anastasia Singh
 Administrative Assistant
 Office of State Engineer
 1201 Main Street, Ste. 600
 Columbia, SC 29201
 Ph#: 803.737.0634
 Fax: 803.737.0639
asingh@mmo.sc.gov

From: Protest-OSE [<mailto:Protest-OSE@mmo.sc.gov>]
Sent: Monday, February 18, 2013 4:54 PM
To: White, John; Singh, Anastasia
Subject: FW: Protest of TQ Constructors, Inc., Project Number J12-9720-AC

From: Friedman, Danya B. [[SMTP:DFRIEDMAN@TURNERPADGET.COM](mailto:DFRIEDMAN@TURNERPADGET.COM)]
Sent: Monday, February 18, 2013 4:53:37 PM
To: Protest-OSE

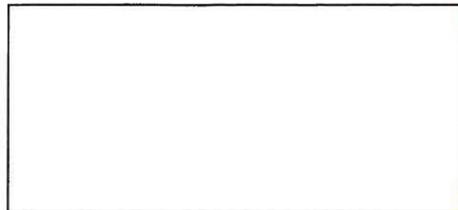
Cc: Cuttino, John E.
Subject: Protest of TQ Constructors, Inc., Project Number J12-9720-AC
Auto forwarded by a Rule

PRP22

To whom it may concern:

Attached please find the the bid protest letter for project number J12-9720-AC.

Thank you,



Danya B Friedman
Secretary
PO Box 1473 | Columbia, SC 29202
1901 Main Street, Suite 1700 | Columbia, SC 29201
803-227-4259 | Fax 803-400-1455
dfriedman@turnerpadget.com
[vCard](#) | [Location](#)

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.

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If you have received this communication in error or are not sure whether it is privileged, please immediately notify us by return e-mail and destroy any copies, electronic, paper or otherwise, which you may have of this communication.



February 12, 2013

John White, PE
Chief Procurement Officer
Office of the State Engineer
1201 Main Street, Suite 600
Columbia, SC 29201

RE: Bid Protest – MAR Construction Company, Inc.
State Project No. J12-9720-AC
South Carolina Department of Mental Health – Bryan Psychiatric Roof
Replacement, Phase IV

MAR Construction Company, Inc. submitted a bid to the South Carolina Department of Mental Health on a project entitled Bryan Psychiatric Roof Replacement, Phase IV, State Project J12-9720-AC on January 29, 2013. MAR was notified by letter dated February 4, 2013 that the Department of Mental Health considered its bid to be non-responsive. MAR answered that letter on February 7, 2013 by a letter sent by e-mail to Mr. James Berry. However, the Department of Mental Health published its notice of intent to award the contract to another on Friday, February 8, 2013. Pursuant to S.C. Code Ann. § 11-35-4210, kindly consider this letter to be the required notice of protest to the Department of Mental Health's decision to award the project to another. The grounds for the protest are as set forth below, but MAR reserves the right to argue any other grounds to the State Engineer/Chief Procurement Officer that may arise before a hearing on the matter is held.

The bid form contained a Subcontractor Specialty listing section. The subcontractor listing requires the bidder to list "Roof (steel deck) Assembly." MAR listed "Roofing Systems," the same subcontractor it used for the identical work on Phase III of the Project. Roofing Systems is a division of Bonitz Contracting Co. The Department of Mental Health had no difficulty determining who "Roofing Systems" is, as born out by the Department's letter of February 4, 2013, because MAR also included the license number when it listed Roofing Systems. Everything in the description for steel deck is included within the licensure of Roofing Systems, a Division of Bonitz Contracting Co.

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(803) 796-8960 Facsimile (803) 796-4400

www.marconstruction.com

The steel deck assembly is described under Division 5, Structural Steel, Section 53110, Steel Deck Assemblies, of the specifications. The steel deck assembly is defined in Section 53110.1.3, System Description, as

The integrally engineered and integrally tested structural roof deck assembly shall consist of fluted rib-pattern sections, each with its protective coating(s), as specified; rigid thermal insulation panels; high-density, fire resistive roofing substrate panels; special screw fasteners, joint reinforcement tape, compression devices, and composite termination members, to be assembled on the jobsite in accordance with the project plans, specifications, and manufacturer's recommendations.

There is nothing in this description that includes any roofing installation requiring a specialty roofing license as required by the South Carolina Code of Laws.

Section 531103.1.2(B) includes language indicating that the steel deck roof includes "i. Asphalt architectural shingles," "j. Special approved fasteners of asphalt architectural shingles," and "k. Sheet metal flashings and trim including ice and water shield material as specified." However, those items are not "(steel deck)", which is what the listing asked for. Roofing Systems, as a division of Bonitz, is licensed to install even those parts of the roof if those items are included in the description. Therefore, listing Roofing Systems covers both the detailed description in Section 1.3 and the more general description in Section 1.2.

The Department also relies upon an argument that "[d]ue to the PVC membrane finish on the flat roof areas in this project, the listed firm performing roofing will require a Specialty Roofing license," which Bonitz does not have. However, this argument presupposes that the Department asked for a listing of the roofing contractor, not the steel deck contractor. There are a couple of reasons why the Department would have asked for the steel deck contractor and not the roofing contractor.

The steel deck assembly is a proprietary deck. The bid documents listed two approved assemblies in Section 531103.1.3(B) 2: Perform-A-Deck Integral Roof Deck Assembly by Martin Fireproofing Corporation and Loadmaster Pyro Span (22 gauge) P-100 Insulated Nailable Roof Deck Assembly. Each of these suppliers requires a certified installer or they will not warrant their assembly. Therefore, it is reasonable for the Department of Mental Health to require the bidder to list his steel deck subcontractor.

The steel deck with asphalt shingles comprises 93.2% of the deck, while the membrane roofing comprises only 6.8%. It is not reasonable for the Department of Mental Health to ask for a listing of the 6.8% while ignoring the 93.2%. A reasonable contractor, reading the specifications and the bid form, would list the 93.2% as requested and not the 6.8% that is not requested.

If the intent of the listing was to list the roofing contractor, or a combination of contractors who would install both the steel deck and the architectural shingles and other

roof, it was incumbent upon the Department of Mental Health to make that clear. The fact that the bid documents were at the least latently ambiguous and possibly misleading is established by the fact that "three of the seven bidders listed 'Roofing Systems' or a version thereof."

MAR is the lowest responsible bidder. The project should be awarded to MAR.

Sincerely,

A handwritten signature in cursive script, appearing to read "Howard Morrow", with a long horizontal flourish extending to the right.

Howard Morrow
Vice President

Cc: Brian P. Robinson - Bruner, Powell, Wall & Mullins, LLC

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

PRP26
CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

John E. Cuttino

Direct Dial: (803) 227-4271

jcuttino@turnerpadget.com

February 18, 2013

VIA EMAIL (protest-ose@mmo.sc.gov)

VIA FACSIMILE ((803) 737-0639)

Chief Procurement Officer for Construction
Office of State Engineer
1201 Main Street, Suite 600
Columbia, SC 29201

Re: Protest of TQ Constructors, Inc.
Project Name: Bryan Psychiatric Roof Replacement
Project Number: J12-9720-AC
Owner: South Carolina Department of Mental Health
Protest of Notice of Intent to Award to Burkwood Construction, Inc.
posted February 8, 2013, the accompanying Final Bid Tabulation listing
the bid of TQ Constructors, Inc. as Non-responsive and Non-responsible
and any award of the contract for the above-referenced Project to any
bidder other than TQ Constructors, Inc.

Dear Sir:

As attorney for TQ Constructors, Inc. ("TQ"), I am submitting this Protest on behalf of TQ.

TQ hereby protests the Notice of Intent to Award the contract for the Bryan Psychiatric Roof Replacement Project, Project Number J12-9720-AC (the "Project") by the South Carolina Department of Mental Health (the "Department") to Burkwood Construction, Inc., the accompanying Final Bid Tabulation listing the bid of TQ Constructors, Inc. as Non-responsive and Non-responsible, and any award of the contract for the Project to any bidder other than TQ Constructors, Inc.

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Bank of America Plaza • 17th Floor • 1901 Main Street (29201) • PO Box 1473 • Columbia, SC 29202
Phone (803) 254-2200 • Fax (803) 799-3957 • turnerpadget.com

Chief Procurement Officer for Construction

February 18, 2013

Page 2

Grounds for Protest

The grounds for this Protest are as follows:

1. TQ was the lowest qualified bidder and was a responsible and responsive bidder.
2. The listing of TQ on the Bid Tabulation Form that accompanied the Notice of Intent to Award as “Non-Responsible & Non-Responsive” was erroneous and did not comply with South Carolina law.
3. The South Carolina Department of Mental Health intends to award the contract for the Project to Burkwood Construction, but Burkwood Construction was not the low bidder, which is in violation of the Bid Documents and South Carolina law.
4. The South Carolina Department of Mental Health acted arbitrarily and unreasonably in determining that TQ’s bid was “Non-Responsive & Non-Responsible”.

Further Explanation and Documents in Support of Grounds for this Protest

1. TQ was the low bidder, not Burkwood Construction

TQ submitted the low bid on the Bryan Psychiatric Roof Replacement – Phase IV Project, Project Number J12-9720-AC (the “Project”). The Bid Tabulation Form that accompanied the Notice of Intent to Award listed TQ’s bid of \$5,763,345.00 as the lowest bid. (A copy of the Notice of Intent to Award with the accompanying Bid Tabulation Form is included with this Protest as Exhibit 1.) The second lowest bidder was listed as Burkwood Construction with a bid of \$5,792,299.00, which was \$28,954.00 higher than TQ’s bid.

2. TQ was a responsible bidder.

The accompanying Bid Tabulation Form listed TQ and two other bidders, Hood Construction and MAR Construction, as “Non-Responsible”, apparently because they listed Roofing Systems as a subcontractor for the Roof (Steel Deck) Assembly line item. No explanation was provided with the Notice of Intent to Award or in the Bid Tabulation Form as to why TQ (or Hood Construction or MAR Construction) was “Non-Responsible” because it listed Roofing Systems as a subcontractor for this item.

The only explanation provided by the South Carolina Department of Mental Health (the “Department” or the “Agency”) as to its position as to TQ’s listing of Roofing Systems as its roofing subcontractor was in the letter dated February 4, 2013, a copy of which is included in

Chief Procurement Officer for Construction

February 18, 2013

Page 3

this Protest as Exhibit 2, from James Berry, PE Director of Physical Plant Services for the Department. A copy of TQ's Bid Form as submitted, which includes TQ's listing of its proposed subcontractors, is attached as Exhibit 3. I responded to Mr. Berry's letter on behalf of TQ as its counsel, by letter dated February 7, 2013, a copy of which is included in this Protest as Exhibit 4 and is incorporated herein by reference.

Mr. Berry raised two positions as to TQ's listing of "Roofing Systems". One was that the Department had determined that from the License No. listed (G12175), TQ intended to use Bonitz Contracting Co. but had listed "Roofing Systems" under the name of the subcontractor. The other position was that the work included a PVC membrane finish that had to be done by a specialty roofing company with a Specialty Roofing (SR) license, but that Bonitz was listed on-line by the State of South Carolina with a General Contracting License.

On behalf of TQ, I responded to both of these points in my letter of February 7, 2013. Roofing Systems is part of Bonitz Contracting Co. Inc. ("Bonitz"). I attached a copy of an e-mail from Jim Leveridge of Bonitz that confirmed that Roofing Systems was part of Bonitz and that the Agency had already admitted by Mr. Berry's letter that it understood TQ Constructors, Inc. intended to use Bonitz Contracting Co., Inc. for the Roof (steel deck) Assembly. TQ listed its proposed roofing subcontractor by the correct license number, and the Agency already knew the license number was the number for Bonitz. As part of Bonitz, Roofing Systems is not required to have a separate license number. Furthermore, TQ understands from Bonitz that Roofing Systems has previously done roofing work and submitted bids as a subcontractor for projects of the Department. The Department must have approved the use of Roofing Systems with the same license number for the previous work and did not disqualify other contractors previously for submitting bids using Roofing Systems and G12175 as the license number. In addition, using the name under which Bonitz does its roofing work did not have anything to do with TQ being "Non-Responsive". As the Bid Tabulation Form acknowledges, the listing of Roofing Systems was only an issue of being "Non-Responsible" not "Non-Responsive".

The only other basis that the Department previously raised as to Roofing Systems was that the subcontractor had to hold a Specialty Roofing (SR) license due to the PVC membrane finish. First, the Subcontractor Specialty for roofing was listed as "Roof (steel deck) Assembly". The PVC membrane finish is not part of the Steel Deck Assembly and is less than 10 percent of the total square footage of the roof. The Roof (steel deck) Assembly includes removal of the existing deck and shingles and installing the steel deck, duraplex, ice and water shield and the shingles. Bonitz planned to perform all of this work with its own forces except for the installation of the shingles, which it planned to subcontract to Curtis Construction Company ("Curtis"). Curtis performed the roofing work for Bonitz dba Roofing Systems on Phase III of Bryan Psychiatric Roofing Project. That Project involved a small amount of PVC membrane, which was performed by Curtis. Curtis holds the Specialty license for the PVC membrane work

Chief Procurement Officer for Construction

February 18, 2013

Page 4

in North Carolina, which license is recognized by reciprocity in South Carolina. Bonitz planned to subcontract the PVC membrane installation to Curtis for the Project that is the subject of this Protest. The PVC membrane for the Project that is the subject of this Protest is not part of the Steel Deck Assembly. The metal deck where the PVC membrane is to be installed is not being removed as part of the Project, and a new steel deck is not being installed where the PVC membrane is located. Bonitz's license, which covers its division, Roofing Systems, satisfies the licensing requirement for General Roofing, which is all that is required for the "Roof (steel deck) Assembly". If the Department wanted a separate listing for the Specialty subcontractor for the PVC membrane, not the steel deck roof, it should have included a separate line item on the Bid Form for the PVC membrane.

The Instructions to the Bidders did not require that the subcontractor listed have an SR license and did not prohibit the subcontractor from subcontracting any specialty work for the PVC membrane finish to another company. Bonitz planned to subcontract this specialty work to a subcontractor with the SR License. The bid documents do not require a sub-subcontractor to be listed. Rather, Paragraph 2 of the Instructions for Subcontractor Listing specifically states that the "Bidder should not insert the names of sub-subcontractors in the spaces provided on the bid form but only the names of those entities with which bidder will contract directly."

Therefore, listing Roofing Systems or Bonitz did not make TQ's bid non-responsive or make TQ a non-responsible bidder. Since the only issue as to listing Roofing Systems was responsibility, not responsiveness, as acknowledged by the Bid Tabulation Form, and the small amount of specialty roofing requiring an SR license was to be done by a sub-subcontractor, the determination that TQ was non-responsible so as to disqualify its bid was erroneous, arbitrary, unreasonable and not supported by the facts or law.

3. TQ's Bid was responsive.

The Bid Tabulation Form contains two asterisks for the electrical subcontractor for TQ, which according to the corresponding note on the form is a determination that TQ's bid was non-responsive due to how it listed the subcontractor for the electrical work. It is important to note that this determination of TQ's bid being non-responsive was based solely on the electrical subcontractor, because the double asterisks do not appear under the roofing subcontractor for TQ or in any other item for TQ.

The position of the Department as to TQ's listing of its electrical subcontractor was stated in Mr. Berry's letter of February 4, 2013 (Exhibit 2 to this Protest). As counsel for TQ, I previously addressed the issue as to the electrical subcontractor in my letter of January 31, 2013, a copy of which letter without exhibits is included with this Protest as Exhibit 5 and is incorporated herein by reference. I responded to Mr. Berry's letter of February 4, 2013 with my letter of February 7, 2013 (Exhibit 4), which is also incorporated herein by reference.

Chief Procurement Officer for Construction

February 18, 2013

Page 5

The Department's position, as expressed by Mr. Berry's letter of February 4, 2013, was that TQ failed to list the electrical subcontractor per the requirements of the bid form and SC Code of Laws 11-35-3020, paragraph b., sub paragraphs (i), (ii). The bid form used by the Department must conform to and be interpreted in accordance with South Carolina law, as interpreted by the courts of South Carolina. The Department's position is not consistent with South Carolina case law interpreting the statute or other language in the Instructions to the Bidders.

In Section 7 of the Bid Form, TQ listed its electrical subcontract by its South Carolina Subcontractor License Number, M2309, but inadvertently omitted the name associated with that License Number in Section 7. Please see a copy of TQ's listing of subcontractors in the Bid Form in Exhibit 1. At the bid opening, Sharon Davis of TQ showed Joe Guido, who was opening the bids, that a clerical mistake had been made when the names of the subcontractors were transferred to the Bid Form and the name of M & M Electrical was inadvertently not transferred. The Subcontractor License Number that was listed, License Number, M2309, belongs solely to M & M Electrical.

As shown by Mr. Berry's letter of February 4, 2013 (Exhibit 2 to this Protest), the Department can readily determine from the State of South Carolina's own website that a particular License No. matches to one specific company. Yet, in determining that TQ's bid listing M & M Electric as the electrical subcontractor, the Department chose to ignore the information from the State's website although it used the same website for its argument that TQ's listing of Roofing Systems was really Bonitz because of the License Number from that website. This demonstrates the arbitrary and unreasonable action of the Department in determining that TQ's bid listing the unique License No. that belongs only to M & M electric was non-responsive.

Section 7 of the Bid Form was entitled "Listing of Proposed Subcontractors Pursuant to Section 3020(b) (1), Chapter 35, Title 11 of the South Carolina Code of Laws, As Amended". Section 3020 has been interpreted by the Supreme Court of South Carolina as follows:

Under the Procurement Code, a contractor is required to **list** any subcontractor who will fabricate or install a portion of the project for 2% or greater of the total bid if a project is between three million dollars and five million dollars. S.C. Code Ann. § 11-35-3020 (1976, as amended) (Emphasis added)

William C. Logan & Associates v. Leatherman, 290 S.C. 400, 402, 351 S.E.2d 146, 147 (1986)

Here, TQ did list the subcontractor for the electrical work by its Subcontractor License Number, M2309. This is a unique number in South Carolina that identifies M & M Electrical.

Chief Procurement Officer for Construction

February 18, 2013

Page 6

No other company has that Subcontractor License Number. I have attached a print-out from the South Carolina website as support that Subcontractor License Number is for M & M Electrical. (This print-out is Exhibit 6 to this Protest.) Therefore, since the statute has been interpreted by the Supreme Court of South Carolina to require the contractor to “list” (not name) the subcontractor, and TQ listed the subcontractor by its unique Subcontractor License Number, TQ complied with the statute.

Further, only substantial compliance with a statute in South Carolina is required. See Davis v. Nations Credit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred). “The underlying goals of the State Procurement Code are, *inter alia*, to ensure standards for the fair and equitable treatment of all persons dealing with public procurement, establish a system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process, and foster effective broad-based competition ... To these ends, a primary objective of the bid listing provisions, particularly regarding subcontractors, is to prevent bid shopping and peddling.” Ray Bell Const. Co., Inc. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998). In Ray Bell, the Supreme Court of South Carolina explained bid shopping and bid peddling as follows:

“Bid shopping is the use by the general of one subcontractor's low bid as a tool in negotiating lower bids from other subcontractors. Bid peddling, conversely, is the practice whereby subcontractors attempt to undercut known bid prices of other subcontractors in order to get a job. In most circumstances, bid peddling is simply a response of competing subcontractors to the bid shopping activity of a general, and insofar as a solution to this problem is concerned, bid shopping and peddling may be treated as one.” Thomas P. Lambert, Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 UCLA L.Rev. 389, 394 (1970). Bid shopping allows a bidder “to be in a position to increase his profit, often to the detriment of the project itself, by forcing subcontractors to provide services at destructively low prices in order to obtain work.” George & Lynch, Inc. v. Division of Parks and Rec., 465 A.2d 345, 349 n. 4 (Del.1983)

Ray Bell Const. Co., Inc. v. Sch. Dist. of Greenville County, 331 S.C. at 19, fn. 7

Since the purpose of the statute and the Bid Form used here, which was by its title to comply with the statute, was to prevent bid shopping and bid peddling, TQ met that purpose by listing its electrical subcontractor as well as its roofing subcontractor by their respective unique South Carolina license number. Because the subcontractor’s license number is unique, TQ could not bid shop and the subcontract work of TQ was not subject to bid peddling because the specific subcontractor chosen by TQ for the particular line item was already identified in TQ’s Bid Form.

It would be obvious to the Department or to other bidders if TQ subcontracted the work to another subcontractor with a different South Carolina license number. Therefore, the integrity of the process has been protected.

Also, the Instructions to the Bidders recognizes that listing as allowed by law, not naming, is the focus of rejection of bids. In Section 2.33 of the Standard Supplemental Instructions to Bidders, the wording for reasons to reject a bid include 5.2.2.6: “Failure to **list** qualified Subcontractors **as required by law**”. (Emphasis added.) As shown above, the law allows substantial compliance with a statute and the Supreme Court of South Carolina has interpreted the statute to require the contractor to “list” the subcontractor. TQ’s listing of the subcontractor by unique South Carolina License number satisfies the Bid Form language to “list qualified Subcontractors as required by law.” Therefore, omitting the name of the electrical subcontractor, while including the unique South Carolina License number for M & M Electrical, is not a proper or reasonable basis to reject TQ’s bid or to declare it nonresponsive.

Finally, while the listing of the subcontractor by its unique license number satisfies the statute and the Bid Form, the Owner may also treat the omission of the name of the electrical subcontractor or not including the full name of the company, while including its license number, as a “Minor Informality and Irregularity” pursuant to S.C. Code § 11-35-1520(13). Under Section 5.3.1, the Owner has the right to waive informalities and irregularities. A minor informality or irregularity is defined as “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 be prejudicial to bidders.” S.C. Code § 11-35-1520(13). Here, leaving out the name of the electrical subcontractor and using the name of “Roofing Systems” rather than “Bonitz Contracting Co., Inc. d/b/a Roofing Systems, while including the correct license numbers, had no effect on the bid price, quality, quantity, or delivery of the supplies or performance of the contract. Moreover, since the subcontractor’s license number is unique, there is no doubt as to who the bid is referring to.

4. Awarding the Contract to Burkwood Construction Violates the Bid Documents and South Carolina law.

Where a bidder is the lowest bidder and meets the statutory qualifications, awarding the contract to the second lowest bidder violates the competitive bidding statutes, and the contract to the second lowest bidder would be void and of no effect. See Funderburg Builders, Inc. v. Abbeville County Mem'l Hosp., 467 F. Supp. 821, 823-824 (D.S.C. 1979)

Furthermore, under the Instructions to the Bidders for the Project, the Owner stated in Section 5.3.1 that:

It is the intent of the Owner to award a Contract to the lowest qualified Bidder provided the Bid has been submitted in accordance with the requirements of the Bidding Documents and does not exceed the funds available. The Owner shall have the right to waive informalities and irregularities in a Bid received and to accept the Bid which, in the Owner's judgment, is in the Owner's best interest."

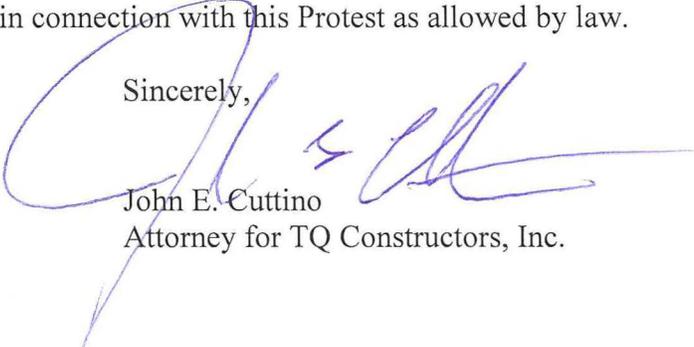
As set forth above, Section 7, which is the Bid Form for listing subcontractors, ties that form to the statutory requirements. Furthermore, in Section 2.33 of the Supplemental Instructions to the Bidders, the Department added language to Sections 5.2.2 and 5.2.3 of the Instructions to the Bidders to add reasons for which the Owner will reject the bids, one of which was "Failure to list qualified Subcontractors as required by law." (emphasis added). This Supplement shows not only that the Department recognized that the law required "listing" of the subcontractors but also that the failure to list had to be interpreted in accordance with what is required by law. Also, as shown above, the statute has been met by TQ's listing of its subcontractors by their respective unique South Carolina License Number.

Relief Requested

On behalf of TQ, the following relief is requested:

1. That the Contract for the Project not be awarded to Burkwood Construction or any other bidder other than TQ;
2. That the determination by the Department that TQ's bid was non-responsive and that TQ was not a responsible bidder be reversed and set aside;
3. That TQ be awarded the Contract for the Project;
4. That TQ be allowed such costs in connection with this Protest as allowed by law.

Sincerely,



John E. Cuttino
Attorney for TQ Constructors, Inc.

Chief Procurement Officer for Construction

February 18, 2013

Page 9

cc: (with enclosures)

Tony Wright (via e-mail)

Via Fax:

South Carolina Department of Mental Health

2414 Bull Street

Columbia, South Carolina 29202

Curt Davis and Associates, Inc. dba CDA Architects

1122 Lady Street

Suite 810

Columbia, South Carolina 29201

EXHIBIT 1

SE-370

Notice of Intent to Award

STATE OF SOUTH CAROLINA

South Carolina Department of Mental Health (insert agency name)
CFSH-Bldg. #4, 7901 Farrow Rd., Columbia, SC 29203 (insert agency address)

Posting Date: 2/8/2013

Unless stayed by protest or canceled, the State intends to enter into a contract for the project with the contractor noted below. The successful bid will be accepted and the contract formed by execution of the contract documents. All bid bonds remain in effect for the bid acceptance period as provide in Section 4 of the Bid Form, except as otherwise provided in the instructions to bidders.

Project Number: J12-9720-AC
Project Name: Bryan Psychiatric Hospital Roof Replacement
Awarded To: Burkwood Construction, Inc.

Solicitation Type Invitation for Bid Request for Proposals
Contract Amount \$ \$5,803,534.00

**Invitation for
Bid**

Information	Description	Bid Amount
Base Bid	Replace FRTW roof decking on five buildings at Bryan Psychiatric Hospital	\$ \$5,792,299.00
Alternate 1	Perform selective demolition and renovation to 1 st floor of Admin Bldg	\$ \$11,235.00
Alternate 2		\$
Alternate 3		\$

Remarks (explain any negotiations that resulted in a change in either the Base Bid or the accepted Bid Alternates)

Contractor should not incur any costs associated with the contract prior to receipt of a contract from the Agency for execution. The State assumes no liability for any expenses incurred by the contractor prior to submitting a contract to the contractor for execution. Contractor should not perform any work prior to (1) delivering to the Agency both certificates of insurance and performance and payment bonds meeting the requirements of the solicitation; and (2) receipt of the Agency's written notice to proceed. The State assumes no liability for any expenses incurred by the contractor prior to issuance of notice to proceed other than contractor's non-reimbursable costs incurred in providing such bonds.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with the Consolidated Procurement Code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. [Section 11-35-4210]

PROTEST - CPO ADDRESS - OSE: Any protest must be addressed to the Chief Procurement Officer for Construction, Office of State Engineer, and submitted in writing (a) by email to protest-ose@mmo.sc.gov, (b) by facsimile at 803-737-0639, or (c) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201. By submitting a protest to the foregoing email address, you (and any person acting on your behalf) consent to receive communications regarding your protest (and any related protests) at the e-mail address from which you sent your protest.

Agency Procurement Officer: _____

(Signature)

INSTRUCTIONS TO THE AGENCY:

1. Post a copy of this form at the location specified by the Instructions to bidders and announced at the Bid Opening.
2. Send a copy of this form and the final bid tabulation to all responsive bidders and OSE.



BRYAN PSYCHIATRIC
ROOF REPLACEMENT - PHASE IV
STATE PROJECT #J12-9720-AC

220 Faison Road
 Columbia, South Carolina



1122 Lady Street, Ste. 810
 Columbia, South Carolina 29201
 (803) 799-6502 FAX (803) 799-2014

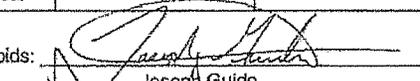
BID TABULATION FORM

Bid Date: 01/29/13

BIDDER'S NAME	Palmetto Construction Group	PC Construction of Greenwood, Inc.	Hood Construction (Non-Responsible)	MAR Construction (Non-Responsible)	Sherman Construction Company	Burkwood Construction	TQ Constructors (Non-Responsible & Non-Responsive)
CONTRACTOR LICENSE NUMBER	G104680	G104914	G14914	G10444	G13430	G14685	G116486
BID SECURITY	5%	5%	5%	5%	5%	5%	5%
ADDENDUMS 1,2 &3 ACKNOWLEDGED	Yes	Yes	Yes	Yes	Yes	Yes	Yes
TOTAL BASE BID	\$5,895,000.00	\$6,527,070.00	\$6,149,900.00	\$5,766,777.00	\$6,268,786.00	\$5,792,299.00	\$5,763,345.00
ALTERNATE NO. #1	\$20,677.00	\$26,689.00	\$18,420.00	\$21,700.00	\$36,437.00	\$11,235.00	\$19,927.00
Roof (steel Deck) Assembly	Needham Roofing	Needham Roof System Inc	Roofing Systems/ Bonitz *	Roofing Systems *	Needham	Needham Roofing	Roofing Systems *
Fire Protection	Quality Fire Protection	Quality Fire protection	Southeastern Fire LLC	Castle Automatic	Quality Fire Protection	Century Fire	Augusta Fire Prt
Heating	Catawba Mech.	W.B. Guimarin	Catawba Mechanical	Mac's Mech	Catawba Mechanical	Catawba	Catawba
Air Conditioning	Catawba Mech.	W.B. Guimarin	Catawba Mechanical	Mac's Mech	Catawba Mechanical	Catawba	Catawba
Electrical	Judy's Elec.	Judy's Electric Inc.	Judy's Electric	M&M Elect	Judy's Electrical	Judy's	**

* Non-Responsible, ** Non-Responsive

Person opening bids:


 Joseph Guido

Witness:

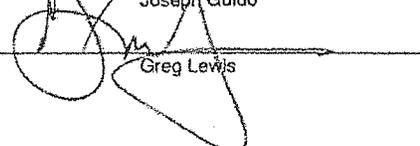

 Greg Lewis

EXHIBIT 2



State of South Carolina
Department of Mental Health

February 4, 2013

MENTAL HEALTH COMMISSION:

Alison Y. Evans, PsyD, Chair
Joan Moore, Vice Chair
Jane B. Jones
Everard Rutledge, PhD
J. Buxton Terry

2414 Bull Street • P.O. Box 485
Columbia, SC 29202
Information: (803) 898-8581

John H. Magill
State Director of Mental Health

T.Q. Constructors, Inc.
1145 E. Hiawatha St.
Metter, Ga. 30439

Att: Mr. Tony Wright

Re: Letter of Determination of Bid Responsiveness and Responsibility for
State Project No. J12-9720-AC, South Carolina Department of Mental Health-
Bryan Psychiatric Roof Replacement Phase IV

Dear Mr. Wright,

Bids were received for J12-9720-AC on January 27, 2013. A total of 7 bids were received. Upon review of the bid submitted by T.Q. Constructors, Inc., the following irregularities have been cited:

Failure to comply with the instructions for listing subcontractors per page BF-2A of the SE 330 Bid Form.

Item 1: SE 330, page BF-2, Required Subcontractor listing, Electrical:

At the time of bid, T.Q. Constructors, Inc. bid failed to list the electrical sub per requirements of the bid form and SC Code of Laws 11-35-3020, paragraph b., sub paragraphs (i), (ii). A license number was provided (not required) however, no company name (required) was provided in the designated space. For this reason the agency considers this listing as nonresponsive.

Item 2: SE 330, page BF-2, Required Subcontractor listing, Roof (steel deck) Assembly:

"Roofing Systems" was listed as the company name (required) and License No. G12175 was provided (not required). A current South Carolina contractor's license verification was conducted by the agency using the "Licensee LookUp" data base provided on the SC Department of Labor, Licensing & Registration website. All results were confirmed by phone with Ms. Lillia Ann Gray of SCLLR.

MISSION STATEMENT

To support the recovery of people with mental illnesses.



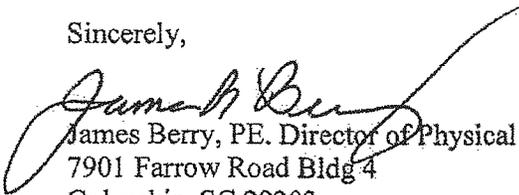
Using only the company name listed on the bid form resulted in 7 companies with names containing the words "Roofing Systems". Only 2 of these had currently active licenses; Commercial Roofing Systems (Swansboro, NC) and Core Roofing Systems (Alpharetta Ga.). Neither of these firms could be listed accurately on the bid form as "Roofing Systems" nor do either possess the listed license number G12175. Using a combination of the listed name and license number yielded no (0) matches. Upon entering only the license number provided one (1) match was generated, however, the license holder's name, Bonitz Contracting Co, Inc. (Columbia, SC) licensed as General Contractors-Building-BD5, did not match the name listed on page BF-2 for Roof Assembly. After 3 different searches into SCDLLR's data base it was still not clear who would be performing the roofing portion of this bid.

Three of the seven bidders listed the name "Roofing Systems", or a version thereof, as the subcontractor to perform this category of the work. All three listed the same license No. G12175. The agency has concluded that T.Q. Constructors, Inc. intended to use Bonitz Contracting Co., Inc. for the Roof (steel deck) Assembly and that the firm licensure is limited to BD5. Under this licensure a contractor or subcontractor is limited to "General Roofing". Due to the PVC membrane finish on the flat roof areas in this project, the listed firm performing the roofing will require a Specialty Roofing (SR) license (not covered by the BD5 classification) as defined in SC Code of Laws, Title 40, Chapter 11, Section 40-11-410, paragraphs (1), and paragraph (4), subparagraph (I).

Given the ambiguity in listing the name for this subcontractor, and that the license number provided yields a classification not sufficient for the specialty roofing license required, the agency does not consider "Roofing Systems" a responsible listing for this scope of work.

Per the announcement at the conclusion of the Bid Opening the SE 370 Notice of Intent to Award is scheduled to be posted on February 8, 2013 at 3:00 PM.

Sincerely,



James Berry, PE. Director of Physical Plant Services
7901 Farrow Road Bldg 4
Columbia, SC 29203

Cc: Allen Carter, OSE
Allen Powell, SCDMH
Joseph Guido, CDA
Greg Lewis, SCDMH

EXHIBIT 3

**SE-330 – LUMP SUM BID
BID FORM**

2011 Edition
Rev. 9/21/2011

Bidders shall submit bids on only Bid Form SE-330.

BID SUBMITTED BY: TQ Constructors, INC.
(Bidder's Name)

BID SUBMITTED TO: South Carolina Department of Mental Health
(Owner's Name)

FOR PROJECT: PROJECT NAME Bryan Psychiatric Roof Replacement – Phase IV
PROJECT NUMBER J12-9720-AC

OFFER

§ 1. In response to the Invitation for Construction Bids and in compliance with the Instructions to Bidders for the above-named Project, the undersigned Bidder proposes and agrees, if this Bid is accepted, to enter into a Contract with the Owner on the terms included in the Bidding Documents, and to perform all Work as specified or indicated in the Bidding Documents, for the prices and within the time frames indicated in this Bid and in accordance with the other terms and conditions of the Bidding Documents.

§ 2. Pursuant to Section 11-32-3030(1) of the SC Code of Laws, as amended, Bidder has submitted Bid Security as follows in the amount and form required by the Bidding Documents:

Bid Bond with Power of Attorney Electronic Bid Bond Cashier's Check

(Bidder check one)

§ 3. Bidder acknowledges the receipt of the following Addenda to the Bidding Documents and has incorporated the effects of said Addenda into this Bid:

ADDENDUM No: # 1, 2, 3

§ 4. Bidder accepts all terms and conditions of the invitation for Bids, including, without limitation, those dealing with the disposition of Bid Security. Bidder agrees that this Bid, including all Bid Alternates, if any, may not be revoked or withdrawn after the opening of bids, and shall remain open for acceptance for a period of 60 Days following the Bid Date, or for such longer period of time that Bidder may agree to in writing upon request of the Owner.

§ 5. Bidder herewith offers to provide all labor, materials, equipment, tools of trades and labor, accessories, appliances, warranties and guarantees, and to pay all royalties, fees, permits, licenses and applicable taxes necessary to complete the following items of construction work:

§ 6.1 **BASE BID WORK** (as indicated in the Bidding Documents and generally described as follows): includes selective demolition and renovations to five (5) existing buildings. Project is primarily for removal of Fire Retardant Treated Wood (FRTW) roof decking (involves removal of interior ceilings as well as entire roof) for the following buildings: Learning Resource Center, Physical Therapy, Village Hall, Admission/Administration Building and Energy Plant. Project also includes major mechanical and electrical work to each building as well as the installation of a new fire suppression system in the Learning Resource Center, Village Hall and the Admission/Administration Building.

5,763,345 which sum is hereafter called the Base Bid,
(Bidder - insert Base Bid Amount on line above)

2011 Edition
Rev. 9/21/2011

**SE-330 – LUMP SUM BID
BID FORM**

§ 6.2 BID ALTERNATES - as indicated in the Bidding Documents and generally described as follows:

ALTERNATE # 1 (Brief Description): includes selective demolition and renovation to Administrative areas on the first floor of the Admissions/Administration Building as indicated on the contract documents as alternate #1. Refer to floor plans, reflected ceiling plans, finish schedule, door schedule, hardware schedule, mechanical and electrical plans for alternate #1

ADD TO or DEDUCT FROM BASE BID:

19927

(Bidder to Mark appropriate box to clearly indicate the price adjustment offered for each alternate)

**SE-330 – LUMP SUM BID
BID FORM**

§ 8. LIST OF MANUFACTURERS, MATERIAL SUPPLIERS, AND SUBCONTRACTORS OTHER THAN SUBCONTRACTORS LISTED IN SECTION 7 ABOVE (FOR INFORMATION ONLY): Pursuant to instructions in the Invitation for Bids, if any, Bidder will provide to Owner upon the Owner's request and within 24 hours of such request, a listing of manufacturers, material suppliers, and subcontractors, other than those listed in Section 7 above, that Bidder intends to use on the project. Bidder acknowledges and agrees that this list is provided for purposes of determining responsibility and not pursuant to the subcontractor listing requirements of SC Code Ann § 11-35-3020(b)(j).

§ 9. TIME OF CONTRACT PERFORMANCE AND LIQUIDATED DAMAGES

a. **CONTRACT TIME:** Bidder agrees that the Date of Commencement of the Work shall be established in a Notice to Proceed to be issued by the Owner. Bidder agrees to substantially complete the Work within 300 calendar days from the Date of Commencement, subject to adjustments as provided in the Contract Documents.

b. **LIQUIDATED DAMAGES:** Bidder further agrees that from the compensation to be paid, the Owner shall retain as Liquidated Damages the sum of \$500,00 for each calendar day the actual construction time required to achieve Substantial Completion exceeds the specified or adjusted time for Substantial Completion as provided in the Contract Documents. This sum is intended by the parties as the predetermined measure of compensation for actual damages, not as a penalty for nonperformance.

§ 10. AGREEMENTS

- a. Bidder agrees that this bid is subject to the requirements of the law of the State of South Carolina.
- b. Bidder agrees that at any time prior to the issuance of the Notice to Proceed for this Project, this Project may be canceled for the convenience of, and without cost to, the State.
- c. Bidder agrees that neither the State of South Carolina nor any of its agencies, employees or agents shall be responsible for any bid preparation costs, or any costs or charges of any type, should all bids be rejected or the Project canceled for any reason prior to the issuance of the Notice to Proceed.

§ 11. ELECTRONIC BID BOND

By signing below, the Principal is affirming that the identified electronic bid bond has been executed and that the Principal and Surety are firmly bound unto the State of South Carolina under the terms and conditions of the AIA Document A310, Bid Bond, included in the Bidding Documents.

Electronic Bid Bond Number: N/A
Signature and Title: Jamy Wright, President

**SE-330 - LUMP SUM BID
BID FORM**

BIDDER'S TAXPAYER IDENTIFICATION

FEDERAL EMPLOYER'S IDENTIFICATION NUMBER: 58-2089031

OR

SOCIAL SECURITY NUMBER: N/A

CONTRACTOR'S CLASSIFICATIONS AND SUBCLASSIFICATIONS WITH LIMITATIONS

Classification(s) & Limits: BDS

Subclassification(s) & Limits: _____

SC Contractor's License Number(s): 91164810

BY SIGNING THIS BID, THE PERSON SIGNING REAFFIRMS ALL REPRESENTATIONS AND CERTIFICATIONS MADE BY BOTH THE PERSON SIGNING AND THE BIDDER, INCLUDING WITHOUT LIMITATION, THOSE APPEARING IN ARTICLE 2 OF THE INSTRUCTIONS TO BIDDER. THE INVITATION FOR BIDS, AS DEFINED IN THE INSTRUCTIONS TO BIDDERS, IS EXPRESSLY INCORPORATE BY REFERENCE.

SIGNATURE

BIDDER'S LEGAL NAME: TQ Constructors, Inc

ADDRESS: 1145 E. Hiawatha Street
Metter, GA. 30439

BY: Amy Wright
(Signature)

DATE: 1-29-2013

TITLE: President

TELEPHONE: 912-685-7950

EMAIL: tonywa@tqconstructorsinc.com

TQ Constructors, Inc

2011 Edition
Rev. 9/21/2011

**SE-330 - LUMP SUM BID
BID FORM**

§ 7. LISTING OF PROPOSED SUBCONTRACTORS PURSUANT TO SECTION 3020(b)(i), CHAPTER 35, TITLE 11 OF THE SOUTH CAROLINA CODE OF LAWS, AS AMENDED - (See Instructions on the following page BF-3A)

Bidder shall use the below-listed Subcontractors in the performance of the Subcontractor Specialty work listed:

SUBCONTRACTOR SPECIALTY By License Classification and/or Subclassification (Completed by Owner)	SUBCONTRACTOR'S PRIME CONTRACTOR'S NAME (Must be completed by Bidder) BASE BID	SUBCONTRACTOR'S PRIME CONTRACTOR'S SC LICENSE NUMBER
Roof (steel deck) Assembly	Roofing Systems	G-12175
Fire Protection	Augusta Fire Prot.	FSC1750B
Heating	Catawba	M108109
Air Conditioning	Catawba	M108109
Electrical		M-2309

If a Bid Alternate is accepted, Subcontractors listed for the Bid Alternate shall be used for the work of both the Alternate and the Base Bid work.

THE AMERICAN INSTITUTE OF ARCHITECTS



AIA Document A310

Bid Bond

KNOW ALL MEN BY THESE PRESENTS, that TQ Constructors, Inc.
1145 East Hiawatha Street
Metter, GA 30439

as Principal, hereinafter called the Principal, and Western Surety Company

a corporation duly organized under the laws of the State of South Dakota

as Surety, hereinafter called the Surety, are held and firmly bound unto South Carolina Department of Mental Health
2414 Bull Street
Columbia, SC 29202

as Obligee, hereinafter called the Obligee, in the sum of Five Percent of Amount Bid
Dollars (\$ 5 %),

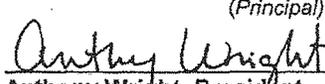
for the payment of which sum well and truly to be made, the said Principal and the said Surety, bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a bid for Bryan Psychiatric Roof Replacement, Columbia, SC 29203. Project Invitation No. J12-9720-AC.

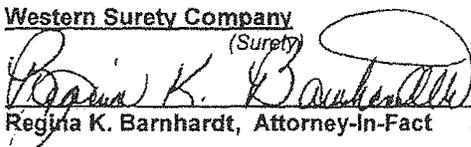
NOW, THEREFORE, if the Obligee shall accept the bid of the Principal and the Principal shall enter into a Contract with the Obligee in accordance with the terms of such bid, and give such bond or bonds as may be specified in the bidding or Contract Documents with good and sufficient surety for the faithful performance of such Contract and for the prompt payment of labor and material furnished in the prosecution thereof, or in the event of the failure of the Principal to enter such Contract and give such bond or bonds, if the Principal shall pay to the Obligee the difference not to exceed the penalty hereof between the amount specified in said bid and such larger amount for which the Obligee may in good faith contract with another party to perform the Work covered by said bid, then this obligation shall be null and void, otherwise to remain in full force and effect.

Signed and sealed this 22nd day of January, 2013.


(Witness)

TQ Constructors, Inc.
(Principal) (Seal)

Anthony Wright, President (Title)


(Witness)

Western Surety Company
(Surety) (Seal)

Regina K. Barnhardt, Attorney-in-Fact (Title)

Western Surety Company

POWER OF ATTORNEY APPOINTING INDIVIDUAL ATTORNEY-IN-FACT

Know All Men By These Presents, That WESTERN SURETY COMPANY, a South Dakota corporation, is a duly organized and existing corporation having its principal office in the City of Sioux Falls, and State of South Dakota, and that it does by virtue of the signature and seal herein affixed hereby make, constitute and appoint

Michael W Paul, Regina K Barnhardt, Individually

of Suwanee, GA, its true and lawful Attorney(s)-in-Fact with full power and authority hereby conferred to sign, seal and execute for and on its behalf bonds, undertakings and other obligatory instruments of similar nature

- In Unlimited Amounts -

and to bind it thereby as fully and to the same extent as if such instruments were signed by a duly authorized officer of the corporation and all the acts of said Attorney, pursuant to the authority hereby given, are hereby ratified and confirmed.

This Power of Attorney is made and executed pursuant to and by authority of the By-Law printed on the reverse hereof, duly adopted, as indicated, by the shareholders of the corporation.

In Witness Whereof, WESTERN SURETY COMPANY has caused these presents to be signed by its Vice President and its corporate seal to be hereto affixed on this 3rd day of October, 2012.



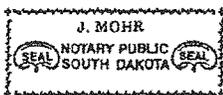
WESTERN SURETY COMPANY

Paul T. Bruslat
Paul T. Bruslat, Vice President

State of South Dakota }
County of Minnehaha } ss

On this 3rd day of October, 2012, before me personally came Paul T. Bruslat, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Sioux Falls, State of South Dakota; that he is the Vice President of WESTERN SURETY COMPANY described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed pursuant to authority given by the Board of Directors of said corporation and that he signed his name thereto pursuant to like authority, and acknowledges same to be the act and deed of said corporation.

My commission expires
June 23, 2015



J. Mohr
J. Mohr, Notary Public

CERTIFICATE

I, L. Nelson, Assistant Secretary of WESTERN SURETY COMPANY do hereby certify that the Power of Attorney hereinabove set forth is still in force, and further certify that the By-Law of the corporation printed on the reverse hereof is still in force. In testimony whereof I have hereunto subscribed my name and affixed the seal of the said corporation this 22nd day of January, 2013.



WESTERN SURETY COMPANY

L. Nelson
L. Nelson, Assistant Secretary

EXHIBIT 4

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

PRP50

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

REPLY TO:

John E. Cuttino

E-Mail: JCuttino@TurnerPadget.com
Writer's Direct Dial: (803) 227-4271
Direct Fax: (803) 400-1472

February 7, 2013

VIA FAX AND HAND DELIVERY

James Berry, PE Director of Physical Plant Services
South Carolina Department of Mental Health
7901 Farrow Road Bldg 4
Columbia, SC 29203
FAX: (803) 935-5653

Re: Bryan Psychiatric Roof Replacement – Phase IV Project, Project Number J12-9720-AC

Dear Mr. Berry:

This is to respond to your letter of February 4, 2013.

You have asserted two irregularities in TQ's bid for this project, but your assertions are not correct. Your first assertion is that TQ failed to list the electrical subcontractor per the requirements of the bid form and SC Code of Laws 11-35-3020, paragraph b., sub paragraphs (i), (ii). I have enclosed my letter of January 27, 2013, which addressed the bid form, this statute and case law interpreting the statute. The bid form used by the Owner must conform to and be interpreted in accordance with South Carolina law, as interpreted by the courts of South Carolina. Your position is not consistent with the case law that I cited in my letter. I explained to you in my letter of January 27, 2012 in detail how TQ's bid complied with applicable South Carolina law and how TQ's bid was responsive. I look forward to your response to the case law and reasoning that I presented in my letter to you.

We also strongly disagree with your position regarding TQ's listing of "Roofing Systems". "Roofing Systems" is part of Bonitz Contracting Co. Inc. ("Bonitz"). Please see the attached e-mail from Jim Leveridge of Bonitz. You acknowledge in your letter that License No. G12175 is the license number for Bonitz Contracting Co. and that the "agency has concluded that TQ Constructors, Inc. intended to use Bonitz Contracting Co., Inc. for the Roof (steel deck) Assembly." Therefore, TQ listed its proposed subcontractor by the correct license number, and the agency already knows that that the license number is the number for Bonitz. As part of Bonitz, Roofing Systems is not required to have a separate license number. Furthermore, TQ understands from Bonitz that Roofing Systems has previously done roofing work and submitted

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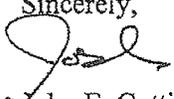
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Phone (803) 254-2200 • Fax (803) 799-3957 • turnerpadget.com

bids as a subcontractor for projects of the South Carolina Department of Mental Health. The South Carolina Department of Mental Health surely approved the use of Roofing Systems with the same license number for the previous work and did not disqualify other contractors previously for submitting bids using Roofing Systems and G12175 as the license number.

With respect to your point that the listed firm will require a Specialty Roofing (SR) license due to the PVC membrane finish, I understand that the PVC membrane finish is only a small portion of the roofing work and that Bonitz plans to subcontract this work to a subcontractor with the SR License. The bid documents do not require sub-subcontractors to be listed. Rather, Paragraph 2 of the Instructions for Subcontractor Listing specifically states that the "Bidder should not insert the names of sub-subcontractors in the spaces provided on the bid form but only the names of those entities with which bidder will contract directly."

Finally, while the listing of the subcontractor by its unique license number satisfies the statute and the Bid Form, the Owner may also treat the omission of the name of the electrical subcontractor or not including the full name of the company, while including its license number, as a "Minor Informality and Irregularity" pursuant to S.C. Code § 11-35-1520(13). Under Section 5.3.1 the Owner has the right to waive informalities and irregularities. A minor informality or irregularity is defined as "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 be prejudicial to bidders." S.C. Code § 11-35-1520(13). Here, leaving out the name of the electrical subcontractor and using the name of "Roofing Systems" rather than "Bonitz Contracting Co., Inc. d/b/a Roofing Systems", while including the correct license numbers, had no effect on the bid price, quality, quantity, or delivery of the supplies or performance of the contract. Moreover, since the subcontractor's license number is unique, there is no doubt as to who the bid is referring to.

On behalf of TQ, I urge you to reconsider your position that there are irregularities in TQ's bid for this project.

Sincerely,

for John E. Cuttino

 (Joshua D. Shan

cc: Via Fax and Hand Delivery with enclosure

South Carolina Department of Mental Health
Attn: Greg Lewis, Project Manager
7901 Farrow Road, Physical Plant Building #4
Columbia, SC 29203
FAX: (803) 935-5653

South Carolina Department of Mental Health
Attn: Janet Watkins, State Director
2414 Bull Street
Columbia, SC 29202
FAX: (803) 737-0639

Curt Davis & Associates, Inc. dba CDA Architects
Attn: Joseph Guido
1122 Lady Street, Suite 810
Columbia, SC 29201
FAX: (803) 799-2014

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TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH**John E. Cuttino**E-Mail: JCuttino@TurnerPadget.com

Direct Dial: (803) 227-4271

January 31, 2013

VIA FAX AND HAND DELIVERY

South Carolina Department of Mental Health
 Attn: Greg Lewis, Project Manager
 7901 Farrow Road, Physical Plant Building #4
 Columbia, SC 29203
FAX 803-935-5653

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Curt Davis & Associates, Inc. dba CDA Architects
 Attn: Joseph Guido
 1122 Lady Street, Suite 810
 Columbia, SC 29201
FAX 803-799-2014

Re: Bryan Psychiatric Roof Replacement – Phase IV Project,
 Project Number J12-9720-AC
 Our File: TBA

Dear Sirs and Madam:

As attorney for TQ Constructors, Inc. ("TQ"), I am submitting this letter on behalf of TQ.

It is my understanding that TQ submitted the low bid on the Bryan Psychiatric Roof Replacement – Phase IV Project, Project Number J12-9720-AC (the "Project"). It is also my understanding that the Owner, the South Carolina Department of Mental Health is to make a decision soon as to whether to award the contract to TQ. It is further my understanding that the only issue is whether TQ's listing of its electrical subcontract by its South Carolina Subcontractor License Number, M2309, but inadvertently omitting the name associated with that license Number in Section 7 of the Bid Form, made TQ's bid nonresponsive. At the bid opening, Sharon Davis of TQ showed Joe Guido, who was opening the bids, that a clerical mistake had been made when the names of the subcontractors were transferred to the Bid Form and the name of M & M Electrical was inadvertently not transferred. The Subcontractor License Number was listed for M & M Electrical. Please see a copy of TQ's Bid Form attached.

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January 31, 2013

Page 2

Section 7 of the Bid Form was entitled "Listing of Proposed Subcontractors Pursuant to Section 3020(b) (1), Chapter 35, Title 11 of the South Carolina Code of Laws, As Amended". Section 3030 has been interpreted by the Supreme Court of South Carolina as follows:

Under the Procurement Code, a contractor is required to list any subcontractor who will fabricate or install a portion of the project for 2% or greater of the total bid if a project is between three million dollars and five million dollars. S.C.Code Ann. § 11-35-3020 (1976, as amended) (Emphasis added)

William C. Logan & Associates v. Leatherman, 290 S.C. 400, 402, 351 S.E.2d 146, 147 (1986).

Here, TQ did list the subcontractor for the electrical work by its Subcontractor License Number, M2309. This is a unique number in South Carolina that identifies M & M Electrical. No other company has that Subcontractor License Number. I have attached a print-out from the South Carolina website as support that Subcontractor License Number M2309 is for M & M Electrical. Therefore, since the statute has been interpreted by the Supreme Court of South Carolina to require the contractor to "list" (not name) the subcontractor, and TQ listed the subcontractor by its unique Subcontractor License Number, TQ complied with the statute.

Further, only substantial compliance with a statute in South Carolina is required. See Davis v. Nations Credit Fin. Servs. Corp., 326 S.C. 83, 86, 484 S.E.2d 471, 472 (1997) (looking to the purpose of a statute in determining whether substantial compliance occurred). "The underlying goals of the State Procurement Code are, *inter alia*, to ensure standards for the fair and equitable treatment of all persons dealing with public procurement, establish a system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process, and foster effective broad-based competition ... To these ends, a primary objective of the bid listing provisions, particularly regarding subcontractors, is to prevent bid shopping and peddling." Ray Bell Const. Co., Inc. v. School Dist. of Greenville County, 331 S.C. 19, 501 S.E.2d 725 (1998). It is clear that the underlying purposes of the statute are substantially complied with by including just the electrical subcontractor's license number. Since the subcontractor's license number is unique, there is no doubt as to who the bid is referring to. As such, the integrity of the process has been protected.

Also, the Instructions to the Bidders recognizes that listing as allowed by law, not naming, is the focus of rejection of bids. In Section 2.33 of the Standard Supplemental Instructions to Bidders, the wording for reasons to reject a bid include 5.2.2.6: "Failure to list qualified Subcontractors as required by law". (Emphasis added.) As shown above, the law allows substantial compliance with a statute and the Supreme Court of South Carolina has interpreted the statute to require the contractor to "list" the subcontractor. TQ's listing of the subcontractor by unique South Carolina License number satisfies the Bid Form language to "list qualified Subcontractors as required by law." Therefore, omitting the name of the electrical subcontractor, while including the unique South Carolina License number for M & M Electrical, is not a basis to reject TQ's bid or to declare it nonresponsive.

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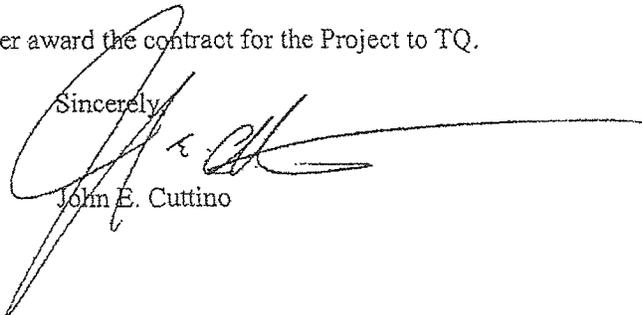
January 31, 2013

Page 3

Finally, while the listing of the subcontractor by its unique license number satisfies the statute and the Bid Form, as set forth above, the Owner may also treat the omission of the name of the electrical subcontractor, while including its license number, as a "Minor Informality and Irregularity" pursuant to S.C. Code § 11-35-1520(13), and under Section 5.3.1 the Owner has the right to waive informalities and irregularities. A minor informality or irregularity is defined as "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 be prejudicial to bidders." S.C. Code § 11-35-1520(13). Here, leaving out the name of the electrical subcontractor, while including its license number, had no effect on the bid price, quality, quantity, or delivery of the supplies or performance of the contract. Moreover, since the subcontractor's license number is unique, there is no doubt as to who the bid is referring to.

On behalf of TQ, I request that the Owner award the contract for the Project to TQ.

Sincerely,



John E. Cuttino

Enclosures
JEC:kle

cc: Tony Wright, TQ Constructors, Inc.

From: Jim Leveridge [<mailto:JimLeveridge@Bonitz.com>]

Sent: Wednesday, February 06, 2013 5:32 PM

To: Winona Lindsey

Subject: RE: Letter of Determination of Bid Responsiveness and Responsibility for State Project No. J12-9720-AC

We did one job out there that finished up in November of 2011, state project # J12-9701-LC-C. We have bid all three phases of the work that have been bid so far, along with this one.

Our name is Bonitz Contracting Co. Inc. dba Roofing Systems; we do not need additional license to cover us. Our license in Va. is listed as Bonitz Contracting Co. Inc. as well and we took the test.

EXHIBIT 5

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CHARLESTON
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GREENVILLE
MYRTLE BEACH**John E. Cuttino**E-Mail: JCuttino@TurnerPadget.com

Direct Dial: (803) 227-4271

January 31, 2013

VIA FAX AND HAND DELIVERY

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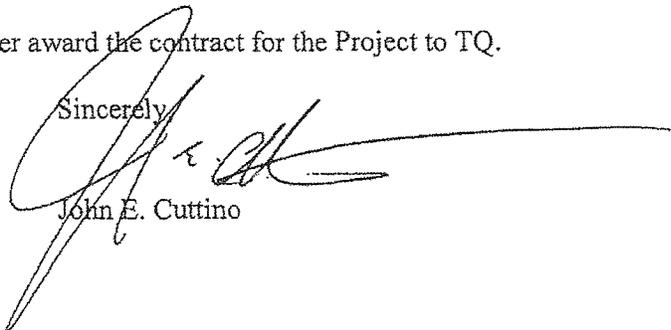
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On behalf of TQ, I request that the Owner award the contract for the Project to TQ.

Sincerely,



John E. Cuttino

Enclosures

JEC:kle

cc: Tony Wright, TQ Constructors, Inc.

EXHIBIT 6

M & M ELECTRICAL CONTRS OF COLUMBIA INC
214 BRUNER ROAD
LEXINGTON, SC 29072
(803) 356-8977

License number: 2309
License type: MECHANICAL CONTRACTOR
Status: ACTIVE
Expiration: 10/31/2013
First Issuance Date: 01/01/1992
Classification: EL5

Supervises
AL MURPHY - (COM)

[Click here for classifications key](#)