

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
)  
IN THE MATTER OF: PROTEST )  
)  
M.A.R. CONSTRUCTION COMPANY, )  
INC. & TQ CONSTRUCTORS, INC. )  
)  
VS. )  
)  
SOUTH CAROLINA DEPARTMENT OF )  
MENTAL HEALTH )  
)  
BRYAN PSYCHIATRIC ROOF )  
REPLACEMENT )  
INDEFINITE DELIVERY CONTRACT )  
STATE PROJECT NO. J12-9720-AC )  
\_\_\_\_\_ )

BEFORE THE CHIEF PROCUREMENT  
OFFICER FOR CONSTRUCTION

DECISION

CASE NO. 2013-010A/B

POSTING DATE: April 8, 2013

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to requests from M.A.R. Construction Company, Inc. (MAR) and TQ Constructors, Inc. (TQ), under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review of the Bryan Psychiatric Roof Replacement bid for the South Carolina Department of Mental Health (DMH). MAR and TQ protest DMH's posting of a Notice of Intent to Award a contract to Burkwood Construction, Inc. (Burkwood). Pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review. As a part of this review, the CPOC held a hearing on March 27, 2013. At the hearing, Attorney Brian P. Robinson represented MAR, attorney John Cuttino represented TQ, attorney Alan Powell represented DMH, and attorney Alan Peace represented Burkwood. Present as witnesses were Michael A. Rozbitsky, President of MAR; Howard Morrow, Project Manager for MAR; Wallace Wiggin, Senior Project Manager for TQ; Sharon Davis, Project Administrator for TQ; Jim Leveridge, Assistant Vice President for Bonitz Contracting Company, Inc. (Bonitz); Steve Jordan, Vice President for Bonitz; Fred Frank, General Manager for Burkwood; Joseph Guido, Architect with Curt Davis and Associates, Inc., Architects (CDA); James Berry, Physical Plant Director for DMH; and Allen Carter, Project Manager for the Office of the State Engineer (OSE). During the

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.<sup>1</sup> 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.

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<sup>1</sup> 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.<sup>2</sup>

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<sup>2</sup> 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.<sup>3</sup> 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).<sup>4</sup>

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<sup>3</sup> 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).

<sup>4</sup> 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.<sup>5</sup> *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

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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.

<sup>5</sup> “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.<sup>6</sup> 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.<sup>7</sup> In contrast, responsibility is determined on facts as they exist at the time of award.<sup>8</sup> As a rule, responsiveness is determined from the bid documents.<sup>9</sup> In contrast, responsibility is determined on any facts available to the agency.<sup>10</sup> 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

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<sup>6</sup> 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.

<sup>7</sup> *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.”).

<sup>8</sup> 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.”).

<sup>9</sup> 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).

<sup>10</sup> 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,<sup>11</sup> 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.<sup>12</sup>

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

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<sup>11</sup> 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.

<sup>12</sup> 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;<sup>13</sup> 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,

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<sup>13</sup> 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 identifier<sup>14</sup> 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.<sup>15</sup> [Testimony of Steve Jordan, Vice President for Bonitz] Before it made its determination, DMH either had these facts in hand<sup>16</sup> or they were

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

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

<sup>16</sup> 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 nonresponsive 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.<sup>17</sup>

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 require<sup>18</sup>) 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

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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.

<sup>17</sup> 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.

<sup>18</sup> 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.

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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: \_\_\_\_\_

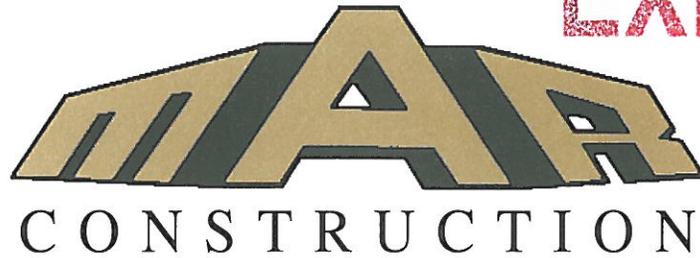
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For official use only:      \_\_\_\_\_ Fee Waived      \_\_\_\_\_ Waiver Denied

\_\_\_\_\_  
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](http://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

FEB 13 2013

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

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**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](#)

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**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](mailto: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

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**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**

To whom it may concern:

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

Thank you,

	<p>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 <a href="#">vCard</a>   <a href="#">Location</a></p>
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