STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND** **IN THE MATTER OF: PROTEST** **ACTION MECHANICAL CONTRACTORS INC.** **VS.** **YORK TECHNICAL COLLEGE** **BUILDING D CHILLER REPLACEMENT** **STATE PROJECT NO. H59-N752-FW**	)	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION** **DECISION** **CASE NO. 2013-015** **POSTING DATE: May 24, 2013**

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a request from Action Mechanical Contractors, Inc. (Action), under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review on the Building "D" Chiller Replacement bid ("the Project") for York Technical College (York). Action protests York's posting of a Notice of Intent to Award a contract to Boiler Masters, Inc. (BMI). Pursuant to S.C. Code Ann. §11-35-4210(4), the CPOC conducted an administrative review. This decision is based on the evidence and applicable law and precedents.

NATURE OF THE PROTEST

A copy of Action's protest is incorporated herein by reference and attached hereto as Exhibit A.

RELEVANT FACTS

1. On March 28, 2013, York advertised for bids to construct the project. [Ex. B]
2. The solicitation required each bidder to list on his bid the subcontractor he intended to use to perform the portion of the work requiring a contractor's license with an Electrical subclassification. [Ex. C]
3. By the time for receipt of bids, York received three bids. [Ex. C]
4. BMI submitted the apparent low bid for the base bid and each of the two alternates. [Ex. C]

5. BMI listed Johnson Controls, Inc., as its Electrical subcontractor. [Ex. C]
6. On April 26, 2013, York posted a Notice of Intent to Award a contract to BMI. [Ex. D]

DISCUSSION

The Project is chiller replacement project with associated controls and electrical. Because the engineer for the Project estimated the electrical work to exceed 3% of the expected base bid, York required bidders to list the name of the subcontractor they intended to use to perform the electrical work. York did this to comply with the requirements of S.C. Code Ann. § 11-35-3020(b)(i) and (b)(ii) (2011), which require that the solicitation identify, by specialty, those categories of subcontractors who are expected to perform 3% or more of the work and that the bidders list the subcontractor they intend to use for each category so identified. In response to this requirement, BMI listed "Johnson Controls, Inc.," a properly licensed electrical contractor for the specialty of Electrical. Action protests the award to BMI on the ground that Johnson Controls does not intend to self-perform the work requiring an electrical license but intends to sub-subcontract this work to Electro Services, Inc. (Electro). Therefore, Action requests that BMI's bid "be rejected as non-responsive" for "listing Johnson Controls as the electrical subcontractor."

An agency must award a contract only to the lowest responsive 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, an agency must reject a bid that deviates from any essential solicitation requirements. Section 11-35-1520(13).[1] In the context of the subcontractor-listing requirement of the Procurement Code, "[a] bidder in response to an invitation for bids shall set forth in his bid the name of **only those subcontractors** to perform the work as identified in the invitation for

[1] 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 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.*, Panel Case No. 1989-13.

bids." [emphasis added] Section 11-35-3020(b)(i). BMI did just this by providing the name of Johnson Controls. Therefore, BMI's bid is responsive.

Whether or not Johnson Controls intended to use someone else to perform the work requiring a contractor's license with an electrical subclassification is irrelevant to the issue of BMI's responsiveness. Having listed Johnson Controls as the entity it intends to contract with for the performance of this work, BMI may contract only with Johnson Controls. S.C. Code Ann. §§ 11-35-3020(b)(i) and 3021. However, nothing in the law prohibits Johnson Controls from sub-subcontracting with another entity to perform this work and nothing in the law requires bidders to provide the names of sub-subcontractors that their named subcontractors intend to use.

DETERMINATION

BMI, by listing the name of Johnson Controls as the entity it intended to contract with for the performance of the work requiring a contractor's license with an electrical subclassification, is responsive. Therefore, the protest is denied.

John St. C. White
Chief Procurement Officer For Construction

24 May 13
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.

EXHIBIT A

Singh, Anastasia

From: Protest-OSE
Sent: Monday, April 29, 2013 9:49 AM
To: White, John; Singh, Anastasia
Subject: FW: York Tech - Project H59-N752-FW Bid Tab and Notice of Intent to Award, Bldg D Chiller Replacement
Attachments: BidTabResults_BldgDChillerReplace_H59-N752-FW_04-22-13.pdf; SE-370 _NOItoAward_H59-N752-FW_04-26-13.pdf

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From: Randolph J. Minnich
Sent: Monday, April 29, 2013 9:48:44 AM (UTC-05:00) Eastern Time (US & Canada)
To: Protest-OSE
Cc: benny@actionmechanical.biz
Subject: FW: York Tech - Project H59-N752-FW Bid Tab and Notice of Intent to Award, Bldg D Chiller Replacement

Office of the State Engineer (OSE),

Action Mechanical Contractors, Inc. request that the OSE review the bid of the project listed in the Subject above. For your convenience, the notice of award and the certified bid tab are attached to this email.

We believe that the apparently low bidder, Boiler Masters, improperly listed the electrical subcontractor and/or license number. The apparently low bidder listed Johnson Controls as the electrical subcontractor. However, Johnson Controls intends to subcontract this work to a local, licensed electrical contractor. Per the bid documents and per instruction given by Mr. Robert Brown at the pre-bid conference, all bidders had to list the actual electrical contractor performing the work in the subcontractor section of the bid form.

By listing Johnson Controls as the electrical subcontractor, we request the apparently low bid be rejected as non-responsive.

Randolph J. Minnich, PE, LEED® AP
ACTION MECHANICAL CONTRACTORS, Inc.
O: 704.587.4450 F: 704.587.4451 M: 704.400.7707
randy@actionmechanical.biz

From: Robby Brown [mailto:rbrown@yorktech.edu]
Sent: Friday, April 26, 2013 12:22 PM
To: boilermasters1@aoll.com; Randolph J. Minnich; Benny Weaver; willt@mccartermechanical.com
Cc: Fred Walker (fwalker@mmo.sc.gov); Campagna, Scott (SCampagna@mcveighmangum.com); James Reeves
Subject: York Tech - Project H59-N752-FW Bid Tab and Notice of Intent to Award, Bldg D Chiller Replacement

Good afternoon,
On behalf of York Technical College, we want to thank you for bidding our project. Attached you will find the Bid Tabulation and Notice of Intent to Award for your records.

We want to thank you for considering our project and hope that you will consider future projects that we advertise.

Have a good weekend.
Regards

EXHIBIT B

Note: All questions & correspondence concerning this Invitation to Bid shall be addressed to the A/E.
Bidding Documents/Plans May Be Obtained From: Buford Goff & Associates, Inc.
Plan Deposit: $25.00, non-refundable
Note: Only those bidding documents / plans obtained from the aforementioned source are official. Bidders rely on copies of bidding documents / plans obtained from any other source at their own risk.
Bidding Documents/Plans Are Also on File for Viewing Purposes Only At:
AGC: North Charleston
Dodge: Arlington, Tx.
Reed: Norcross, Ga.
iSqFt / HCAC: Charlotte
Pre-Bid Conf.: Not mandatory
Pre-Bid Date/Time: 4/4/13 – 10:00am
Place: Crafts Farrow State Hospital, Building #4, Conference Room, 7901 Farrow Rd., Columbia, SC 29203
Agency/Owner: SC Department of Mental Health
Agency Procurement Officer: James R Berry, PE
Address: Crafts Farrow State Hospital, Building #4, 7901 Farrow Rd., Columbia, SC 29203
E-mail: jrb63@scdmh.org
Telephone: (803) 935-5655
Fax: (803) 935-5653
Bid Closing Date/Time: 4/16/13 – 2:00pm
Place: Crafts Farrow State Hospital, Building #4, Conference Room, 7901 Farrow Rd., Columbia, SC 29203
Hand Deliver/Mail Bids To: SCDMH, Attn.: Ray Nanney, Physical Plant Services, Crafts Farrow State Hospital, Building #4, 7901 Farrow Rd., Columbia, SC 29203

Project Name: THURMOND / GAZES BUSWAY TIE-IN TO PARALLELING GEAR
Project Number: H51-N308
Project Location: MUSC, Charleston
Bid Security Required: Yes
Performance Bond Required: Yes
Payment Bond Required: Yes
Description of Project: Demolish existing busway tap box on the ninth floor; extend 3000A 277/480V busway from ninth floor up to existing paralleling gear located on the tenth floor (penthouse); provide new switch section & tie in to existing paralleling gear. Contractor may be subject to performance appraisal at close of project.
Construction Cost Range: $75,000 - $125,000
Architect/Engineer: GWA, Inc.
A/E Contact: Tripp Player
A/E Address: 168 Laurelhurst Ave., Columbia, SC 29210
A/E E-mail: gwa@gwainc.net
A/E Telephone: (803) 252-6919
A/E Fax: (803) 799-5494
Note: All questions & correspondence concerning this Invitation to Bid shall be addressed to the A/E.
Bidding Documents/Plans May Be Obtained From: GWA, Inc.
Plan Deposit: $25.00, non-refundable
Note: Only those bidding documents / plans obtained from the aforementioned source are official. Bidders rely on copies of bidding documents / plans obtained from any other source at their own risk.
Bidding Documents/Plans Are Also on File for Viewing Purposes Only At:
AGC: www.cagc.org on IBuild
Dodge: www.network.construction.com
iSqFt / HCAC: www.iSqFt.com
Pre-Bid Conf.: Mandatory
Pre-Bid Date/Time: 4/9/13 – 10:00am
Place: MUSC, 97 Jonathan Lucas St., Room 209, Charleston
Agency/Owner: Medical University of South Carolina
Agency Procurement Officer: Philip Mauney, PE, Director of Engineering
Address: 97 Jonathan Lucas St., MSC 190, Charleston, SC 29425
E-mail: mauney@musc.edu
Telephone: (843) 792-2490
Fax: (843) 792-0251
Bid Closing Date/Time: 4/23/13 – 10:00am
Place: MUSC, 97 Jonathan Lucas St., Room 209, Charleston
Hand Deliver/Mail Bids To: MUSC, Attn.: Bob Branson, Facilities & Engineering, 97 Jonathan Lucas St., MSC 190, Charleston, SC 29425

Project Name: BUILDING "D" CHILLER REPLACEMENT
Project Number: H59-N752-FW
Project Location: York Technical College, 452 South Anderson Rd., Rock Hill, SC 29730
Bid Security Required: Yes
Performance Bond Required: Yes
Payment Bond Required: Yes
Description of Project: An existing 60-ton air cooled chiller that serves Building D at York Technical College is being replaced with a new 60-ton modular air cooled chiller. Chilled water piping will be renovated to accommodate the new chilled water connections on the chiller. The control system shall be updated to accommodate new chiller valves & ensure proper operation of equipment served by the chiller. The two existing chilled water pumps will be replaced. Contractor may be subject to performance appraisal at close of project.
Construction Cost Range: $90,000 - $110,000
Architect/Engineer: McVeigh & Mangum Engineering
A/E Contact: Scott Campagna, PE
A/E Address: 1610 East Morehead St., Ste. 100, Charlotte, NC 28207
A/E E-mail: scampagna@mcveighmangum.com
A/E Telephone: (704) 547-9035
A/E Fax: (704) 547-9036
Note: All questions & correspondence concerning this Invitation to Bid shall be addressed to the A/E.
Bidding Documents/Plans May Be Obtained From: McVeigh & Mangum Engineering
Plan Deposit: $35.00, refundable
Note: Only those bidding documents / plans obtained from the aforementioned source are official. Bidders rely on copies of bidding documents / plans obtained from any other source at their own risk.
Bidding Documents/Plans Are Also on File for Viewing Purposes Only At:
AGC: http://www.cagc.org
Dodge: http://dodgeprojects.construction.com
Pre-Bid Conf.: Not mandatory
Pre-Bid Date/Time: 4/8/13 – 10:00am
Place: York Technical College, Building J, Student Services, Conference Room 311
Agency/Owner: York Technical College
Agency Procurement Officer: Robert L. Brown, Facilities Management Director
Address: 452 South Anderson Rd., Rock Hill, SC 29730
E-mail: rbrown@yorktech.edu
Telephone: (803) 981-7375
Fax: (803) 981-7147
Bid Closing Date/Time: 4/22/13 – 2:00pm
Place: York Technical College, Building J, Student Services, Conference Room 311
Hand Deliver/Mail Bids To: York Technical College, Attn.: Robert L. Brown, Facilities Management Director, 452 South Anderson Rd., Rock Hill, SC 29730

Project Name: FIRE LANE & DRAINAGE IMPROVEMENTS AT BURGESS ELEMENTARY & GREEN SEA FLOYDS ELEMENTARY
Project Number: 1213-42
Project Locations: Burgess Elementary School, 9645 Scipio Lane, Myrtle Beach, SC 29588, & Green Sea Floyds Elementary School, 5000 Tulip Grove Rd., Green Sea, SC 29545
Bid Security Required: Yes
Performance Bond Required: Yes
Payment Bond Required: Yes
Description of Project: This project will include drainage improvements, paving of fire lanes, relocating ex-

EXHIBIT C

Bid Tabulation Form

BUILDING "D" CHILLER REPLACEMENT
YORK TECHNICAL COLLEGE (452 S. Anderson Rd, Rock Hill, SC 29730)

Bids Received on April 22, 2013 at 2:00 pm in Bldg J (Conference Room 311)

State Engineer's Project Number: H59-N752-FW
A&E : McVeigh & Mangum Engineering Inc.

	General Contractor	Bid Security	Acknowledge Addendum No. 1		Base Bid		Electrical Subcontractor
	Action Mechanical Contractors, Inc.	Yes	Yes		$179,500.00		Electro Services, Inc
	Boiler Masters, Inc.	Yes	Yes		$174,000.00		Johson Controls
	McCarter Mechanical, Inc.	Yes	Yes		$249,237.00		Switzer Construction & Electric, Inc.

Bids Opened By: Robby Brown [signature] 4/22/13
Bids Witnessed By: Scott Campagna [signature] 4/22/13

EXHIBIT D

SE-370
Notice of Intent to Award

2011 Edition
Rev. 7/18/2011

STATE OF SOUTH CAROLINA

York Technical College *(insert agency name)*
452 S. Anderson Road, Rock Hill, SC 29730 *(insert agency address)*

Posting Date: 04-26-13

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: H59-N752-FW
Project Name: Building D Chiller Replacement
Awarded To: Boiler Masters Inc

Solicitation Type ☒ Invitation for Bid ☐ Request for Proposals
Contract Amount $ $174,000.00

Invitation for Bid Information	Description	Bid Amount
Base Bid	Replacement of 60-ton chiller and chilled water pumps.	$ $174,000.00
Alternate 1		$
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: Robert L. Bru
(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.