STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND** **IN THE MATTER OF: PROTEST** **SHERMAN CONSTRUCTION CO. LLC** **vs.** **COASTAL CAROLINA UNIVERSITY** **STUDENT CENTER ANNEX** **STATE PROJECT NO. H17-9582-AC**	**BEFORE THE CHIEF PROCUREMENT OFFICER FOR CONSTRUCTION** **DECISION** **CASE NO. 2013-016** **POSTING DATE: July 8, 2013**

DECISION

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to requests from Sherman Construction Company, Inc. (Sherman) under the provisions of §11-35-4210 of the South Carolina Consolidated Procurement Code, for an administrative review of the Student Center Annex bid for Coastal Carolina University (Coastal). Sherman protests Coastal's posting of a Notice of Intent to Award a contract to Dargan Construction Company (Dargan). 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 June 25, 2013. At the hearing, Andy Sherman, Vice President for Sherman, represented Sherman, attorney Tim Meacham represented Coastal, and Harold G. Cushman, III, Executive Vice President/COO for Dargan, represented Dargan. Present, as witnesses were Mark Avant, a project manager for Coastal, Eddie Richardson, also a project manager for Coastal, Reed Chestnut, a Student Worker for Coastal, and John Lee Kester, III, a project manager for Dargan. During the hearing, the parties submitted into evidence 13 exhibits. This decision is based on the evidence and applicable law and precedents.

NATURE OF THE PROTEST

Sherman's protest is attached as Exhibit A and incorporated herein by reference.

FACTS

1. Coastal advertised for bids for the project on April 25, 2013. [Hearing Ex. 12]

2. The solicitation documents provided for a base bid and one alternate. [Hearing Ex. 4, 5, and 7]

3. The advertisement provided for a bid closing date and time of May 23, 2013 at 2 PM and stated that hand delivered bids were to be delivered to "Coastal Carolina University, Attn.: Eddie Richardson, Facilities Building 1, 755 Hwy 544, Conway, SC 29526."

4. The advertisement provided that the Place of the bid closing (hence the place the bids would be opened) was to be at "CCU, Kleine Hospitality Suite at Brooks Stadium." [See also Hearing Ex. 3, p. 4, item 3]

5. The straight-line distance between the location for hand delivering bids and the location for the bid opening is approximately 500 yards but the distance via Highway 544 is approximately 1,300 yards.[1]

6. On the afternoon of April 25, 2013, at approximately 1:58, John Lee Kester, III, a project manager for Dargan, entered Coastal's Facilities Building 1 to deliver Dargan's bid for the project. Reed Chestnut, a student worker for Coastal, received the sealed bid and upon receiving further direction from another Coastal employee, signed the bid envelop noting the date and time as May 23, 2013 at 1:59 in the afternoon. Mr. Chestnut, under direction from the other Coastal employee, then handed Dargan's sealed bid back to Mr. Kester with instructions to carry it over to the location of the bid opening and deliver it to the Coastal employees conducting the bid opening.[2] [Testimony of Mr. Kester and Mr. Chestnut, and Hearing Exhibits 5, 6, and 12]

7. Mr. Kester proceeded by vehicle to Brooks Stadium and arrived at Kleine Hospitality Suite approximately five minutes later. [Testimony of Mr. Kester]

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[1] Google Earth measures 1320 yards via Highway 544.

[2] As one might expect, there were minor differences in the testimony and written statements of Mr. Kester and Mr. Chestnut but they agreed on the key points. Moreover, the differences have no bearing on the results of this decision.

8. By the time Mr. Kester arrived at the Kleine Hospitality Suite, Mark Avant, a project manager with Coastal, had declared the time for receipt of bids closed and had opened at least one bid. [Testimony of Mr. Avant and Eddie Richardson, a project manager for Coastal]

9. Upon entering Kleine Hospitality Suite, Mr. Kester placed Dargan's sealed bid, signed on the envelope by Mr. Chestnut, on the table where Mr. Avant and Mr. Richardson were opening bids. Mr. Avant advised him that the time for receiving bids had passed. [Testimony of Mr. Kester, Mr. Richardson, and Mr. Avant]

10. Mr. Avant proceeded to finish opening all bids except the bid delivered by Mr. Kester. [Testimony of Mr. Kester, Mr. Richardson, and Mr. Avant]

11. After the other bidders attending the bid opening left, Mr. Kester approached Mr. Avant and explained the circumstances surrounding the delivery of Dargan's bid. [Testimony of Mr. Kester and Mr. Avant]

12. After discussing the situation with Mr. Kester, Mr. Avant called the Office of State Engineer (OSE) for advice. [Testimony of Mr. Kester and Mr. Avant]

13. A staff member at OSE advised Mr. Avant to open Dargan's bid in the presence of Mr. Kester, Mr. Richardson, and the Project architect. [Testimony of Mr. Kester and Mr. Avant]

14. Sherman submitted the apparent low bid for the base bid work and Dargan submitted the apparent low bid for the base bid plus alternate # 1. [Hearing Ex. 7]

15. On June 4, 2013, Coastal posted Notice of Intent to Award a contract to Dargan for the work of the base bid and alternate. [Hearing Ex. 9]

16. On June 6, 2013, Sherman protested Coastal's intended award of a contract to Dargan.

DISCUSSION

Sherman argues that it was improper for Coastal to consider a bid that Coastal failed to secure and was in the hands an Employee of Dargan for approximately five minutes both after the time for receiving bids had passed, and after Coastal had started opening bids. Dargan

counters that its employee simply followed Coastal's instructions and that it should not be penalized for Coastal's error. Coastal argues that award to Dargan was appropriate because Dargan's bid was timely, Coastal simply followed the instruction of OSE in considering Dargan's bid, and there was no evidence the bid envelope had been opened between the time Mr. Chestnut handed the bid back to Mr. Kester and Mr. Kester delivered it to Mr. Avant.

The Consolidated Procurement Code (Code) states "All bids … received before the time of opening must be kept secure and unopened, except as provided by regulation of the board." S.C. Code Ann. § 11-35-1520(4). S.C. Code Ann. Reg. 19-445.2045(A) specifically addresses safeguarding bids. It provides in part:

> All bids … received prior to the time of opening shall be kept secure and … unopened. Necessary precautions shall be taken to insure the security of the bid. Prior to bid opening, information concerning the identity and number of bids received shall be made available only to the state employees, and then only on a "need to know" basis….

. Regulation 19-445.2050 prescribes the procedure for opening bids:

> The procurement officer of the governmental body or his designee shall decide when the time set for bid opening has arrived, and shall so declare to those present. In the presence of one or more state witnesses, he shall then personally and publicly open all bids received prior to that time, and read aloud so much thereof as is practicable, including prices, to those persons present and have the bids recorded. The amount of each bid and such other relevant information, together with the name of each bidder, shall be tabulated and certified in writing as true an accurate by both the person opening the bids and the witness. The tabulation shall be open to public inspection.

S.C. Code Ann. Reg. 19-445.2050(A). And Regulation 19-445.2070(G) describes the narrow circumstances under which late bids may be accepted:

> Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless the bid had been delivered to the location specified in the solicitation or the governmental bodies' mail room which services that location prior to the bid opening.

Implicit in these provisions is the absolute requirement that the government have physical custody of bids from the time they are received until they are opened.

The language of our rules tracks nearly verbatim the text of the Federal Acquisition Regulation, 48 C.F.R. pts. 1-54. FAR 14.401, like our Regulation 19-445.2045, is titled "Receipt and safeguarding of bids," and reads:

> All bids … received before the time set for the opening of bids shall be kept secure. Except as provided in paragraph (b) of this section, the bids shall not be opened or viewed, and shall remain in a locked bid box, a safe, or in a secured, restricted-access electronic bid box. If an invitation for bids is cancelled, bids shall be returned to the bidders. Necessary precautions shall be taken to ensure the security of the bid box or safe. Before bid opening, information concerning the identity and number of bids received shall be made available only to Government employees. Such disclosure shall be only on a "need to know" basis….

FAR § 14.401(a). FAR 14.402-1 sets forth bid opening protocol:

> (a) The bid opening officer shall decide when the time set for opening bids has arrived and shall inform those present of that decision. The officer shall then (1) personally and publicly open all bids received before that time, (2) if practical, read the bids aloud to the persons present, and (3) have the bids recorded. The original of each bid shall be carefully safeguarded, particularly until the abstract of bids required by 14.403 has been made and its accuracy verified….
>
> (c) Examination of bids by interested persons shall be permitted if it does not interfere unduly with the conduct of Government business. Original bids shall not be allowed to pass out of the hands of a Government official unless a duplicate bid is not available for public inspection. The original bid may be examined by the public only under the immediate supervision of a Government official and under conditions that preclude possibility of a substitution, addition, deletion, or alteration in the bid.

Federal agencies enjoy somewhat more discretion to accept late bids. One requirement, though, is crystal clear:

> Any bid, modification, or withdrawal of a bid received at the Government office designated in the IFB after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award is made, the contracting officer determines that accepting the late bid would not unduly delay the acquisition; and—
>
> (i) If it was transmitted through an electronic commerce method authorized by the IFB, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of bids; or
>
> (ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids **and was under the Government's control prior to the time set for receipt of bids.**

FAR 14.304(b)(1) (emphasis added). What is implicit in South Carolina's scheme is explicit in the federal sphere: Only bids that have been in the government's control from the time they are submitted until they are opened can be considered for award.

One may argue about what precautions are necessary to maintain the security of a bid, but, at a minimum, keeping the bid in the sole possession of the governmental body is necessary. Coastal failed to take this minimum precaution to secure Dargan's bid. Instead, Coastal returned the bit to Dargan's employee. From the time Mr. Kester left Facilities Building 1 until he arrived at the Kleine Hospitality Suite, Coastal cannot account for what Mr. Kester may or may not have done with Dargan's bid. Because Coastal did not secure Dargan's bid and it was actually in the hands of a Dargan employee when the time for receipt of bids had passed, Coastal should have rejected Dargan's bid.

In this case Dargan's project manager traveled nearly three quarters of a mile down Highway 544 to reach Brooks Stadium. Under facts much more favorable to the bidder than these, the federal government has rejected an offer. The circumstances in J.C. Kimberly Company, B-255018 (Comp.Gen.), B-255018.2, 94-1 CPD P 79, 1994 WL 39130, are similar to this case:

> At approximately 3 minutes before the bid deadline, the protester's representative entered the building and proceeded to the Navy procurement clerk's desk, located approximately 15 steps from the front door, and handed the procurement clerk three bids to time/date stamp. These bids were time/date stamped 2:29 p.m. and immediately returned to Kimberly's representative. 1 The clerk then directed the representative to the bid opening room (Room 1342), which was located around the corner, approximately five steps away.
>
> The clock in the bid opening room reached 2:30 p.m., and the bid opening officer announced that the time for receipt of bids had passed and no more bids would be accepted. Kimberly's representative entered the bid opening room after this announcement and attempted to submit its bid, which was refused. Kimberly's representative then exited the room and tendered the bids to the clerk, who also refused them. Kimberly's representative then reentered the bid opening room and delivered the bids. Kimberly's bid was later opened and determined to be the low bid. However, after some consideration, the bid was rejected as late by the Navy.

Underlying the Comptroller General's decision is the principle that the integrity of the government procurement system is of greater importance than the possible advantage to be gained by considering a bid not properly tendered. The identical aim is expressed in Section 11-35-20(g) of the Procurement Code. Our system is based on policies designed

> to provide safeguards for the maintenance of a procurement system of quality and integrity with clearly defined rules for ethical behavior on the part of all persons engaged in the public procurement process....

Thus, the fact that there was no tampering with the bid envelope or any other intentional wrongdoing in this case does not matter. Section 11-35-1520 and Regulation 19-445.2045 set forth a prophylactic rule intended to protect the integrity of the bid process. If a bidder can retain possession of his bid while bids are being opened, there is the potential for the bidder to modify his bid after becoming aware of some or all of the actual bids of his competitors. Indeed an agency could intentionally use a process as the one employed here to obtain the contractor of its choice. Again, federal authority is clear:

> We have no reason to question the good faith of the protester here. However, to allow consideration of bids that could have been altered while out of the government's control would be inconsistent with maintaining the integrity of the competitive system.

Leggett & Platt, Incorporated, (Comp. Gen.) B-246733, 1992 WL 70972, 3. Conversely, "[w]here, as in the case at hand, a late bid travels through normal agency channels, remaining in the agency's possession and out of the bidder's reach, the integrity of the system is not compromised." *Ranco Construction, Inc.*, B-246345, 92-1 CPD ¶234

The CPOC is sympathetic to Dargan's plight. Dargan's employee simply did what Coastal employees instructed him to do. However, the General Assembly adopted the Consolidated Procurement Code to prevent favoritism and other unethical behavior in the award of state contracts. "Men must turn square corners when they deal with the Government," *Rock Island A. & L.R. Co. v. U.S.*, 254 U.S. 141 (1920). Those who seek state contracts without informing themselves of the Code's safeguards do so at their own risk. S.C. Code Ann. § 11-35-20; *see Wertz v. U.S.*, 2 Cl.Ct. 45, 51 (1983) . Whether or not Dargan had actual knowledge that Coastal was required to secure Dargan's bid after Mr. Chestnut received it and that it was inappropriate for Coastal to hand the bid back to Dargan with instructions to carry it to the location of the bid opening is irrelevant. Once Dargan decided to pursue a state contract, the law charged Dargan and Mr. Kester as its agent for the purposes of delivering the bid[3] with constructive knowledge of the restrictions imposed by the Consolidated Procurement Code on the state's actions. Yes, Coastal was in the wrong when it handed Dargan's bid back to Mr. Kester with instruction to deliver it to the place of the bid opening. Once Coastal committed this

[3] Mr. Kester is not a mere novice or runner; he is a Project Manager with eight years of experience on government projects.

infraction, though, it was incumbent upon Mr. Kester to refuse to comply. Had Mr. Kester done so, the award to Dargan would be appropriate.

Since Coastal's actions, in the first instance, were the root cause of the infraction, one might ask, why just punish Dargan rather than reject all bids and rebid the project? Regulation 19-445.2065(A) states that "[u]nless there is a compelling reason to reject one or more bids, award will be made to the lowest responsible and responsive bidder." While there is a compelling reason to reject Dargan's bid, the CPOC was not presented with a compelling reason to reject all bids. No one has alleged a violation of the Procurement Code with respect to the other bids. Moreover, it is patently unfair to rebid a project after all bidders have revealed there pricing when there is no compelling reason to do so.

DECISION

The CPOC finds that Coastal failed to secure Dargan's bid as required by the S.C. Code 11-35-1520 and Reg. 19-445.2045. The CPOC further finds that for some minutes after Coastal first received Dargan's bid, and after the time for receipt of bids had passed, Dargan's bid was in Dargan's sole possession, and that Coastal cannot account for Dargan's bid during the period it was in Dargan's sole possession.

For the foregoing reason, the protest is granted. Coastal 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 July 13
Date

Columbia, South Carolina

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Protest Appeal Notice (Revised June 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 108.1 of the 2013 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.

Sherman Construction
1330 Piedmont Hwy
Piedmont, SC 29673
T: 864.277.0060
F: 864.277.7524
shermanconstruction.com

EXHIBIT A

June 6, 2013

To: Chief Procurement Officer
Materials Management Office

Project Number: H17-9582-AC
Description: Student Center Annex
Agency: Costal Carolina University

Sherman Construction is a registered and licensed general contractor in the State of South Carolina and would like to file a protest for the notice of intent to award for project number H17-9582-AC for the Student Center Annex Construction Project that was posted on June 4th, 2013.

The protest is filed for the following reasons:

1. Dargan Construction delivered their bid to the facilities office that was listed on the SE-310 prior to the bid closing time. However, after the bid was stamped received, Dargan Construction took possession of their bid and went to a different bid opening location, and turned in their bid after the bid closing time. The bid was originally deemed non responsive, but was later deemed responsive and read after all other bids were opened and all other bidders were dismissed. At no time should Dargan Construction have been in possession of their bid post bid closing time.

2. Sherman Construction would like to protest the intent to award to Dargan Construction based on the fact that Dargan Construction was in possession of their bid post bid closing time, therefore their bid did not meet the deadline requirement for the submission of their bid.

We appreciate the opportunity to express our concern for this matter and look forward to your response.

Respectfully,

Robert A. Sherman
Vice President/Owner
Sherman Construction Co. Inc.

RECEIVED
JUN 6 2013
OFFICE OF STATE ENGINEER

A Natural Fit.