1975 WL 29664 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
April 7, 1975

***1 Re: Project No. 26-78, Energy Facility, Utility System and Lake (Roads and Parking Lots—Village Complex)**

William S. Hall, MD
State Commissioner of Mental Health
South Carolina Department of Mental Health
Post Office Box 455
Columbia, SC 29202

Dear Dr. Hall:
Your letter of March 20, 1975, has been referred by Mr. McLeod to me for answer. In said letter you ask an opinion as to whether or not Smith Grading and Paving Company, Inc. should be relieved of its obligations to perform the contract it bid on in the above referenced project.

The fact situation surrounding this project as I understand it from the information submitted to this Office, is that on February 11, 1975, the Department of Mental Health received bids, pursuant to invitations to bid on Project No. 26-78 published in The State Newspaper. Smith Grading and Paving Company, Inc. submitted the apparent low bid of $99,106.00 taking in consideration the base bid and alternatives Number 1 and Number 3. The next low bid, that of Mustard-Coleman Construction Company, Inc. was $182,118.00. The bids for the above project were tabulated by Bruce Fleming and Associates, Inc., consultant engineers for the Department of Mental Health.

On February 12, 1975, Mr. C. Milford Hunter, Jr., P.E., Vice President of-Bruce Fleming and Associates, Inc., called Mr. Billy Carter of Smith Grading and Paving Company, Inc. and inquired of them as to whether or not Smith Grading and Paving was satisfied and willing to perform under the conditions of the plans and specifications in reference to alternative Number 1. At a February 14, 1975, meeting between Mr. Robert, Price, Mr. Robert Goff, Mr. C. Milford Hunter, and Mr. Billy Carter representing Smith Grading and Paving Company, Mr. Carter informed these men that Smith Grading and Paving had made an error in interpreting the bids and wished to be relieved from performance. Then, in February 24, 1975, the attorneys for Smith Grading and Paving Company formerly contacted the South Carolina Department of Mental Health and requested that the company's bid be disqualified. Then on March 7, 1975, the South Carolina Department of Mental Health formerly awarded the bid for the roads and parking lot village complex to Smith Grading and Paving. Finally, on March 20, 1975, an opinion concerning whether or not Smith Grading and Paving should be relieved from performance under their bid was requested from this Office. For the reasons set forth below, it is the opinion of this Office that the bid should be awarded to the second low bid Mustard-Coleman Construction Company, Inc. and that Smith Grading and Paving Company should be allowed to withdraw from the bidding without penalty.

The situation in the present case is that a unilateral mistake was made by the general contractor in the bids submitted to the South Carolina Department of Mental Health. The mistake was not discovered nor was it reported to Mental Health until after all sealed bids were opened. However, the errors, one being a misinterpretation of alternate Number 1 of the specifications and the second, a smaller error in mathematics, was made known to the Department of Mental Health prior to acceptance of the bid.
***2** Statutes for the letting of public contracts are enacted for the benefit of the public and should be carried out with sole reference to the public interest, and accordingly the rights of bidders must always be held subordinate to that interest. So also, requirements of the law that contracts for public work or for public supplies shall be awarded to the lowest bidders

are intended for the protection of the public from collusive contracts, favoritism, fraud, and extravagance rather than for the benefit of the bidders for such contracts. 64 Am Jur 2d Public Works and Contracts Section 82 at 942 (1972).

Furthermore,
As a general rule, at law a bidder for a public contract cannot, in the absence of special circumstances, either withdraw his bid or proposal, or recover the deposit made pursuant to the requirements of the advertisement for bids at the time of the submission of his bid, although in equity the bidder will be protected where it would be inequitable to compel him to perform the contract or forfeit the deposit in the case of his refusal or failure to perform, and there are numerous exceptions and qualifications to the rule at law. 64 Am Jur 2d Public Works and Contracts Section 83 at 942-943 (1972) (Emphasis supplied.)

There are, however, special circumstances in the present case. The general rule in situations such as this, where bids are submitted on a public contract, and unilateral error is discovered by the bidder and this error is brought to the attention of the State prior to the time the bid is accepted, is that the bidder will be allowed to withdraw the bid without penalty. See 52 ALR 2d § 5 at 797 (1957).
It is a general rule that although a bidder for a public contract makes unilateral mistake in the preparation of his bid, yet if the mistake is one which is remedial in equity, notice thereof to the offeree previous to acceptance of the bid makes equitable relief or its equivalent available, absent other circumstances which it would make it inequitable to grant it. See 52 ALR 2d 779, § 5A at 797 (1957).

There are four essential conditions which must be met before a mistake is remedial in equity. These conditions are that (1) a mistake is of such consequence that its enforcement would be unconscionable; (2) the mistake is related to a material feature of the contract; (3) the mistake occurred regardless of the exercise of ordinary care; (4) it is possible to place the other party, that is the State, in status quo. 52 ALR 2d 779, § 3 at 793 (1957). There is no question that the conditions of 1, 2, and 4 are met with this bid. Furthermore, in that the language of alternate Number 1 is somewhat confusing, it is the opinion of this Office that the conditions of Number 3 is met.

A strong factor supporting the case of allowing Smith Paving and Grading to withdraw its bid is that the Department of Mental Health had both constructive and actual notice of the bidder's mistake prior to awarding the bid. The Department had constructive notice in that there was an obvious discrepancy between Smith's bid of $158,106.00 deduction for Alternate No. 1 and the next low bid of $76,896.00 deduction. Smith's bid on this Alternate was more than double that of the next low bid. As recounted above, the Department received written notification of this error on February 24, 1975.

***3** In the case of Conduit and Foundation Corp. v. Atlantic City, 64 A 2d 382, 2 N.J. Super 433 (1949) a fact situation similar to present one is encountered. In Conduit, the corporate bidder was held to be entitled to a recession of its bid and to recovery of its bid deposit. A case in point arising out of South Carolina is Hester v. New Amsterdam Casualty Company, 268 F. Supp. 623 (D.S.C., 1967). In Hester the district judge held:
Especially has the right to rescind for unilateral mistake been sustained where the other party, from the very nature of the offer, should have been put on notice that the offerer was acting under a mistaken notion, that is, where the mistake should have been 'palpable to the offence,' . . . As it is put in 1 Williston, Contracts (3d ed. 1957), sec. 94, an 'offeree will not be permitted to snap up an offer that is to good to be true; no agreement based on such an offer can be enforced by the acceptor.' Hester v. New Amsterdam Casualty Company, 268 F. Supp. 623 at 628 (D.S.C., 1967). (Citations omitted.)
See Also: Noland Company v. Graver Tank and Manufacturing Co., 301 F. 2d 43 (4th Cir., 1962): Jumper v. Queen Mob Lumber Co., 115 S.C. 452, 106 S.E. 473 (1921).

It is, therefore, the opinion of this office that Smith Grading and Paving Company, Inc. should be allowed to withdraw its bid and recover its bid bond. The contract may then be awarded to the next low bidder or; if the Department of Mental Health chooses, you may invite bids again, pursuant to § 1-466 CODE OF LAWS OF SOUTH CAROLINA (1962).
Yours very truly,

M. Elizabeth Crum
Assistant Attorney General

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