

1973 WL 27737 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

December 6, 1973

***1 Re: Validity of the bid entered by Threatt-Maxwell Contractors, Inc. on a classroom building, University of South Carolina, Coastal Carolina Regional Campus.**

Dr. Thomas F. Jones
President
University of South Carolina
Columbia, South Carolina 29208

Dear Sir:

Mr. Harold Brunton, Vice President of Business Affairs has requested an opinion from this office as to the validity of the bid of Threatt-Maxwell Contractors, Inc., specifically with regard to the Contractor's variation of the time of completion. It is the opinion of this office that the Threatt-Maxwell bid cannot be accepted in its present form and that the Contractors cannot retract its condition after the bids have been opened.

The applicable portion of the Threatt-Maxwell Bid (Bid) reads: 'The undersigned agrees to substantially complete the work within the number of calendar days as stipulated in the General Conditions and is familiar with the fixed liquidated damages.' The Contractor altered the above statement by adding the phrase 'Subject to Availability of Materials.' The above quoted phrase materially alters the Specifications for the proposed Classroom Building.

The time of completion of a public improvement is a material part of the specifications and a bidder has no more right to change it than to change other portions of the specifications, such as the materials to be used . . .

If the time stated in a bid for the doing of a proposed public work varies materially from the beginning and completion of the work, as proposed in the specifications submitting the proposition for bids, the bid is not responsive to the proposal and may be rejected. 65 ALR 835, 847 annot. (1930)

Furthermore,

And where, in letting a county paving contract to the lowest and best bidder, as required by statute, the specifications and proposal for bids called upon each bidder to specify the time when he would agree to begin and when he would complete the work, if awarded the contract, and provided that liquidated damages should be charged against a contractor for each day's delay in performance beyond the contract time, it was held, in [Root v. Douglas County \(1920\) 105 Neb. 262, 180 N. W. 46](#), that the time of performance was an essential part of the bid, and that, where omitted, the bid was incomplete and not responsive to the proposal; and that an award of the contract to such bidder was invalid, although, after the bid was received and opened by the county board, a date for performance was inserted. 65 ALR [supra](#), at 848.

Thus, Threatt-Maxwell altered a material term of the contract and not just an informality or technicality which the University may waive. Pursuant to § 1-466, CODE OF LAWS OF SOUTH CAROLINA (1962):

No public building, or addition thereto, constructed from State funds, costing more than ten thousand dollars shall be constructed in the State unless competitive bids for the contract therefor shall have been advertised in a newspaper of general circulation in the State, at least three times over a period of thirty days. All bids shall be opened at the same time, and a performance bond shall be required from the successful bidder. All proposals shall be opened in public and shall be recorded in the minutes of the board or governing body, and the award shall be made to the lowest responsible bidder, taking into consideration quality

or workmanship, past performance of law bidder and time specified in the proposals for the performance of contract. The right to reject any and all bids shall be reserved. (Emphasis supplied.)

*2 By conditionally agreeing to Time of Performance, Threatt-Maxwell's bid varred the terms of the proposed contract and was not responsive to the Bid Proposal.

As to any later retraction of the time qualification,

It has been held that after the bids have been filed and opened, the officers cannot permit corrections except for mistakes apparent on the face of the bids. The contractor has been held to be bound by his bid as filed; after filing the bid cannot be varied or changed, is beyond modification by private, confidential, or secret communication, and no form of evidence can be received to show that the bid had some meaning not ascertainable from its face. 81 CJS, States § 116 at 1095 (1963).

For the above reasons, the bid of Threatt-Maxwell Contractors, Inc. is unresponsive to the University's Proposal and defective in that the bid altered a material condition of the contract and cannot be accepted by the University. Therefore, in this situation, the second low bid should be considered for acceptance.

Yours very truly,

M. Elizabeth Crum
Staff Attorney

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