

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Civil Action No. 2016-CP-40-07353
Appellate Case No. 2017-000134

Richardson Construction Company, Inc.,

Appellant,

v.

Richland County, a political subdivision, and
McClam & Associates, Inc.,

Respondents.

**INITIAL BRIEF OF RESPONDENT
McCLAM & ASSOCIATES, INC.**

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JUN 19 2017

SC Court of Appeals

M. Alan Peace
Taylor A. Peace
Harrell, Martin & Peace, P.A.
P.O. Box 1000
Chapin, South Carolina 29036
Tel: (803) 345-3353
Fax: (803) 345-9171
apeace@harrellmartin.com
tpeace@harrellmartin.com
**ATTORNEYS FOR RESPONDENT,
McCLAM & ASSOCIATES, INC.**

June 19, 2017
Chapin, South Carolina

Other Counsel of Record:

Benjamin E. Nicholson, V, Esq.
MCNAIR LAW FIRM
1221 Main Street, Suite 1800
Columbia, SC 29201

**ATTORNEYS FOR RESPONDENT
RICHLAND COUNTY**

Richard C. Detwiler, Esq.
CALLISON TIGHE & ROBINSON, LLC
1812 Lincoln Street, Suite 100
PO Box 1390
Columbia, SC 29202-1390

ATTORNEYS FOR APPELLANT

Kathleen M. McDaniel, Esq.
Burnette Shutt McDaniel, PA
PO Box 1929
Columbia, SC 29202
Attorneys for Richardson Construction Company, Inc.

ATTORNEYS FOR APPELLANT

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TABLE OF AUTHORITIES

Ray Bell Const. Co. v. School Dist. of Greenville County,
331 S.C. 19, 501 S.E.2d 725 (1998)6

*In Re: Appeal by M.A.R. Construction Company, Inc. and Burkwood
Construction, Inc.*, Case No. 2013-4A and Case No. 2013-4B
(S.C. Procure. Rev. Panel, June 10, 2013)6,7

NOTE: Pursuant to Rule 208(b)(6), SCACR, in order to avoid duplication, Respondent McClam & Associates, Inc. (“Respondent McClam”) joins in the Brief of Respondent Richland County (“Respondent County”) and incorporates the Brief of Respondent County as if repeated herein verbatim. However, Respondent McClam submits its Brief to address one (1) issue specific to Respondent McClam as raised in the Brief of Appellant.

STATEMENT OF ISSUE SPECIFIC TO RESPONDENT McCLAM ON APPEAL

- I. WAS THE BID OF RESPONDENT McCLAM & ASSOCIATES, INC. RESPONSIVE?**

STATEMENT OF THE CASE

Respondent McClam joins in the Statement of the Case articulated by Respondent County in its Brief.

STATEMENT OF THE FACTS

Respondent McClam joins in the Statement of the Facts articulated by Respondent County in its Brief.

ARGUMENT

I. THE BID OF McCLAM WAS RESPONSIVE.

Appellant argues that the trial court erred in holding that Appellant would not have a likelihood of success of the merits in its procurement challenges before the Richland County Procurement Review Panel. (see Appellant’s Brief, Argument 1, p. 7.) As part of Appellant’s argument, it contends that Respondent McClam’s bid was defective and thus the Richland County Procurement Review Panel would “weigh’ towards rejecting Respondent McClam’s bid as non-responsive. (Appellant’s Brief, p. 10.) In support of its position, Appellant contends Respondent McClam’s bid was non-responsive for three (3) reasons:

- a. Respondent McClam improperly used one subcontractor to satisfy the Small Local Business Entity (“SLBE”) and Disadvantaged Business Enterprise (“DBE”) goals for the project;
- b. The bid of Respondent McClam failed to list the addresses and license numbers of its subcontractors; and,
- c. There is no evidence that Respondent McClam submitted to Respondent County the signed quotes from its DBE subcontractors.

(Appellant’s Brief p. 10.)

It is easy to conclude that the trial court did not find the need to specifically address responsiveness of Respondent McClam’s bid given the overwhelming failure of Appellant to satisfy any of the elements needed to obtain a temporary injunction. Further, there was little, if any, need for the trial court to specifically address an issue given such limited attention and emphasis by Appellant in its argument before the trial court. (see Transcript, p. 24, 1.20-p. 26 1.7 and Memorandum in Support of Motion for Temporary Injunction). Nevertheless, as discussed

below, the arguments proposed now by Appellant on the issue of Respondent McClam's bid are meritless.

- a. It was not improper for Respondent McClam to use one subcontractor to satisfy the Small Local Business Entity ("SLBE") and Disadvantaged Business Enterprise ("DBE") goals for the project.**

Respondent McClam listed one company, Taylor Brothers, to satisfy the SLBE and DBE goals for the project. (McClam bid). Appellant contends that doing so is contrary to the "procurement code". (Appellant Brief, Argument 1.C.a. p. 10). However, Appellant references no authority whatsoever for that statement. The reason for failing to list any authority for that position is that no such authority exists. Neither the Richland County Procurement Code nor the bid forms completed and submitted by McClam and other bidders, including Appellant, have any prohibition whatsoever on a bidder's right to use one subcontractor certified both as SLBE and a DBE to satisfy the SLBE and DBE goals for the project. (McClam Bid, C.R. Jackson Bid, RCC Bid). Moreover, such a prohibition cannot be found in the Invitation to Bidders, Instructions to Bidders, General Conditions and Special Provisions found in the Project Manual for the Project. (See Affidavit of Jesse R. McClam, III).¹ Indeed, that specific question was asked by prospective bidders at a Mandatory Pre-Bid Conference between Respondent County representatives and prospective bidders which took place on August 10, 2016. At that meeting, various questions were posed by prospective bidders in attendance and answered by Respondent County. Among the questions and answers was the following:

¹ Respondent McClam acknowledges that the Affidavit of J.R. McClam, III, was not before the trial court at the hearing on December 22, 2016. However, the Affidavit of Mr. McClam was submitted to this Court on May 19, 2017 in opposition to Appellant's Motion for Expedited Temporary Injunction During Appeal filed on May 9, 2017. Respondent McClam makes reference to the Affidavit only to the extent that this Court deems it appropriate and proper for consideration. Otherwise, Respondent McClam's position remains as indicated above. There was no evidence or legal authority presented by Appellant at the hearing before the trial court to support Appellant's position that using one company certified as a SLBE and DBE to satisfy the project goals was not permitted.

Q: Can subcontractors be included on both SLBE and DBE Participation Forms and be credited toward both percentages?

A: **Yes (Emphasis Added)**
(McClam Aff. ¶3, Ex. 2, JRM 070.)

That question and answer was subsequently included in Addendum 1 to Invitation for Bids PDT-290-IFB-206, Shop Road Extension Phase I issued to the bidders on August 16, 2016. (McClam Aff. ¶3, Ex. 2, JRM 054, 070.) That Addendum supplemented the Invitation for Bids and thus was part of the bid specification upon which the bidders were entitled to rely. It is noteworthy that among the attendees at that mandatory pre-bid meeting on August 10, 2016 was a representative of Appellant. (McClam Aff. ¶3, Ex. 2, JRM 076.) Consequently, the information publicized by Respondent County to the bidders prior to the bidding on the Project clearly indicates that a single subcontractor certified as a SLBE and DBE can be used to satisfy the SLBE and DBE goals for the Project. Respondent McClam's bid was the only bid that properly listed a certified SLBE and certified DBE to satisfy the goals. Accordingly, Respondent McClam's bid must be considered responsive and Appellant's argument that using one company to satisfy the SLBE and DBE goal would "weigh" in favor of rejecting Respondent McClam's bid is completely unfounded.

b. The omission of a specific address and license number for subcontractors is not a material defect in the bid of Respondent McClam.

Appellant further argues that the bid of Respondent McClam was deficient because it purportedly did not include the addresses and license numbers of the subcontractors. First of all, the document requiring the listing of subcontractors entitled, (18) LISTING OF SUBCONTRACTORS, provides as follows: "Any bidder in response to this Request for Bids shall set forth in his bid the **Percent of Work, Name and Location** of the place of business for each of the following subcontractors...." (emphasis added) (McClam Bid). The description of what was

to be provided indicates that an address or “location” for the subcontractors is to be provided. A review of Respondent McClam’s Listing of Subcontractors form clearly shows that the percent of work, name and location of the place of business for each of its listed subcontractors was provided. (McClam Bid.) Based on the description of what was being requested in the written instructions, the analysis on that issue should end there. However, even the omission of license numbers for listed subcontractors does not change the responsiveness of Respondent McClam’s bid.

Whether the failure to provide the license numbers is a material defect in the bid impacting responsiveness must be analyzed in the light of the purpose of the requirement to list subcontractors. The request of Respondent County that the bidders list their subcontractors is similar and consistent with the subcontractor listing requirements of the South Carolina Procurement Code (see S.C. Code Ann. § 11-35-3020, 1976 as amended, and Respondent McClam’s bid.) The purpose of the subcontractor listing requirements is to prevent bid shopping and bid peddling of subcontracts after bid opening. *Ray Bell Const. Co. v. School Dist. of Greenville County.*, 331 S.C. 19, 501 S.E.2d 725 (1998). Given that Respondent McClam’s subcontractor listing information provides sufficient information on the bid listing form to prevent anyone other than the listed entities from performing the work, the policy goal for subcontractor listing requirements was satisfied. Respondent McClam listed the name of the subcontractor, its location, its percentage of the total contract amount, and its scope of work. The information provided within the four corners of Respondent McClam’s bid was clearly sufficient to prevent anyone other than the subcontractors listed from performing the work. Accordingly, Respondent McClam materially complied with the subcontractor listing requirements for this project and Respondent County obviously recognized that fact. That is contrary to Appellant’s material bid defect in listing a non-certified SLBE to meet the SLBE goals of the project. Responsiveness of a

bidder's bid must be determined solely from the information appearing in the bid documents *In Re: Appeal by M.A.R. Construction Company, Inc. and Burkwood Construction, Inc.*, Case No. 2013-4A and Case No. 2013-4B (S.C. Procure. Rev. Panel, June 10, 2013.) Respondent County could not determine from Appellant's bid who Appellant "intended" to list as its SLBE other than the name listed. That leaves the SLBE candidates at risk of bid shopping and bid peddling, regardless of whether Appellant's bid defect was intentional or negligent. Allowing Appellant to correct such a material bid defect would be contrary to the purpose of the listing requirement and the integrity of the competitive bid process. Id.

c. There is no evidence that bidders were required to submit signed quotes from DBE subcontractors with the bid.

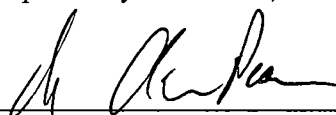
Appellant next argues that there was no evidence that Respondent McClam submitted the required signed quotes from its DBE subcontractors. (see Appellant's Brief, p. 10.) However, just as with Appellant's position on using one company to satisfy SLBE and DBE requirements, Appellant provides no authority whatsoever for its position that Respondent McClam or any other bidder was required to submit signed quotes for its DBE subcontractors with their bid. Again, there is no such requirement for this Project. At the hearing before the trial court on Appellant's motion, even counsel for Appellant could point to no authority or requirement that the DBE quotes be provided with the bid. (Transcript p. 25, l. 10-22). The only evidence before the trial court on the issue simply does not support Appellant's position. The Bidder's Checklist which bidders are required to complete and submit with their bid lists no requirement that the DBE quotes be submitted with the bids. (Memorandum in Support of Temporary Injunction, Exhibits 1 and 3). Although Appellant's counsel argued that Appellant submitted its DBE quotes, there was no documentation or other evidence presented to the trial court to verify if or when any such

information was provided. Appellant's counsel further indicated that another bidder, C. R. Jackson, Inc., submitted its DBE quotes. However, from the evidence before the trial court, the quotes submitted by C. R. Jackson, Inc., were submitted on September 16, 2016, which was two days after the bid opening on September 14, 2016. (Memorandum in Support of Temporary Injunction, Exhibit 2). Therefore, the only evidence before the trial court on the issue "weighs" against Appellant's position that DBE quotes have to be submitted with the bids.

CONCLUSION

Again, Respondent McClam joins in the position and arguments of Respondent County and incorporates the Brief of Respondent County herein as if repeated verbatim. However, in addition, based upon the foregoing, Respondent McClam states that its bid was not deficient in any manner as argued by Appellant, and such arguments cannot be used as the basis for a finding by the Procurement Review Panel that McClam's bid was non-responsive in support of Appellant's argument that it had a likelihood of success on the merits. Accordingly, the trial court's denial of Appellant's motion should be affirmed.

Respectfully submitted,



M. Alan Peace
Taylor A. Peace
Harrell, Martin & Peace, P.A.
P.O. Box 1000
Chapin, South Carolina 29036
Tel: (803) 345-3353
Fax: (803) 345-9171
apeace@harrellmartin.com
tpeace@harrellmartin.com

**ATTORNEYS FOR RESPONDENT,
MCCLAM & ASSOCIATES, INC**

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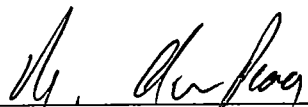
PROOF OF SERVICE

I certify that I served Respondent McClam & Associates, Inc.'s Initial Brief and Designation of Matter on all counsel of record by hand delivery of same on June 19, 2017 to the following:

Richard C. Detwiler, Esq.
Callison Tighe & Robinson, LLC
1812 Lincoln St., Ste 200
Columbia, SC 29201
Attorneys for Richardson
Construction Company, Inc.

Benjamin E. Nicholson, V, Esq.
McNair Law Firm
1221 Main Street, Suite 1800
Columbia, SC 29201
Attorneys for Richland County

Kathleen M. McDaniel, Esq.
Burnette Shutt McDaniel, PA
912 Lady St.
Columbia, SC 29202
Attorneys for Richardson
Construction Company, Inc.



M. Alan Peace
Taylor A. Peace
Harrell, Martin & Peace, P.A.
P.O. Box 1000
Chapin, South Carolina 29036
Tel: (803) 345-3353
Fax: (803) 345-9171
apeace@harrellmartin.com
tpeace@harrellmartin.com
**ATTORNEYS FOR RESPONDENT,
McCCLAM & ASSOCIATES, INC.**

HARRELL, MARTIN & PEACE, P.A.

ATTORNEYS AND COUNSELORS AT LAW

135 Columbia Avenue

Post Office Box 1000

Chapin, South Carolina 29036

TELEPHONE 803-345-3353

FAX 803-345-9171

harrellmartin.com

L.K. "Trey" Harrell, III

Jeremy C. Marin

*M. Alan Peace **

Jennifer Down Nichols

Brent M. Takach

Taylor A. Peace

Robert W. Dibble, Jr.

William Jennings (Bill) Buchanan

Donald W. Tyler

Thomas B. Jackson, III

** Certified Mediator*

June 19, 2017

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: **Richardson Construction Company, Inc. v. Richland County, a political subdivision,
and McClam & Associates, Inc.**
Appellate Case No.: 2017-000134
Case No. 2016-CP-40-07353
Our File No.: 1115.28205/MAP

Dear Ms. Kitchings:

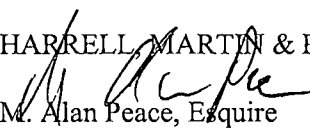
Enclosed for filing please find the original and one (1) copy of the Respondent McClam & Associates, Inc.'s Initial Brief and Designation of Matter to be included in the Record on Appeal along with the original and one (1) copy of the Proof of Service. Please file the originals of record and return a clocked copy to me in the self-addressed envelope provided.

By copy of this letter, I am serving all counsel of record with a copy of the same via hand delivery.

Thank you for your assistance with this matter.

Sincerely,

HARRELL, MARTIN & PEACE, P.A.


M. Alan Peace, Esquire

MAP/tsm

Enclosures

cc: Benjamin E. Nicholson, V, Esq. (w/enclosures) via hand delivery
Kathleen McDaniel (w/enclosures) via hand delivery
Richard C. Detwiler, Esq. (w/enclosures) via hand delivery

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