

November 13, 2001. SCDOT determined Stepp Manufacturing Co., Inc. (hereinafter "Stepp") to be the lowest responsive bidder on November 27, 2001.

The IFB included detailed specifications for the asphalt distributor as enumerated in the document.

SCDOT issued an award by purchase order to Stepp on December 28, 2001. On September 19, 2002, SCDOT issued an amendment to its purchase order specifying a change in the size of the axle and deducting \$100 from the purchase order making the purchase price \$74,575. This change was made at Stepp's request.

Stepp delivered the asphalt distributor to SCDOT's Equipment Depot in Columbia on October 9, 2002.

On November 5, 2002, SCDOT authorized payment to Stepp.

A Stepp representative conducted training for the SCDOT technicians in Orangeburg on the use of the asphalt distributor on February 19, 2003.

SCDOT attempted to put the asphalt distributor to use on March 14, 2003, but it failed to work as SCDOT expected.

A Stepp representative returned to South Carolina on April 15, 2003, to make warranty repairs to leaks on the asphalt distributor. Said work continued until April 18, 2003.

SCDOT attempted to use the asphalt distributor in April and May 2003, but it malfunctioned again and SCDOT contacted Stepp on May 28, 2003 with additional concerns.

Ted Nemetz of Stepp returned to South Carolina on August 4th and 5th, 2003, to work with SCDOT technicians on the computer controller, electrical/solenoid relays, spray bar and valves, and installation on the burner thermostat controls.

During this period, SCDOT modified the equipment by adding a wand and hand sprayer which utilized the heaters and pumps on the equipment, like the spray bar Stepp installed this item utilized the heaters and pumps originally installed by Stepp.

On August 6, 2003, SCDOT operated the asphalt distributor for demonstration and re-training Orangeburg personnel. During this operation, SCDOT observed that the asphalt distributor's lower burner malfunctioned apparently shorting out its igniter, the spray bar valves operated inconsistently, and the spray bar winch malfunctioned preventing the spray bars from extending or retracting.

James Fedra, SCDOT's Director of Maintenance, sent a letter to Shane Stepp on August 26, 2003, requesting that Stepp accept the asphalt distributor back and refund the original purchase price of \$74,575 to SCDOT.

Shane Stepp responded to Norma Hall, SCDOT's Procurement Director, on October 15, 2003, with two suggestions: instead of Stepp's accepting the asphalt distributor back and refunding the purchase price to SCDOT. The suggestions were (1) that Stepp take the asphalt distributor back to its facility and remove all computerized controlling systems and replace them with less complicated controls, and (2) that Stepp repair the asphalt distributor and keep the computer in place. After the repairs, SCDOT would send the asphalt distributor to a different district in the state and train the operators accordingly.

Norma Hall, SCDOT's Procurement Director, wrote a letter to Shane Stepp on November 19, 2003, stating SCDOT's intent to revoke acceptance of the equipment and requesting a refund of the full purchase price of \$74,575 (hereinafter referred to as "Cure Letter"). Mrs. Hall further rejected the suggestions Mr. Stepp made in his October 15, 2003, letter because neither was acceptable to SCDOT.

After the Cure Letter, Mrs. Hall and Mr. Stepp had several telephone conversations, and ultimately, SCDOT agreed to let Stepp take the asphalt distributor back to Stepp's facilities in Minnesota and re-work it so that SCDOT might be able to use it at the Orangeburg Maintenance site. Mrs. Hall and Mr. Stepp further agreed that, when the asphalt distributor was re-delivered and accepted as working properly, the one-year warranty period would start over.

Stepp picked up the asphalt distributor on January 8, 2004, and took it to Minnesota for repair. Stepp returned the asphalt distributor to Orangeburg on March 15, 2004. Over the period of March 15-17, 2004, Mr. Stepp and SCDOT officials met in Orangeburg to conduct tests of the re-worked asphalt distributor.

On April 5, 2004, without other notice, SCDOT's Orangeburg Maintenance office returned the asphalt distributor to the SCDOT's Equipment Depot in Columbia. After the equipment's return, Norma Hall, SCDOT's Procurement Director, telephoned Mr. Stepp and informed him that the asphalt distributor was not functioning properly and the SCDOT wanted him to pick up the equipment and refund the original purchase price of \$74,575.

Subsequent to this call, SCDOT neither requested nor allowed Stepp the opportunity to service the equipment or perform work.

SCDOT filed its Request for Resolution with the CPO on December 1, 2004.

Other Findings

Payment for the distributor was made before it was tested. Jim Brooks testified for the SCDOT that the reason for the lag time between receipt and use was that the equipment had to be issued and people had to be trained. SCDOT paid without testing because they did not want to wait too long to pay. Also, they had a previous business relationship with Stepp, spanning more than twenty years.

There were many repairs made to the machine. Even when the machine first arrived in Columbia, it had no serial number and had bolts missing and loose. Ray Hughes who repairs machinery for SCDOT testified he worked on the machine “heaps of times.” Stepp sent technicians to South Carolina to work on the machine and offered repair guidance by telephone.

Conclusions of Law

S.C. Code Ann. §11-35-4230 is the provision governing contract disputes. The procedure set forth in the section is the “...exclusive means of resolving a controversy between the State and a contractor...concerning a contract solicited and awarded under the provision of the South Carolina Procurement Code.” Section 11-35-4230 (6) provides for a request for review before the Procurement Review Panel.

The question in this case is whether the SCDOT properly revoked its acceptance of this equipment thus entitling it to reimbursement of the \$74,575 purchase price. The parties and the CPO turned to the South Carolina Commercial Code which governs purchases in situations where the parties have not agreed otherwise. S.C. Code Ann. § 36-2-608 is the provision governing revocation of acceptance. It says in pertinent part,

A buyer may revoke its acceptance of a commercial unit when its nonconformity substantially impairs its value to the buyer, if the buyer accepted it (a) on the reasonable assumption that its nonconformity would be cured and it has been seasonably cured; or (b) without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by seller’s assurances.

Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects...

This asphalt distributor was a complicated machine, especially when the SCDOT technicians had not worked with machinery of this type in the past. The distributor could not be

shipped from Stepp Manufacturing one day and put to work the next day. The machine had to be assigned to a location in the State. Employees had to be trained on the machine. The machine was delivered in October and the State was hesitant to test it during the cold months because that is not when paving is usually done. However, the SCDOT decided to pay Stepp because they knew it would be a while before they could test it and they did not want to make Stepp wait for the money. For these reasons we find that the acceptance was reasonably induced by the difficulty of discovery before acceptance.

As stated in the Findings of Fact, the machine was rife with problems which substantially impaired its value to the SCDOT. The machine did not conform to the SCDOT plan of having a functioning asphalt distributor. It does trouble us that the SCDOT took an unusually long time to revoke acceptance. However, they were trying to get the machine working the entire time - as was Mr. Stepp- and therefore, we do not conclude that amount of time was unreasonable in light of all of the circumstances.

At the start of the hearing, Stepp moved that the SCDOT should have the burden of proof in this matter since it was the one seeking revocation. SCDOT had no objection. We conclude that the SCDOT met its burden of proof.

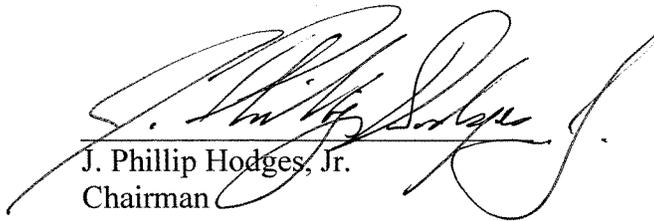
ORDER

Based on the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the SCDOT properly revoked its acceptance of the asphalt distributor and that Stepp should pay SCDOT the amount of \$74,575 which is the original purchase price for the equipment. Further, pursuant to our authority in S.C. Code Ann. §11-35-4320, we find that this payment of the original purchase price is all the relief necessary to resolve the controversy.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN



J. Phillip Hodges, Jr.
Chairman

This 26th day of December, 2005