

of the contract in issue on the ground that Martin Engineering, Inc. failed to designate its subcontractors as required by State law and the Bid Documents.

A hearing was held by the Chief Procurement Officer for Construction pursuant to his authority under Section 11-35-4210, South Carolina Code of Laws (1976), as amended, on September 2, 1983, on the issue of the responsiveness of the Bid submitted by Martin Engineering, Inc. in respect to the requirements of Section 11-35-3020 (2)(b) (i) and Section 11-35-3020(2)(b)(ii).

By Mailgram dated September 6, 1983, Martin Engineering, Inc. "lodged" a Protest of award of the construction contract to any other contractor with the Chairman of the Procurement Review Panel alleging Martin Engineering, Inc. to be the lowest responsive and responsible bidder and further alleging the bid of J. A. Metz & Sons, Inc. to be non-responsive due to an alleged failure to list a masonry subcontractor. There was no testimony as to any similar Mailgram being sent to the Chief Procurement Officer for Construction.

On September 12, 1983, the Chief Procurement Officer for Construction issued a Decision declaring the Bid submitted by Martin Engineering, Inc. non-responsive due to the failure to list the fabricator or supplier of the structural steel and the millwork required for the project.

On September 13, 1983, legal counsel for Martin Engineering, Inc. filed with the Chairman of the Procurement Review Panel a Request for Review of the September 12, 1983, Decision of the Chief Procurement Officer for Construction pursuant to Section 11-35-4410(5) and Section 11-35-4410(6), South Carolina Code of Laws (1976), as amended. The

Request for Review was premised on the ground that the Decision violated Section 11-35-3020 of the South Carolina Code.

An Administrative Review was conducted pursuant to Notice to all parties on September 23, 1983. Martin Engineering, Inc., J. A. Metze & Sons, Inc., and the South Carolina Division of General Services were present and represented by legal counsel. It was agreed by the parties that the Record for the purpose of the Administrative Review would consist of "the Appendix to Brief on Behalf of Martin Engineering, Inc." with the exception of Item F of the Appendix, the Project Manual, and the testimony received by the Panel.

The moving party did not adequately show whether or not its Protest of the consideration of the Bid of J. A. Metze & Sons, Inc., due to a failure to list a masonry subcontractor, had been timely or correctly filed or even considered by the Chief Procurement Officer for Construction at the hearing resulting in the Decision upon which Administrative Review was requested. Accordingly, the South Carolina Procurement Review Panel determined that the responsiveness of the Bid submitted by J. A. Metze & Sons, Inc. was not properly before it for consideration. Additionally, according to statements by legal counsel for Martin Engineering, Inc., any Protest concerning the responsiveness of the Bid submitted by J. A. Metze & Sons, Inc. was filed with the Chief Procurement Officer for Construction subsequent to the issuance of the Decision appealed from.

The President of Martin Engineering, Inc., James Martin, testified under oath that the steel company utilized would only be fabricating the steel and not installing the steel on the project. This was apparently also to be the case with the millwork. Testimony

was also given by Mr. Martin that had he understood that the requirement for subcontractor "listing" also included the listing of fabricators or suppliers whose prices exceeded the statutory percentages, he would have so listed those "subcontractors".

The Advertisement for the construction of the South Carolina Vocational Rehabilitation Office Building clearly directs the contractor's attention to Section 11-35-3020(2)(b) of the Code of Laws of South Carolina (1976), as amended, pertaining to the mandatory listing of proposed subcontractors in the Bid as detailed in the Bid Documents. It is stated that a failure to list subcontractors in accordance with this Section shall render the contractor's Bid unresponsive.

The form of proposal quotes Section 11-35-3020(2)(b)(i) verbatim. See Tab E of "Appendix". Legal counsel for Martin Engineering Inc. argues that the definition of subcontractor in the Bid Documents and the Project Manual differs from that in the Procurement Code at Section 11-35-3020(2)(b)(i), thereby rendering the Instructions to Bidders ambiguous and unenforceable.

There has in the past been confusion on the part of contractors concerning what is required in respect to the listing of subcontractors required in order to comply with the statutory subcontractor listing requirements under Sections 11-35-3020(2)(b)(i) and 11-35-3020(2)(b)(ii).

The South Carolina Consolidated Procurement Code, at Section 11-35-310(27), South Carolina Code of Laws (1976), as amended, defines a "subcontractor" as follows:

"Subcontractor" means any person having a contract to perform a particular service for a contractor as a part of the contractor's agreement with a governmental body.

Section 11-35-3020(2)(b)(i) requires:

(i) Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds the following percentages:

Prime contractor's total bid up to three million dollars.....	2 1/2%
Prime contractor's total bid is three million to five million dollars.....	2%
Prime contractor's total bid is over five million dollars.....	1 1/2%

Section 11-35-3020(2)(b)(ii) requires:

(ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.

In order to clarify and to inform the contractor as to precisely what listing was being sought in order to comply with the cited Sections, on Page 1 of 2 of the Project Manual, SUPPLEMENT TO INSTRUCTIONS TO BIDDERS, AIA DOCUMENT A701 (May, 1978 Edition) 10-16-81 at ARTICLE 9, Paragraph 4.1.8, the following was stated:

"Each copy of the bid shall include a list of subcontractors whose prices exceed the following percentages of the prime contractor's total bid:

Up to \$3,000,000.....	2 1/2%
From \$3,000,000 to \$5,000,000.....	2%
Over \$5,000,000.....	1 1/2%

The term 'subcontractor' is deemed to mean:

a) Those who perform work or render services to the prime contractor to or about the construction,

- b) Those who supply and/or install materials fabricated to a special design, and
- c) Those who supply and/or install equipment fabricated to a special design."

It is the Decision of the Panel that the Bid Documents are not ambiguous in regard to the requirement of subcontractor listing and that the "Instructions to Bidders" does not conflict with the statutory language of the Code.

Legal counsel for Martin Engineering, Inc. argued that the Procurement Code only required the listing of subcontractors who "performed work" or "rendered service" to the contractor conjunctively with "fabricating" and "installing" a portion of the work, the value of which exceeds the statutory amounts set under the Code. This interpretation would render the purpose of these Sections meaningless. The legislative purpose underlying the requirement for the listing of "subcontractors" was to inhibit and prevent the common practice of "bid shopping" whereby a contractor receives a bid from a subcontractor, uses that bid in compiling his own bid, and, upon receipt of the contract proceeds to "shop" for a better price, thereby increasing his own profit and perhaps decreasing the quality of the work supplied to the owner. The Procurement Code defines "subcontractor" as being any person having a contract to perform a particular service for a contractor as a part of that contractor's agreement with the public owner.

In view of this definition, it is the Panel's determination that Section 11-35-3020(2)(b)(i) requires the listing of all subcontractors, including fabricators and suppliers; and that under Section 11-35-3020(2)(b)(ii), a failure to list these subcontractors,

including fabricators, suppliers, and any other entity having a contract with the contractor to furnish work, render services, fabricate, or install portions of the work in an amount exceeding the statutory percentages must render the Bid of the prime contractor unresponsive.

Alternatively and independently of the above, the Bid Documents in this matter clearly defined "subcontractor" for the purpose of this Bid. See, SUPPLEMENT TO INSTRUCTIONS TO BIDDERS, id. The definition unmistakably includes certain material suppliers and fabricators. As applied to this case, the term included Martin Engineering's steel fabricator and millwork supplier. As stated by the Chief Procurement Officer for Construction in his Decision of September 12, 1983, bidders must respond to and follow the Instructions of the Bid Documents and Project Manual. Otherwise, the Bid is not responsive to the request. The Bid Documents in this case made the requirement of listing the noted material suppliers and fabricators sufficiently clear to all prospective bidders.

It is the determination of the Panel that, based upon the testimony and the record as a matter of fact, the Decision of the Chief Procurement Officer shall be confirmed.

CONCLUSIONS OF LAW

It is the Determination of the Procurement Review Panel that the Bid Documents and Instructions to Bidders were not ambiguous nor in conflict with the requirements of the South Carolina Consolidated Procurement Code.

IT IS THEREFORE the Decision of this Panel that the Deter-