

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

APPEALED
IN THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT

William C. Logan & Assoc.)
and Francis Marion College,)
)
Appellants-Petitioners,)

IN RE: PROTEST OF POWERS CONSTRUCTION
CO.

-vs-

ORDER

Hugh Leatherman, Luther Taylor,)
Grady L. Patterson, Jr., Nikki)
G. Setzler, Harriette G. Shaw,)
Steve Bilton, Jules J. Hesse,)
Jeffrey Rosenblum, as officers)
and members of the South)
Carolina Procurement Review)
Panel, Governor Richard W. Riley,)
Grady L. Patterson, Jr., Earle)
Morris, Jr., Rembert C. Dennis,)
Tom G. Mangum, and William T.)
Putnam, as officers and members)
of the South Carolina Budget &)
Control Board Division of General)
Services, a Division of the South)
Carolina Budget & Control Board)
John A. McPherson, Jr., Chief)
Procurement Officer for General)
Services and Powers Construction)
Company,)

Docket No. 85-CP-40-3047

Heard: July 22, 1985
Filed: August 1, 1985

Respondents.)

In Re:)

Francis Marion College,)

Appellant,)

and)

William C. Logan & Associates,)

Appellant,)

-vs-

Docket No. 85-CP-40-3048

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A TRUE COPY


C. C. C. P. & G. S. m

BARBARA A. SCOTT
C. C. C. P. & G. S. m

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Powers Construction Company)
and John A. McPherson, as Chief)
Procurement Officer, Division of)
General Services of the State)
Budget and Control Board,)
)
Respondents.)
_____)

INTRODUCTION

This matter is before the Court on two petitions consolidated, without objection, for hearing because each involves the same subject matter. Petitioner, William C. Logan & Associates of Florence, S.C. (Logan), filed Civil Action 85-CP-40-3047 seeking judicial review of an order of the South Carolina Procurement Review Panel (Panel) dated July 8, 1985, under §1-23-380, S.C. Code Ann. (1976 and Cum. Supp.) (hereinafter the APA). Logan alleged various factual and legal matters appropriate for review under the APA. It sought an injunction against the Panel's Order and such other relief as the Court might deem proper.

Petitioner, Francis Marion College (FMC), filed simultaneously Civil Action 85-CP-40-3048 seeking identical relief. The petitioners were granted a temporary restraining order on July 15, 1985, by Order of this Court.

At a hearing on July 22, 1985, all parties were present and represented by counsel. After argument by counsel this Court ruled that the injunction would be made permanent until such time as there was a decision on the merits of the Petition for judicial review. In compliance with Rule 65, S.C. Rules of Civil Procedure, the Court made Findings of Fact and of Law to conclude that the injunction was an appropriate remedy until a decision on the merits.

The Court further found it to be in the interests of all parties to hold a hearing on the merits as soon as possible. It further ordered the Panel to certify the record of the proceedings below on or before July 29, 1985, and set a hearing on that date.

This decision as follows is the Order of the Court based on the record of the proceedings before the Panel and its hearing on July 29, 1985. All parties were represented by counsel and filed responsive pleadings. The Court, for the following reasons, enjoins the enforcement of the Panel's Order of July 8, 1985, insofar as it orders a re-award of the contract between Logan and FMC; affirms the Panel's Findings of Facts and Conclusions of Law; and modifies the Panel's Order as to the remedy to be granted.

PROCEEDINGS BELOW

On or about March 20, 1985, the South Carolina Budget and Control Board (Board) through Respondent, John A. McPherson, as Chief Procurement Officer of the Division of General Services, issued an invitation for construction bids for three student housing buildings and a cafeteria at Francis Marion College, State Project No. H18-8320. Bids were received from W. C. Logan & Associates (Logan), and Powers Construction Company, Inc. (Powers), and Wise Construction Company, Inc. (Wise) among others. Bids were opened in accordance with the solicitation on April 30, 1985. After evaluating the bids, the Chief Procurement Officer determined that Logan had submitted the lowest responsive bid. (Ap. Exh. 1, Certified Bid Tabulation). All bidders were informed of the award on April 30, 1985.

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Thereafter, on May 1, 1985, Powers timely filed a protest alleging that Logan failed to list subcontractors as required in S.C. Code of Laws, §11-35-3020 (Cum. Supp. 1984) for (1) ceramic and quarry tile; (2) millwork; (3) steel; and (4) masonry. (See, Exh. "Package for Panel--Power's Protest"). Section 11-35-3020 provides in relevant part:

The using agency's invitation for bids shall set forth all requirements of the bid invitation but not limited to the following:

(1) 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%

In this case, Logan's bid was \$4,497,000 (Ap. Exh. 1, Certified Bid Tabulation); therefore, it was required to list any subcontractor who would perform work, render service and specifically fabricate and install a part of the work for an amount in excess of \$89,940, the "threshold" amount of the bid.

The Chief Procurement Officer conducted a hearing pursuant to §11-35-4210 on the protest on May 9, 1985, and issued his determination on May 13, 1985, that Logan was the lowest responsive bidder (See Exh. "Package for Panel", Determination by Chief Procurement Officer). The contract was awarded to Logan. Logan and the owner, appellant-petitioner, Francis Marion College, executed

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the contract on May 15, 1985 (Resp. Exh. 14). On May 15, 1985, Francis Marion College sent Logan a Notice to Proceed with the contract (Resp. Exh. 15). Construction under the contract has been under way for some two months with a contract completion date of 400 days or July 15, 1986.

On May 23, 1985, Powers appealed the Chief Procurement Officer's decision to the Procurement Review Panel. The hearing was held on July 1, 1985. On July 8, 1985, the Panel rendered the decision herein appealed which was basically that Logan's bid was nonresponsive and ordered that the contract would be reawarded. The Panel found that Logan had divided the steel requirements for the project into four parts each of which were less than 2% and had decided to subcontract each part. The panel held the bid was nonresponsive because on bid day Logan did not have a firm commitment from a subcontractor as to subparts of the steel package.

Logan and Francis Marion College filed separate suits requesting a temporary and permanent injunction and stay of the Panel's July 8, 1985, Order, requesting a reversal of the Order, and such other relief as the Court deemed appropriate.

DISCUSSION

This case is before the Court for judicial review pursuant to the APA and for equitable relief.

1. Equitable Relief

FMC has petitioned this Court for a permanent injunction to prohibit enforcement of the Panel's Order to re-award the

contract for construction on its campus. This Court adopts the reasoning expressed in Corbin on Contracts, 1512 at 646 (1984) that contracts in violation of licensing statutes are not automatically unenforceable, "that the punishment should fit the crime." This Court, exercising its equitable jurisdiction, will consider the harm to FMC and weigh this harm against the violation found by the Panel in its order.

FMC, complying with all applicable law for its conduct executed the contract with Logan and gave a Notice to Proceed on May 15, 1985. The contractor began performance under the contract which requires a 400 day completion schedule.

The 400 day completion schedule is important to permit FMC to lease the dormitory space. That revenue is required to enable FMC to pay its obligations on the bonds it issued to pay for the construction (Affidavit of Pres. Stanton, FMC). Re-award and or rebid of the construction contract under these circumstances would result in severe monetary and other loss to the State and its citizens and would be contrary to the purpose and spirit of the Procurement Code. Section 11-35-30, S.C. Code Ann. (1976 and Cum. Supp.)

FMC is an innocent party in this proceeding. It has acted in good faith with all the parties and should not now bear any risk of harm from the actions of others. For these reasons the injunction against enforcement of the Panel's Order to re-award the contract shall be made permanent.

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2. Judicial Review of the Facts

In reviewing the Panel's determination, this Court is bound by the provisions of S.C. Code Ann. §1-23-380 (Cum. Supp. 1984). This section of the Administrative Procedures Act mandates a non-jury review confined to the record, and requires this Court to affirm the Panel's decision unless it is found to be clearly erroneous, arbitrary or capricious, or in violation of law. Furthermore, the Statute prohibits this Court from substituting "its judgment for that of the (Panel) as to the weight of the evidence on questions of fact." S.C. Code Ann. §1-23-380(f), (g) (Cum. Supp. 1984). In order to reverse the Panel's judgment as to the facts and the law, this Court must find that the Panel's factual finding, that Logan's excuse for failing to list a steel subcontractor was untrue, was clearly not supported by reliable, probative and substantial evidence on the whole record. In applying this substantial evidence test, the Court cannot conduct judicial fact finding or substitute judicial judgment for agency judgment; and judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E. 2d 304 (1981).

The record of the Panel's hearing illustrates that the Panel's decision was based on substantial evidence that Logan's failure to list a steel subcontractor in its bid was negligent or intentional, and provided Logan the opportunity to bid-shop steel subcontractors after the award. The Panel specifically found that "Logan failed to list a subcontractor for the structural steel the cost of which is greater than the 2% threshold for listing. Logan's bid was therefore non-responsive." (Panel's Order at 9-10). The

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evidence showed that "(o)n bid day Logan had solicited only lump sum bids on steel. Had Logan solicited bids on packages for steel that bid day, the State would have received the benefit of the lower prices received by Logan for the total steel package." (Panel's Order at 9.)

The substantial evidence on the whole record clearly supports the Panel's decision to infer that Logan negligently or intentionally failed to list subcontracts in accordance with S.C. Code Ann. §11-35-3020 (Cum. Supp. 1984), which rendered Logan's bid per se nonresponsive.

3. Judicial Review of the Law

It is well settled that the construction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons. Faile v. S.C. Employment Security Commission, 267 S.C. 536, 230 S.E. 2d 219 (1976); Hart v. Miller Islands v. Corps of Engineers, 621 F. 2d 1281 (4th Cir. 1980). In its order of July 8, 1985, the Panel was required to apply §11-35-3020 to the facts as reviewed and to determine whether an amendment to §11-35-4210 of the Procurement Code ratified by the Governor on May 23, 1985, should be retroactively applied to this case. The Panel determined that . . .

the 1985 procurement code amendments are curative or remedial. The statutes were amended to cure the defects that were made apparent by the South Carolina Supreme Court in Acta-Fax Business Machines, Inc. v. Royal Business Machines, Inc., South Carolina Supreme Court Order (December 17, 1984), with regard to the powers and duties of the procurement review panel. (Order at 8).

Subsection 2 of the amendment provides:

(7) Reimbursement for Reasonable Costs and Authority to Grant Other Relief. In the event a protestant contends that it should have been awarded a contract under a solicitation but is not, then the party may apply to the Review Panel, as provided for in Section 11-35-4410, for relief. Upon receipt of this application the Review Panel may order the computation and award of a reasonable reimbursement amount including reimbursement for bid preparation costs, and may order such other and further relief as justice dictates, including but not limited to a reaward of the contract or a rebid of the contract. The decision of the Review Panel is the final administrative review and the decision of the Review Panel is appealable to the Circuit Court under the provisions of the South Carolina Administrative Procedures Act. [Emphasis added] (R. 158, §2, 1985).

This court concurs that the amendment is applicable to the instant case. Remedial or procedural statutes are generally held to operate retrospectively. Hercules, Inc. v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E. 2d 45 (1980); Howard v. Allen, 368 F. Supp. 310 (D.S.C. 1973), aff'd. 487 F. 2d 1397 (4th Cir. 1973), cert. denied 417 U.S. 912 (1974). A curative or remedial statute is one passed to cure defects in prior law, or to validate legal proceedings which, in the absence of such an act, would be void for want of conformity with existing legal requirements but which would have been valid if the statute had so provided at the time of enactment. See, e.g., Green v. Rock Hill, 149 S.C. 234, 147 S.E. 2d 346 (1929); 16 A C.J.S. Constitutional Law §421 (1956).

It is the well-settled rule that a statute that is procedural or remedial will be applied from its effective date. Hercules, Inc. v. S.C. Tax Commission, 274 S.C. 137, 262 S.E. 2d 45. This provides a litigant with the procedures or the remedies that are available by statute from the date of the enactment. See Howard

v. Allen, 368 F. Supp. 310, 315 (D.S.C. 1973). The exceptions to this rule as expressed in Boyd v. Boyd, 277 S.C. 416, 289 S.E. 2d 153 (1982), are when the application of the statute would create a new substantive right or impair a vested right. No substantive right has been created in R.158, §2, as was in Boyd. The right to protest was created in Act 148 of 1981, the S.C. Consolidated Procurement Code. Act 148 also created remedies. R.158, §2, has expanded the remedies which may be granted by the review panel.

For the foregoing reasons this Court affirms the Panel's Order as to the applicability of §2, R.158 (1985) to this proceeding.

REMEDY

Pursuant to the authority granted this Court by Code §1-23-380(g), this Court modifies the decision of the Panel as to remedy. The Court finds, as discussed in the grant of the permanent injunction above, that substantial rights of an innocent party (FMC) have been prejudiced by the Panel's Order. The Court finds the panel's order to be an "unwarranted exercise of discretion," §1-23-380(g)6. Unlike the facts in Deese v. S.C. State Bd. of Dentistry, Davis Adv. Sheets, Op. #504 (June 18, 1985) an innocent party FMC will suffer considerable injury if the imposition of maximum sanctions permitted by the law are upheld. For that reason this Court adopts the rule as stated in Corbin on Contracts, §1519 at 713 (1962):

...enforcement of the wrong doer's bargains is not always denied him. The statute may be clearly for protection against fraud and incompetence; but in very many cases the statute breaker is neither

fraudulent nor incompetent. He may have rendered excellent service or delivered goods of the highest quality, his noncompliance with the statute seems nearly harmless, and the real defrauder seems to be the defendant who is enriching himself at the plaintiff's expense. Although many courts yearn for a mechanically applicable rule, they have not made one in the present instance. Justice requires that the penalty should fit the crime; and justice and sound policy do not always require the enforcement of...statutes by large forfeitures....

The 1984 enactment (R. 158, §2) grants to the Panel the power to "order such other and further relief as justice dictates." The record before this Court and the Panel's Order clearly focus on the point that the State as a result of the violation of §11-35-3020 did not receive the benefit of the bargain made by Logan for the steel in this project. Logan's bid for the project was based on its own in-house steel takeoff of \$151,500 (Tr. 193, Resp. Exh. 9). After submitting its bid Logan subcontracted that portion of the job it had estimated at \$151,500 at a figure \$5,787 less. The total price it will pay is \$145,793. Logan will pay \$84,647 for the structural steel (Resp. Exh. 11), \$26,796 for the miscellaneous steel (Resp. Exh. 12) and \$34,350 for the joists and decking (Resp. Exh. 13). That savings of \$5,787 would have been FMC's had Logan solicited those subparts of the steel package before bid day as it did with carpentry and millwork.

To allow a contractor to do as Logan did, will result in a situation where the contractor can utilize a subcontractor at an amount less than that the contractor bid to the state. The contractor will realize this savings and expand his profit margin at the expense of the public treasury. By Logan's own admission this

is precisely what has happened. This is the evil for which statutes prohibiting bid shopping have been adopted. The Panel's remedy, however, is an unwarranted exercise of discretion. A re-award of the contract is excessive in relation to the violation found, when weighed against the rights and liabilities of FMC in its contract with Logan. A more suitable remedy is to require Logan to remit the gain realized by it through failure to observe the proper bid procedure.

For the foregoing reasons Logan is ordered to remit to Francis Marion College within thirty (30) days from the date of this Order the sum of \$5,787.

The record is devoid of any imputation of fraud on Logan's part. There is no evidence that Logan has not performed adequately to date on the contract and no evidence that Logan will not carry the project to completion in a responsible and timely fashion. There is evidence in the record of the likelihood of substantial damage to FMC and to Logan if the Panel's Order were executed.

IT IS THEREFORE ORDERED THAT:

→ 1. The enforcement of the Panel's Order of July 8, 1985, to reaward the contract for State Project H18-8320 is permanently enjoined.

2. The Findings of Fact and Conclusions of Law of the Panel's Order of July 8, 1985, are otherwise affirmed.

3. The Panel's Order of July 8, 1985, is modified to require Logan to remit to Francis Marion College the sum of \$5,787 within thirty (30) days from the date of this Order.

This Order is not intended to prevent Respondent Powers

Construction Company from applying to the Review Panel for reimbursement of its bid preparation costs as provided by §11-35-4210(7). The record is devoid of any facts on which to determine that Powers was a responsive and responsible bidder who should have gotten the bid; and, therefore, this Court expresses no opinion on the merits of any such claim. ←

AND IT IS SO ORDERED.



TOM J. ERVIN
Presiding Judge
Fifth Judicial Circuit

August 1, 1985
Columbia, South Carolina