

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1987-8

IN RE:)
)
PROTEST BY J.A. METZE & SON, INC.) O R D E R
_____)

This matter is before the South Carolina Procurement Review Panel (hereinafter "Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws, 1976, as amended, as a result of a Bid Protest filed under Section 11-35-4210(1), South Carolina Code of Laws, 1976, as amended, and a Request for Review of the Determination issued by the Chief Procurement Officer for Construction (CPO) from that Protest pursuant to his authority granted by Section 11-35-4210(2) and Section 11-35-4210(3).

BACKGROUND

. On or about June 10, 1987, the Division of General Services issued an invitation for construction bids for the upfitting of the Robert Mills Building and Addition, State Project No. 9064-F12. The date on which the bids were due to be turned in was initially set for July 9, 1987, and was subsequently changed to July 21, 1987. On July 22, 1987, the Division of General Services issued a Notice of Intent to Award the contract to Carolina Construction Company ("Carolina").

On July 29, 1987, J. A. Metze and Son, Inc. ("Metze") timely filed a protest alleging that Carolina Construction had failed to list subcontractors as required by South Carolina Code of Laws, §11-35-3020 (Cum. Supp. 1986). That section provides:

(b) Bid Acceptance. In lieu of Section 11-35-1520(7), the following provision shall apply. Bids shall be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The using agency's invitation for bids shall set forth all requirements of the bid including but not limited to the following:

(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%.

(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.

(iii) No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown.

(iv) The using agency shall send all responsive bidders a copy of the bid tabulation within ten working days following the bid opening.

Specifically, Metze alleges that Carolina failed to list subcontractors or suppliers, or failed to list itself in lieu of subcontractors or suppliers, for the following work or supplies: venetian blinds, finished carpentry/millwork, and folding doors and partitions; the amounts for each, according to Metze, exceeding 2 1/2% of Carolina's base bid or, in this case, exceeding \$13,575.00. (Record, p. 1).

The State Engineer, Jay A. Flanagan, conducted a hearing on Metze's protest on August 26, 1987. All interested parties were present. In his September 4, 1987, decision, the CPO determined that the bid submitted by Carolina had complied with §11-35-3020 and the invitation for bids, that the bid was responsive, and that Carolina was the low bidder.

As a result of Metze's request for further review of this protest, the S. C. Procurement Review Panel convened a hearing on September 22, 1987. A quorum of the Panel was present. The Division of General Services was present and represented by Ms. Helen Zeigler. The protestant, Metze, was present and represented by Mr. W. Duvall Spruill. The respondent, Carolina, was present and represented by Mr. Robert E. Kneece, Jr.

At the beginning of the hearing Carolina moved to dismiss the partitions from the items under protest as being untimely raised because they were not part of Metze's initial letter of protest to the CPO. (Record, pp. 21, 26). The record below reveals, however, that the issue surrounding the partitions was fully litigated at the CPO hearing and that

Carolina did not object to the consideration of this issue even though it was not part of the protest at that time.

On the main issues before the Panel, Metze presented evidence tending to show that Carolina artificially broke down work into categories, the dollar amount of which was below the 2 1/2% threshold. Mr. J. A. Metze, Jr. testified that Metze received the following quotes for the work under protest:

1.	Venetian blinds for Robert Mills Building and new addition --	
	Joyce Marie Shade Shop	\$30,983
	The Shade Shop	\$37,375
2.	Folding Door and Folding Partitions --	
	Bass Specialties	\$15,447
	McDonald's	\$18,000
3.	Finished Carpentry/Millwork (including Flush and Panel Doors) --	
	Columbia Lumber	\$28,670
	Sumter Lumber	\$31,614

In each case the cost of the work in question well exceeds the 2 1/2% threshold of Metze.

According to Carolina's evidence, it broke down the same work listed above as follows:

1.	Venetian Blinds for Robert Mills Building Addition ("new building") --	
	Kenny Manufacturing	\$9,072.94
2.	Venetian Blinds for Robert Mills Building ("old building") --	
	Lonnie Miracle - Decorator Supply	\$10,990.00
3.	Folding Door --	
	Bass Specialties	\$2,503.70

4.	Folding Partitions -- Bonitz	\$12,800.00
5.	Flush Doors -- Caroland Doors	\$7,322.00
6.	Panel Doors -- R&D Enterprises	\$9,960.00
7.	Finished Carpentry/Millwork Brazzell's Home Improvement	\$7,332.00

Metze presented evidence that the bid of \$7,322 from Caroland Doors was unusable because the quote was for doors which did not meet bid specifications. Carolina offered evidence that it also had a quote of \$7,980 from Pleasant's Hardware for the same door.

Metze further presented evidence that the bid of \$10,990 from Lonnie Miracle was not adequate because it was for less than all the venetian blinds required for the old building by the specifications. Carolina conceded that Miracle's bid was for less than all the windows and offered a new bid from Miracle dated September 21, 1987, for \$13,372.80, covering all the venetian blinds required for the old building. This new bid was solicited well after the bid opening and after the hearing below.

Mr. Miracle testified that he did not visit the site to verify the number of windows. He also testified that his new bid was arrived at by figuring an average unit cost for a blind and multiplying that figure by the total number of blinds. Mr. Miracle admitted that irregular-shaped blinds, such as for arched or circular windows, have a higher materials

cost that normal rectangular blinds. Evidence was also presented that the cost of installing irregular blinds is higher. It was established by Metze that Miracle's first quote did not take into account at least 17 irregular shaped blinds and 44 rectangular blinds.

Regarding the finished carpentry and millwork, Carlisle Smith of Carolina testified that he used his notes from a verbal quote received from Columbia Lumber to solicit a verbal quote from Brazell's Home Improvements before bid date, July 21, 1987. The effect of soliciting the Brazzell bid was to break out the doors from the carpentry and millwork, thus bringing both items under the 2 1/2% threshold. The quote from Brazzell covered every item of Columbia's quote except twenty-eight, four-panel wood doors and ninety-four, flush paint grade doors. Mr. Smith admitted, and the record reveals, that, but for the absence of the doors, the written quote from Brazzell is identical to that of Columbia Lumber. Mr. Smith also admitted that the specifications do not contain the exact language found in Columbia Lumber's written quote. Both the written quote from Columbia Lumber and the written quote from Brazzell, according to Mr. Smith, were received after bid day.

Finally, it was brought to the Panel's attention that Carolina had solicited after the bid opening at least one of the bids allegedly relied upon by it in preparing its bid. Carolina admitted that the bid received from Bass Specialties breaking down the work concerning the folding door and folding partitions was not requested or received prior to bid day. Ms.

Timmons of Bass Specialties testified at a supplemental hearing before the CPO that Carlisle Smith, President of Carolina, contacted her on or about August 18, and requested that she break down Bass' bid to list separately the folding door. Ms. Timmons stated that Bass did not want to break down its bid and probably would not have done so if Carolina had not apparently received award of the contract. It was also uncontroverted that Carolina approached McDonald and Columbia Lumber after the bid to get these subcontractors to break down their bids into smaller categories.

Carolina claims that it had an oral quote from Butler Hardware for the folding door. However, the only written evidence of this quote indicates that it was given September 21, 1987, a day before the hearing before the Panel.

No evidence other than the testimony of Carlisle Smith was offered before the Panel to support Carolina's assertion that it received prebid oral quotes from the subcontractors it allegedly relied upon in preparing its bid. Smith, in sworn testimony before the CPO, stated that he did not write down the date on which he received verbal quotes. Counsel for Carolina interjected in the hearing before the Panel that Smith's notes were 'scrambled'.

FINDINGS OF FACT

1. Carolina did not object at the hearing before the CPO to the litigation of the issue concerning the folding partitions.

2. The threshold amount to trigger the listing of subcontractors and suppliers as required by §11-35-3020, as it relates to Carolina, is \$13,575.00 (2 1/2% of Carolina's base bid in this solicitation).

3. Carolina received unsolicited bids from subcontractors and suppliers seeking to perform various portions of the work that are under protest. Carolina also solicited bids from various subcontractors and suppliers that might not otherwise have sought to participate in this upfitting project.

4. The bid of \$2,503.70 from Bass Specialties for the folding door and \$13,032 for the folding partitions was not received by Carolina until August 18, 1987, after the bid opening.

5. The testimony of Carlisle Smith concerning Carolina's receiving prebid oral quotes from Butler Hardware was not convincing.

6. If not for the award of the contract to Carolina, Bass Specialties would not have broken down its bid into smaller categories.

7. The only other bid received by Carolina covering the folding door is that of Butler Hardware dated September 21, 1987.

8. At the time it prepared its bid, Carolina did not have a bid for the folding door alone.

9. The bid of \$10,990.00 from Lonnie Miracle for venetian blinds in the old building was for less than the full amount of

blinds required for that building and it omitted approximately 38% of the total number of irregular blinds required (17 of 44 nonrectangular blinds).

10. The unit cost of material and installation of irregular blinds is substantially higher than for regular rectangular blinds.

11. Prior to bid opening, Carolina did not have a bid which covered the material and labor associated with installing all the venetian blinds in the old building alone.

12. The Panel finds that Mr. Smith was less than candid in the hearing before the CPO concerning the date on which the quote from Bass Specialties was received. (Record, p. 8). It is clear from the evidence submitted to the Panel that Bass was not approached about breaking its price down until after bid date.

13. The Panel finds, and the testimony of Liz Timmons of Bass Specialties confirms, the pressure that Bass Specialties felt to accommodate Carolina when it had reason to believe that Carolina had been, or was about to be, awarded the contract.

14. The Panel finds that this same pressure applied to Lonnie Miracle because he knew that Carolina stood a reasonable chance to be awarded this contract. The pressure Mr. Miracle undoubtedly felt, coupled with his admitted failure to visit the job site, casts serious doubt on his testimony on the cost issue. Consequently, the Panel finds that the computation of the cost of the blinds in the old building provided by Metze is more reasonable and adopts it as its own.

15. The Panel finds that the cost to supply and install the blinds in the old building exceeds the threshold amount of \$13,575.

DISCUSSION AND CONCLUSIONS OF LAW

Based on its evaluation of the evidence, the Panel does not accept as convincing the testimony of Carolina that it had all the necessary verbal quotes to know, prior to bid day, whether all subcontractors and suppliers were listed as required by §11-35-3020. Carolina's conduct demonstrates that at every turn it sought to break down bids in order to allow it the option to seek even lower prices after bid day.

By creating a threshold percentage, §11-35-3020 is intended to provide general contractors some flexibility for the less significant portions of the contract. Here, however, Carolina sought to find subcontractors on some of the most significant portions of the contract where other general contractors uniformly listed subcontractors and suppliers. Section 11-35-3020 is the legislature's statement of policy to afford some protection to subcontractors and suppliers who are often in an unequal bargaining position with a general contractor and to ensure that the state receives a quality building.

Despite Mr. Smith's assertion that the benefit of his shopping accrued to the state, the record before the Panel suggests another conclusion. Accepting Mr. Smith's testimony as accurate, he used the following quotes for the items under

protest to arrive at his bid:

1. Blinds	(a) Old Building	Kenny Mfg.	\$10,990
	(b) New Building	Decorator Supply	9,072
2. Folding Door		Butler Hardware	3,371
3. Folding Partitions		Bonitz	12,800
4. Flush Doors		Caroland Doors	7,322
5. Panel Doors		R&D Enterprises	9,960
6. Millwork		Brazell's	<u>7,332</u>
			\$60,847

Additionally, Metze listed subcontractors and arrived at the following totals:

1. Blinds	(1(a) and (b) above)	Joyce Marie	30,983
2. Doors/ Millwork	(Items 4, 5, & 6 above)	Columbia Lumber	28,760
3. Folding Door & Partitions	(Items 2, 3 above)	Bass Specialties	<u>15,237</u>
			\$74,980

Consequently, the base bid of Carolina should be approximately \$14,000 less than that of Metze. However, the record reflects that Carolina's base bid was \$8,099 more than Metze. (Record p. 34) Clearly, the state has received no benefit from Mr. Smith's attempt, as he claimed, to shop prior to bid day, and the Panel so concludes.

These figures further cast doubt on Mr. Smith's testimony which the Panel, as a finder of fact, has the

discretion and duty to judge. Additionally, Carolina offered no evidence other than the testimony of Mr. Smith to prove that the oral quotes received by Carolina were obtained prior to bid day, July 16, 1987. Not one affidavit from a subcontractor was offered by Carolina to verify that verbal quotes were given prior to bid day.

In reaching a decision on this protest the Panel concludes that it is bound by William C. Logan & Associates v. Leatherman, 290 SC 400, 351 S.C. 2d 146,(1986). The Panel concludes as a matter of law that Carolina "negligently or intentionally failed to list subcontractors in accordance with S.C. code Ann. §11-35-3020(1976, as amended)" id at p. 147. Specifically, as the findings of fact dictate, Carolina failed to list a subcontractor for the blinds in the old building and at the time of the bid Carolina had no bid for the folding door alone, but rather had several bids above the threshold which included the folded door.

In Logan the court stated "[i]t is irrelevant that the bidder may have had plans to gather additional bids in the future in such a manner that, according to the bidder's own in-house estimate, the subcontractor's bids would not have exceeded the threshold amount." Following the reasoning, the Panel expressly concludes that it is irrelevant that Carolina knew, or thought it knew, that the folding door could be obtained elsewhere for under the threshold. The record indicates that Carolina did not in fact have a separate quote

on the folding door. Thus, Carolina had to accept or reject the offer by Bass or McDonald under the facts of this protest. If a general contractor may rely on a portion of a quote that brings that quote below the threshold for listing subcontractors required by §11-35-3020, this Code provision and the policies embodied therein would be meaningless. Logan requires that general contractors must have all the subcontractors quotes in hand, either verbal or oral, that are necessary to establish that the requirements of §11-35-3020 have been met.

Although the protestant normally has the burden of proof on all items of its protest, in this instance, Carolina had the burden to establish that it was in compliance with §11-35-3020, as further defined by Logan. By offering no other evidence that all quotes were in by bid day, the Panel concludes, based on the facts presented, that Carolina failed to establish what was required by Logan.

Having failed to meet the standard set forth in Logan, the Panel concludes as a matter of law that Carolina's bid was nonresponsive because it failed to list a subcontractor for the blinds (old building) and the folding door and partitions, both of which exceed the threshold amount established by §11-35-3020. The other grounds of Metze's protest are denied.

The motion of Carolina to dismiss that portion of Metze's appeal dealing with the folding partitions as untimely is also denied. Carolina waived its right to raise timeliness

as an issue by failing to object to the consideration of the issue below.

Based on the foregoing, the only remaining issue is the appropriate remedy. In Logan, the court determined that a reaward of the contract was too harsh a remedy when the contract had been executed and work had begun. This situation is not present in this protest. Since no contract has been executed, the Panel finds that the appropriate remedy is to reaward the contract for State Project #9064-F12 to Metz as the next lowest responsive and responsible bidder.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Hugh K. Leatherman", written over a horizontal line.

Hugh K. Leatherman,
Chairman
Procurement Review Panel

October 15th, 1987