

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1987-9

IN RE:)
)
PROTEST BY M. L. CLAPP CONSTRUCTION)
COMPANY)

O R D E R

This matter comes before the South Carolina Procurement Review Panel (the "Panel") on the appeal of M. L. Clapp Construction Company ("Clapp") pursuant to S. C. Code Ann. §§11-35-4210 and 11-35-4410 (1976) from the decision of the Chief Procurement Officer for Construction ("CPO") awarding the contract in State Project # P20-9477 to Blankenship Construction ("Blankenship").

INTRODUCTION

On or about August 12, 1987, in accordance with S. C. Code Ann. §11-35-1520 and Reg. 19-445.2040, 2045 and 2050, Clemson Public Service ("Clemson") solicited bids for construction of nine catfish ponds in Hampton County, South Carolina. After the bid opening on August 26, 1987, Clemson issued a Notice of Intent to Award the contract to Clapp. On September 2, 1987, the CPO received a protest from Blankenship contending that it should be awarded the contract because of alleged irregularities in the bidding process. Essentially, Blankenship contended that Clapp's bid was not timely delivered and, therefore, should not have been considered.

The CPO issued his decision on September 21, 1987, determining that Clapp had not proved that its bid was timely

received and directing that the contract be awarded to Blankenship. Clapp timely filed its Request for Review by the Panel on September 30, 1987.

As a result of Clapp's Request for Review, the Panel held a hearing on October 13, 1987. A quorum of the Panel was present. Also present were M. L. Clapp Construction Company represented by Paul Detrick, Blankenship Construction represented by H. Grady Brown, and the Department of General Services, represented by Helen Zeigler. Clemson University was also present but was not represented by counsel.

FINDINGS OF FACT

Based on the evidence presented the Panel finds the facts of this case to be as follows:

Sometime prior to July 1987, Clapp learned that bids were being solicited by Clemson for construction of a catfish demonstration facility in Estill, South Carolina. Clapp submitted a bid by first class mail and in the course of time learned that it was the low bidder. Clapp was not awarded the contract, however, because of funding problems.

A short time later Clapp learned that a new invitation to bid had been issued for the project and Clapp again decided to submit a bid. To that end, Mr. Marshall L. Clapp and his wife worked the weekend prior to the scheduled August 26, 11:00 A.M. bid opening on preparing the bid. Mr. Clapp had a previous conversation with Mr. George L. Hardy, Jr., of Clemson, who was the Project Director, in which Mr. Hardy advised Mr. Clapp that

it was acceptable to mail bids. In reliance on that conversation, Mr. Clapp sent his wife to the post office Monday morning to mail Clapp's bid to the State Engineer's Office. Mrs. Clapp asked and was assured by the post office that regular mail sent from Hampton that day would reach Columbia by 11:00 A.M. August 26, the bid opening date. On Monday evening Clapp advised George Hardy that his bid had been mailed that day.

On the morning of the bid opening, the regular mail for the State Engineer's Office arrived in its normal course and was put in a dumbwaiter to be picked up by the appropriate offices. Normally, the receptionist shared by the State Engineer and the Construction and Planning office would pick up the mail, open and stamp it and then distribute it to the proper parties. On this occasion, however, because of a recent vacancy in the receptionist position, Jolene Martin, an employee of Construction and Planning, picked up the mail from the dumbwaiter between 10:30 and 11:00 A.M. Numerous witnesses testified that it was not unusual for the mail to arrive either before or after 11:00 A.M.

Ms. Martin did not open and stamp the mail but did separate the State Engineer's batch from the Construction and Planning batch. She took the Construction and Planning batch with her and put the State Engineer's batch on Rachel Langdon's desk. Ms. Langdon is the secretary to Sam Harper, an engineer with the State Engineer's office, and is the person designated to receive mail for that office.

When the mail was placed on Ms. Langdon's desk in a position where she could see it, she was busy preparing forms for persons who were in her office waiting on them. As a consequence, rather than sorting and opening the mail, Ms. Langdon laid it to one side. Ms. Langdon does not remember what time the mail was laid on her desk.

Ms. Lynn Verlinden, an accounting technician in the State Engineer's office walked by Ms. Langdon's desk on the way from her desk to a birthday party being given for her down the hall. She remembers seeing the mail sitting on Ms. Langdon's desk at that time. She also remembers glancing at the clock hanging on the wall across from Ms. Langdon's desk and noting the time as two or three minutes after 11:00 A.M.

The bid opening for the catfish project was scheduled to begin in the State Engineer's office at 11:00 A.M. At about 10:40 A.M., George Hardy and Dr. John Collier arrived from Clemson. Mrs. Blankenship of Blankenship Construction was already there, waiting in the conference room with her bid. At a few minutes to 11:00 A.M., Sam Harper came into the conference room, recorded some personal notes relative to the impending bid opening, and left.

According to Mr. Harper, he went into the outer office to check for persons who might be present for the bid opening.

According to her he did not check with Rachel Langdon to see whether any bids had come in the mail. Finding no other persons waiting for the bid opening, Mr. Harper returned to the conference room.

The two bids available were then opened and it was revealed that Blankenship was the low bidder at \$28,750.00. Mr. Harper asked Mrs. Blankenship if she felt she had made any errors in her bid. She said no. Dr. Collier advised her that a Notice of Intent to Award and Bid Tabulation would be sent out in a few days.

Within minutes after Mrs. Blankenship left, Rachel Langdon discovered on her desk in the morning mail the bid from Clapp. She looked at the clock and noted that it was 11:30 A.M. Ms. Langdon immediately took the bid to Sam Harper. Because the State Engineer, Jay Flanagan, was not in, Mr. Harper instructed Mr. Hardy and Dr. Collier to take Clapp's sealed bid back to Clemson and not to open it until he had a chance to speak with Mr. Flanagan.

That night Mr. Clapp called Mr. Hardy to inquire about the results of the bid opening. He was advised of the late discovery of the bid and was told that Mr. Flanagan would decide in the morning whether to open the bid.

After discussing the situation with Sam Harper, Mr. Flanagan decided that Clapp's bid should be opened pursuant to Reg. 19-445.2070 (H). That regulation provides:

Subsection H. - Exceptions to Rejection Procedures. Any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected unless a bid was in the possession of the designated purchasing office and had been misplaced by state employees in that office. In this event, the Chief Procurement Officer, or the procurement officer of the governmental body, shall annotate

the bid tabulation and consider the misplaced bid along with the other previously received bids. (Emphasis added).

When Clapp's bid was opened, it was discovered that Clapp was the low bidder at \$24,725.00.

Mr. Clapp and Mrs. Blankenship were advised of the bid opening and shortly thereafter, they along with Malphrus Construction received the Notice of Intent to Award and Bid Tabulation indicating that Clapp would be awarded the contract.

Blankenship protested the award and a hearing was held before the CPO, Mr. Flanagan. Neither Jolene Martin nor Lynn Verlinden testified at that hearing, however, and the CPO decided that it could not be determined when Clapp's bid arrived. He therefore awarded the contract to Blankenship.

DISCUSSION AND CONCLUSIONS OF LAW

This case raises three issues for consideration by the Panel. First, Blankenship contends that it cannot be determined with certainty that Clapp's bid was delivered at the State Engineer's office prior to August 26, 1987 at 11:00 A.M. Blankenship argues that after all the evidence is considered there still remains some doubt as to when Clapp's bid was received.

The standard of proof in a civil case, including administrative hearings, is a preponderance or greater weight of the evidence. A "preponderance of the evidence" is simply that evidence which is convincing as to its truth. Frazier v. Frazier, 228 S. C. 149, 89 S.E.2d 225 (1955). Any fact in issue may be proved with either direct or circumstantial evidence. St. Paul

Fire and Marine Ins. Co. v. American Ins. Co., 251 S. C. 56, 159 S.E.2d 921 (1968). Where circumstantial evidence is relied upon, the facts proved need not be such to exclude every other conclusion. They need only be sufficient to reasonably warrant the inference sought. Floyd v. Town of Lake City, 231 S. C. 516, 99 S.E.2d 181 (1957).

All Clapp must show in this case is that it is more probable than not that its bid was timely delivered. It is not necessary that Clapp prove its case beyond all doubt.

While it cannot be determined with absolute certainty, the Panel is convinced that it is more likely than not that Clapp's bid was received by 11:00 A.M. on August 26. Jolene Martin's testimony that she normally got the mail between 10:30 and 11:00 coupled with Lynn Verlinden's recollection that she saw the mail on Rachel Langdon's desk at 11:02 or 11:03 make it probable that Clapp's bid was in the office of the State Engineer prior to the bid opening.

The second issue raised by both Blankenship and the Division of General Services is that, under the bid documents, Clapp assumed responsibility of insuring that its bid was timely delivered. Section 4.3.3 provides that, "The bidder shall assume full responsibility for timely delivery at the location designated for receipt of bids." Blankenship and General Services argue that Clapp failed to meet its responsibility because it did not inquire about state mail service in enough detail, it used regular mail rather than certified or overnight mail or hand delivery, and it

did not follow up on the whereabouts of its bid after it was mailed but prior to bid opening.

The Panel recognizes that it is highly unusual for a contractor to entrust its bid on a construction project to regular mail. However, the Instructions to Bidders clearly contemplate and approve of regular mail as a means of bid delivery. See Section 4.3.1. In addition, Mr. Clapp had previous favorable experience in mailing bids and had cleared with Mr. Hardy the appropriateness of mailing his bid in this case. Recognizing that Mr. Clapp did not exert every effort he might have, nevertheless, the Panel concludes that Clapp's bid was in fact timely delivered and that Clapp met its responsibility under section 4.3.3 of the Instructions to Bidders.

Finally, Blankenship argues that, even assuming Clapp's bid was on Rachel Langdon's desk by 11:00 A.M., there was no basis for opening the bid because it was not "misplaced" within the meaning of Reg. 19-445.2070 (H) quoted above. Giving "misplaced" its ordinary meaning, as is urged by Blankenship, the Panel concludes that Clapp's bid was indeed misplaced under the facts of this case.

Ms. Langdon testified that when the mail was placed on her desk she was too busy to attend to it and pushed it out of her way to one side of her desk. In essence, she forget about it until more pressing matters were taken care of. In addition, several witnesses testified that, although it would have been normal or usual for Sam Harper to check with Ms. Langdon to see

if she had any bids, he did not in this case, according to Ms. Langdon.

If Ms. Langdon had sorted the mail rather than laying it aside or if Mr. Harper had checked with Ms. Langdon prior to bid opening, the bid would have been discovered. Under the circumstances, the bid was in the wrong place and was therefore "misplaced" by employees of the State Engineer's office. The Panel concludes that Reg. 19-445.2070 (H) applies in this case.

CONCLUSION

For the reasons stated above, the Panel finds that the CPO was incorrect in deciding that Clapp's bid was not timely delivered. Therefore, the decision of the CPO is reversed and it is ordered that the contract in State Project No. P20-9477 be awarded to M. L. Clapp Construction Company.

IT IS SO ORDERED.

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

Hugh K. Leatherman, Sr.
Chairman
Procurement Review Panel

October 15th, 1987