

Charlotte to perform the masonry work. Metro sought out and solicited a bid from Brik-Laco after the bid date. This action was in violation of §11-35-3020.

On or about February 5, 1988, USC learned that Metro had provided fraudulent performance and payment bonds. On February 11, officials of USC and General Services met with Metro about the invalid bonds. Metro proclaimed innocence regarding the fraud and proposed that USC buy out its contract. To support that proposal Metro presented USC with a buyout package. (Record, Pltf.'s Ex. 3 and 6). When USC expressed no interest in the buyout proposition, Metro requested that it be given time to secure new bonds. USC gave Metro two weeks.

While examining the buyout package submitted by Metro, Mr. Ed Bass, USC's Director of Project Development, learned for the first time that Brik-Laco was on the job as masonry subcontractor. According to Mr. Bass, he advised the State Engineer, Jay Flanagan, of this on February 12, 1988.

After realizing the problems with Metro would probably result in suspension of work, USC became concerned about the safety of the construction site. Excavation on the site had left steep nearly vertical slopes which bordered on city streets. Drain pipes had been removed which increased the likelihood of erosion of the construction site and possible cave-ins. (See Record, Def.'s Ex. 1 and 2). USC also feared for the security and safety of the site in light of the rapidly approaching baseball season and the nearness of the

baseball field to the site. A final concern was that, if Metro could not complete the job, federal funding might be withdrawn if a replacement contractor were not found quickly. (See Record, Def.'s Ex. 5).

Faced with the above concerns, USC on February 10 declared an emergency to exist relative to the drainage problems. On that date, USC initiated a Request for Emergency Procurement Form SE-560 to procure the services of Hoppy's Construction Company in laying drain pipes at the construction site. The State Engineer approved this emergency procurement on February 22. (Record, p. 57).

Mr. Bass and USC further decided on February 17, 1988, that, if Metro failed to meet the deadline, USC would declare another emergency situation relative to completing the entire project.

On February 25, Metro's deadline expired without its obtaining replacement bonds. On that day Mr. Bass called Metro and terminated the contract for the Roost construction. On that day USC also declared an emergency regarding completion of the Roost project. Mr. Bass immediately contacted Prime South Construction Company to see if it was interested in taking over the construction contract at the price originally bid by it. Prime South had been the second low bidder in the original bid solicitation.

USC had previously decided that, if it had to terminate Metro, the best option was to negotiate with the second low bidder. According to Mr. Bass, USC reached that decision in

light of the perceived emergency situation, the potential loss of federal funds, the delay in rebidding and the unfairness in rebidding now that the original bid information had become public knowledge. USC was also concerned about how to handle the work that was already in progress.

According to Mr. James M. Woods, Vice-president of Operations for Prime South, when contacted by USC, Prime South expressed interest in completing the Roost project and was given several days to contact its suppliers and subcontractors to see if it could perform the contract at the price originally bid. The bids had expired on January 10, 1988, so on the date of Mr. Bass' phone call, Prime South was not obligated to USC to perform at the price originally bid or at all. Similarly, Prime South's suppliers and subcontractors were not obligated to Prime South.

Mr. Woods testified that either he or his assistant called the subcontractors and suppliers originally listed in Prime South's bid. The Protestant Spires had been listed on Prime South's bid as performing the masonry work (Record, p.28) and was one of the subcontractors contacted after Mr. Bass's call. Spires indicated that he could perform as originally bid.

According to Mr. Woods, Spires was asked only if he could perform at his original price; he was not offered the USC job. Mr. Woods admitted that Prime South relied on

Spires' answer in responding to USC but stated that Prime South had contacted at least one other masonry subcontractor for a quote in case the Spires quote fell through.

In any event, on February 29, 1988, USC and Prime South had a meeting at which Prime South agreed that it could perform the contract at its original price with some modification. At that meeting, USC for the first time asked Prime South whether it would keep four subcontractors hired by Metro who were already on the job.

According to Mr. Bass, USC chose the four subcontractors based on the buyout package submitted by Metro and based on USC's own observations about what was going on at the site. The four subcontractors were Hoppy's Construction, which was performing the site work, Owens Steel, which already had material on the site, Palmetto Wholesale, which had started some drawings, and Brik-Laco, the masonry subcontractor, which had been observed by USC on site.

USC was concerned both with fairness to the subcontractors already on the job and with protecting itself from possible lawsuits or liens being filed after Metro was terminated. There were other subcontractors listed by Metro as performing work or providing services, however, USC determined that only four subcontractors had performed sufficiently to be considered.

In fact, according to Mr. Cornell Sutton, President of Brik-Laco, no actual on-site work had been performed by Brik-Laco at that time although Brik-Laco had incurred certain mobilization costs. (Record, pp. 10-11, 13). Metro's buyout package showed Brik-Laco's mobilization costs at \$2500. (Record, Pltf.'s Ex. 6). Mr. Sutton testified that Brik-Laco could have been bought out of its contract at that point for \$20,000, however no one ever made or suggested a buyout offer.

Mr. Woods testified that Prime South told USC that Prime South would have to check the subcontractors out before it agreed to use them. Even though Prime South determined that Brik-Laco was not as strong financially as it should be, on March 4, 1988, Prime South agreed to keep Brik-Laco and the other three subcontractors. Mr. Woods testified unequivocally that Prime South would have preferred to use Spires but took Brik-Laco to please USC.

On March 4, USC initiated a second Request For Emergency Procurement Form SE-560 requesting the emergency procurement of Prime South's services in completing the Roost Project (Record, p. 73). The State Engineer did not approve this request until May 5, 1988. Mr. Bass explained the delay as occurring because his superiors misplaced the form he sent on March 4. According to Mr. Bass, the form in the Record at page 73 was not actually signed by USC on March 4 but was a replacement copy signed shortly before the State Engineer's approval on May 5. In any event, the State

Engineer did approve a Request for Authority to Execute A Construction Contract with Prime South on March 4. (Record, Def.'s Ex. 4).

The net effect of keeping Brik-Laco and rejecting Spires was to decrease USC's costs by approximately \$147,000.¹ According to Mr. Woods, Prime South had discovered that Brik-Laco was probably not able to obtain a bond. Prime South advised USC that it needed some security against Brik-Laco's being unable to finish the job. Prime South suggested that it retain \$120,000 of the money saved by USC as a "bond" for Brik-Laco. USC would get the remaining savings.

Mr. Bass testified that he felt that USC should get the benefit of the extra money rather than Prime South. He proposed that USC retain all the money and use it to purchase certain alternates to the base contract. The original contract with Metro including the alternates was about the same price as Prime South's base bid. Mr. Bass testified that he saw the opportunity to use the savings to

1. According to Mr. Bass the savings was calculated as follows, with all figures rounded:

+ \$897,000	(Spires contract price)
- \$734,000	(Brik-Laco's price)
+ \$ 51,000	(credit given when Brik-Laco was allowed to substitute cheaper material)
- \$ 52,000	(Prime South's increased cost due to other subcontractors)
- \$ 15,000	(Price USC paid to get alternates)
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\$147,000	(TOTAL)

get the same contract plus alternates at essentially the same price from Prime South as USC had from Metro.

USC and Prime South finally agreed that Prime South for \$15,000 would perform alternate work valued at \$162,000. USC would thereby realize a "gain" of \$147,000. To satisfy Prime South's concern about Brik-Laco, USC agreed that, if Brik-Laco were unable to finish the job, USC would pay Prime South without limitation the difference between Brik-Laco's price and what it cost Prime South to complete the work. USC in effect guaranteed the performance of Brik-Laco to persuade Prime South to use it.

Although the March 4, 1988 letter from Mr. Bass to Prime South authorizing the start of work mentions that a change order will be issued for \$161,000 (Record, p. 64), the price of the work ultimately was listed as \$15,000. Nothing in the change order reflects the agreement between USC and Prime South. The State Engineer testified that he did not learn of the arrangement until the hearing before the Panel.

CONCLUSIONS OF LAW

Normally procurements of construction services such as those in issue here are pursuant to the procedures outlined in S.C. Code Ann. § 11-35-3020 (1976). These procedures amount to the issuing of an invitation for bids and the receipt and evaluation of competitive sealed bids with the contract going to the lowest responsive and responsible bidder. If the bids are unreasonable or noncompetitive or

the low bid exceeds available funds and circumstances will not permit the delay required to resolicit competitive sealed bids, an emergency procurement may be made provided emergency conditions then exist. Reg. 19-445.2110 (F) (1976).

Emergency procurements are governed by S. C. Code Ann. §11-35-1570 (1976), which provides:

Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

The regulations referenced above occur at 19-445.2110. An "emergency" is defined as a "situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by either the Chief Procurement Officer or the head of a governmental body or a designee of either office." To be an "emergency", the existence of such conditions must create a serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten the

functioning of state government, the preservation or protection of property, or the health or safety of any person.

Emergency procurements are specifically limited to those supplies, services and construction items necessary to meet the emergency. Reg. 19-445.2110(C) (1976).

In the present case USC declared two separate emergencies. The February 10, 1988 emergency was declared because of USC's concern about the threat to safety and integrity of the construction site posed by poor drainage conditions. The emergency procurement made at that time consisted of purchasing the services of Hoppy's Construction Company to install drain pipes to divert water from the construction site (Record, p. 57). The Panel finds that an emergency did indeed exist on February 10, 1988 and that USC's subsequent emergency procurement was justified and was appropriately limited to the emergency at hand.

On March 4, 1988, USC declared the second emergency on the grounds that the "site needs immediate attention and time is a factor on the dormitory." (Record, p. 73). USC was concerned primarily about the hazard posed by the vertical slopes and the absence of a fence or other security device in light of the opening of baseball season. USC was

also interested that construction proceed on schedule to avoid the possible loss of federal funds.²

The Panel finds that, while an emergency may have existed on March 4 relative to the safety threat posed by the vertical slopes and lack of security, USC's procurement went well beyond that necessary to meet the emergency. The erection of a retaining wall or other supports would have removed the hazard posed by the vertical slopes. The installation of a fence would have alleviated the security problem. The emergency which existed on March 4 did not justify procurement without competition of a \$3.629 Million contract for completion of the entire project.

Spires' claim is that Prime South and USC had an obligation to use it on the contract instead of Brik-Laco because Prime South originally listed Spires on its bid and relied on Spires' quotation to obtain its position as second low bidder and ultimate recipient of the contract. Spires' contention is that the listed subcontractors flow with the general contract.

2. Insofar as the possible loss of federal funds, the Panel does not find this to be a true emergency condition. USC found the threat to exist on its counsel's interpretation of a work stoppage clause contained in the loan agreement. (Record, Def.'s Ex. 5, p. 7, Sec. 15a.) There is no evidence that USC contacted its lender to negotiate or clarify this provision nor is there any evidence that the lender was threatening withdrawal of funds. USC simply assumed a worst case scenario and used its assumption to bolster its declaration of an emergency.

USC and Prime South argue that no duty was owed to Spires because the bids had expired at the time Prime South started negotiating with USC and, in any event, no duty was owed in the context of an emergency procurement. USC also argues that fairness to Brik-Laco precluded use of Spires in this case.

As stated earlier, the Panel finds that no emergency existed to justify the procurement of construction services by any means other than the competitive bidding procedure set forth in §11-35-3020. If this procedure had been used, Prime South would have been required to list Spires (or the masonry contractor of its choice), would be entitled to rely on Spires' quote, and would have been bound to use Spires if it eventually obtained the contract.

Assuming, arguendo, however, the existence of an emergency in this case, the Panel agrees that, in an appropriately declared emergency situation, the operation of the usual competitive bidding procedure is suspended. Section 11-35-3020 and the requirement that listed subcontractors be used does not per se apply to emergency situations. However, USC is incorrect in its assertion that it owed no duty to Spires.

The Procurement Code has as two of its stated purposes the assurance of "fair and equitable treatment of all persons who deal with the procurement system of this State" and the provision of "safeguards for the maintenance of a procurement system of quality and integrity with clearly

defined rules for ethical behavior on the part of all persons engaged in the public procurement process." S. C. Code Ann. § 11-35-20 (1976). Section 11-35-30 further provides that every contract imposes an obligation of good faith in its negotiation, performance and enforcement. The emergency regulations themselves recognize that even in an emergency such competition as is practicable must be obtained. Reg. 19-445.2110(E).

The existence of an emergency, therefore, does not justify the wholesale suspension of the basic policies and safeguards built into the Procurement Code. Even in an emergency, an agency must act fairly and ethically towards all parties concerned.

In this case, USC acted only with regards to its and Brik-Laco's interests. USC apparently never even considered the interests of Spires or of Prime South. Brik-Laco had not actually begun on-site work at the time Metro was terminated. A large part of what had been done by Brik-Laco was nothing more than that which any contractor would do in simply bidding a job, e.g., lining up suppliers, local workmen and equipment and visiting the job site. Indeed, Metro listed Brik-Laco's involvement as limited to mobilization costs of \$2500. Brik-Laco's president testified that Brik-Laco would have consented to being bought out for \$20,000 but no one offered. Finally, although it was apparently innocent, Brik-Laco was not even legitimately on the job because of Metro's violation of

§ 11-35-3020.

On the other hand, Spires had also expended time and money in bidding on the contract. Prime South relied on Spires' quote to obtain the position of next low bidder, which position put it in line to receive the contract when Metro was terminated. Spires reaffirmed its price when contacted by Prime South after the bids expired.³ In reliance on Spires' reaffirmed quote, Prime South was able to accept USC's offer to complete the work begun by Metro.

According to its Vice-President, Prime South's stated preference was to stay with its original choice of masonry contractor, Spires. Prime South agreed to use Brik-Laco only in order to "please" USC, no doubt feeling coerced that its cooperation was tied to whether it received the contract. When Prime South doubted the ability of Brik-Laco to complete performance, USC took the highly questionable step of guaranteeing Brik-Laco's performance in an effort to persuade Prime South to keep Brik-Laco.

The equities on Spires' side warranted as much consideration as those on Brik-Laco's side. Notwithstanding this, all of USC's efforts were on behalf of Brik-Laco and

3. It is arguable, though not an issue for the Panel to decide, that Prime South and Spires had a binding agreement on the basis of the phone conversation in which Spires reaffirmed its quote. See, Powers Constr. Co. v. Salem Carpets, 283 S. C. 302, 322 S.E. 2d 30 (S. C. App. 1984). If so, USC's conduct may have been in interference of this contract.

in intentional or reckless disregard of the rights of Spires. There is no evidence that USC ever balanced the rights of Spires and Prime South against the rights of Brik-Laco.

The Panel finds that USC's pressuring Prime South to use Brik-Laco without justification and its questionable guarantee of Brik-Laco's performance coupled with a complete disregard for Spires' interests were in contravention of the obligation of good faith and fairness imposed by the Procurement Code. Spires had the right to expect the same consideration of its rights by USC as Brik-Laco. Instead it was the victim of USC's arbitrary one-sided conduct.

The Panel holds that Spires is entitled to its bid preparation costs and attorney's fees in the amount of \$7,108.05 as compensation for its treatment at the hands of USC. (Record, Pltf.'s Ex. 1 and 2).

Spires urges the Panel to exercise its authority and award it lost profits in the amount of \$173,722.00. Assuming, without deciding, that it could award lost profits as an element of damages, the Panel declines to do so in this case. The Panel does believe, however, that this case calls for the award of something more than reimbursement.

Pursuant to its authority to award "such other and further relief as justice dictates", the Panel awards Spires \$10,000 additional damages as a deterrent against further reckless and questionable conduct of the kind exhibited in this case, as a warning to other agencies that such conduct

will not be tolerated in the future, and as encouragement to other wronged vendors to bring such conduct to light.

Finally, although not bearing directly on the issues at hand, several facets of this case warrant comment from the Panel. First, the Panel condemns USC's guaranteeing without limitation the obligations of a subcontractor. The Panel finds that such conduct violates the intent and spirit of the Procurement Code in that it results in favoritism by the State of one contractor over another. Second and more importantly it subjects the State (and consequently its taxpayers) to open-ended liability and subverts the notion of the State getting the lowest responsible and responsive bidder on a job. Under no circumstances, including emergencies, should the CPO or procuring agencies tolerate such conduct.

Second, the Panel directs that the State Engineer's Office in the future more closely monitor the projects under its supervision. In this case, not only did the guaranty arrangement between USC and Prime South go unnoticed but apparently so did the unlawful presence of Brik-Laco on the job and Metro's violation of the subcontractor listing provision of the Code. It is incumbent on the State Engineer's Office to see that these types of flagrant violations of the Procurement Code do not occur.

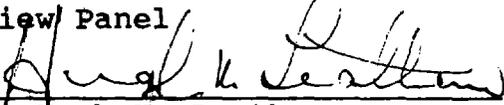
Third, the Panel cautions that an emergency procurement is by its nature an extreme measure. The Procurement Code

sets up procedures carefully designed to balance the interests of the State and the vendors using the system. Therefore, because it suspends the normal safeguards built into the system, use of the emergency procurement procedure is not to be taken lightly by agencies.⁴ The Panel warns General Services and procuring agencies that in the future declarations of emergencies to justify emergency procurements will be subject to strict scrutiny both as to existence and scope.

The June 6, 1988, decision of the CPO is overturned and USC is hereby required to pay to the protestant Spires the sum of \$17,108.05 within sixty days of receipt of this Order.

IT IS SO ORDERED.

South Carolina Procurement
Review Panel

By: 

Hugh K. Leatherman, Sr.
Chairman

Sept 14, 1988
Columbia, South Carolina

4. The Panel is aware that General Services made some changes to emergency procurement procedures in response to Legislative Audit Council's April 20, 1988 Statewide Review of Noncompetitive Procedures. The Panel encourages further constructive action in this regard.