

as "The Roost." Metro Construction Company of Charlotte ("Metro") was awarded the contract on December 21, 1987. In violation of the Procurement Code, Metro, which had listed itself to perform the masonry work, contracted with Brik-Laco of Charlotte for performance of the same work.

USC terminated Metro on February 25 and on that same day contracted with Primesouth, which had been the second low bidder on the project. Primesouth's stated preference at the time it was approached by USC was to use the masonry subcontractor it listed rather than Brik-Laco.

On March 7, 1988, James E. Bass, USC's Director of Project Development, wrote James Woods, Vice President of Primesouth, about Brik-Laco:

This letter is to confirm our agreement to use the masonry subcontractor who was originally going to perform the masonry work for Metro Construction Company.

Since this firm is unable to provide bonds and since they have very little working capital, it is agreed that you will work very closely with them, providing joint checking for suppliers and providing extra supervision and crane services.

Since the savings to the University represent approximately \$146,000,² we agree to assume the risk should this brick mason leave the project prior to its completion and you are required to bring in some one else to complete the work.

² USC and Primesouth finally agreed that Primesouth for about \$15,000 would perform alternate work valued at about \$161,000. USC would thereby realize a "gain" of approximately \$146,000.

We would hope that this firm will complete the work as they have indicated . . . ; however should there be a problem we will assist you with the additional cost.

(Record, p. 48).

The contract between Primesouth and Brik-Laco dated April 27, 1988, reflects some of the things agreed to in the above letter. The joint checking to insure that all suppliers were paid and the provision of a crane to assist in hoisting materials are found as additional terms to the contract. (Record, p. 62 and p. 59).

On July 22, 1988, Brik-Laco filed bankruptcy under Chapter 13 of the Bankruptcy Code. On July 29, 1988, Primesouth notified Brik-Laco that deficiencies in its work needed to be corrected. (Record, p. 75) On August 10, 1988, Primesouth declared Brik-Laco in default of its contract. (Record, p. 75).

On September 22, 1988, Primesouth filed a case with the bankruptcy court to determine its rights toward Brik-Laco in light of Brik-Laco's alleged default. In early October, the bankruptcy court issued an order modifying the contract between Primesouth and Brik-Laco to require Brik-Laco to finish the brick masonry portion of contract by December 20 and to finish the block masonry by November 11, 1988. The contract was further amended to require Primesouth to provide "a dependable and safe crane to service masons in an expeditious manner." (Record, pp. 79-81).

On December 28, 1988, Primesouth again declared Brik-Laco in default and terminated the contract pending approval of the bankruptcy court. The reasons given were delays in completing work and inability to complete the work for the contract amount. (Record, p. 83).

On January 2, 1989, Brik-Laco, in response to Primesouth's December 28th termination letter, wrote USC, "Brik-Laco denies that it is in default of its sub-contract with Primesouth. Brik-Laco would further say that any delays or cost overruns, are the direct result of acts and omissions of Primesouth." (Record, p. 100).

The bankruptcy court approved Primesouth's termination of Brik-Laco's contract on about January 26, 1989. The bankruptcy court determined in that order that Brik-Laco was in default of its contract.

ISSUES

In order for the Panel to have jurisdiction under §11-35-4230, Brik-Laco must show a controversy between itself and the State, in this case, USC. At the close of Brik-Laco's case, USC moved to dismiss on the grounds that Brik-Laco had failed to present any evidence that USC was responsible for any of the damage allegedly sustained by Brik-Laco.

In its appeal letter to the Panel, Brik-Laco alleges that Primesouth forced it off the job by:

- (1) Failing to provide a concise work schedule
- (2) Failing to provide the necessary crane to lift materials in place;

(3) Failing to provide assistance in permitting the work to go forward;

(4) Requiring Brik-Laco to work under conditions in conformity with practices of scheduling and working on construction.

(Record, p. 2). Brik-Laco claims that USC encouraged this conduct on Primesouth's part by guaranteeing Brik-Laco's performance under the March 7 agreement and by failing to insist on a proper contractual relationship between Primesouth and Brik-Laco.

Even assuming that Primesouth behaved as Brik-Laco alleges, the Panel find no evidence that USC's agreement to guarantee Brik-Laco's performance caused or even facilitated Primesouth's conduct. Primesouth testified that, under the March 7 agreement, it would receive only its actual costs to complete the project if Brik-Laco were unable to. Contrary to Brik-Laco's assertions, USC, if it had any interest, had an interest in keeping Brik-Laco on the job.

Further, there is no evidence that USC had any duty to control Primesouth's conduct toward Brik-Laco. Under the contract between USC and Primesouth, Primesouth had sole responsibility for all construction "means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract." (para. 4.3.1).

In its appeal to the Panel, Brik-Laco claims that USC caused to be submitted certain change orders to the contract to which Brik-Laco was a party and that the change orders

have not been paid "even though money was retained by the University from the original bid of Homer Spires [Primesouth's original brick mason]." (Record, p. 1).

Under the prime contract, neither USC nor the architect "shall have any obligation to pay or to see to the payment of any money to any subcontractor except as may otherwise be required by law." (Para. 9.5.4). Also, the subcontract provides a specific procedure for payment claims. Paragraph 5.3 states:

The Subcontractor shall make claims promptly to the Contractor for additional cost, extensions of time and damages for delays or other causes in accordance with the Subcontract documents. A claim which will effect or become part of a claim which the Contractor is required to make under the Prime Contract within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Prime Contract. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim is made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound."

(Record, pp. 54-55). The prime contract requires the contractor to give written notice "within twenty days of the occurrence of the event giving rise to such claim." (Para. 12.3.1).

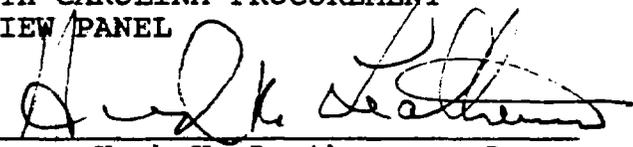
According Mr. Cornell Sutton of Brik-Laco, the change orders that Brik-Laco complains of were not submitted under

this section. The Panel finds no evidence that USC was in any way responsible for nonpayment of any change orders.

For the reasons stated above, USC's motion to dismiss is granted, the petition by Brik-Laco for relief under §11-35-4230 is dismissed and the Order of the Chief Procurement Officer dated March 30, 1989, is affirmed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.
Chairman

June 1, 1989
Columbia, S. C.