

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1989-7

IN RE:)
)
PROTEST OF ECB CONSTRUCTION COMPANY, INC.) O R D E R
)
)

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on July 19, 1989, on the ECB Construction Company, Inc. ("ECB") of a decision by the Chief Procurement Officer ("CPO") to award to Stanley Smith & Sons a contract to construct an addition to the existing Sumter Community Mental Health Center for the Department of Mental Health ("DMH"). At issue is whether ECB properly listed a roofing subcontractor in compliance with S. C. Code Ann. §11-35-3020(2)(b)(ii) (1976).

Present at the hearing before the Panel were ECB Construction Company represented by Jack W. Erter, Jr., Esq.; Stanley Smith & Sons, represented by William F. Austin, Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire.

FACTS

Prior to the hearing, the parties entered into an agreement entitled "Stipulated Facts", which sets forth the agreed upon facts of this case as follows:

1. The Department of Mental Health solicited bids on February 22, 1989 for a contract for construction of a 3,400 square foot addition to the existing Sumter County Community Mental Health

Center in accordance with 11-35-3020 of the S. C. Procurement Code and S. C. Budget and Control Board Regulation 19-445.2040.

2. Addendum No. 1 was issued March 22, 1989, changing the type of roof from a single ply to a built-up roof. The specifications in this regard provided as follows in item 4 of Addendum 1:

0710 Built-up Roofing

a. Furnish and install Owens-Corning 43-IS built-up roof over tapered perlite roof insulation (Section 0721).

b. The roofing contractor must be an Owens-Corning approved applicator.

3. Bids were received and opened on April 12, 1989.

4. A Bid comparison dated April 12, 1989 was mailed to all bidders on April 20, 1989 by Mr. John Jackson, project architect for Drakeford-Jackson & Associates/Architects.

5. The bid tabulation was transmitted as part of a letter of intent to award the contract to Stanley Smith & Sons for the base bid plus alternates 1, 5, 6, 8, 9, 11, 13, and 16. A second letter to Stanley Smith & Sons on April 20, 1989, confirmed that the intent was to let the contract to them.

6. On May 5, 1989, the letter of intent was rescinded by Mr. Jackson because of funding problems, and a new notice of intent to award the contract to ECB Construction Company was issued by DMH for the base bid only on May 8, 1989.

7. A comparison of bid prices by Stanley Smith and ECB is as follows:

<u>Bidder</u>	<u>Base Bid</u>	<u>Base Bid Plus Alternates</u>
Stanley Smith	\$261,900	\$326,805
ECB	254,000	330,251

The difference between the two bids is \$7,900.

8. Budget and Control Board records indicate that the approved funds available for this project totaled \$290,000 of which \$19,246.50 was already encumbered, leaving \$270,752.50 available for letting this contract.

9. Stanley Smith & Sons, Inc., protested the award of the bid to ECB on the grounds that ECB's bid was nonresponsive in that the bid specifications required an approved "built-up" roofing subcontractor, the protestant asserting that the roofing subcontractor listed on ECB's bid form, Bonitz Contracting Company, does not install "built-up" roofs.

10. Bonitz is a duly licensed roofing contractor under the laws of the State of South Carolina and is recognized as such the the State Engineer's

Office. Bonitz is not an Owens-Corning approved applicator of built-up roofs.

11. Bonitz' bid in connection with the captioned project was to construct a "single ply" roof; however, Bonitz certified to the Chief Procurement Officer who heard the subject protest that it will have a roof constructed according to the project plans and specifications (i.e., a "built-up" roof) at and for its submitted bid price of \$15,960.00. To do so would necessitate its subcontracting to an approved "built-up" roofing subcontractor in order to comply with the bid specifications as cited in Fact #2 above.

12. Bonitz has stated to the Chief Procurement Officer that alternately it has no objection to the substitution of the roofing subcontract low bidder, Southern Roofing Services, Inc., in its place to perform the required roofing portion of the contract.

13. The listing of Bonitz as the roofing subcontractor was an inadvertent error on the part of ECB Construction Company.

14. ECB has stated to the Chief Procurement Officer that it will either:

- a. Proceed to utilize its listed licensed roofing contractor, Bonitz, in [sic] through a subcontract with an approved

subcontractor, or in the alternative,

- b. Use the roofing contractor who submitted the low bid, Southern; whichever the Owner, the Project Architect, or the Chief Procurement Officer prefer.

15. Southern's roofing bid was in the sum of \$15,900.00 and Bonitz' roofing bid was in the sum of \$15,960.00, the bid of Southern being \$60.00 less than the bid of Bonitz.

CONCLUSIONS OF LAW

In its arguments before the Panel, ECB conceded that its bid as offered did not meet the requirements of §11-35-3020(2)(b)(i). That section requires a contractor to list the name of all subcontractors who will perform work in excess of a certain percentage of the total contract. It is not disputed that Bonitz will not perform the roofing work in this case.

The issue before the Panel is whether ECB's inadvertent error in listing Bonitz may be waived or excused by the State and ECB allowed to substitute a qualified roofing contractor. ECB points to regulation 19-445.2080 which allows the State to waive minor informalities or irregularities in bids and section -3020(2)(b)(iii) which allows a contractor whose bid is accepted to substitute for good cause another person in place of a listed subcontractor. ECB argues that such waiver and substitution do not violate the policy reasons behind section

-3020(2)(b)(i) because ECB's mistake was inadvertent and because it did not improve its position by listing Bonitz whose bid was \$60 more than the lowest bid by a qualified roofer.

In In re: Protest by Brown & Martin Co., Case No. 1983-4, the Panel found that the failure to list a subcontractor was not waivable pursuant to Reg. 19-445.2080 because the General Assembly specifically provides in section -3020(2)(b)(ii) that failure to list subcontractors as required renders a bid nonresponsive. The Panel found that something which by statute renders a bid nonresponsive cannot be characterized as a minor informality or irregularity. The Panel finds this holding to apply to the case before it. The failure of ECB to list a qualified subcontractor cannot be waived by the State.

Likewise, the Panel is persuaded by General Service's argument that substitution for good cause under section -3020(2)(b)(iii) is not applicable to this case because it applies only to a prime contractor whose bid has been accepted. As pointed out by General Services, the State may not accept a bid which is nonresponsive.

Finally, the Panel believes that there are sound policy reasons for the strict application of section -3020(2)(b)(i). The purpose behind the listing requirement is to "prevent the common practice of 'bid shopping' whereby a contractor receives a bid from a subcontractor, uses that bid in compiling his own bid, and, upon receipt on the

contract proceeds to 'shop' for a better price, thereby increasing his own profit and perhaps decreasing the quality of the work supplied to the owner." In re: Protest of J. A. Metze & Sons, Inc., Case No. 1983-10. It would defeat this purpose if a contractor could list any subcontractor, even an unqualified one, and get relief from its "mistake" by substituting another subcontractor or having the unqualified subcontractor sub-subcontract with a qualified subcontractor. In that case, the contractor or unqualified subcontractor would still be in a position to bargain with subcontractors after receipt of the contract and the State would still not know at the time the contract is awarded just who is going to be on the job.

ECB places great emphasis on Logan v. Leatherman, 351 S.E.2d 146 (1986), in arguing that the CPO's award of the contract to Stanley Smith & Sons is an unwarranted exercise of discretion. The Panel holds that Logan can be distinguished from the case at bar.

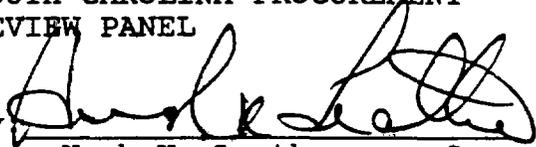
In Logan, the South Carolina Supreme Court held that the Panel's reaward of a contract was an unwarranted exercise of discretion because it was excessive in relation to the violation especially considering the rights and liabilities of the State. 351 S.E.2d, at p. 148. In this case ECB has not been awarded the contract and has performed

no work for the State.¹ Furthermore, there is no possible liability of the State for breach of contract. The Panel finds that award to Stanley Smith & Sons as the lowest responsive and responsible bidder is the proper remedy in this case. See also, In re: Protest of J. A. Metze & Sons, Inc., Case No. 1987-8.

For the reasons stated above, the Panel affirms the decision of the Chief Procurement Officer and orders that award be made to Stanley Smith & Sons as the lowest responsive and responsible bidder.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.
AUGUST 1, 1989

¹The General Assembly amended §11-35-1520(10) the same year as Logan was decided to require the State to wait sixteen days after Notice of Intent to Award before entering into a contract whose total or potential value exceeds \$50,000.