

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1991-16

In re:)
)
Protest of Johnson Controls, Inc.)
)
Appeals by Johnson Controls, Inc. and) O R D E R
Barber-Colman Company) APPEALED
)
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on September 26, 1991, as a continuation of a previous hearing before the Panel held on August 28, 1991. As a result of the previous hearing, the Panel determined that the Protestant Johnson Controls, Inc., was entitled to award of a maintenance contract which was mistakenly given to Barber-Colman Company. This hearing concerns the appropriate remedy to correct the erroneous award to Barber-Colman.

Present at the hearing before the Panel were Johnson Controls, represented by Richard Brooks; Barber-Colman, represented by Robert F. McMahan, Jr., Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire. South Carolina State College was present but did not participate as a party.

FINDINGS OF FACT

On June 3, 1991, State Procurement issued an IFB for maintenance services on South Carolina State College's environmental systems. Bids were opened on June 18.

Without applying the resident vendor preference found in S. C. Code Ann. §11-35-1520(9)(e)(1990 Supp.), Johnson

Controls was low bidder with a cost of \$54,900 per year to Barber-Colman's \$55,230. The contract was to be paid in twelve equal monthly installments.

Both vendors claimed the South Carolina resident vendor preference, however, the state procurement officer disallowed Johnson Controls' claim for the preference because its affidavit was not notarized. Barber-Colman's claim was granted because its affidavit was completed correctly.

After the preference was applied against Johnson in favor of Barber-Colman, Barber-Colman became the low bidder. On July 8, 1991, Johnson Controls protested the application of the preference and the award to Barber-Colman. The Panel ultimately found in Johnson's favor, applying an earlier Circuit Court case with identical facts, In the Matter of Honeywell, December 13, 1983 order of Judge Harrison.¹

The Panel directed Barber-Colman to file a notarized statement with the Panel itemizing the unreimbursed expenses it has incurred in performing the contract in question for two months. Barber-Colman complied and that affidavit is attached hereto as Exhibit 1.

At the hearing before the Panel Barber-Colman presented testimony in support of its affidavit that its figures were

¹For a complete discussion of the merits of this case, see the Panel's previous decision dated August 30, 1991.

based on actual hours worked and materials purchased multiplied by a mark-up factor for overhead and profit.

Johnson Controls testified how it figured its bid, what markup factor it used, and what the industry average is regarding labor charges and markup factors.

By agreement of the parties, most of this testimony was given by Johnson Controls and Barber-Colman in executive session out of the presence of each other. This was done in an effort to protect proprietary information recognized by the Procurement Code as confidential. See S. C. Code Ann. §11-35-410 (1986).

Without divulging the confidential information, the essence of the testimony of Barber-Colman was that it actually prepared its bid by adding 5% to its winning bid on the previous year's contract for this same service. Shortly after being awarded the contract, Barber-Colman prepared an in-house estimate sheet breaking down its expected expenses for labor and materials per month. (Plaintiff's Ex. #1). Barber-Colman's projected expenses for the first two months were \$1,891.46 for materials and \$6,880.32 for labor totalling \$8,771.78, including the markup factor. (See attached Affidavit).

Barber-Colman actually expended \$2,727.25 for materials and \$8,122.60 for labor (170 hours x \$47.78 per hour).²

²Mr. Neiders testified that in preparing Barber-Colman's affidavit, he inadvertently forgot to
(Footnote Continued)

Both figures include Barber-Colman's markup factor for profit and overhead. During this two-month period, Barber-Colman was reimbursed \$9,205.

Tom Neiders, Branch Manager for Barber-Colman, explained that the actual costs exceeded the anticipated costs and the reimbursed costs because the first two months of this contract involved the start-up of systems in anticipation of students returning in the Fall. During start-up, it is not unusual to have some equipment failure. In this case, Barber-Colman was required to replace a compressor. As Mr. Neiders explained, if Barber-Colman were to keep this contract for the remainder of the term, costs would level out and it would eventually recoup the extraordinary expenses it incurred in the first two months.

General Services countered with the testimony of Johnson Controls that its hourly rate and markup factor and the average industry rates and markup factors are substantially lower than those claimed by Barber-Colman.

CONCLUSIONS OF LAW

In its previous order in this matter, the Panel determined that the State violated established legal precedent when it applied the resident vendor preference against Johnson Controls and thus deprived it of a contract

(Footnote Continued)

include some \$782 worth of equipment. The Panel agrees with General Services that, in fairness to all the parties, the charges before the Panel are those itemized in the Affidavit.

to which it was entitled. The task of the Panel today is to decide what the appropriate remedy for the State's error is in light of William C. Logan & Associates v Leatherman, 351 S.E.2d 146 (1986). In Logan, the South Carolina Supreme Court held that the Panel may not reaward a contract if reaward is excessive in relation to the violation, considering the liability to the State. In Logan, the Panel ordered reaward of a partially performed construction contract because the winning contractor failed to list a subcontractor in violation of S. C. Code Ann. §11-35-3220(2)(b)(ii).

In this case, Barber-Colman claims \$1,644.85 in unreimbursed expenses for performing the first two months work under this contract. Viewing the evidence as a whole, the Panel concludes that \$1,644.85 is a reasonable reimbursement amount.³

Further, as General Services points out, under the terms of the contract with Barber-Colman, the State had the ability to terminate upon thirty days notice without penalty. (Defendant's Ex. #1).

The Panel finds that, under the Logan case, reaward to Johnson Controls is a proper remedy for the State's misapplication of the resident vendor preference in this

³Although General Services and Johnson Controls raised some doubts as to whether Barber-Colman's labor rate and markup factor are on the high side, the Panel notes that the difference in Barber-Colman's and Johnson Controls' total bids was only \$330.

case, provided Barber-Colman is reimbursed \$1644.85 for its outstanding expenses.

For the reasons stated above, the Panel orders that the contract in question be reawarded to Johnson Controls for the price quoted in its bid pro-rated to reflect the amount of time remaining in the term of the contract. Further, the Panel orders the Division of General Services to terminate the contract with Barber-Colman and to pay to Barber-Colman the sum of \$1,644.85 as full reimbursement for the outstanding expenses incurred by it for work during the months of July and August, 1991.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 

Gus J. Roberts
Acting Chairman

Columbia, S.C.
October 7, 1991

expended 170 hours of actual time at a total cost plus profit and overhead of \$8,122.60.

7. If this contract were to be taken from Barber-Colman, as of the end of August, Barber-Colman would be claiming damages in the amount of \$1,644.85, which represents the difference between the total cost with profit and overhead of \$10,849.85 less the amounts paid of \$9,205.00.

Further Affiant Sayeth Naught.

BARBER-COLMAN COMPANY

By: *Thomas H. Neiders*
Thomas H. Neiders
Branch Manager, Columbia

SWORN to before me this
6th day of September, 1991.

Harry Stuart Kier (LS)
Notary Public for SC

My Commission Expires: 9/10/96