

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1991-18

In re:

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)
PROTEST OF SUPERIOR CONTAINER SERVICE, INC.) O R D E R
APPEAL BY CONTAINER CORPORATION OF CAROLINA)
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This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on September 12, 1991, on the appeal by Container Corporation of Carolina ("Container") of a decision of the Chief Procurement Officer ("CPO") reinstating award of a refuse collection contract for the Department of Corrections to Superior Container Service, Inc. ("Superior").

Present at the hearing before the Panel were Superior, represented by Henry Deneen, Esq., and Henry Taylor, Esq.; Container, represented by Clinch H. Belser, Jr., Esq., the Department of Corrections, represented by Larry Batson, Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire.

FINDINGS OF FACT

On February 22, 1991, State Procurement issued an Invitation for Bids ("IFB") for trash collection services at the Department of Corrections. (Record, p. 17). Bids were opened on March 21. (Record, p. 44). Superior Container was the apparent low responsive and responsible bidder at \$179,391.00.

Pursuant to S. C. Code Ann. § 11-35-1810 (1986), the State undertook an inquiry to determine whether Superior had

the ability to perform the contract. Superior has held state contracts in the past with a mixed record. A 1981 contract was terminated for default and several vendor complaints have been filed against Superior on other contracts. On the other hand, Superior has performed satisfactorily on some contracts and its five-year contract with the Department of Mental Health was renewed during the period relevant here.

Because of its past experience with Superior, the State's inquiry focused on whether Superior had the financial and material resources to perform the contract in question. As part of this inquiry, pursuant to Paragraph F of the IFB specifications, the State sought assurance from Superior that it had available sufficient equipment to do the job. Paragraph F provides:

F. Proof of Sufficient Equipment

The bidder, prior to the execution of the contract, will be required to show proof that he has sufficient equipment and personnel to provide the services required with necessary backup equipment to cover breakdown of scheduled maintenance activities.

(Record, p. 34).

To comply with Paragraph F, Superior produced Mr. Pelham, a representative of McClain Industries, Inc., a supplier of solid waste disposal equipment. Mr. Pelham and Superior assured the State that Superior had ordered and that McClain would supply the equipment needed to perform this job by the July 1 start date.

After receiving the assurances of McClain and Superior that Superior had made arrangements to acquire the necessary equipment, State Procurement issued a Notice of Intent to Award to the contract to Superior on May 23, 1991. The contract took effect on June 10, 1991.

On June 18, eight days after the contract went into effect, State Procurement received from McClain Industries a copy of a letter cancelling the order which Superior had placed for equipment to be used on the job. McClain indicated that Superior had failed to make a 5% downpayment on the equipment. (Record, p. 54).

That same day, State Procurement notified Superior that it had received the order cancellation from McClain and asked Superior to prove that it would have the necessary equipment available by the July 1 start date. State Procurement indicated that it would cancel the contract if Superior didn't provide proof by Friday, June 21, at 3:00 p. m. (Record, p. 55). David Bright, the sole owner and president of Superior, received the letter, which was read to him by his wife.¹

On June 21, the day of the deadline, David Hutchens, Mr. Bright's son-in-law and an employee of Superior, called Virgil Carlsen, the Director of State Procurement, and

¹Mr. Bright testified before the Panel that he can neither read nor write. He relies on his wife and his son-in-law, David Hutchens, to read and respond to correspondence sent to Superior.

requested that the deadline be extended until 8:30 a.m. Monday morning, June 24.² Mr. Hutchens indicated that Superior was attempting to get financing to purchase the necessary equipment from a local bank with the assistance of a locally prominent attorney. Mr. Carlsen agreed to the extension.

On the same day, Mr. Bright also spoke to Mr. Carlsen and informed him that Superior was working with Bes-Pac, another equipment supplier, to obtain the needed equipment. Mr. Bright gave Mr. Carlsen the name and number of a Mr. Boone in order that Mr. Carlsen might confirm Bes-Pac's involvement. Mr. Boone advised Mr. Carlsen that some but not all of the necessary equipment could be ready by the July 1 start date.

Mr. Carlsen was not aware, and apparently Mr. Bright did not inform him, that Mr. Boone worked not for Bes-Pac, but for Nu-Life Environmental, Inc., which was a distributor for Bes-Pac. (See, Record, pp. 48-49). Nu-Life was to act as distributor for Bes-Pac on the contract for the equipment in this case.

On Monday, June 24 at 8:30, David Hutchens was in the offices of State Procurement to meet with state officials on the renewal of Superior's contract with the Department of Mental Health. Prior to that meeting, Mr. Hutchens advised

²Mr. Hutchens was well-known to state officials and had often represented Superior's interests before the State in the past, both with Mr. Bright and alone.

Virgil Carlsen that Superior was unable to get financing for the equipment on the Department of Corrections job. Mr. Carlsen indicated to Mr. Hutchens that the State would have to terminate the contract because Superior could not perform. Mr. Hutchens indicated that he understood.

At the subsequent meeting on the Department of Mental Health contract, which was Mr. Hutchens' reason for being in the State Procurement Office that morning, the question whether Superior could handle both the Corrections and the Mental Health contracts came up. Mr. Hutchens indicated to the state officials present that they should not be concerned because Superior was going to give up the Corrections contract for lack of financing.

Based on Mr. Hutchens' indication that Superior could not perform, the State wrote Mr. Bright and cancelled the contract effective June 25, 1991. (Record, pp. 57-58).

On June 28, State Procurement awarded the contract to the second low bidder, Container Corporation of Carolina, who was the incumbent on the previous contract. (Record, p. 43). The new contract to Container was to take effect July 15, 1991.

Also on June 28, three days after termination, Mr. Bright, through his son-in-law Mr. Hutchens, wrote State Procurement contesting the cancellation and stating that Superior stood ready, willing, and able to perform the contract by July 1. (Record, pp. 51, 52). By agreement, Mr.

Hutchens delivered the letter to Mr. Carlsen after work hours at a mutually convenient location.

Apparently, unbeknownst to both the State and to Mr. Hutchens, Mr. Bright had made satisfactory financial arrangements with Bes-Pac for the necessary equipment, placed an order on June 14 and Bes-Pac had slated delivery for the July 1 start date. (Record, p. 50). On June 26, production stopped at Bes-Pac because of termination of the contract.

On July 3, Superior protested the cancellation of its contract and the reaward to Container under S. C. Code Ann. §11-35-4210(1)(1986).³ The Notice of Intent to Award to Container was rescinded before the contract went into effect. Container, as the incumbent, has continued to provide the services under an emergency contract which is to terminate upon resolution of Superior's protest.

After his hearing, the CPO ordered that the contract be reinstated to Superior with performance to begin on October 1, 1991.⁴ On August 22, 1991, Container Corporation appealed the decision of the CPO to the Panel alleging that

³This case could have been brought under S. C. Code Ann. §11-35-4230(1986) as a contract dispute with the State. Under that section, Container would have no intervention or appeal rights in this matter. Of course, Container could have filed a separate protest of the CPO's rescission of the Intent to Award to it under §-4210.

⁴At the hearing before the Panel, Mr. Bright and a representative of Bes-Pac testified that Superior can meet the new contract start date of October 1.

the State was justified in cancelling Superior's contract and that Container should receive the reaward.

CONCLUSIONS OF LAW

The issue before the Panel is whether the State was legally and factually justified in cancelled the contract with Superior in anticipation that Superior would be unable to perform. This issue may be broken into two primary subparts: (1) Was the State, prior to the contract start date, justified in demanding proof that Superior could perform the contract? and (2) Was Mr. Hutchens acting with apparent authority when he indicated to the State that Superior was unable to perform the contract?

Superior argues that the State had no contractual right to set a deadline and demand proof of performance other than under Paragraph F of the IFB. As noted earlier, Paragraph F provides:

F. Proof of Sufficient Equipment

The bidder, prior to the execution of the contract, will be required to show proof that he has sufficient equipment and personnel to provide the services required with necessary backup equipment to cover breakdown of scheduled maintenance activities.

(Record, p. 34). Superior contends that the State sought and received such assurances prior to award of the contract when Superior produced Mr. Pelham of McClain Industries to verify that an order for the equipment had been placed. According to Superior, the State then had to wait until the

July 1 start date before it could determine that Superior could not perform.

Container cites the Restatement (Second) of Contracts, §§250-253 (1981), as setting forth the general principles of contract law applicable in this case.⁵ Under the law as summarized in the Restatement, a party to a contract is justified in seeking assurance of performance where reasonable grounds exist to believe that the other party will not perform. If the other party fails to give such assurances or indicates that he will not or cannot perform, the first party may treat such failure as a repudiation and may cancel the contract. §251. Container argues that, under general contract law, the State could seek assurance of performance and, when Superior stated that it could not perform, the State was justified in terminating the contract.

The Panel agrees with Container. In this case, prior to award, the State sought assurances under Paragraph F that Superior had sufficient equipment to perform the work. Superior does not contest that the State had this right. Superior produced a representative of McClain Industries to verify to the State that Superior had ordered the necessary

⁵The CPO notes in his decision that state officials cited the doctrine of anticipatory breach set forth in the Uniform Commercial Code, S. C. Code Ann. § 36-2-610 (1976), as applicable to their actions in this case. Because this is a contract for services rather than goods, however, the Uniform Commercial Code is not applicable. §36-2-102.

equipment and that it would be ready by the July 1 start date. The State accepted this verification and, on that basis, awarded the contract to Superior.

On June 18, only twelve days prior to the date performance was to start, McClain notified the State that it had cancelled Superior's order because Superior had failed to make the 5% downpayment of \$3,515.25. The Panel finds that McClain's notification that the order had been cancelled created reasonable grounds for the State to question whether Superior could perform. McClain was not a stranger to this transaction but was the very "proof" that Superior had produced in response to its obligation under Paragraph F.

The Panel further finds that, given the nature of this contract, the State acted reasonably in giving Superior six days to provide proof that it had the ability to procure the needed equipment. The response date of June 24 was only six days prior to performance date. If Superior could not perform, the State had to make other arrangements to have all of the garbage produced by the Department of Corrections and its prison system hauled away.⁶

Superior next argues that, even if the State had the right to seek assurance of performance, the State was not justified in terminating the contract on the word of David

⁶Time was of the essence in this contract and the inability of Superior to perform on July 1 would amount to a substantial and fundamental breach.

Hutchens that Superior could not perform. Superior argues that David Bright, as the sole owner, President and signer of Superior's bid, was the only person authorized to respond to the State's inquiries.

The Panel does not agree. The evidence shows that Mr. Hutchens, who is Mr. Bright's son-in-law and an employee of Superior, had represented Superior's interests before the State in the past. Mr. Hutchens was the person who called and asked for the extension of the deadline in this case. Although he was in the State Procurement Office on another matter, Mr. Hutchens never indicated that he had no authority to speak for Superior on this contract. Instead, he undertook to respond to the State's deadline and to convey the information that Superior could not get financing to perform this contract. When advised that, in that event, the State would have to cancel the contract, Mr. Hutchens assented.

Significantly, Mr. Hutchens made the same representations about abandonment of the Department of Corrections' contract to state officials in connection with the Mental Health contract, which Superior admits he was authorized to discuss.

Further, Mr. Hutchens' apparent authority was not undermined by Mr. Bright's phone call to State Procurement on the Friday before the deadline. In that conversation, Mr. Bright indicated that Superior was working with Bes-Pac to secure the necessary equipment. However, when the State

called the name and number given it by Mr. Bright, the distributor for Bes-Pac indicated that not all of the necessary equipment could be ready by the start date.

When Mr. Hutchens came in Monday morning and indicated that, in fact, Superior would not be able to perform by July 1, this was not inconsistent with what the State had learned as a result of Mr. Bright's phone call the previous Friday. Mr. Bright did not contradict Mr. Hutchens' representations until June 28, three days after termination.

The Panel finds that Superior repudiated its contract when Mr. Hutchens indicated that Superior could not perform by the start date and the State was then justified in terminating the contract and mitigating damages by securing performance from another vendor.

For the reasons stated above, the Panel reverses the August 12, 1991 decision of the Chief Procurement Officer and dismisses the protest of Superior. State Procurement is directed to proceed with award of the contract to the next low responsive and responsible bidder, if any, or if not, to rebid this contract.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
September 16, 1991