STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1991-23

In re:
APPEAL OF DAVIDSON AND JONES CONSTRUCTION COMPANY - D & C FIRE PROTECTION, INC., REAL-PARTY-IN-INTEREST

O R D E R

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on December 4, 1991, on the appeal of Davidson and Jones Construction Company ("Davidson and Jones"), on behalf of its subcontractor, D & C Fire Protection, Inc., ("D & C"), from a decision by the Chief Procurement Officer ("CPO") resolving a contract controversy between the South Carolina Department of Corrections and D & C.

Present and participating in the hearing were Davidson and Jones and D & C, represented by Ron Garber, Esq.; the Department of Corrections, represented by Larry Batson, Esq., its General Counsel; and the Division of General Services, represented by Wayne Rush, Esquire.

FINDINGS OF FACT[1]

On February 21, 1990, the Department of Corrections issued an Invitation for Bids ("IFB") to construct a women's prison in Greenwood, South Carolina. The owner of the Greenwood Women's Center Project is the Department of

[1]At the start of the hearing, the parties submitted a statement of facts to which they agreed. (Plaintiff's Exhibit #1 Stipulations). These facts are marked with an asterisk herein.

Corrections.* The Department of Corrections hired Davis & Floyd, Inc., to be the architect for the project.* As the architect for the project, Davis & Floyd acted as agent for the Owner and prepared the design for the project.*

Bids were received on April 5, 1990, from eight bidders.* Davidson and Jones was the successful bidder for the project and entered into a contract dated May 8, 1990, with the Department of Corrections for the construction of this facility.* D & C was listed in Davidson & Jones' bid as the fire protection subcontractor for this contract.*

The IFB included the following provisions:

> Article 10 EXAMINATION OF DRAWINGS AND SPECIFICATIONS
>
> Each bidder shall carefully examine the Drawings and Specifications and all Addenda or other revisions thereto and thoroughly familiarize himself with the detailed requirements thereof prior to submitting a Bid. If any Bidder is in doubt as to the true meaning of any part of the Drawings, Specifications, or other Documents, or if any error, discrepancy, conflict, or omission is noted, the Bidder should immediately contact the Engineer in writing and request clarification. . . . No allowance will be made after Bids are received for oversight by a Bidder.
>
> COMPLETE WORK REQUIRED: The Drawings, Specifications, and all supplementary documents are essential parts of the Contract, and requirements occurring in one are as binding as though occurring in others. They are intended to be cooperative, to describe and provide for a complete work. In case of discrepancy on the Drawings, figure dimensions shall govern. In case of omissions from the specifications as to items of equipment and materials or quantities therefor, the Drawings shall govern. It shall be

> the responsibility of the Bidder to call to the attention of the Engineer obvious omissions of such magnitude as to affect the strength, adequacy, function, completeness, or cost of any part of the work in ample time for amendment by Addendum prior to letting date.

(Record, pp. 49 and 50)(Emphasis added).

Section 15330 of the Specifications described the fire protection work as follows:

> GENERAL: The work includes designing and providing a new automatic wet pipe fire extinguishing system for light hazard occupancy to afford complete fire protection coverage throughout the first and second floors of the Dormitory Buildings and Sections 1 and 2 of the Central Services Building. Provide a new automatic wet pipe fire extinguishing system for ordinary hazard occupancy protection for the "Kitchen" area of the Central Services Building and the entire Industries Building. The design, equipment, materials, installation, workmanship, examination, inspection, and testing shall be in strict accordance with the required and advisory provisions of NFPA 13, except as modified herein. Each system shall include all materials, accessories and equipment inside and outside the building to provide each system complete and ready for use. Design and provide each system to give full consideration to blind spaces, piping, electrical equipment, ductwork, and other construction and equipment in accordance with detailed drawings to be submitted for approval....
>
> DESIGN OF SPRINKLER SYSTEMS: NFPA 13 and requirements specified herein ....

(Record, pp. 54 and 57)(Emphasis added).

The bid documents also included drawings prepared by Davis & Floyd that indicated sprinkler heads.* Davis & Floyd included these sprinkler drawings in an effort to

duplicate certain prototype prison plans provided by the Department of Corrections.

In response to several inquiries concerning the actual quantity of sprinkler heads required, Davis & Floyd caused Addendum #4 to the bid documents to be issued.* Addendum #4 amended the "DESIGN OF SPRINKLER SYSTEMS" section to add the following paragraph:

> Sprinkler layouts shown on the drawings are diagrammatic. Actual sprinkler head locations shall be in accordance with the requirements of NFPA 13.

(Record, p. 64). Davis & Floyd did not advise all bidders that questions had been raised whether the sprinkler drawings reflected the actual number of sprinkler heads required but rather responded only to those bidders questioning the drawings that design of the fire protection system should be in accordance with NFPA 13. Davidson and Jones was not one of the bidders so advised by Davis & Floyd.

The Davis & Floyd sprinkler drawings showed a quantity of 1224 sprinkler heads for the project.* The actual quantities of sprinkler heads installed by D & C for the project was 1645.* The difference between the quantities shown on the sprinkler drawings and the actual quantities installed on the project was 421 or a 34% variance.*

On September 5, 1990, D & C submitted to Davidson and Jones and Davidson and Jones submitted to Davis & Floyd shop drawings for the dormitories which drawings showed the number of sprinkler heads shown on the sprinkler drawings,

and such submittal was rejected by Davis & Floyd.* D & C had marked in red on the shop drawings the areas which it believed had inadequate sprinkler head coverage. D & C offered to provide the additional sprinkler heads at an additional cost of $85.00 per head. D & C indicated that its original contract price was based on the number of sprinkler heads shown in Davis & Floyd's sprinkler drawing. (Record, pp. 22-23).

On September 20, 1990, Davis & Floyd responded that the specifications required the contractor to design and install a fire protection system in strict accordance with the requirements of the National Fire Protection Agency standard 13 ("NFPA 13"), which would mandate as part of the original contract the additional sprinkler heads noted by D & C. (Record, p. 25-26).

On October 1, 1990, D & C responded that it was not responsible for the inadequate number of sprinkler heads shown by the architect and that it could not undertake installation of the additional heads without a change order. (Record, p. 28).

On October 18, Davidson and Jones wrote D & C indicating that D & C was in default because it refused to proceed with its performance under the contract to install a fire protection system in accordance with NFPA 13. (Plaintiff's Ex. #3). D & C responded by letter of October 23 indicating that it should not be considered in default and that it would perform as soon as Davidson and Jones and

Davis & Floyd clarified what was expected of D & C regarding the number of sprinkler heads to be installed. (Plaintiff's Ex. #4).

On October 29, 1990, Davis & Floyd responded by quoting that portion of the specifications which require the contractor to design and install a fire protection system. The architect further rejected the shop drawings submitted by D & C because they did not include the additional sprinkler heads. (Record, pp. 88-89).

On November 2, 1990, D & C confirmed that all parties agreed that Davis & Floyd's drawings did not show an adequate number of sprinkler heads as required by NFPA 13. D & C further confirmed that it would provide an adequate number of heads under protest. (Record, pp. 85-86).

On March 28, 1991, D & C presented a change order to Davidson & Jones in the amount of $34,106, which covered 421 sprinkler heads additional to those shown in Davis & Floyd's drawing plus the contractor's 7% markup. (Record, pp. 92-96).

On May 2, Davis & Floyd rejected D & C's claim and reiterated its previous position that the contractor as part of the original contract was required to design and install a system which met the requirements of NFPA 13. (Record, p. 97).

On September 13, 1991, Davidson and Jones requested a that the CPO hear this matter under his authority granted in S. C. Code Ann. § 11-35-4230 (1986) to resolve contract

controversies involving the State. (Record, pp. 98-99). The CPO held a hearing on October 10, 1991, and issued his decision on October 21, 1991, finding against Davidson and Jones and D & C Fire Protection and in favor of the Department of Corrections. (Record, pp. 7-18). On October 28, Davidson and Jones appealed to the Panel on behalf of its subcontractor, D & C, the real-party-in-interest. (Record, pp. 1-4).

CONCLUSIONS OF LAW

D & C contends that, under South Carolina law, the Department of Corrections and its agent Davis & Floyd impliedly warranted the plans and specifications, including the sprinkler drawings, when they included them in the bid and contract documents and that D & C reasonably relied on the accuracy of the drawings in submitting its bid. D & C argues that the Department breached this implied warranty because Davis & Floyd's sprinkler drawings are defective in several ways.

First, the drawings show some sprinkler heads too far apart to get adequate coverage resulting in the need for 250 additional heads in those areas. Second, the drawings fail to indicate any sprinkler heads in areas which actually required 145 heads. Finally, the drawings indicate a "light hazard occupancy rating" when NFPA 13 requires an "ordinary hazard occupancy rating," resulting in an additional 26 heads. D & C contends that these defects necessitated an

additional 421 heads at an additional cost to D & C of $34,106.00.

The Department of Corrections admits that Davis & Floyd's sprinkler drawings do not contain enough sprinkler heads to meet the requirements of NFPA 13, however, it argues that the specifications charge the contractor "designing" the system in accordance with NFPA 13. The Department contends that it was, therefore, incumbent on D & C to discover prior to bidding the true number of heads required and to notify the architect if it thought a discrepancy existed. The Department further contends that the omission of 421 heads (34% of the total required) is a major omission which should have been obvious to a fire protection expert such as D & C, especially because of the absence of sprinkler heads in some rooms which were clearly within the coverage area.

D & C counters that it had a right to rely on the drawings when figuring its costs because the specifications do not indicate a certain quantity of heads but do state that the system shall be in accordance with NFPA 13 "<u>except as modified herein.</u>" (Record, p. 54). According to D & C, the drawings which indicate the sprinkler quantity as 1,224 modify the NFPA requirement and, therefore, control. The specifications state that the drawings control if the specifications omit quantities. (Record, p. 50).

Finally, the Department argues that Addendum #4 which states that, "Sprinkler layouts shown on the drawings are

diagrammatic. Actual sprinkler head locations shall be in accordance with the requirements of NFPA 13" put all bidders on notice that the contractor was to determine the proper amount of sprinkler heads prior to bidding.

D & C counters that the Department's agent, Davis & Floyd, was aware of the problems with the quantities shown on the sprinkler drawings prior to bidding and failed to properly notify bidders. D & C contends that Addendum #4 does not address the problem with quantities but rather the statement that the sprinkler layouts are "diagrammatic" and actual locations shall be in accordance with NFPA 13 means that once installation begins it may be necessary to change the location of some heads because of light fixtures, obstacles such as columns, etc.

The South Carolina Supreme Court in Hill v. Polar Pantries, 64 S.E.2d 885 (1951) recognized that, "if a party furnishes plans and specifications for a contractor to follow in a construction job, he thereby impliedly warrants their sufficiency for the purpose in view." 64 S.E.2d, at 888. The Panel agrees with D & C that, in this case, by undertaking to provide drawings showing the location of fire protection sprinklers, the Department, through its agent Davis & Floyd, warranted that those drawings were accurate. Such being the case, the Panel believes that D & C had a right to rely on the accuracy of such drawings in figuring its bid.

The Panel is not persuaded that the specifications make clear that D & C was required to ignore the drawings and calculate a much greater quantity of sprinklers than those shown. The fire protection specification states, "The design, equipment, materials, installation, workmanship, examination, inspection, and testing shall be in strict accordance with the required and advisory provisions of NFPA 13, <u>except as modified herein.</u>" (Record, p. 54).

The Panel believes that D & C was reasonable in believing that the drawings "modified" the NFPA 13 standard when they indicated a certain location and number of sprinkler heads and that the specifications modified NFPA 13 when they indicated that a certain area was to be "light hazard" rather than "ordinary hazard" as NFPA 13 required.

Further the Panel believes that the Department, through its agent, failed to notify the bidders when it became aware of the apparent discrepancy in the number of sprinkler heads. Addendum #4 does not clearly address quantity of sprinkler heads but merely repeats that the system is to be designed in accordance with NFPA 13. The "except as modified herein" language of the original specification is not addressed or altered by Addendum #4.

The Department does not dispute that D & C satisfactorily completed the installation of the fire protection system and that a charge of $34,106 for the additional sprinkler heads is reasonable and the Panel so finds.

For the reasons stated above, the Panel reverses the October 21, 1991, decision of the Chief Procurement Officer and orders the Department of Corrections to pay to Davidson and Jones Construction Company on behalf of its subcontractor D & C Fire Protection, Inc., the sum of $34,106.00, as payment for the installation of 421 sprinkler heads in addition to those required in the contract.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: Hugh K. Leatherman
Hugh K. Leatherman, Sr.
Chairman

December 31, 1991
Columbia, South Carolina