STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1992-3

IN RE:	)	
	)	
PROTEST OF D & S CONSTRUCTION CO., INC.	)	O R D E R
APPEAL BY H. C. BROWN CONSTRUCTION, CO., INC.	)	
	)	

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on March 30, 1992, on H. C. Brown Construction Co., Inc.'s ("Brown") appeal of a decision by the Chief Procurement Officer ("CPO") declaring Brown not responsive to an Invitation to Bid on a contract to renovate the Children's Dental Center for the Medical University of South Carolina ("MUSC").

Present at the hearing were Brown, represented by Steven L. Smith, Esq.; D & S Construction Co., Inc., represented by its President, Stephan R. Griebe; the Division of General Services, represented by Helen T. Zeigler, Esq., and MUSC, represented by George F. von Kolnitz.

FINDINGS OF FACT

On November 27, 1991, MUSC solicited bids for the renovation of its Children's Dental Center pursuant to S.C. Code Ann. § 11-35-3020(1986) of the Consolidated Procurement Code. Sections 11-35-3020(2)(b)(i) and (ii) state:

> Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who

> will specifically fabricate and install a portion of the work in an amount that exceeds [2 1/2% of the prime contractor's bid up to three million dollars].
>
> Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.

The IFB provides that "Failure to list subcontractors in accordance with the code shall render the prime contractor's bid unresponsive." (Record, p. 46).

Part 08410 of the specifications concerns the aluminum entrances and storefront portion of the contract. Paragraph 1.10 of that specification, entitled "QUALIFICATIONS", states:

> A. Manufacturer and Installer: Company specializing in manufacturing aluminum glazing systems with minimum three years documented experience.

(Record, p. 55 and Panel's Ex. #1). The specification also contains a list of approved manufacturers for materials to be used in constructing the aluminum entrances and storefront. Vistawall, Butler Manufacturing Company is an approved manufacturer. (Panel's Ex. #1).

MUSC received bids on December 18, 1991 from fourteen bidders. MUSC decided to award the contract for the base bid plus alternates # 1, 2, 3 and 5 with the intent to include alternate #4 in the work if and when the money becomes available. The low bidder for the base bid plus alternates #1, 2, 3 and 5 was Brown.

Brown did not list an aluminum entrance and storefront subcontractor to perform the work required under Alternate #4, Specification 08410, even though the total amount of work exceeds the 2 1/2% threshold.[1] Brown received an oral quote prior to bid opening from Harry Moses Construction Co., Inc., indicating that Moses would supply the Vistawall material needed for Alternate #4 at a total cost of $9,648.00, plus tax. Moses confirmed its oral quote in writing sometime after bid opening. (Record, p. 35). Brown had estimated that the cost of its own forces installing the Vistawall material was between $2500 and $3000.

On December 19, D & S Construction Co., Inc., ("D & S") protested the bid of Brown as being unresponsive for failure to list a window/storefront subcontractor. (Record, p. 40).

After D & S' protest, Brown contended that it did not list a subcontractor for the Alternate #4 glass and storefront work because it intended to perform the work itself for an amount less than the threshold, using the Vistawall material supplied by Harry Moses. (Record, p. 33).

The CPO conducted a hearing on D & S' protest on January 30, 1992, and issued a decision dated February 28, 1992, in which he declared Brown unresponsive for failing to list a subcontractor. The CPO determined, based on the

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[1]Both D & S and Brown received subcontractor quotes on the total work which ranged from $12,000 to $18,000. The threshold amount is $6357.50.

evidence presented to him, that Brown was unable to obtain Vistawall product from Harry Moses and that Brown did not meet the qualifications of three years experience installing storefronts.

Brown appeals from the decision of the CPO.

CONCLUSIONS OF LAW

Section 11-35-3020(2)(b)(ii) requires a prime contractor to list the name and address of every subcontractor who will perform work or render service to the prime contractor and every subcontractor who will specifically fabricate and install a portion of the work in an amount which exceeds 2 1/2% of the bid. The threshold amount in this case is $6357.50. The amount of glass and storefront work and material required under Alternate #4 exceeds this amount.

Under In re: Protest of Pizzagalli Construction Company, et al., Cases No. 1989-8 and 1989-9 (consolidated), the Panel held:

> The initial burden of proving that [a prime contractor] failed to list a subcontractor in accordance with § 11-35-3020(2)(b)(i) is on the protestant. Once the protestant has made a prima facie showing that the amount of work exceeds the threshold and that no subcontractor is listed, the burden shifts to the bidder who is challenged to demonstrate a sufficient reason why no subcontractor was listed, eg., the contractor received quotes prior to bidding which fell below the threshold or the contractor intends, and is capable of, performing the work itself.

(Pizzagalli, p. 25, fn. 13). As the Panel notes in Pizzagalli, this process follows the general rule that the burden of evidence is imposed on the party best able to sustain it. See Martin v. Southern Railway, Co., 240 S.C. 460; 126 S.E.2d 325 (1962).

In order to make a prima facie case, D & S and General Services had to demonstrate that the amount of aluminum storefront and glass work on Alternate #4 exceeded the 2 1/2% threshold and that Brown did not list a subcontractor for this work. The Panel finds that D & S and General Services have met this burden.

All of the quotes received by Brown and D & S for the total glass and storefront work far exceeded the $6,357.50 threshold and at least eleven of fourteen bidders on the project listed a glazing and glass or storefront subcontractor. (Record, pp. 50-53). It is undisputed that Brown did not list a glazing and glass or storefront contractor.

Because D & S and General Services established a prima facie case, the burden shifted to Brown to establish that it was not required to list a subcontractor for this work. Brown claims that it does not have to list because, at the time of bidding, it intended to purchase the materials and perform the work itself. In order to prevail, therefore, Brown must show that it had in hand prior to bidding all of the quotes necessary to establish that no listing was required. Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146

(1986); See also, In re: Protest of J. A. Metze and Sons, Inc., Case No. 1987-8, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 377.

Brown was able to demonstrate that it had a prebid quote on the Vistawall materials from Harry Moses Construction at a price of $9,648.00. (Record, p. 35).[2] The Panel holds that the quote on the materials is sufficient to meet the required burden of proof.

Brown was also able to demonstrate that it had a prebid in-house estimate in the $2500-3000 range for the installation of the material. In order for this quote to be sufficient, however, Brown must also demonstrate that it is capable of performing the work. The Panel holds that Brown failed to meet its burden in this regard.

Part 08410, Paragraph 1.10 sets forth the qualifications for the manufacturer and installer of the aluminum storefront material as a "company specializing in manufacturing aluminum glazing systems with minimum three years documented experience." In order to document its three years experience, Brown offers a list of "Completed Projects in Past Five Years" which it submitted to the CPO with seven entries marked as references. (Record, pp. 21-25). On its face the list contains nothing more than the

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[2] D & S and General Services claim that Moses cannot supply Brown with the Vistawall materials because Moses is not a glazing contractor. D & S and General Services offered no admissible evidence on this point, however.

name of project, owner's name, architect's name, total amount of project and date of completion.

Brown presented no evidence to the Panel whether those projects involved manufacturing or installing aluminum glazing systems, the amount of such, whether Brown performed the work itself or merely acted as general contractor on the job . The only witness offered by Brown testified that someone else had drawn up the list, that he had not been with the company when the jobs were undertaken and that he was unfamiliar with the work performed.

The Panel holds that Brown has failed to document that it has the requisite three years' experience in installing or manufacturing aluminum glazing systems and, therefore, Brown has failed to prove that it is qualified to perform the work.

Because Brown is not qualified to perform the work itself, it had to obtain a quote to perform the installation work from a qualified subcontractor prior to bidding. As stated by the South Carolina Supreme Court in the Logan case, "It is irrelevant that the bidder may have had plans to gather additional bids in the future in such a manner that, according to the bidder's own in-house estimate, the subcontractor's bids would not have exceeded the threshold amount." 351 S.E.2d, at 147.

Brown did not obtain any prebid quotes from subcontractors on the labor required to install the Vistawall. Therefore, Brown has failed to prove that it was

not required to list a storefront subcontract for Alternate #4 in accordance with §11-35-3020(2)(b)(i).[3]

Brown additionally raises the question whether D & S' protest is moot because MUSC did not select Alternate #4 as part of the contract to be awarded. MUSC has indicated that it has future plans to include Alternate #4 in the scope of the work if its budget permits. The Panel has held that an alternate is an integral part of an Invitation for Bids to which a proper response is required even if the alternate is not subsequently selected as part of a contract. In re: Protest of Pizzagalli, Cases No. 1990-8 and 1990-9. The Invitation for Bids provides that failure to bid an alternate shall render the prime contractor's bid unresponsive. (Record, p.44). Likewise, the Panel has held in In re: Protest of Brown & Martin, Case No. 1983-4, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 57) that failure to list a subcontractor is not a curable minor technicality because the Procurement Code states that such failure renders the bid unresponsive.

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[3]Brown seeks to use quotes it and D & S obtained for the total work and to subtract the cost of the material quoted by Harry Moses to arrive at an installation cost. This procedure is not allowed under In re: Protest of J. A. Metze & Sons, Inc., Case No. 1987-8, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 377, 389 ("If a general contractor may rely on a portion of a quote that brings that quote below the threshold for listing subcontractors required by §11-35-3020, this Code provision and the policies embodied therein would be meaningless.")

In Mathis v. South Carolina State Highway Department, 260 S.C. 344, 195 S.E.2d 713 (1973) the Supreme Court stated, "A case becomes moot when judgment, if rendered, will have no practical legal effect upon an existing controversy."

In this case, Brown was required to list a subcontractor for the aluminum storefront work under Alternate #4. Its failure to do so renders its entire bid unresponsive. That Alternate #4 was not initially selected as part of the contract award in this case is not relevant to the issue of Brown's failure to list a subcontractor prior to bid opening. The Panel holds that this case is not moot.

For the reasons stated above, the Panel holds that the bid of H. C. Brown Construction Co., Inc., is unresponsive because it fails to list a subcontractor in accordance with S. C. Code Ann. § 11-35-3020(2)(b)(i). Award of this contract should be made to the next lowest responsive and responsible bidder. The February 18, 1992, decision of the Chief Procurement Officer is affirmed in part and reversed in part consistent with the above decision of the Panel.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: _____
Gus J. Roberts
Chairman

Columbia, S.C.
April 1, 1992