

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1993-8

In re: )  
 )  
Protest of Charleston Constructors, ) O R D E R  
and D&S Construction Co., Inc.; )  
Appeal by Brantley Construction Co.)  
and D&S Construction Co., Inc. )  
\_\_\_\_\_ )

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on March 23, 1993, on the appeals of Brantley Construction Co. and D&S Construction Co., Inc., from a decision by the Chief Procurement Officer ("CPO") finding the bids of Brantley and D&S nonresponsive.

Present and participating in the hearing before the Panel were Brantley Construction Co. ("Brantley"), represented by W. H. Bundy, Jr., Esquire; Charleston Constructors, ("Charleston"), represented by its project manager, Michael Auerbach; and the Division of General Services, represented by James W. Rion, Esquire.<sup>1</sup>

FINDINGS OF FACT

The parties stipulated to the following findings of fact made by the CPO in his Order:

The South Carolina Department of Parks, Recreation and Tourism (PRT) solicited bids on October 28, 1992 in the

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<sup>1</sup> D&S Construction Co. did not appear at the hearing, despite having filed a protest of the CPO's decision finding its bid nonresponsive and notification of the date and time of the hearing being sent to its President, Stephan Griebe. D&S Construction's protest is dismissed for failure to appear and present its case.

the bids of Brantley and D&S based on their failure to list all subcontractors.

In a January 21, 1993, letter to the State Engineer's Office, Charleston Constructors more specifically protested Brantley's bid based on "not listing a pile driving subcontractor" and D&S' bid "for the failure to list a structural and rigging fabricator".

Brantley did not list in its bid either a subcontractor or itself to perform steel fabrication, structural steel erection or rigging.

The parties stipulated to the following additional facts:

Brantley has not driven piles on any job with its own employees. (Record p. 11).

Based on Brantley's base bid price of \$334,900.00, its 2% threshold, as set forth in Section 11-35-3020, is \$6698.00. (Record p. 11).

Brantley's pile driving labor cost is estimated at \$3960.00 in its work sheets and \$5148.00 when mark up is applied. (Record p. 12).

Brantley's total estimated price for the pile driving work, including the cost of piles, equipment, fuel and labor, was \$73,156.00. Charleston Constructors presented three (3) pile driving bids from subcontractors ranging from \$83,790.00 to \$114,458.00. (Record p. 12).

Brantley is capable and competent to drive piles.

South Carolina Business Opportunities publication for the construction of this project. Bids were solicited in accordance with Section 11-35-3020 of the S. C. Consolidated Procurement Code (Procurement Code) and the S.C. Budget and Control Board Regulations.

Bids were received on December 9, 1992, from nine bidders. The base bid prices of the three lowest bidders are as follows:

	<u>Base Bid Prices</u>
Brantley	\$334,900.00
D&S	339,431.00
Charleston Constructors	347,705.00

D&S indicated to PRT on the day of the bid opening that it would protest Brantley's bid for failure to list a pile driving subcontractor.

Charleston Constructors indicated to PRT on the day of the bid opening that it had problems with Brantley's and D&S' bids.

PRT did not immediately issue a Notice of Intent to Award notice because it was waiting for total funding to be accomplished.

In a December 9, 1992, letter to PRT, Brantley stated their intention to self-perform the piling work.

PRT issued a Notice of Intent to Award dated January 13, 1993, indicating its intent to award this Contract to Brantley for the base price of \$334,900.00.

In a January 14, 1993, letter to the State Engineer's Office in Charleston, SC, Charleston Constructors protested

No requirement exists requiring the listing of rental equipment.

Piles are not specialty equipment.

Bid Tabulations were sent to all parties within ten (10) days of bid opening.

#### CONCLUSIONS OF LAW

Brantley appeals to the Panel claiming that the CPO's decision "violates, inter alia, Sections 11-35-4210 and 11-35-3020 of the South Carolina Procurement Code, and the Due Process Clauses of the South Carolina and United States Constitutions by imposing requirements on Brantley which are neither part of the Procurement Code nor the invitation for bids."

The threshold issue for determination by the Panel is whether Charleston Constructors timely filed its protest under Section 11-35-4210(1). That section requires submission of a written protest within ten (10) days after the "aggrieved" persons "know or should have known" of the facts giving rise to their protest.

Brantley argues that the protest is not timely because Charleston Constructors knew the facts giving rise to its protest on bid day or when it received the bid tabulation and did not file its protest within ten days of either event.

General Services and Charleston Constructors contend that Charleston Constructors' protest is timely because Charleston Constructors was not aggrieved until it received

the Notice of Intent to Award and filed its protest within ten days.

The Panel holds that Charleston Constructors' protest is not timely.

Mr. Auerbach with Charleston Constructors admitted that he knew on the day bids were opened that the apparent low bidder was Brantley and that Brantley had not listed a subcontractor or itself to do the pile driving. Further, Mr. Auerbach testified that he pointed out this fact to the State at that time and was told to wait until the Notice of Intent to Award was issued. Sometime later Charleston Constructors received the bid tabulation indicating that the State considered Brantley the low bidder. The Panel holds that Charleston Constructors became "aggrieved" when it received the bid tabulation.

The Panel distinguishes this case from In re: Protest of The Computer Group, Case No. 1992-6, in which the Panel found that the protestant did not have aggrieved status until the State made a final decision to award. In The Computer Group, the Panel found that the protestant's aggrieved status changed when the State, in writing, before the ten-day protest period expired, extended the award and reevaluated the proposals.

In this case, Charleston Constructors' aggrieved status did not change because, even after it informally complained to the State of Brantley's failure to list a subcontractor, the State took no affirmative action within the ten-day

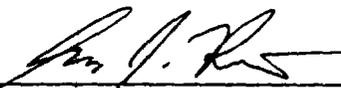
protest time on the informal complaint. It was, therefore, incumbent on Charleston Constructors to formally act on its complaint within the proper time limitation.<sup>2</sup> This it did not do.

The Panel holds that Charleston Constructors was aggrieved and knew the facts giving rise to its protest more than ten days prior to filing its written protest and, therefore, the protest is not timely filed under Section 11-35-4210(1). Because the protest of Charleston Constructors is not timely, the Panel lacks jurisdiction to decide the merits of the protest.

For the reasons stated above, the Procurement Review Panel reverses the March 1, 1993, decision of the Chief Procurement Officer and dismisses the protest of Charleston Constructors as untimely.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

By:   
Gus J. Roberts  
Chairman

Columbia, SC  
April 21, 1993

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<sup>2</sup>In Case No. 1988-13, In re: Protest of Oakland Janitorial Service, Decisions of the Procurement Review Panel 1982-1988, p. 533, the Panel held that a protestant is charged with knowing its rights under the law and may not rely on representations by state officials to the contrary. In The Computer Group, the Panel specifically noted that the protestant did not rely solely on alleged misrepresentations by state officials but rather relied on the State's written rescission of the award within the protest time. Case No. 1992-6, at page 7.