

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1997-2

In re:)
))
) Protest of MTC Service Maintenance;) ORDER
) Appeal by MTC Service Maintenance.)
))

This case came before the South Carolina Procurement Review Panel (Panel) on February 26, 1997, on the appeal of MTC Service Enterprise (MTC). MTC appeals the decision of the Chief Procurement Officer (CPO) denying MTC's claim for breach of contract and damages.

Present and participating in the hearing before the Panel were MTC¹ represented by Robert F. Masters, II, Esquire; S. C. Vocational Rehabilitation Department represented by John E. Batten, IV, Esquire; and Office of General Services of the Budget and Control Board represented by Delbert H. Singleton, Jr., Esquire.

FINDINGS OF FACT

MTC stipulates that the CPO's findings of fact are accurate, and contends that few facts are in dispute. The following facts are found in the Record before the Panel. On June 19, 1996, the Materials Management Office (MMO) of

¹ No one representing MTC, other than its attorney, was present at the hearing. William Powell, the owner of MTC, and the person filing the protest, was not present. Apparently, on the afternoon of February 25, 1997, Mr. Powell informed his attorney that he was entering the hospital for emergency surgery the following morning, the day of the hearing, but he did not object to the Panel hearing proceeding in his absence. After considering all of the circumstances, while the Panel regrets Mr. Powell is having medical difficulties, the Panel determined that the hearing should not be postponed.

General Services issued an Invitation For Bids (IFB) on behalf of the SC Vocational Rehabilitation Department (VRD) for Interior Renovations at the Charleston Rehabilitation Center. [Record p. 33]. A mandatory pre-bid conference was held at the Charleston Rehabilitation Center on July 9, 1996. [Record p. 34]. The two proposals received in response to the IFB were opened on July 16, 1996. [Record p. 33]. MTC Service Enterprise (MTC) bid \$51,500.00 and Frisch & Assoc. Construction bid \$56,892.10. [Record p. 32]. An Intent to Award to MTC was issued on July 29, 1996. [Record p. 31].

MTC began to perform under the contract no earlier than August 15, 1996, which is sixteen days from the date of the notice of intent to award. On September 12, 1996, William D. Leitner, Director of Property and Transportation Management, and J. Wesley Stokes, Engineer for VRD, after inspecting MTC's work, verbally ordered MTC to stop work. [Record p. 58]. Pictures of the work site were taken that same day. [Record p. 82, referencing CPO Exhibit 13]. MTC sent a letter to MMO, which included an invoice in the amount of \$17,000.00, dated September 12, 1996, for partial payment of work completed. [Record p. 73-75]. On September 13, 1996, MTC requested that the stop work order be lifted. [Record p. 30]. On September 17, 1996, Boyd Wood of the Office of State Engineer in Charleston, which is not involved in the contract, inspected the work site and prepared a report, which was submitted to the MMO on September 18, 1996. [Record p. 63-64]. The verbal order to stop work was confirmed in a September 18, 1996, letter to MTC, which also informed MTC that termination of the contract was being considered. [Record p. 58]. MTC was given the

opportunity to discuss the possible termination of the contract for default under the IFB workmanship requirements. MTC responded by letter dated September 19, 1996, agreeing to meet with the State and requested copies of documents, as well as demanded payment of its invoice. [Record p. 76].

On September 20, 1996, MMO responded to MTC, explaining that the meeting was a preliminary meeting to discuss the matter while a hearing before the CPO would be the next step if the meeting did not resolve the issues, as well as providing a copy of the report of Boyd Wood and denying partial payment. [Record p. 59]. Also on September 20, 1996, the SC Dept. of Labor, Licensing and Regulation (DLLR) sent MMO a letter stating that MTC Service Enterprise and William Powell have never held a contractor's license in SC, but Mr. Powell holds a Residential Specialty Registration Card, which allows work on private residences up to \$5,000.00. [Record p. 65].

Representatives of MMO, VRD and MTC met on September 24, 1996. On September 25, 1996, MMO sent a Notice of Termination of Contract to MTC for failure to perform quality workmanship as specified, and failure to be licensed as required. [Record p. 62]. By letter dated September 27, 1996, MTC responded to MMO's letter of September 20, 1996, by countering points in the report prepared by Boyd Wood, and claiming MMO has breached the contract. [Record p. 78-79]. Also, on September 24, 1996, MTC sent a letter to MMO denying the requirement for a license and claiming any requirement was waived. [Record p. 28]. In early October, VRD contracted with Harbourtowne

Construction, Inc., for \$54,800.00, to do the work originally awarded to MTC. [Record p. 83-84].

MTC filed a response to the Notice of Termination on October 24, 1996, labeled "Notice of Appeal, Default Termination". [Record p. 68]. The CPO conducted a hearing on the contract controversy on January 3, 1997, and issued a decision on January 16, 1997. [Record p. 5-18]. MTC requests review by the Panel of the CPO decision, by letter dated January 24, 1997, which alleges the CPO decision is arbitrary, capricious and fraudulent. [Record p. 3]. At the Panel's hearing, General Services and VRD made motions to dismiss MTC's case, which are discussed below.²

CONCLUSIONS OF LAW

MTC's October 24, 1996 letter is essentially a request for review by the CPO, which establishes the issues for determination. MTC raises several issues. MTC claims the State breached the contract by terminating MTC without cause, because MTC did not provide poor workmanship. As to the contractor licensing issue, MTC claims there is no license requirement in the specifications, and if a licensing requirement exists, it was waived by the State when it awarded the contract to MTC. MTC further claims that the State provided faulty drawings and specifications. MTC seeks damages for breach of contract in the amount of the contract, \$51,500.00, or, at least the amount of the work completed, \$17,000.00, so that the State is not unjustly enriched.

² A motion for Directed Verdict was made, which the Panel treats as a Motion to Dismiss for failure to meet the burden of proof.

Faulty Specifications

The issue of the drawings and specifications being faulty is clearly not raised within the time required under the Consolidated Procurement Code at §11-35-4210, which provides:

Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date of issuance of the Invitation For Bids or Requests For Proposals or other solicitation documents, whichever is applicable, or any amendment thereto, if the amendment is at issue.

Within fifteen days of when the IFB was issued would be the proper time for a request for review of faulty solicitation documents, including specifications and drawings. The issue of alleged insufficiencies in the specifications is not timely raised, and thus the Panel can not take jurisdiction over the subject matter.

License Requirement

As to the issue of MTC being required to be licensed as a general contractor, S. C. Code Ann. §40-11-10 and §40-11-100 define a general and mechanical contractor as well as make it illegal to "engage in or offer to engage in general or mechanical contracting in this State without having first obtained a license as required by this chapter." South Carolina law clearly requires someone undertaking construction when the cost is \$30,000.00 or more to be licensed as a general contractor. Further, a mechanical contractor is defined, and must be licensed for undertakings over \$17,500.00. The state law is

applicable whether or not it is clearly stated as a requirement in the IFB.³ A state law requiring a contractor's license to engage in work cannot be waived by the State's action of awarding the contract to an unlicensed contractor, as claimed by MTC. The project involved in this case clearly requires a licensed contractor, and MTC admits that it does not have a general or mechanical contractors license. The State properly terminated the contract with MTC on the grounds that MTC is not a contractor properly licensed to complete the work required by the IFB and contract.

Also, MTC is incorrect in claiming that no licensing requirements are stated in the IFB. The license requirements are noted in the IFB, where the license numbers are required to be filled in and required to be placed on the outside of the bid envelope. [Record p. 45]. Clearly, the IFB requires a bidder to list its general contractor and mechanical contractor license numbers and notes that "Bidder's License, Contractor's License, Classification and Group Numbers must be shown on the outside of Bid envelope...." [Record p. 45]. In fact, MTC provided a number for both the Mechanical Contractor's License Number and the General Contractor's License Number in its bid. [Record p. 57]. Mr. Powell, owner of MTC, holds a Residential Specialty Registration Card, which allows him to do work only on private residences up to \$5,0000.00, and that is the number provided by MTC as a license number in its bid. [Record p. 65]. MTC claims it misunderstood the request for licensing information as it is accustomed to

³ The Panel notes that it is always desirable to reference any related state statutes applicable to the contract so that misunderstandings can be avoided.

federal procurements, which have different requirements. MTC further claims it did not provide the specialty registration number in an attempt to misrepresent itself. In fact, once the number provided by MTC had been researched, the extent of MTC's failure to be licensed was revealed. The Panel does not address the issue of the possible misrepresentation by MTC, but does find that the IFB requires bidders to have proper contractor licenses. MTC failed to be properly licensed to do the work required in the IFB and contract.

Quality of Performance

The final issue raised by MTC is the claim of breach of contract by the State for termination of the contract due to poor workmanship. The IFB and contract require that "workmanship shall be first quality in every respect" and "all measures necessary to ensure a first class job shall be taken". [Record p. 39] Other sections of the IFB and contract also indicate that the State expects quality work to be performed. Upon the request of MMO, Boyd Wood, an engineer with the State Engineer's Office and independent of the project, prepared a report after inspection of MTC's work at the project site. The report finds that "the work is not in compliance with the Standard Building Code requirements and that the quality of work is not in compliance with the minimum acceptable trade standards." [Record p. 64]. Mr. Wood also notes that "with the occupant load of about 100 people and only two toilets now available, it is apparent that they have a very serious problem." [Record p. 64]. MTC responded to Mr. Wood's report by claiming faulty specifications, lack of responsibility for the quality of materials, and suggesting that problems existed

only because the work was not finished at the time of the inspection. [Record p. 78]. The video and photographs taken of the work completed by MTC clearly show poor quality work, which could not possibly meet acceptable standards of the trade. Other than its own argument in correspondence, MTC did not provide any evidence that the materials used and work completed by MTC meets the standards of the trade and is in compliance with building code requirements. The evidence supports the State's action of ordering MTC to stop work and terminating the contract due to failure to perform under the workmanship clause of the contract. The Panel finds that MTC breached its contract with the State for failure to meet the workmanship requirements.

Damages

MTC initially claimed the full contract price of \$51,500.00 as damages for the State's alleged breach of contract, or, in the alternative, MTC claimed \$17,000.00 for the work completed by MTC, listed in "INVOICE No. 1". [Record p. 75]. At the Panel hearing, MTC requested equitable treatment for reimbursement of at least its out of pocket expenses, but did not provide the Panel with evidence of the cost of materials and other possible out of pocket expenses that might be reimbursable. The issue of payment to MTC goes back to the lack of quality of MTC's work and materials. The State is not obligated to pay for below standard work, and the evidence shows that MTC's work was below standard. MTC did not present any evidence of work or materials that were not below standard. In fact, Mr. Wood's report on MTC's work indicates that "demolition of some of the unacceptable work will have to take place to

correct the current situation". [Record p. 60]. The contract entered into by VRD after MTC's termination for failure to perform is \$3,300.00 more than MTC's contract for \$51,500.00. [Record p. 83-84]. The Panel finds that the additional cost of \$3,300.00 is a direct result of MTC's breach of contract. MTC is ordered to pay VRD the \$3,300.00 additional cost of the replacement contract.⁴

Other damages claimed by the State include \$5,800.00 for additional staff hours and associated costs relating to MTC's nonperformance under the contract. [Record p. 19-20]. Clearly, the State failed to verify the number provided by MTC as a contractor's license number prior to award of the contract. Also, the State failed to notice that the license number provided for the mechanical and general contractors' licenses is the same number, rather than two different numbers. This should have indicated to the State a need to verify the license number prior to awarding the contract. Because the State could have avoided the additional staff hours and associated cost involved in handling MTC's breach of contract, the Panel declines to award the additional costs of \$5,800.00 requested by VRD.⁵

Motions to Dismiss

After opening arguments, MTC indicated it did not intend to call any witnesses, but would question witnesses called by the State, as well as rely on

⁴ The default clause of the contract provides that "the State reserves the right to purchase any or all items in default in the open market, charging the contractor with any additional costs. The defaulting contractor shall not be considered a responsible bidder until the assessed charge has been satisfied." MTC will not be considered a responsible contractor for purposes of receiving State work until charges assessed in this Order are paid to the State.

⁵ The Panel does not find that the State has breached any duty in its failure to verify the number provided to it as a valid contractor's license number in this case. MTC has the responsibility to provide accurate information based on the laws under which it is operating.

the evidence in the record before the Panel. At that time, General Services made a Motion to Dismiss or, in the alternative, for a Directed Verdict, based on MTC's failure to meet its burden of proof. VRD also made a Motion for Directed Verdict based on MTC's failure to meet its burden to present a prima facie case for determination. The Panel grants the motions to dismiss MTC's case based on the findings and conclusions contained in this order.

Frivolous Protest

S. C. Code Ann. §11-35-4330 addresses frivolous protests, as follows:

[t]he signature of an attorney or party on a request for review, protest, motion, or other document constitutes a certificate by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. [emphasis added]

The Panel realizes the possible chilling effect application of the frivolous protest law may have on appeals to the Panel and the Panel does not desire to discourage appeals to the Panel. However, occasionally an appeal to the Panel will have no merit, and the Panel does not desire to see funds, entrusted to the State by tax paying citizens, wasted on such appeals.

MTC admits that it did not, at the time of the bid and while performing work under the contract, have a general or mechanical contractors license. After the CPO hearing, MTC can no longer claim ignorance of the requirements

established in S. C. Code Ann. §40-11-10, *et seq.*, which are applicable to contractors. Once the State knew MTC was not a licensed contractor, it could not allow MTC to continue to work, even to correct deficiencies. Even if the quality of MTC's work was flawless, the State was required to terminate the contract when MTC's failure to be licensed became known. No argument grounded in fact and warranted by existing law can be made to the contrary.

At the Panel's hearing, in requesting compensation for work done, MTC relied entirely on existing evidence in the Record and did not present any testimony or new documents to support its claim. As discussed above, the State is not required to pay for below standard work and materials, and MTC did not provide evidence that its work and materials were not below standard. MTC is the party requesting review and has the burden of proof. MTC's request for compensation is not grounded in fact and warranted by existing law.

MTC's appeal to the Panel, signed by William Powell, claims the CPO decision is "arbitrary, capricious, and fraudulent", and provides no other reasons why MTC disagrees with the decision of the CPO. No facts or law was presented by MTC to substantiate its claims concerning the CPO decision. In fact, the Record before the Panel is replete with evidence supporting the decision of the CPO and lacking evidence supporting the position of MTC. The Panel finds that MTC's appeal is frivolous as it is not grounded in fact and warranted by existing law.

S. C. Code Ann. §11-35-4330 addresses sanctions for frivolous protests, as follows:

If a request for review, protest, pleading, motion, or other document is signed in violation of this subsection on or after appeal to the Procurement Review Panel, the Procurement Review Panel, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the protest, pleading, motion, or other paper, including a reasonable attorney's fee.

The Panel sanctions MTC and William Powell \$1000.00 as the Panel's cost to convene, as well as reasonable expenses incurred by VRD and General Services because of the filing of the frivolous appeal. The reasonable expenses will be determined by the Panel upon the filing of affidavits of VRD and General Services by March 12, 1997. MTC and William Powell will have an opportunity to respond to the reasonableness of filed affidavits by March 21, 1997.

For the foregoing reasons, the Panel dismisses MTC's appeal to the Panel, finds that MTC owes VRD \$3,300.00 in damages, and sanctions MTC and William Powell \$1,000.00 plus reasonable expenses to be determined by the Panel, for filing a frivolous appeal.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, South Carolina

February 28, 1997