



**Contractors shall be licensed in accordance with the provisions of Section 40-11-10 through 40-11-340 and Regulations 29-1 through 29-110 of the Code of Laws of South Carolina.**

Midlands Tech. received and opened bids from two bidders, Burkwood and Tyler Construction Company, Inc. (Tyler), on March 20, 1997. Burkwood was the low bidder and it listed "Franklin D. Plumbing" (Franklin) in its bid as the name of its plumbing subcontractor. On March 20, 1997, Tyler asserted to Midlands Tech. that Franklin did not possess the necessary South Carolina license to perform the plumbing work required by the project. On March 21, Franklin withdrew from bidding on the project because it was not licensed to perform work at the level required by the project. On March 21, 1997, Midlands Tech. issued a Notice of Intent to Award to Tyler after determining Tyler to have the lowest responsive bid. Burkwood then filed a letter of protest with the CPO for construction. The CPO issued a decision upholding the State's determination that Burkwood's bid was non-responsive for failure to list a licensed subcontractor.

### **CONCLUSIONS OF LAW**

Burkwood claims that it should have been allowed to substitute an appropriate subcontractor in place of Franklin. Burkwood relies on § 11-35-3020(2)(b)(iii) of the Procurement Code which states: "No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except for one or more of the following reasons:" Nine reasons follow and are enumerated as letters (a) through (e). The issue in this case deals only with section (e) which provides:

(e) upon a showing satisfactory to the using agency by the contractor that the listed subcontractor is required to be licensed and does not have the license by the time it is required by law.

In order for § 11-35-3020(2)(b)(iii)(e) to apply to a contractor, its bid must be "accepted" by the State. Burkwood's argument is based the interpretation of the word "accepted". The Panel has interpreted the word "accepted" in the bid process to mean "awarded". In re: Protest of ECB Construction Company, Case No. 1989-7, the low bidder listed a subcontractor who could not perform the work specified by the bid and its bid was therefore determined to be non-responsive. The low bidder argued that it should be allowed to substitute under § 11-35-3020(2)(b)(iii) because it was a bidder whose bid had been accepted. The Panel disagreed and held that, in the bid process, the word "accepted" is interpreted as "awarded". In re: Protests of Pizzagalli Construction Company, Case No. 1991-8 and 1991 (consolidated), the Panel affirmed this decision holding again that accepted means awarded and that a prime contractor is not allowed to substitute a subcontractor named in the bid so as to correct a deficiency in the bidding of the contract.

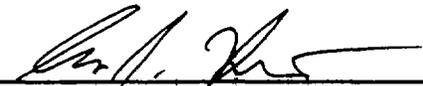
Burkwood argues that these prior Panel decisions no longer apply because the Procurement Code was amended in 1992 and 1993. At this time, one of the amendments was the expansion of §11-35-3020(2)(b)(iii) to include more circumstances in which a substitution can be made and section (e) was added. Burkwood contends that if the interpretation of the word "accepted" remains as "awarded" then new section (e) can never be utilized because the

State can never award a bid which lists an unlicensed contractor. The Panel disagrees and finds that Section (e) is to be utilized in situations where a subcontractor's license may have lapsed between the time it bids to the prime contractor and the time the contract is awarded or the time it must begin work and in similar situations. Its purpose is not to allow prime contractors to substitute subcontractors at the last minute, thereby enabling bid shopping.

For the foregoing reasons the Panel affirms its prior decisions interpreting § 11-35-3020(2)(b)(iii) and upholds the decision of the CPO.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:   
Gus J. Roberts, Chairman

Columbia, South Carolina

June 11, 1997