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Decision

Matter of: Request for Resolution of Contract Controversy by the South Carolina Department of Corrections

Case No.: 2018-152

Posting Date: October 9, 2018

Contracting Entity: South Carolina Department of Corrections

Solicitation Nos.: 5400010231 and 5400010236

Description: Disputes Regarding Deliveries of Mechanically Separated Chicken and Dry Lima Beans

The South Carolina Department of Corrections (“SCDC”) filed a Request for Resolution of a Contract Controversy, pursuant to § 11-35-4230, seeking resolution of its dispute with contractor JNS Foods, LLC (“JNS”). SCDC alleges that JNS, a food supplier, breached its contracts with SCDC by failing to deliver several shipments of mechanically separated chicken and by delivering two shipments of defective lima beans.¹ To assist in his administrative review, the Chief Procurement Officer (“CPO”)² convened a meeting of interested parties on June 5, 2018. This decision is based on the administrative record, applicable law and precedents and information provided at the June 5 meeting. For the reasons discussed below, the CPO finds in favor of SCDC on some but not all of its claims and awards it **\$31,149.22** in damages plus interest.

¹ SCDC also requested that the CPO debar JNS. This decision addresses only the contract controversy.

² The Materials Management Officer delegated the administrative review of this contract controversy to the Chief Procurement Officer for Information Technology.

BACKGROUND

This dispute concerns alleged breaches of two contracts. The first contract required JNS to follow a delivery schedule and provide fresh meats to SCDC. The second contract required JNS to make periodic deliveries of 100-pound bags of lima beans.

MECHANICALLY SEPARATED CHICKEN

SCDC issued Solicitation No. 5400010231 on September 18, 2015.³ (Exhibit 1, hereinafter “Fresh Meats Solicitation”). In it, SCDC sought reverse auction bids for nine types of fresh meats. Each meat type was a separate line item and each line item included a specific delivery schedule. [*Id.*, Bidding Schedule, pp. 21 ff.] On November 3, 2015, SCDC awarded JNS four line items, including line item 0005 for “Ground Turkey or Chicken.” [Exhibit 2] The contract was for an initial term of one year, with two one-year automatic renewals unless the parties opted out pursuant to the terms of the contract. [Fresh Meats Solicitation, p. 20] Under the contract JNS agreed to fulfill SCDC purchase orders by making periodic deliveries of 40,000 pounds each of Gold Creek brand chicken, for its bid price of \$0.279 a pound. [Fresh Meats Solicitation, p. 25; and Exhibit 2]

The Statement of Award included a delivery schedule through November 13, 2016. After the contract automatically renewed, deliveries were based on purchase orders sent by SCDC. The contract included a requirement, highlighted in yellow, that “all items shall be delivered no later than twenty days after contractor’s receipt of the purchase order.” [Fresh Meats Solicitation, p. 11] In the event of a missed delivery, the contract provides as follows:

DELIVERY DATE DEFAULT

Items must be delivered on or before the dates stated within the bidding schedule and/or PO [purchase order]. If no dates are listed in bidding schedule you must refer to the bid Delivery Date requirement above. Failure to deliver by end of business on the required delivery date is considered default and SCDC will quote the quantity for the line item on the open market and an alternate vendor will be issued a purchase order to deliver the product. You will be issued an invoice for

³ SCDC amended the solicitation twice. Neither amendment is pertinent to this claim.

the variance of your award and the actual cost to the alternate vendor. You will be considered a NON-RESPONSIBLE BIDDER for all future bids until the variance invoice issued for the items purchased on the open market is PAID IN FULL

[Fresh Meats Solicitation, p. 12] This text was likewise highlighted in yellow.

During the first term, JNS appears to have met its scheduled deliveries. The contract was then automatically renewed on November 4, 2016 for a second one-year term. During the second term, however, JNS began to miss deliveries. JNS blamed this on market forces that caused a “dramatic surge in pricing” for mechanically separated chicken. Through its president, JNS informed SCDC on May 4, 2017 that “[s]ome suppliers [are] coming to us with costing increases.” [Exhibit 3] He did not request a price increase or contract modification at that time, but asked to discuss the issue so that he could “be correct in the procedure and process.” *Id.* Two months later, on July 17, JNS’s president wrote SCDC and formally requested a contract modification:

The real situation is that Gold Creek will not supply under present conditions. JNS FOODS LLC is confirming that due to Supplier and Market Conditions, there is a Force Majeure in place and that we are unable to ship this specific product at present. We ask that we be removed from the item or allowed to discuss pricing as we requested in MAY.

[Exhibit 4]

Regardless of the causes, JNS made late deliveries in April and May 2017, and failed to make *any* deliveries after July.⁴ This left SCDC short of chicken to feed its inmates, so SCDC was forced to procure the chicken on the open market. For July and August, SCDC procured four 40,000 pound shipments from Good Source at \$0.3239 a pound. For September through December, SCDC procured eleven 40,000 shipments from Good Source at \$0.3377 a pound. Because SCDC had to pay more than JNS’s quoted price of \$0.279 a pound, it invoiced JNS to cover the difference. The first invoice, dated August 21, 2017, billed \$7,184 for the July and August deliveries. [Exhibit 5] The second, dated October 3, 2017, billed \$25,828 for eleven

⁴ SCDC’s purchase orders are not found in the record, but JNS does not dispute that SCDC requested these deliveries.

shipments in September through December.⁵ [Exhibit 6] As of the date of the hearing on this matter, JNS had not paid the invoices.

LIMA BEANS

SCDC issued Solicitation No. 5400010236 on September 18, 2015.⁶ (Exhibit 7, hereinafter “Dry Vegetables Solicitation”). In it, SCDC sought reverse auction bids for thirteen types of dry vegetables. Each vegetable type was a separate line item and each line item included an estimated delivery schedule. [*Id.*, Bidding Schedule, pp. 23 ff.] On December 11, 2015, SCDC awarded JNS line item 0002 for “Lima Beans, Dry, 100LB/Bag.” [Exhibit 8] The contract was for an initial term of one year, with two one-year automatic renewals unless the parties opted out pursuant to the terms of the contract. [Dry Vegetables Solicitation, p. 21] Under the contract JNS agreed to provide 600 hundred-pound bags of dry lima beans in two separate deliveries, at a price of \$55.49 per bag. JNS made the first two deliveries without incident. The contract then automatically renewed for another year on the same terms.

During the next term, JNS delivered 300 bags of lima beans in March, 2017 and another 300 bags three months later. In August SCDC received several complaints from individual facilities complaining of lima beans with a “bitter chemical-like taste.”⁷ [Exhibit 9] SCDC informed JNS of the complaints, and JNS picked up 178 bags for testing. [Exhibit 10] In the meantime, JNS delivered another 300 bags in November. SCDC alleges that these beans were also defective, with the same chemical and bitter taste.

The contract requires that, if a food product is allegedly defective, the parties must attempt to resolve the issue using the following procedure:

⁵ SCDC apparently believed JNS abandoned performance, as the second invoice includes both missed and anticipated shipments. As discussed below, JNS was not obligated to deliver five of the eleven shipments.

⁶ SCDC amended the solicitation twice. Neither amendment is pertinent to this claim.

⁷ There is some discrepancy in the record about whether the first shipment of “bitter” lima beans was delivered in March or in June. Given that the complaints did not arise until August, it seems that June is the most likely date. In any event, the date of the shipment does not affect the analysis.

After acceptance of the products, if the agency has reason to suspect the products do not meet contract conformation; the vendor shall be given an opportunity to inspect the product. If resolution between the agency and the vendor is unobtainable, the “determination of contract conformation clause” will apply.

Contract conformation: The SCDC reserves the right to employ the U.S.D.A. Inspection Service to inspect any fruits and vegetables delivered by a vendor and believed not meeting specification. If inspection proves the product does not meet contract conformation, the certification fee shall be paid by the vendor, at which time the vendor and/or product may be removed from the bid list.

[Dry Vegetables Solicitation, pp. 18-19]

JNS submitted laboratory test results of a sample from the 178 bags it retrieved. [Exhibit 11] The testing laboratory concluded that the sample was “good quality and fit for human consumption.” SCDC, on the other hand, did not use an independent laboratory but rather relied on its own “Food Inspectors,” who “were dispatched to verify the complaints, and they proved to be valid.” [Exhibit 9]

SCDC sent JNS two invoices on January 5, 2018 seeking \$27,617.10 in reimbursement for the “bitter” lima beans. [Exhibit 12] Unsurprisingly, JNS denied the lima beans were defective. It also disputed how SCDC calculated the invoices, claiming that SCDC mistakenly added additional damages.

DISCUSSION

Pursuant to § 11-35-4230, the CPO has the authority to resolve contract controversies between a governmental body and a contractor. SCDC alleges that JNS breached two separate contracts—one involving mechanically separated chicken, the other involving lima beans. As the party that initiated this contract controversy, SCDC bears the burden of proving that JNS breached these contracts. SCDC must prove “the existence of the contract, its breach, and the damages caused by such breach.” *Southern Glass & Plastics, Inc. v. Kemper*, 399 S.C. 483, 491, 732 S.E.2d 205, 209 (Ct. App. 2012). “The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach.” *Id.*

MECHANICALLY SEPARATED CHICKEN

SCDC alleges that JNS failed to make a total of 15 deliveries of mechanically separated chicken from July to December 2017. Under the terms of the contract, SCDC would present JNS with a purchase order. Once received, a purchase order had to be fulfilled within 20 days. [Fresh Meats Solicitation, p. 11] “Failure to deliver by end of business on the required delivery date *is considered default[.]*” *Id.*, p. 12 (emphasis added). Here, it is undisputed that the parties had a contract; that JNS failed to make a number of deliveries after receiving purchase orders; and that SCDC covered the missed deliveries by buying chicken on the open market. Thus, the CPO finds that SCDC met its initial burden of proving a breach of contract for the four July and August deliveries and six of the eleven deliveries scheduled from August to December 2017.

As to the remaining five deliveries that JNS missed, the CPO finds that SCDC failed to prove a breach. SCDC’s purchase order dated August 29, 2017 requested deliveries on eleven separate dates. [Exhibit 13] Five of those dates fell after November 4, 2017. Under the contract, a contractor may opt out of the automatic term renewal by giving SCDC at least 90-days’ notice. [Fresh Meats Solicitation, p. 20] Here, JNS formally requested on July 16, 2017 that it “be removed from the item [i.e., mechanically separated chicken] or that the State of South Carolina, Department of Corrections be willing to accept a revised pricing schedule . . .” [Exhibit 4] By sending this letter more than 90 days in advance of the November 4, 2017 renewal date, JNS timely opted out of another term. The CPO finds that JNS had no obligation to deliver chicken after November 4, 2017.

Having found that SCDC met its initial burden of proving a breach for 10 of the 15 missed deliveries, the CPO now addresses whether JNS had a legally justified reason to excuse its nonperformance. To this end, JNS alleges it should be excused for two primary reasons. First, JNS alleges that it was impossible to perform due to dramatic changes in the market. Second, JNS alleges that it requested a valid price adjustment, which was not honored.

Under South Carolina law, “[a] party to a contract must perform its obligations under the contract unless its performance is rendered impossible by an act of God, the law, or by a third

party.” *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 594, 493 S.E.2d 875, 879 (1997). The impossibility, however, must be real and not a mere inconvenience; a party cannot be excused unless “the thing to be done cannot *by any means* be accomplished, for if it is only improbable or out of the power of the obligor, it is not deemed impossible.” *Id.* (emphasis added). The party seeking to excuse its nonperformance based on impossibility bears the burden of proving that defense.

The CPO finds that JNS failed to prove it was impossible to deliver the mechanically separated chicken at its quoted price. This was a fixed-price contract through which JNS agreed to sell chicken at \$0.279 a pound. When JNS bid on this contract, it took a commercial risk. As an experienced vendor, JNS knows the market is not static; wholesale prices may go up or down. JNS’s bid is a reflection of its analysis of the market. It can hedge its risk by bidding a higher amount; or it may simply choose not to bid if the risks are too high. But once a price is bid, that price is set absent a permissible price adjustment. And because the contract is on a year-by-year basis, in which a party may opt out of renewal by giving proper notice, JNS could opt out of the contract if the market turned unfavorable.

The record shows that JNS had warning signs in early 2016 that the market was turning, yet it chose to stay on the contract. JNS’s brief admits that, by May 2016, the price of frozen mechanically separated chicken had started to climb. [JNS Brief, June 4, 2018, p. 18] Thus, JNS knew the wholesale prices were increasing, and knew that it could opt out of the automatic renewal by giving 90-days’ notice before the November 4 renewal date. [Fresh Meats Solicitation, p. 20] By failing to opt out, JNS took the risk that the prices would stabilize, rise, or drop like they had in 2015.⁸ JNS cannot agree to a fixed price and then claim impossibility when performance later becomes more expensive than it anticipated.

⁸ JNS’s Brief cites USDA market data for mechanically separated chicken. JNS points to this as showing the prices in the market increased significantly in 2017. This same data, however, also showed that prices had decreased by roughly 4 cents from August to October 2015. JNS bid on this contract around that time. Perhaps it was hoping this trend would continue and it would realize even greater profits from its fixed-price with SCDC. In any event, the data merely show that the market is not static, and that JNS knew this when it bid.

Further, a change in the market is not an Act of God that will excuse performance. As one court has stated:

A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed price contract is that the market price will change. If it rises, the buyer gains at the expense of the seller . . . if it falls, as here, the seller gains at the expense of the buyer. The whole purpose of a fixed price contract is to allocate risks in this way. A force majeure clause interpreted to excuse the buyer from the consequences of the risk he expressly assumed would nullify a central term of the contract.

Langham-Hill Petroleum, Inc. v. Southern Fuels Co., 813 F.2d 1327, 1330 (4th Cir. 1987) (quoting *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986)). Simply put, changing market conditions do not excuse JNS's nonperformance. Indeed, JNS even admits it was not impossible to perform. It stated that "any sourcing of the [chicken] would have had to come from a direct competitor." [JNS Brief, p. 30] While that option may have been unpalatable, it was still possible. That SCDC was able to procure the chicken on the open market further shows that performance was not impossible. The CPO finds that JNS failed to prove its non-performance was excused because of impossibility.

As to JNS's allegation that it requested a valid price adjustment, the contract allows a contractor to request a price adjustment after the first one-year term has passed:

Price adjustments may be requested (60) days prior to the 7th month of this term. Adjustments which are approved will begin on the 1st day of the 7th month of the contract term.

[Fresh Meats Solicitation, p. 19] (emphasis in original). In this case, the second annual term began on November 4, 2016. The seventh month of this term began on June 4, 2016. If JNS wanted a price adjustment for the latter half of the second term, it was required to request one at least 60 days before June 4; in other words, by April 4, 2016.

JNS, however, failed to make a timely request. On May 2, 2016, JNS's president emailed SCDC stating that "[s]ome suppliers coming to us with costing increase. Can you and I discuss, as I have not done this with you, and want to be correct in the procedure and process." [Exhibit 3]

Even assuming a request to “discuss” prices was a request for a price adjustment, JNS still missed the April 4 deadline by almost one month. The CPO finds that JNS failed to meet its burden of proving it made a timely price adjustment.

Having found that SCDC met its burden of proving JNS defaulted on 10 of the 15 deliveries, and having found that JNS failed to meet its burden of showing that its nonperformance was excused, the CPO turns to the damages that SCDC is entitled to recover.

Under the contract, if JNS defaults by missing a delivery, SCDC is entitled to buy replacement foods on the open market and invoice JNS “for the variance of [JNS’s] award and the actual cost to the alternate vendor.” [Fresh Meats Solicitation, p. 12] SCDC’s damages, therefore, are based on its costs to cover the difference between JNS’s bid price and the price at which SCDC bought chicken on the open market. For the July and August deliveries, SCDC procured four 40,000 pound shipments on the open market at \$0.3239 a pound.⁹ The amount of SCDC’s damages for these four missed deliveries is \$7,184.¹⁰ As to the other six missed 40,000 pound deliveries, SCDC procured the chicken on the open market at \$0.3377 a pound.¹¹ The amount of damages for these missed deliveries is \$14,088.¹²

In sum, the CPO awards SCDC \$21,272 on its claim for the missed deliveries of mechanically separated chicken. The CPO also awards interest in accordance with the contract’s PAYMENT and INTEREST clause (07-7A055-3) and in a manner consistent with § 11-35-45.

⁹ SCDC procured this on the open market through the “fresh meats” exemption found in § 11-35-710(9). SCDC sought and received five price quotes, and Good Source was the low bidder.

¹⁰ The difference in price per pound between \$0.279 and \$0.3239 is \$0.0445, which multiplied by 160,000 equals \$7,184.

¹¹ For these eleven shipments, SCDC claims that Good Source was the only vendor who had chicken available to ship immediately.

¹² The difference in price per pound between \$0.279 and \$0.3377 is \$0.0587, which multiplied by 240,000 equals \$14,088.

LIMA BEANS

SCDC alleges that it received 600 bags of dry lima beans that were bitter and tasted like chemicals. Under the contract, “if the agency has reason to suspect the products do not meet contract conformation[,] the vendor shall be given an opportunity to inspect the product.” [Dry Vegetable Solicitation, p. 18] In accordance with this provision, SCDC gave JNS an opportunity to inspect 178 bags from the first 300-bag shipment. JNS picked up those 178 bags and hired Hispanic Certified Foods, Inc., an independent laboratory, to test them. Hispanic inspected the beans, chose a random sample, and certified the sample as “good quality and fit for human consumption.” [Exhibit 11].

If the contractor’s testing does not resolve the issue, the contract provides the following procedure:

Contract conformation: The SCDC reserves the right to employ The U.S.D.A. Inspection Service to inspect any fruits and vegetables delivered by a vendor and believed not meeting specification. If inspection proves the product does not meet contract conformation, the certification fee shall be paid by the vendor, at which time the vendor and/or product may be removed from the bid list.

[Dry Vegetable Solicitation, p. 19]

Here, SCDC never employed the USDA inspection service to test the beans. SCDC’s Food Service Administrator wrote in a memorandum that “My Food Inspectors were dispatched to verify the complaints, and they proved to be valid.” [Exhibit 9] But there is no mention of how the beans were tested, what methods were used, or the identity of these “food inspectors.” No certification, independent or otherwise, was entered into the record. Because taste is subjective, the contract required independent testing before SCDC could reject the food as non-conforming. And because SCDC failed to perform any independent testing, it failed to meet its burden of proving that JNS was in default.

SCDC, however, is entitled to reimbursement for the 178 bags that JNS picked up for testing but never returned. As SCDC has already paid \$55.49 for each of the 178 bags, it is entitled to

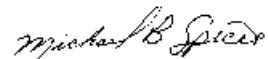
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reimbursement in the amount of \$9,877.22, plus interest in accordance with the contract's PAYMENT and INTEREST clause (07-7A055-3) and in a manner consistent with § 11-35-45.

DECISION

For the reasons stated above, the CPO awards the South Carolina Department of Corrections a total of **\$31,149.22** on its two claims, plus interest in accordance with the PAYMENT and INTEREST clauses (07-7A055-3) and in a manner consistent with § 11-35-45.

For the Materials Management Office



Michael B. Spicer
Chief Procurement Officer

List of Exhibits

<i>No.</i>	<i>Date</i>	<i>Description</i>
1	September 18, 2015	Solicitation No. 5400010231 (Fresh Meats)
2	November 3, 2015	Statement of Award
3	May 2, 2017	Meiseles email to Bishop
4	July 16, 2017	Meiseles letter to Bishop
5	August 21, 2017	SCDC Invoice No. 101
6	October 3, 2017	SCDC Invoice No. 101 [sic]
7	September 18, 2015	Solicitation No. 5400010236 (Dry Vegetables)
8	December 11, 2015	Amended Statement of Award
9	November 28, 2017	Smith Memo to Bishop
10	September 8, 2017	Email message thread between Smith and Meiseles (ending November 7, 2017)
11	November 15, 2017	Certification from Hispanic Certified Foods, Inc.
12	January 5, 2018	SCDC Invoices Nos. 102 and 103
13	August 29, 2017	SCDC Purchase Order

STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

Contract Controversy Appeal Notice (Revised June 2018)

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <http://procurement.sc.gov>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 111.1 of the 2018 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of financial hardship, the party shall submit a completed Request for Filing Fee Waiver form at the same time the request for review is filed. [*The Request for Filing Fee Waiver form is attached to this Decision.*] If the filing fee is not waived, the party must pay the filing fee within fifteen days of the date of receipt of the order denying waiver of the filing fee. Requests for administrative review will not be accepted unless accompanied by the filing fee or a completed Request for Filing Fee Waiver form at the time of filing." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, business entities organized and registered as corporations, limited liability companies, and limited partnerships must be represented by a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003); and *Protest of PC&C Enterprises, LLC*, Case No. 2012-1 (Proc. Rev. Panel April 2, 2012). However, individuals and those operating as an individual doing business under a trade name may proceed without counsel, if desired.

**South Carolina Procurement Review Panel
Request for Filing Fee Waiver
1205 Pendleton Street, Suite 367, Columbia, SC 29201**

Name of Requestor

Address

City

State

Zip

Business Phone

1. What is your/your company's monthly income? _____

2. What are your/your company's monthly expenses? _____

3. List any other circumstances which you think affect your/your company's ability to pay the filing fee:

To the best of my knowledge, the information above is true and accurate. I have made no attempt to misrepresent my/my company's financial condition. I hereby request that the filing fee for requesting administrative review be waived.

Sworn to before me this
_____ day of _____, 20_____

Notary Public of South Carolina

Requestor/Appellant

My Commission expires: _____

For official use only: _____ Fee Waived _____ Waiver Denied

Chairman or Vice Chairman, SC Procurement Review Panel

This _____ day of _____, 20_____
Columbia, South Carolina

NOTE: If your filing fee request is denied, you will be expected to pay the filing fee within fifteen (15) days of the date of receipt of the order denying the waiver.