STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	BEFORE THE SOUTH CAROLINA PROCUREMENT REVIEW PANEL CASE NO. 1985-1
IN RE: PROTEST BY POWERS CONSTRUCTION COMPANY, INC.	)))))	O R D E R APPEALED

This matter is before the South Carolina Procurement Review Panel (hereinafter "Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws, 1976, as amended, as a result of a Bid Protest filed under Section 11-35-4210(1), South Carolina Code of Laws, 1976, as amended, and a Request for Review of the Determination issued by the Chief Procurement Officer for Construction from that Protest pursuant to his authority granted by Section 11-35-4210(2) and Section 11-35-4210(3).

INTRODUCTION

On or about March 20, 1985, the South Carolina Budget and Control Board (Board) issued an invitation for construction bids for three student housing buildings and a cafeteria at Francis Marion College, State Project No. H18-8320. Bids were received from W. C. Logan & Associates (Logan), and Powers Construction Company, Inc. (Powers), the protestant in this matter. Bids were opened in accordance with the solicitation

on April 30, 1985. After evaluating the bids, the Board determined that Logan had submitted the lowest responsive bid. Powers, as were all bidders, was informed on April 30, 1985, which bidder was the apparently low bidder.

On May 1, 1985, Powers timely filed a protest alleging that Logan had failed to list subcontractors as required in S. C. Code of Laws, §11-35-3020 (Cum. Supp. 1984) for (1) ceramic and quarry tile; (2) millwork; (3) steel; and (4) masonry. The statute requires a contractor to list any subcontractor who will fabricate or install a portion of the project for 2% or greater of the total bid on a project between three and five million dollars. Logan's bid on this project was $4,497,000. Thus, Logan was required to list any subcontractor whose materials, labor, or bid on the two combined, exceeded $89,940.

The State Engineer, John McPherson, conducted a hearing on the protest on May 9, 1985. All interested parties were present. In his May 13, 1985, decision, the Chief Procurement Officer determined that Logan had complied with Section 11-35-3020, that the bid submitted by Logan was responsive, and that Logan was the apparent low bidder. The contract was awarded to Logan and was executed on May 15, 1985. On that date, Francis Marion, the owner, sent Logan a Notice to Proceed with the contract.

Powers has abandoned its protest as to the necessity for Logan to list subcontractors for millwork, carpentry, and tile portions of the job. The tile listing was abandoned by omission from the letter of protest requesting review by the Panel on May 23, 1985. No evidence was presented by Powers on either millwork or carpentry at the hearing on July 1, 1985. This constitutes abandonment of these issues.

FINDINGS OF FACT

The testimony of Mr. Barden Rogers, chief estimator for William C. Logan and Associates, is that Logan prices the portions of a job in-house while receiving bids from various subcontractors. On this job Logan decided for various reasons to use multiple subcontractors on masonry, millwork, steel, and carpentry. No subcontractors for this work were listed on Logan's bid as the subdivision of these parts of the job as determined by Logan resulted in no subcontractor in these areas having any portion of the job greater than 2% of the total cost of the job. Mr. Rogers' estimation sheets, (Respondent's Exhibits 2, 4, 5, 7, 8, 9, 10) indicate how he chose to subdivide the parts of the job and the prices he estimated for the subdivided parts.

The parties offered conflicting testimony on whether such a subdivision for labor and purchase of materials is customary in the trade. The Panel makes no finding as to the

wisdom or custom of this practice. However, the Panel does find that this practice of Logan's was differently applied in steel pricing as compared to masonry, millwork, and carpentry.

Mr. Rogers testified that Logan had obtained a firm price and commitment from various subcontractors in masonry, millwork and carpentry on bid day. On bid day Logan's bid for these portions of the project was based on prices from various subcontractors and none of these bids were over the 2% so none were required to be listed.

The testimony as to the steel package in the Bid is equally unambiguous. On bid day, Logan had bids from two subcontractors, Grayco Steel and Southeastern Steel, and an estimation prepared in-house by Mr. Rogers. Both subcontractor's bids exceeded the 2% threshold and would have been required to be listed. Logan's estimation of the steel package, if totalled into a single bid, was comparable to the bids offered by the subcontractors. This total of Logan's exceeded the 2% listing threshold. The subdivision of the package by Mr. Rogers had no subpart exceeding the 2% threshold. Testimony by Mr. Rogers estimated 96 tons of structural steel at $825 per ton and showed that he had placed 20 tons of structural steel as miscellaneous.

On bid day a member of the Logan staff, Mr. Bill Jones, had detailed conversations by telephone with Mr. McDowell of Grayco Steel concerning the validation of Grayco's

bid on the steel package. Grayco's bid was the lower of the two steel bids received by Logan. Mr. Jones asked Mr. McDowell to validate his prices and the two of them compared what portions of the steel package were included in Grayco's bid, as well as the tonnage figures for different parts of the package submitted by Grayco. Representatives of Logan testified that the purpose of this conversation was to determine if there was an error in either steel bid and to ascertain the reason why there was a $40,000 difference between the two steel bids. These witnesses stated a belief that the difference in the two bids could only have been caused by errors of calculation or differences in the scope of the response to the bid, that is that the higher bidder was including more of the steel package in his bid. They pointed out the exclusion clause on Grayco's bid as the source of the latter belief. Mr. DeWitt of Southeastern Steel was also contacted on bid day to validate his bid.

Counsel to the protestant argued for a different inference on these facts. He argued that Logan used Grayco's bid to check its in-house estimation and to determine where the difference in tonnage calculation on structural steel lay. A different tonnage in calculation on that subpart of the package would make the structural steel exceed the 2% listing threshold. Logan's figures for structural steel plus miscellaneous structural steel are nearly the same as Grayco's.

On May 21 and May 22, 1985, Logan made two purchase orders for its structural steel: an order with Southeastern for columns and beams with plates, studs, and bolts for $84,647; and an order with Dixie Gabs for the miscellaneous steel at $26,796. Logan's total steel contracts equal $146,783.

Subsequent actions of Logan lead the Panel to conclude that the inference proposed by the protestants' attorney is correct. On bid day Logan had neither solicited nor received any bids on the steel package as subdivided in their estimation. Unlike their conversation with the millwork bidder, Blanton and Moore, they did not ask Grayco or Southeastern to "back out" of its bid certain parts of the package. Further, as Mr. DeWitt testified, Logan was still soliciting bids on parts of the steel package after signing the contract on May 15, 1985. And further at that time Mr. DeWitt was told by Logan that they could only accept from him a bid on the structural steel. Mr. Rogers and Mr. DeWitt testified to this limitation on the solicitation from Southeastern and to the source of this limitation being the 2% threshold for listing subcontractors. Mr. DeWitt could not bid on other parts of the package. He gave Logan a bid of $84,647 on the Class A steel on May 21, 1985. Grayco was not solicited for any subparts of the packages though on bid day their price had been lower than Southeastern's.

Testimony from various witnesses estimating the cost per ton of steel and the tonnage of structural steel required in the project indicate that either 96 tons of structural steel and 20 tons of miscellaneous steel or ~~109~~ 119 tons of structural steel were required at an approximate cost of $88,000 to $94,000. These figures are the costs estimated by Logan - $80,500 for structural steel plus the structural steel in the miscellaneous category and the costs estimated by Grayco. The total figures from both for structural steel are above the threshold for listing of subcontractors. The figure for structural steel in Logan's estimates is based on the structural steel required in the cafeteria building. It leaves out the tonnage of structural steel required in the connectors to the buildings and places that tonnage under miscellaneous steel.

DISCUSSION OF THE LAW

All parties are agreed that Section 11-35-3020 applies to this solicitation and that a failure to comply with this section would render a bid non-responsive. The parties disagreed on the application of R.158 (1985), an amendment to §11-35-4410 of the Code to this proceeding.

The Panel, after considering the brief of Logan, finds that R.158 is properly the basis of its remedy as ordered because R.158 is a curative and remedial statute.

A curative or remedial statute is one passed to cure defects in prior law, or to validate legal proceedings, instruments or acts of public and private administrative authorities which, in the absence of such an act, would be void for want of conformity with existing legal requirements but which would have been valid if the statute had so provided at the time of enactment. It is evident that the 1985 procurement code amendments are curative or remedial. The statutes were amended to cure the defects that were made apparent by the South Carolina Supreme Court in Acta-Fax Business Machines, Inc. v. Royal Business Machines, Inc., South Carolina Supreme Court Order (Dec. 17, 1984), with regard to the powers and duties of the procurement review panel.

Remedial or procedural statutes are generally held to operate retrospectively. Hercules Inc. v. South Carolina Tax Commission, 262 S.E. 45 (1980). The only exception is where application of such statutes would impair the obligations of contract or vested rights. A contract, entered in violation of statute, is not one which can claim such protection. Both steel subcontractors had lumped all structural steel in their bids. Both steel subcontractors testified that this is the customary practice in their trade. Neither was requested prior to bid date to break out their bids in the fashion that Logan, after receiving the award, solicited a quote from Southeastern

Steel, though with at least one other bidder, the millwork, Logan had done so. On bid day Logan had solicited only lump sum bids on steel. Had Logan solicited bids on packages for steel that bid day, the state would have received the benefit of the lower prices received by Logan for the total steel package.

CONCLUSIONS OF LAW

1. S. C. Code Ann. (1976 and Cum. Supp.) §11-35-3020, and R.158 (1985) apply to this solicitation.

2. S. C. Code Ann. (1976 and Cum. Supp.) §11-35-3020(b) requires a general contractor to list all subcontractors who will "fabricate and install a portion of the work" exceeding a dollar value of 2% of the total where the total bid is between 3 and 5 million dollars.

3. A failure to list such subcontractors "renders the prime contractor's bid unresponsive."

4. Logan failed to list a subcontractor for the structural steel the cost of which is greater than the

2% threshold for listing. Logan's bid was therefore non-responsive.

5. It is the purpose of S. C. Code Ann. (1976 and Cum. Supp.) §11-35-3020 to have bidders present their bids firm on bid day, based on actual bids from subcontractors or themselves. The objective of this statute is to prevent bid shopping after the award.

6. Bidders may take appropriate steps to reduce costs to themselves and to the State, provided, this decision-making has been completed prior to bid opening and the price bid reflects commitments to the bidder with actual bids in hand on all aspects of the project. This is especially true where the subdivision of the job goes beyond what is customary in the trade.

7. On bid day a bidder's total bid must state any cost above the threshold amount.

8. If a bidder has no firm commitment for a portion of a project and chooses to use his own estimate for that portion of the project and that portion on which he has no commitment exceeds the threshold amount for

listing, then he must list himself as the subcontractor. He must be qualified to perform the work so listed.

IT IS ORDERED that the contract be re-awarded in accordance with the Code and with the views set out in this opinion.

Harriette Shaw
Vice-Chairman

Columbia, South Carolina
July 8, 1985