

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
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BEFORE THE SOUTH CAROLINA
 PROCUREMENT REVIEW PANEL
 CASE NO. 1988-3

IN RE:)
)
 PROTEST OF ZUPAN AND SMITH SAND &) O R D E R
 CONCRETE COMPANY, INC.)
)
 _____)

This matter came before the South Carolina Procurement Review Panel ("Panel") for rehearing on June 15, 1988. The Panel originally heard this case on April 7, 1988 and issued its Order in favor of the Protestant Zupan and Smith Concrete Company, Inc. Metromont Materials Corp. appealed the April 13 Order to the Circuit Court and concurrently petitioned the Panel for a rehearing. The Panel granted the rehearing in its May 19, 1988 order. On June 7, 1988 the Circuit Court relinquished jurisdiction over the case for the purpose of permitting the Panel to rehear arguments on the legal issues involved.

Present at the rehearing were Metromont, represented by Stanley J. Case, Esq., Division of General Services represented by Helen Zeigler, Esq., Clemson University, represented by Ben Anderson, Esq., and Mr. William C. Twitty, Jr., for Zupan and Smith which was not represented by counsel.

The facts in this case are as set forth in the Panel's April 13 Order. At issue is the applicability of the South Carolina products preference to a procurement of Ready-Mix concrete by Clemson University to meet all its general needs for 1988. In the initial hearing Zupan argued, and the Panel found, that the preference stated in Reg. 19-446.1000 did not apply to contractors supplying materials related to permanent improvements

on real estate and that the procurement of concrete in question was related to permanent improvements on real estate. Metromont in its argument before the Panel and its motion for rehearing challenges the Panel's interpretation of Reg. 19-446.1000 and raises several issues which are addressed below.

Metromont's primary argument is that the scheme set up by the Procurement Code contemplates that the Materials Management Office will handle the procurement of general products (as in this case) while the State Engineer is responsible for the procurement of goods and services for specific projects involving permanent improvements to real estate. According to Metromont, the intent of the product preference exception is to exempt procurements for a specific project handled by the State Engineer but not procurements of general items by Materials Management.

In support of its argument, Metromont cites S. C. Code Ann. §1-11-35 (1976), which provides:

The State Budget and Control Board by regulation shall develop and implement a policy whereby this State and its agencies...in procuring necessary products to perform their assigned duties and functions must obtain products made, manufactured, or grown in South Carolina, if available....

Metromont contends that this enabling statute expresses a broad intent to prefer all South Carolina products generally and that only specific projects for permanent improvements should be exempt. In other words, Metromont advocates a very narrow reading of the exemption of "any prime contractor or subcontractor providing materials or services relating to permanent improvements on real estate" to include only those

contractors working on specific state construction projects.

The Panel finds that the plain language of the exemption does not permit acceptance Metromont's argument.

There is nothing in the preference regulation to indicate that only construction projects handled by the State Engineer are not subject to the product preference. Either the Legislature in § 1-11-35 or the Budget and Control Board in Reg. 19-446.1000 could have exempted "state construction projects or contracts" or "contracts awarded pursuant to § 11-35-3020", which sets forth the procedure for bidding and awarding state construction contracts. Instead, the Budget and Control Board chose to exempt any prime contractor or subcontractor providing materials or services so long as the goods or services are related to permanent improvements on real estate.

Metromont also renews its argument that concrete is not a permanent improvement and cites a tax regulation and a portion of the Uniform Commercial Code as support. First, the laws cited by Metromont are not persuasive because they involve completely different statutory schemes than the Procurement Code. Second, Metromont misses the gravamen of the Panel's original decision. The question is not whether concrete is or is not a permanent improvement; the question is whether concrete as used by Clemson under this contract is related to permanent improvements. "Related" in its ordinary sense means "connected with" or "associated with."

Mr. Jimmy Boleman, Clemson's Director of Purchasing,

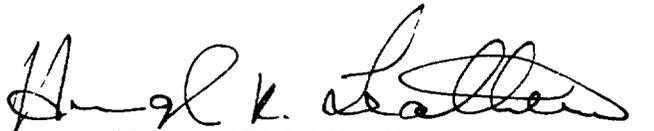
testified in the initial hearing that Clemson intended to use the concrete to repair roads and sidewalks, to make new sidewalks, to make manhole covers and to pour crane weights. Only the use as a crane weight is not connected or associated with permanent improvements. Mr. Boleman candidly admitted that he did not know whether Clemson had ever used concrete to make a crane weight and that such use would be incidental. (Transcript of Record, pg. 49).

The Panel stands by its initial finding that the intended uses of the concrete in question are related to permanent improvements on real estate. Under the plain words of the regulation, the South Carolina products preference does not apply in this case and Zupan and Smith, as low bidder, is entitled to the contract.

The remaining arguments of Metromont stated in its Motion for Rehearing are unpersuasive.

The April 13, 1988 Order of the Panel, including the relief granted therein, is hereby reaffirmed.

IT IS SO ORDERED.



Hugh K. Leatherman, Sr.
Chairman

JUNE 22, 1988, 1988
Columbia, South Carolina