

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS

Martin Engineering, Inc.,) No. 83-CP-40-4155
Plaintiff,)
vs.) IN RE: PROTEST OF J. A. METZE
) & SONS, INC.
South Carolina Procurement)
Review Panel, South Carolina)
Vocational Rehabilitation)
Department, John A. McPherson)
as South Carolina Chief)
Procurement Officer for)
Construction, and J. A.)
Metze & Sons, Inc.,)
Defendants.)

ORDER

FILED
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CLERK OF COURT
SOUTH CAROLINA

WSE

This matter is before the Court on plaintiff's Motion for a Temporary and/or Permanent Injunction. The Summons and Complaint were filed and served on October 10, 1983, and the instant motion was heard on October 14, 1983. For the reasons set forth below, the Court concludes that plaintiff is not entitled to the injunctive relief it seeks.

FACTS

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This case involves the procurement process in connection with the construction of the South Carolina Vocational Rehabilitation Office Building in West Columbia, South Carolina. Plaintiff Martin Engineering was originally awarded the contract when bids were opened on August 9, 1983. Subsequently, J. A. Metze & Sons, Inc., another bidder,

filed a Protest with the Chief Procurement Officer for Construction, pursuant to § 11-35-4210(1), South Carolina Code of Laws of 1976, as amended. The basis for the protest was that Martin had failed to designate all of its subcontractors as required by state law and the Bid Documents.

On September 12, 1983, the Chief Procurement Officer for Construction issued a Decision declaring the Bid submitted by Martin Engineering, Inc. non-responsive due to the failure to list the fabricator or supplier of the structural steel and the millwork required for the project. Martin appealed this decision to the Procurement Review Panel which confirmed the Chief Procurement Officer's decision in an Order of Determination dated October 4, 1983. As previously noted, Martin filed this action six days later. Martin's basic contention is that it was entitled to list only those subcontractors performing work onsite because the requirement that all subcontractors be listed was ambiguously stated and in excess of the procuring agency's statutory authority. 108718

DISCUSSION

The Court is of the opinion that Martin has not established the prerequisites which would entitle it to an injunction in this case.

Ample authority exists for the proposition that injunctive relief is not an appropriate remedy for a disappointed bidder, at least in the absence of a clear violation of duty

by governmental officials, which, as will be seen below, did not occur in this case. As the court stated in M. Steinthal & Co. v. Seamans, 455 F.2d 1289 (D.C.Cir. 1971):

The balancing of the public interest in free and fair competitive bidding ... requires informed judgments by officials continuously faced with such decisions, not by the courts which are unfamiliar with, and ill-equipped to handle, problems couched in ~~these~~ procurement policy terms.

~~Id.~~ at 1304.

For those reasons and others, the court in Steinthal denied injunctive relief, leaving to the disappointed bidder an action for damages. Accord, William F. Wilke, Inc. v. Department of the Army, 357 F.Supp. 988 (D.Md. 1973), aff'd., 485 F.2d 180 (4th Cir. 1973). Among the additional reasons for denying injunctive relief cited by the above cases is the need for an orderly procurement process. This need cannot be served when contracts are delayed at the behest of disappointed bidders who seek injunctive relief in the courts. Aside from the built-in inconvenience which is caused by delay, any delay also raises the prospect that the contract would have to be rebid, at substantial cost to the procuring agency. Also, in this case, delay prolongs the time during which the agency must occupy rental space, with concomitant costs.

The need for the Court to stay its hand, which formed the basis for the Steinthal case, supra, is particularly

appropriate under the South Carolina Consolidated Procurement Code. The Code, in Sections 11-35-4210 through 11-35-4410, provides for review by both the appropriate Chief Procurement Officer and the Procurement Review Panel, a process which could leave a given contract in doubt for at least 60 days.

11-35-3020
In addition, the Court concludes that Martin's claim is substantively barred by § 11-35-3020(2)(b). The gravamen of plaintiff's complaint is that § 11-35-3020(2)(b)(i) requires bidders to list only those subcontractors who will "fabricate and install a portion of the work." However, plaintiff consistently omits reference to the initial paragraph of § 11-35-3020(2)(b), which provides that "[t]he using agency's invitation for bids shall set forth all requirements of the bid including but not limited to the following:... ." (emphasis added). The plain meaning of the language chosen by the General Assembly indicates that the invitation for bids need not be limited to the matters enumerated, but may include such other matters as the using agency deems appropriate.

In this case, the bid documents, copying AIA Document A701, Supplement to Instructions to Bidders, defined "subcontractor" as one who, inter alia, supplies and/or installs specially fabricated equipment or materials. The "Advertisement for Construction Bids," which was a part of the bid

documents, contained a similar definition. While it is true that in one place the bid documents used the limited definition which the statute at a minimum requires, the overwhelming majority of the general contractors who bid on the project did list all their subcontractors, and not merely the ones who did work on the construction site. Such being the case, it cannot be fairly said that the bid documents were ambiguous, especially when the challenged language appeared at one point in a standard AIA instruction form.

WJC The plaintiff has sought only injunctive relief. Since the Court has concluded as a matter of law that injunctive relief is inappropriate, and that there is no legal basis for sustaining plaintiff's claim, it follows that this action should be, and hereby is, dismissed.

AND IT IS SO ORDERED.



William J. Craine, Jr.
Presiding Judge, 5th Judicial
Circuit

November 4, 1983