

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1985-4

IN RE:)
)
PROTEST BY HONEYWELL, INC.)
_____)

O R D E R

INTRODUCTION

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to South Carolina Code of Laws Sections 11-35-4210(5) and 11-35-4410(5) (1976, as amended) as a result of a Decision issued by the Chief Engineer and a request for a review of that Decision. A hearing was held on October 8, 1985. A quorum of the Panel was present. Honeywell, Johnson Controls and General Services were present and represented by counsel.

By letter of July 12, 1985, to the Chief Engineer, counsel for Honeywell stated:

Pursuant to our conference of July 12, this is to confirm that the issues which Honeywell feels need to be resolved in connection with Johnson Controls' bid are as follows:

1. Whether or not the power of attorney from Johnson to David Jacobs, dated April 5, 1977, is "current" as that term is used in the Instructions to Bidders (Section 4.1.7);
2. Whether the power of attorney issued by Safeco dated September 2, 1976, is "current" as that term is used in the Instructions to Bidders (Section 7.2.3);

3. If the power of attorney submitted in connection with the bid is not current, does that fact invalidate Johnson's bid or render it unresponsive;

4. If the Safeco power of attorney is not current, does that fact render the bonds invalid and, therefore, Johnson's bid unresponsive.

I believe that this letter incorporates and summarizes the various questions we have raised concerning Johnson's bid. You have previously advised us that you do not consider the fact that Johnson's duplicate bid bond was incomplete to be an issue which needs to be addressed.

On July 31, 1985, a hearing was held by the Chief Engineer. Honeywell and Johnson Controls were present and represented by counsel. The Chief Engineer's decision is dated August 9, 1985. He found Johnson Controls to be the lowest apparent responsive bidder having confirmed "the validity of the bid bond and it's power of attorney ... by the surety, SAFECO, by letter dated June 21, 1985, and by notarized statement by Kenneth J. Kammeraad of Johnson Controls, Inc."

The letter of protest to the Panel, dated August 19, 1985, from counsel for Honeywell raises two grounds of protest: 1) that the powers of attorney from Johnson Controls to David Jacobs dated April 5, 1977, and from SAFECO dated September 2, 1976, are not "current" as required by the instructions to bidders Subsection 4.1.7 and 7.2.3, and; 2) that the duplicate bid bond was blank. By way of response, attorneys for Johnson Controls raise as a defense that the protest is not timely.

FACTS

The bid involved in this protest is for an energy

monitoring and control system to be installed at the Medical University of S.C. The bid date on the project was April 24, 1985. At bid opening on that date Honeywell was the low bidder. By letter dated May 10, 1985, the Chief Engineer, John McPherson rejected all bids pursuant to paragraph 5.2.1 of the Instructions to Bidders. The project was reworked substantially and rebid with the bid opening set for June 12, 1985. At that bid opening Johnson Controls was the low bidder.

Johnson submitted its bid in duplicate as provided in the instructions to bidders. (Page 1 of Bid Form) The bid opened on June 12 contained a blank bid bond. On June 13, Bruce Carlson, an officer of Honeywell, by letter to the Chief Engineer, protested the acceptance of Johnson's bid for this reason. By letter of June 18, 1985 the Chief Engineer ruled:

When Johnson Controls' bid was opened, the copy read at the time and date set for opening was one in which the Bid Bond (Safeco Form S-54 R6 11/73) was not filled out showing the name of the Obligee or the sum of the principal of the bond. This discrepancy was so mentioned by the representative of the State Engineer's Office.

Later, upon further examination by a representative of the Architect of all bid forms submitted, it was determined that the duplicate bid form submitted by Johnson Controls contained a valid and properly executed Bid Bond (see copy attached).

Based on the above, as Chief Procurement Officer for Construction, I have determined that the bid submitted by Johnson Controls is the apparent lowest responsive bidder.

By letter of June 20, 1985, to the Chief Engineer, counsel for Honeywell raised an additional ground of protest: that Section 4.1.7. of Instructions to Bidders had been violated. This provision required that the person executing the bonds of

the surety attach a "current copy of his power of attorney. Mr. Jacobs executed Johnson's bid bond as attorney-in-fact on behalf of Johnson, obviously, since he was not the corporate insurance manager of Johnson at the time the bid was submitted, the power of attorney is not current."¹

Subsequent to Honeywell's questioning of the surety's bond and powers of attorney, the Chief Engineer inquired of Johnson Controls and its sureties whether they would honor these bonds and powers of attorney. By various letters the answers were affirmative: 1) letter of July 17, 1985, from Bridgeford, Manager of Corporate Risk, Johnson Controls, to McPherson stating that power of attorney to Jacobs "still in full force effect;" 2) letter of June 17, 1985, from Smith of Safeco Insurance Company to von Kolnitz (MUSC) stating that bid bond executed April 24, 1985, "still valid for the June 12th date;" 3) letter of June 21, 1985 from Ortbal of Safeco Insurance Company to McPherson stating that bid bond executed April 24, 1985, "remains in full force and effect;" 4) letter of June 27, 1985, from Bridgeford, Manager of Corporate Risk, Johnson Controls, to McPherson, stating "the Power of Attorney granted to David Jacobs is still in full force and effect."

Mr. Al Johnson, President of R. M. Crawford Co. of the South and an insurance broker with more than 30 years experience in the area of surety bonds, testified as to his

¹ By letter of June 25, counsel for Honeywell corrected its reference to the bid instructions, this quote reflects the corrected statement.

experience with bonds and powers of attorney in this business specialty. He stated that powers of attorney in this industry are valid until revoked or until the issuing authority requests their return. Surety companies, in his experience, operate in one of two ways with their clients. They may operate through insurance agents like himself granting them powers of attorney to bind the surety or they may operate without a middleman granting the power to bind them to an agent of the bidder. This latter was the method used by Johnson Controls. In either case, according to Mr. Johnson, it is the practice of the industry to give to its agents, whether the bidder's employee or an insurance agent, blank bonds and powers of attorney. These are used as needed until exhausted, revoked, or recalled.

DISCUSSION OF THE LAW

TIMELINESS OF APPEAL

The appeal of Honeywell has been timely made. Honeywell, as the apparent low bidder on April 24, 1985, had no grounds to make a protest as to the bonds, sureties and powers of attorney of the remaining bidders. It is axiomatic that the successful bidder does not have grounds on which to protest the bids of unsuccessful bidders. Having found itself at bid opening to be the lowest bidder, Honeywell had no reason to protest unless the owner disqualified it and found another bidder to be the lowest responsive and responsible bidder. Section 11-35-1520(10) S.C. Code Ann. (1984 Cum. Supp.)

COMPLIANCE WITH INSTRUCTIONS TO BIDDERS

The instructions to bidders allow submission of duplicate bids. It is not required. Johnson Controls submitted two copies, Honeywell only one. A blank bond, like a blank or missed sheet of paper in a copy, is not a defect rendering the bid incomplete when only one copy is required. This is a mere technicality and within the judgment of the Chief Engineer to determine waiver. The other copy had a signed bid bond. It indicated "the bidder's intention to be bound by the unsigned bid document." Reg. 19-445.2080(3)

The instructions to bidders required a "current" power of attorney and bond. The testimony was uncontroverted that powers of attorney and bonds are, in this area of business, valid until revoked or recalled.

There is no question that this power of attorney is "presently enforceable." This fact has been clearly established and was not questioned by the protestant. The State, in the instructions to bidders, has no interest in the newness or recency of an otherwise "presently enforceable" power of attorney. See, Naylor v. Gutteridge, 430 S.W. 2d 726, 733 (1968).

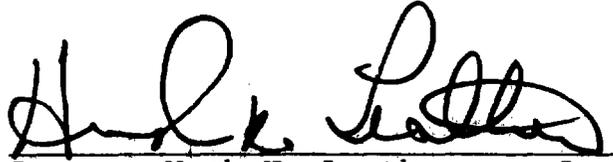
The relation of principal and agent can only be terminated by act or agreement of the parties to the agency or by operation of law. 3 Am. Jur. 2d "Agency", Section 44. In South Carolina, where agency is of no fixed duration, it may be ended by the principal at any time, but it requires an

affirmative act on the principal's part. See, e.g. Hancock v. Nat'l Council Jr. Order United Amer. Mechanics, 180 S.C. 518, 186 S.E. 538 (1936); Moore v. Pilot Life Ins. Co., 205 S.C. 474, 32 S.E. 2d 757 (1945); Fochtman v. Clanton's Auto Auction Sales, 233 S.C. 581, 106 S.E. 2d 272 (1954). Therefore, because no duration was set in the powers of attorney in question, and there has been no act by Safeco Insurance Company to sever the relationship communicated to the State, the power of attorney is still enforceable, and the age of the relationship has no bearing on the "currentness" of the power of attorney.

CONCLUSIONS OF LAW

- 1) This appeal was timely under the provisions of Chapter 35 of Title 11, S.C. Code Ann. (1976 & Cum. Supp.)
- 2) The Chief Engineer properly exercised his discretion to waive a minor irregularity in the form of a bid as submitted. Reg. 19-445. 2080, S.C. Code Ann. (1976 & Cum. Supp.)
- 3) The requirement of a current power of attorney in the bid instructions was properly interpreted by the Chief Engineer to mean presently valid and enforceable.

THEREFORE, the Panel affirms the decision of the Chief Engineer that Johnson Controls is the lowest responsive and responsible bidder on this project.



Senator Hugh K. Leatherman, Sr.
Chairman, South Carolina
Procurement Review Panel

10/23/85
Date