

STATE OF SOUTH CAROLINA)
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 COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
 PROCUREMENT REVIEW PANEL
 CASE NO. 1988-3

IN RE:)
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REVISOR RECONSIDERATION
 O R D E R

PROTEST OF ZUPAN AND SMITH SAND &
 CONCRETE COMPANY, INC.

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on April 7, 1988, pursuant to S. C. Code Ann. §§ 11-35-4210 and -4410(1976) on the protest of Zupan & Smith Sand and Concrete Co., Inc ("Zupan"). Present at the hearing were Mr. William Twitty, Jr., representing Zupan, Mr. Len Smith, representing Metromont, Mr. Jimmy Boleman, representing Clemson University, and Ms. Helen Zeigler, Esquire, representing the Division of General Services. Zupan protests the intent to award to Metromont Materials Corp. ("Metromont") a contract to supply all Clemson University's Ready Mix Concrete needs on the grounds that the South Carolina products preference is not applicable to the contract in question.

FINDINGS OF FACT

The facts are undisputed and are found by the Panel to be as follows:

1. Clemson University issued a solicitation for bids to provide all its needs for one year for three classes of Ready Mix concrete - 2500 PSI, 3000 PSI, and 3500 PSI.
2. Approximately ten vendors participated in the bidding process. All were from South Carolina.
3. When the bids were opened, Zupan was revealed to be the low bidder on the face of its bid.

4. Zupan did not complete an affidavit to claim the South Carolina products preference, even though it was included in the bid package, because Zupan did not believe that the preference applied to the contract in question.

5. The second low bidder, Metromont, did file the affidavit to claim the South Carolina product preference. Metromont did not list the lots on which it was claiming preference as is required by the affidavit.

6. Clemson University found the South Carolina products preference applicable and declared its intent to award the contract to Metromont, which became the low bidder after the preference was applied.

7. Clemson will use the concrete solicited for a variety of purposes including maintenance and repair of roads, patios and sidewalks, etc., and the making of manhole covers and crane weights. Clemson admitted that a large majority of the concrete would be used in the maintenance and repair area.

DISCUSSION AND

CONCLUSIONS OF LAW

Zupan claims that the affidavit for South Carolina product preference by its terms does not apply to the contract. The terms of the affidavit are taken from Reg. 19-446.1000, which provides:

Subsection D. Exceptions. This Regulation shall not apply:
(1) to any procurement of permanent improvements for real

estate, or, (2) to any prime contractor or subcontractor providing materials or services relating to permanent improvements on real estate, or, (3) to any solicitation, bid, offer, or procurement when the price of a single unit of the end-product is more than \$10,000, whether or not more than one unit is bid or offered

Zupan argues that the procurement of concrete is a "procurement of permanent improvements for real estate" or, at the very least, is a procurement of "materials or services relating to permanent improvements on real estate." Zupan also argues that the price of a single unit of the end-product in this case could exceed \$10,000, a unit being an entire allotment of a certain class of concrete for a certain end-product.

A "permanent improvement" is defined as "something, which is done to or put on land, and which the occupant cannot remove or carry away with him, either because it has become physically impossible, or because, in contemplation of law, it has been annexed to the soil and is therefore to be considered part of the freehold." Durham v. Davis, 101 S. E. 2d 278. An "improvement" generally includes "buildings, but may also include any permanent structure or other development, such as streets, sidewalks, sewers, utilities, etc." Black's Law Dictionary 682 (5th ed. 1979). Only the use of concrete as a crane weight in this case could possibly not relate to permanent improvements on real estate. The Panel takes notice that generally crane weights are fashioned from extra concrete rather than from concrete specifically ordered for that purpose. The testimony of Mr. Jimmy Boleman, Director of Purchasing for Clemson, indicated that use as a crane weight by Clemson would indeed be rare and,

in the Panel's opinion, probably incidental to the intended use of the concrete.

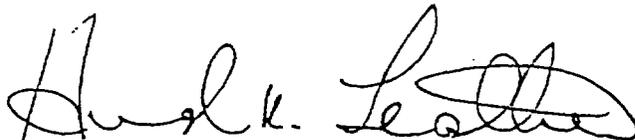
The Panel finds that the solicitation of concrete in this case relates to permanent improvements on real estate and, therefore, Zupan, as a prime contractor supplying materials or services relating to permanent improvements within the meaning of South Carolina products preference regulation, is exempt from coverage by the regulation. Because the product preference did not apply in this case, Zupan is the low bidder and is entitled to award of the contract.

Having found the second exception applicable, the Panel finds it unnecessary to address Zupan's remaining arguments. The Panel cautions that this decision is based on the facts in this case should not be construed to cover situations involving other materials or other conditions.

Finally, although it was not presented to the Panel for decision, the Panel questions whether the South Carolina product preference was meant to be applied against South Carolina products. See In the matter of : Honevwell, Inc. v. Materials Management Office, Order of Judge James C. Harrison, December 13 1983.

The March 10, 1988, Order of the Chief Procurement Officer is hereby reversed and the contract is awarded to Zupan & Smith Sand and Concrete Company, Inc.

IT IS SO ORDERED.



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

Columbia, South Carolina

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