

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1991-11

IN RE:)
PROTEST OF TRICON ASSOCIATES, INC.)
APPEAL BY BRANTLEY CONSTRUCTION) O R D E R
COMPANY, INC.)
_____)

This case came before the South Carolina Procurement Review Panel ("Panel") on the appeal by Brantley Construction Company, Inc., ("Brantley") of the May 1, 1991 decision by the Chief Procurement Officer declaring Brantley's bid nonresponsive.

Present and participating at the hearing before the Panel were Brantley, represented by its President, Sidney A. Brantley; Tricon Associates, Inc., ("Tricon"), represented by C. D. Hopkins, III, Esq.; the Citadel, represented by Dawes Cooke, Esq.; and the Division of General Services, represented by Helen Zeigler, Esquire.

FINDINGS OF FACT

In March, 1991, the Citadel solicited bids for repair of two of its student barracks. On April 17, the Citadel received 12 bids in response. (Record, pp. 14-15). The top three bidders were as follows:

<u>Bidder</u>	<u>Base Bid</u>	<u>Alt. 1</u>	<u>Alt. 2</u>	<u>Total</u>
Brantley	\$435,100	\$120,372	\$128,813	\$684,285
Monolith	374,000	197,133	132,933	704,066
Tricon	365,000	188,000	199,000	752,000

(Record, pp. 14-15). A portion of Alternates 1 and 2 required that the concrete structure of the barracks be rehabilitated by, among other methods, using an epoxy

injection technique. The subcontractors listed by the top three bidders for that portion of the work were as follows:

<u>Bidder</u>	<u>Alternate #1</u>	<u>Alternate #2</u>
Brantley	None	None
Monolith	Construction Adhesive Bonding	Construction Adhesive Bonding
Tricon	Palmetto Gunite	Construction Adhesive Bonding

(Record, pp. 16-17). All bidders except Brantley listed subcontractors for Alternates 1 and 2.

Prior to bidding, Brantley received a quote on the concrete repair work from Construction Adhesive Bonding. When Construction Adhesive Bonding eventually cut its quote in half, Brantley determined that the quote must be too high. Both quotes received were over the 2 1/2% threshold for listing subcontractors.¹

Brantley then made the decision to perform the work itself. Brantley contacted a supplier and received a quote on Prime Resins' materials for use in the epoxy injection portion of the work. (Defendant's Ex. #3). Based on this quote and Brantley's in-house estimate on the labor, Brantley included this portion of the work in its bid price and did not list any subcontractors for Alternates 1 and 2.

On April 18, the Citadel issued a Notice of Intent to Award the contract plus both alternates to Brantley.

¹Construction Adhesive Bonding's quotes to Tricon were \$126,544 plus overage on Alternate 1 and \$128,000, plus overage on Alternate 2. Tricon used Construction Adhesive's quote on Alternate 2 but went with Palmetto Gunite's quote of \$131,895 on Alternate 1.

(Record, p. 13). In a letter dated April 17, Tricon protested the bids of both Brantley and Monolith on the grounds that they failed to list a subcontractor for the concrete repair work as required by S.C. Code Ann. 11-35-3020(2)(b)(ii)(1976). (Record, p. 11). On May 2, Monolith withdrew its bid because of clerical error. (Record, p. 10).

Tricon also questioned the ability of Brantley to perform the concrete repair work itself. The IFB required that the epoxy applicator be a "company specializing in concrete repair with minimum three years documented experience and approved by the materials manufacturer." (Record, p. 21).

After the protest, the Citadel entered into discussions with Brantley concerning its ability to perform the concrete repair portion of the work. Brantley wrote the Citadel detailing its qualifications to perform concrete repair. (Record, pp. 30-50). Brantley admitted at the hearing before the Panel that it had no specific documentation of its concrete repair work, which was performed as part and parcel of its other general contracting functions on projects.

Brantley also offered that no prior certification or approval was necessary to use Prime Resins materials. (Defendant's Ex. #1). Brantley thus took the position that it met the IFB requirements for an experienced, approved applicator.

However, the Citadel determined that Prime Resins' material did not meet the specifications' compressive strength requirements, even though Prime Resins assured Brantley that it did. (Defendant's Ex. #1). Prime Resins' representative eventually concluded that the specifications were in error and that no product could meet the 16,000 lb. compressive strength requirement. (Defendant's Ex. #2).

Based on Prime Resins' failure to meet the requirements, the Citadel refused to allow Brantley to use its materials. It was eventually determined that E-POXY Industries, Inc., made an acceptable material. However, E-POXY Industries, Inc., would not approve Brantley as an applicator of its products until Brantley completed a seminar given by E-POXY. (Record, p. 26). The seminar included instruction on preparation and finishing an epoxy injection site.

Brantley and the Citadel then discussed the possibility that Brantley would use a subcontractor only for the actual epoxy injection portions of the contract.

In course, the Citadel notified Brantley that it was nonresponsive because it did not meet the requirements of the IFB for an approved applicator and because it failed to list a subcontractor. (Record, p. 92).

Brantley now proposes to perform preparation, clean-up, finishing and other support activities itself and to subcontract the inspection and actual injection work to others. In support, Brantley produced two quotes dated well

after bid opening from Terretec, Inc., for \$8000 and from Western Waterproofing Company for \$13,218. (Record, pp. 19 and Record Ex. #1). Both of these quotes is below the 2 1/2% threshold of \$17,107.² However, neither quote is firm but rather is conditioned on confirmation of the job site conditions. Neither quote mentions inspection services as included in the price.

Current budgetary considerations might make it impossible for the Citadel to award all of this contract (Alternates 1 and 2) to any contractor.

CONCLUSIONS OF LAW

The issue presented to the Panel is whether Brantley should have listed a subcontractor for Alternates 1 and 2 to perform the concrete repair work under 11-35-3020(2)(b)(ii), which requires:

(i) Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction, and who will specifically fabricate and install a portion of the work in an amount that exceeds [2 1/2% of prime contractor's bid].

(ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's bid unresponsive.

²Brantley presented evidence that it received four quotes from applicators, all of which were below the threshold.

Brantley admits that it received a quote on the total concrete repair work prior to bidding and that this quote exceeded the threshold at which listing is required. Brantley, however, determined that the quote was too high and decided prior to bidding to perform the work itself. This is permissible under the Procurement Code, provided Brantley met all the requirements of the IFB for a qualified applicator.

Paragraph 1.05 of the bid specifications requires that the applicator company specialize in concrete repair with a minimum of three years documented experience and approval of the materials manufacturer. (Record, p. 21).

Unfortunately, Brantley determined it met these requirements based on assurances given by its materials supplier that its product met IFB specifications and that no approval was needed for use of its product. When, prior to award but after bid opening, it was discovered that the material Brantley selected did not meet strength specifications, not only did the material become disqualified, so did Brantley. This is because Brantley is not approved to use the substitute material which now must be used in order to meet bid requirements.

Therefore, at the time of bidding, Brantley (despite its belief to the contrary) was not qualified to perform the work with its own forces. Because Brantley itself was not qualified, it was required to list a qualified subcontractor to perform that work. This Brantley did not do.

Further, Brantley may not escape the listing requirement by now proposing to perform most of the work itself and subcontract out the portion of the work for which it is unqualified.

The Panel's earlier decision in In re: Protest of J.A. Metze & Sons, Inc., Case No. 1987-8, is controlling in this regard. In Metze, the Panel noted:

In Logan the [Supreme C]ourt stated "[i]t is irrelevant that the bidder may have had plans to gather additional bids in the future in such manner that, according to its in-house estimate, the subcontractor's bids would not have exceeded the threshold amount." Following this reasoning, the Panel expressly concludes that it is irrelevant that Carolina knew or thought it knew, that the folding door could be obtained elsewhere for under the threshold. The record indicates that Carolina did not in fact have a separate quote on the folding door. . . . If a general contractor may rely on a portion of a quote that brings that quote below the threshold for listing subcontractors . . . , this Code provision and the policies embodied therein would be meaningless. Logan requires that general contractors must have all the subcontractors quotes in hand, either verbal or oral, that are necessary to establish that the requirements of 11-35-3020 have been met.

Decisions of the South Carolina Procurement Review Panel, 1982-1988, pp. 388-389.

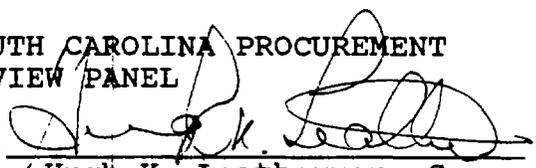
Metze and Logan require that Brantley have in hand, prior to bidding, quotes from subcontractors sufficient to indicate that it is not required by section -3020 to list those subcontractors. The evidence in this case is that Brantley did not decide to subcontract the job until after

bid opening on April 17 and did not obtain quotes until May 2.³

For the reasons stated above, the Panel finds that the bid of Brantley Construction Company is unresponsive for failure to list a subcontractor in accordance with S.C. Code Ann. § 11-35-3020(2)(b)(ii)(1976). The May 13, 1991, decision of the Chief Procurement Officer is affirmed. The Panel orders that award be made to the next low responsive and responsible bidder, as the Citadel determines its budget permits.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
May 31, 1991

³As noted earlier, the quotes Brantley eventually obtained, although below the threshold, are conditioned on job site inspection and do not, on their faces, include inspection services.