STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1991-17

In re:

Protests of Harbert Construction Company/ Primesouth, Inc., a Joint Venture; Batson-Cook of Atlanta, Inc.; MKK Technologies, Inc./Northstar Construction, Inc., a Joint Venture for Construction; and Pizzagalli Construction Company

Appeals by Harbert/Primesouth, Batson-Cook, MKK/ Northstar, Pizzagalli and the South Carolina Department of Corrections

O R D E R

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on August 28, 1991, on the various appeals of the parties from a decision by the Chief Procurement Officer ("CPO") declaring nonresponsive all of the bids on a contract to construct the Lee County Correctional Institute for the South Carolina Department of Corrections ("Corrections").

Present at the hearing before the Panel were Harbert/Primesouth, represented by Thomas B. Jackson, III, Esq.; Batson-Cook, represented by Herbert W. Hamilton, Esq.; Pizzagalli, represented by Franklin L. Elmore, Esq.; the Department of Corrections, represented Larry C. Batson, Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire. MKK/Northstar was not present but submitted a brief in support of its position by its attorney, Frank E. Riggs, Esquire.

FINDINGS OF FACT

The parties stipulated to the findings of fact, as set forth in the August 8, 1991 decision of the CPO. The facts relevant to the issue before the Panel are summarized below:

1. The South Carolina Department of Corrections solicited bids on June 19, 1991 for the Lee Correctional Institute - Phase II Construction. Bids were solicited in accordance with Section 11-35-3020 of the S. C. Consolidated Procurement Code and S. C. Budget and Control Board Regulations.[1]

2. Bids were received and opened on July 23, 1991, with the following results:

Bidder	Base Bid	Alt. 1	Alt. 2	Alt. 3
MKK/Northstar	$27,727,503	$537,000	$2,048,000	$4,000,000
Harbert/Prime-south	28,393,000	373,000	2,083,000	4,183,000
Pizzagalli	28,531,333	428,750	2,400,000	4,733,000
Batson-Cook	28,850,000	511,000	2,294,000	4,562,000
AMCA	28,987,000	445,000	2,320,000	4,635,000
Metric	29,100,000	421,000	2,400,000	4,800,000

(Record, p. 21).

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[1]This is the second attempt by the Department of Corrections to solicit bids on this project. Rebidding came about as a result of the Panel's decision in Case No. 1991-8 and 1991-9 (consolidated), In re: Protests of Pizzagalli Construction Company, etc., issued June 3, 1991.

Prime Bidder	Listed Sprinkler Subcontractor
MKK/Northstar	Superior Fire Protection, Jackson, TN
Harbert/Primesouth	Central Fire Protection, Conyers, GA
Pizzagalli	Atlantic Sprinkler, Hilton Head, SC
Batson-Cook	Central Fire Protection, Conyers, GA
AMCA	Central Fire Protection, Conyers, GA
Metric	Atlantic Sprinkler, Hilton Head, SC

11. Superior Fire Protection, the sprinkler subcontractor listed by MKK/Northstar in its bid, was not a licensed sprinkler subcontractor in South Carolina at the time of bidding.

12. None of the prime bidders included a copy of a fire protection sprinkler contractor's license in its bid.[2]

At the hearing before the Panel, the parties stipulated to the additional fact that, with the exception of Superior Fire Protection, listed by MKK/Northstar, all of the fire protection sprinkler subcontractors listed were licensed in South Carolina at the time of bidding.

CONCLUSIONS OF LAW

The only issue before the Panel is interpretation and application of S. C. Code Ann. § 23-45-130 (Cum. Supp. 1990) and the accompanying regulation of the South Carolina Licensing Board for Contractors, Reg. 29-95.

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[2]Apparently, even though Reg. 29-95 mandates it, the State failed to require in the Invitation for Bids that a copy of the sprinkler contractor's license be attached to bids.

The Certified Bid Tabulation Form indicates that MKK/ Northstar's bid was declared nonresponsive "for failure to list a S. C. licensed sprinkler subcontractor." (Record, p. 21).

4. The Department of Corrections issued a Notice of Intent to Award dated July 24, 1991, indicating its intent to award the base contract plus Alternates 1 and 3 to Harbert/Primesouth for a total price of $32,949,000.00. (Record, p. 41).

5. On July 24, 1991, Batson-Cook formally protested the bids of MKK/Northstar, Harbert/Primesouth and Pizzagalli. In a letter dated July 26, 1991, Batson-Cook added an issue to its protest against Pizzagalli. (Record, pp. 38-39).

6. On August 1, 1991, Harbert/Primesouth protested the bids of Pizzagalli, Batson-Cook, Metric and AMCA. (Record, p. 34).

7. On August 2, 1991, MKK/Northstar protested the issuance of the Notice of Intent to Award to Harbert/ Primesouth. (Record, p. 33).

8. Also on August 2, 1991, Pizzagalli protested the bids of MKK/Northstar and Harbert/Primesouth.

9. The specifications for this project require installation of sprinkler systems in all buildings.

10. The prime bidders listed the following fire protection sprinkler subcontractors who would perform work on the project:

Section 23-45-130 provides:

> This chapter applies to any fire protection sprinkler contractor performing work for any municipality, county, or the State. Officials of any municipality, county or the State are required to determine compliance with this chapter before awarding any contracts for the planning, sale, installation, repair, alteration, addition, or inspection of a fire protection sprinkler system, water spray, or water foam system. Bids must be accompanied by a copy of a valid sprinkler contractor's license.

(Emphasis added). Regulation 29-95, entitled, "Contract Bids, Awards", which became effective May 24, 1991, provides:

> (A) This chapter applies to any fire protection sprinkler work to be performed for a municipality, county or the State. Officials of any municipality, county or the State accepting bids for the planning, sale, installation, repair, alteration, addition or inspection of a fire protection sprinkler system, water spray or water foam system must require a copy of a valid sprinkler contractor's license to accompany any bid. Bids to municipalities, counties or the State not accompanied by a copy of a valid sprinkler contractor's license are in violation of this Act and must be returned to the bidders as nonresponsive.
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> (B) Officials of any municipality, county or the State are required to determine compliance with this chapter before awarding any contracts for the planning, sale, installation, repair, alteration, addition or inspection of a fire protection sprinkler system, water spray or water foam system.

(Emphasis added).

As noted above, none of the prime bidders in this case attached a copy of the South Carolina license of the

sprinkler subcontractor listed in its bid.[3] The CPO concluded that Reg. 29-95 mandates the return and rejection of all such bids as nonresponsive.

Harbert/Primesouth and Corrections appeal the CPO's determination, arguing that §23-45-130 and Regulation 29-95, by their terms, do not apply in this case or, in the alternative, that the requirements of these sections should be construed to follow the spirit rather than the letter of the law. Finally, both Harbert/Primesouth and Corrections contend that the failure to attach a copy of a sprinkler contractor's license is a minor informality which can be cured under Procurement Reg. 19-445.2080.

Harbert/Primesouth and Corrections' first argument is that §23-45-130, by its terms, applies to "any fire protection sprinkler contractor performing work for . . . the State" and the term "contractor" refers only to a person contracting directly with the State. They contend that the law does not apply to this situation, in which a subcontractor is performing fire protection work for a general contractor, who in turn contracts with the State.

General Services and the remainder of the appellants counter that the General Assembly intended to cover both general contractors and subcontractors performing fire

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[3]S. C. Code Ann. §11-35-3020(2)(b)(1986) requires the listing of all subcontractors who will perform work in excess of 1 1/2% of the prime contractor's total bid, if the bid is over $5 Million.

protection work on a state project, as evidenced by Reg. 29-95, which applies to "any fire protection sprinkler work to be performed for . . . the State." (Emphasis added). They argue that both § 23-45-130 and Reg. 29-95 require state bidding officials to determine compliance with the licensing law to ensure that public safety is not compromised by shoddy fire protection work by unqualified contractors in public buildings. (§23-45-20). If the State is expected to enforce compliance, they contend, then licenses must be submitted to the State whenever fire protection work is to be performed on public buildings, regardless of whether the work is by a general contractor working directly for the State or by a subcontractor working for a general employed by the State.

The Panel agrees with General Services. Section 23-45-50 makes it unlawful for any person to engage in performing fire protection sprinkler work unless licensed by the South Carolina Licensing Board for Contractors. It does not matter whether the person engaging in the work is acting as a general contractor or as a subcontractor; a license is required.

Further, review of the entire sprinkler contractor's law reveals that the responsibility for protecting the public from unqualified sprinkler contractors falls on public officials and that a copy of a license is the means selected by the General Assembly as proof of compliance. For example, under § 23-35-110, a person desiring to perform

sprinkler work for a private entity anywhere in South Carolina must submit a copy of his license to the local building official before a building permit may be issued. The submission of the copy of the license is deemed the only proof of competency to perform.

And even though local and state officials may otherwise regulate the quality and character of work performed by contractors by requiring permits, fees or inspections, "the official authorized to issue building or other related permits shall ascertain that the fire protection sprinkler contractor is licensed by requiring evidence of a valid sprinkler contractor's license." §23-45-120.

The Panel believes that the General Assembly intended that § 23-45-130 and Reg. 29-95 apply when any sprinkler work is to be performed for the State, whether by a general contractor or a subcontractor. Therefore, all of the prime bidders were required by the intent and the letter of the law in this case to attach copies of the licenses of their sprinkler subcontractors to their bids.

Harbert/Primesouth and Corrections argue in the alternative that, even if §23-45-130 and Reg. 29-95 technically apply, the spirit of the law is not served by application in this particular case. They contend that the purpose of the law is to prevent unlicensed contractors from performing work for the public and it is undisputed that all but MKK/Northstar's sprinkler subcontractor were licensed in South Carolina at the time of bidding. Further, since none

of the bidders attached a copy of the license, there is no prejudice in ignoring the technical requirements of the law and allowing all of them to supplement their bids with copies of the licenses at this time.

As support for this argument, Harbert/Primesouth and Corrections cite the line of cases which follow the rule that, "courts are not always confined to the literal meaning of a statute; the real purpose and intent of the lawmakers will prevail over the literal import of words." S.C. Department of Social Services v. Forrester, 320 S.E.2d 39 (S. C. App. 1984).

Whatever the many and good policy reasons for not rejecting all of the bids in this case, the Panel does not believe that it can ignore the clear mandate of the General Assembly that "bids . . . not accompanied by a copy of a valid sprinkler contractors license are in violation of this Act and must be returned to the bidders as nonresponsive." Reg. 29-95. The Panel sees no way to "construe" this language other than as literally written.

Harbert/Primesouth and the Department argue finally that Reg. 19-445.2080 of the Procurement Code permits the bidders to cure the failure to attach sprinkler subcontractors' licenses as a minor informality or technicality. Reg. 19-445.2080 allows a "matter of form or some immaterial variation from the exact requirements of the invitation for bids" to be cured or waived if there is no effect on price, quality, quantity or delivery of

performance. The Panel has consistently held in the past that, if the law itself makes the failure to do something nonresponsive, then it cannot be cured as a minor irregularity. See In re: Protest of Brown and Martin Company, Case No. 1983-4, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 57. As noted earlier, the Panel cannot overrule the express wishes of the General Assembly.[4]

For the reasons stated above, the Panel affirms the August 8, 1991, decision of the Chief Procurement Officer rejecting all bids as nonresponsive for failure to comply with §23-45-130 and Reg. 29-95.

The Panel's decision today moots the remaining issues raised in the various protests of the parties. The Panel, therefore, dismisses those protests and directs the Department of Corrections to rebid the contract in question.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: _____
Gus J. Roberts
Acting Chairman

Columbia, S.C.
August 30, 1991

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[4]Although it cannot overrule the General Assembly's mandate, the Panel agrees with Harbert/Primesouth and the Department of Corrections that the result in this case is not desirable and that revision of Reg. 29-95 to harmonize with Reg. 19-445-2080 is warranted.