

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

IN RE:)
)
PROTEST OF PIZZAGALLI CONSTRUCTION)
COMPANY - PRIMESOUTH, INC. and)
HARBERT INTERNATIONAL, INC.,)
Appellants.)

CASE NO. 1991-8

IN RE:)
)
PROTEST OF PRIMESOUTH, INC., -)
HARBERT INTERNATIONAL, INC.,)
PIZZAGALLI CONSTRUCTION COMPANY,)
and PRIMESOUTH, INC., Appellants.)

CASE NO. 1991-9
(Consolidated)

O R D E R

These cases came before the South Carolina Procurement Review Panel ("Panel) for hearing on May 28, 1991, on the appeals by the various parties from the April 22, 1991, and the May 9, 1991, decisions of the Chief Procurement Officer ("CPO") holding all but one of the bidders on the Lee Correctional Institute project - Phase II - nonresponsive to the requirements of the Invitation for Bids ("IFB").

Present and participating at the hearing were Harbert International, Inc. ("Harbert"), represented by Bryan F. Hickey, Esq., and Daniel T. Brailsford, Esq.; Primesouth, Inc. ("Primesouth"), represented by Thomas B. Jackson, III, Esq.; Pizzagalli Construction Company, represented by L. Franklin Elmore, Esq., and William A. Fead, Esq.; the South Carolina Department of Corrections ("Department"), represented by Larry C. Batson, Esq.; and the Division of General Services, ("General Services"), represented by Helen Zeigler, Esquire.

The Panel consolidated these two cases because they contain identical parties and common facts. The various issues were raised, heard and disposed of separately at the hearing before the Panel and the determinations are recorded in logical sequence below.

I. Unlicensed Subcontractor Issue

FINDINGS OF FACT

Prior to the hearing, the parties stipulated the following facts (with minor correction) as found by the CPO in his April 22, 1991, decision:

- "1. The South Carolina Department of Corrections solicited bids on February 13, 1991, in the S. C. Business Opportunities for Lee Correctional Institute - Phase II construction. Project 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.
2. A mandatory pre-bid conference was held on February 27, 1991.
3. Bids were received on March 28, 1991, from 11 bidders, including Harbert Construction Corporation [sic]¹, PrimeSouth, Inc., and Pizzagalli Construction Company.
4. The certified bid tabulation shows PrimeSouth as having the lowest base price bid, with Harbert the next low base

¹The actual bidder was Harbert Construction Company, a division of the appellant Harbert International, Inc. (See, Record, Vol I., p. 205).

bid price and Pizzagalli the next low base bid price after Harbert. This does not include alternates.

5. Harbert, PrimeSouth and two other bidders listed the name of CNF Construction, Inc. (CNF) of Mooresville, N.C. as one of the subcontractors in their bids.

6. In a letter dated April 4, 1991, to Harbert, CNF withdrew its subcontracting bid for the mechanical portion of the Lee Correctional Institution.

7. In a letter dated April 4, 1991, to Architectural Engineering Associates, Inc. (AEA) [the project engineer], Harbert stated that it learned on April 2, 1991, that CNF did not have a South Carolina license at the time of bidding. Harbert requested that W. O. Blackstone be substituted for CNF as the mechanical subcontractor.

8. In a letter dated April 4, 1991, to AEA, PrimeSouth stated that "we have rejected the bid" of CNF "because they do not hold a S. C. Mechanical license" It also stated that it had substituted Cullum Mechanical Construction, Inc. as the mechanical subcontractor.

9. In a letter dated April 4, 1991, to the [Department of Corrections] and the State Engineer's Office, Pizzagalli protested the consideration of Harbert's and PrimeSouth's bid for a contract award.

10. A Notice of Intent to Award was mailed on April 5, 1991, indicating the intent to award the contract to Harbert, including Alternates C1, C6, C11 and C15.

11. A comparison of the bid prices for the three lowest bidders is as follows. Harbert is the lowest bidder with the selected alternates.

<u>Bidder</u>	<u>Base Bid</u>	<u>Base Bid Plus Selected Alternate</u>
Harbert	\$27,693,000	\$32,260,000
PrimeSouth	27,589,000	32,757,000
Pizzagalli	29,058,000	34,170,000

12. In a letter dated April 5, 1991, to the [Department of Corrections] and the State Engineer's Office, Pizzagalli presented additional information concerning its protest.

13. By letter dated April 5, 1991, to [the Department of Corrections] AEA transmitted the above mentioned April 4, 1991, letters from Harbert and PrimeSouth concerning the subcontractor substitution. AEA recommended the mechanical subcontractor substitution as contained in the Harbert and PrimeSouth letters.

14. A hearing was held [by the CPO] at 1201 Main Street, Columbia, S.C. on April 11, 1991."

In addition to the above facts, the Panel makes the following findings based on the evidence presented at the hearing before it on this issue:

1. As a result of an investigation, the South Carolina State Licensing Board for contractors determined that CNF had not been licensed in South Carolina since 1989.

2. The amount of work which CNF proposed to perform on the Lee Correctional project is well in excess of \$17,500, the limit above which a license is required.

3. The State Licensing Board has informed Harbert and Primesouth that neither may utilize CNF as a subcontractor on the Lee Correctional project and that the only way either may proceed on the project without violating the Board's requirements is to substitute a S. C. licensed subcontractor in CNF's place.

4. The State Licensing Board has no requirement that subcontractors be listed in bids by general contractors.

5. The State Licensing Board has accepted Harbert's and Primesouth's explanation for listing CNF and intends no further action against them.

6. The State Licensing Board makes available to the public a roster of licensed contractors and subcontractors. This roster is subject to change on a daily basis. The Board will also respond to telephone inquiry on whether a contractor is licensed. If the number of contractors questioned is small, one or two, the response is immediate. If the number of contractors is larger, the Board will gather the information and relay it within several hours to a day. The Board attempts to assist general contractors who have a bidding deadline.

7. Prior to listing CNF, Harbert discussed the bid with CNF for at least a week prior to bid opening. CNF did not communicate its final price to Harbert until ten minutes before bid opening. CNF told both Harbert and PrimeSouth that it was licensed in South Carolina and provided a license number. Harbert did not have a roster of licensed

contractors available; Primesouth did. Neither Harbert nor Primesouth verified CNF's status with the State Licensing Board.

8. Eight of the eleven general contractors bidding the Lee Correctional project listed subcontractors not licensed in South Carolina.

9. Before recommending issuance of the Notice of Intent to Award to Harbert, the project engineer consulted with the State Licensing Board and the State Engineer's office on the unlicensed subcontractor issue. He did not seek legal opinions from any source.

10. The Department of Corrections also sought advice from the State Engineer's office with regard to the Notice of Intent to Award.

11. Harbert consulted both the State Licensing Board, the project engineer and the Department of Corrections prior to requesting substitution of CNF.

CONCLUSIONS OF LAW

Pizzagalli protests the State's consideration of the bids of Harbert and Primesouth on the grounds that the bids are unresponsive for failure to list a mechanical subcontractor licensed in South Carolina. Pizzagalli further argues that neither Harbert nor Primesouth may cure the nonresponsiveness by substituting a licensed subcontractor.

The section of the Procurement Code in question provides:

In lieu of § 11-35-1520(7), the following provision shall apply. Bids shall be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The using agency's invitation for bids shall set forth all requirements of the bid including but not limited to the following:

(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 [1 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.

S. C. Code Ann. §11-35-3020(2)(b)(1976).

Section 11-35-1410(7) defines a "responsive bidder" as "a person who has submitted a bid which conforms in all material aspects to the invitation for bids." The Invitation for Bids provides in Article 5.2.2 that, "Bids shall be rejected for the following, but not limited to:...

(.4) Failure to list subcontractors as required by law."

Pizzagalli argues that both Harbert and Primesouth are not responsive because listing CNF, an unlicensed subcontractor, is tantamount to listing no subcontractor, which is a violation of §11-35-3020(2)(b) (ii) and the Invitation for Bids. Harbert and Primesouth argue that section -3020 contains no licensing requirement and that

they are responsive because each filled in the name of CNF on its bid listing sheet.

The Panel agrees with Pizzagalli. Section 11-35-3020 requires that a general contractor bidding on the Lee Correctional project list all subcontractors who will perform work on the project in an amount greater than 1 1/2% of its total bid.

Section 40-11-100 of the contractor's licensing law provides: "It shall be unlawful for any person coming within the definition contained in §40-11-10 to engage or offer to engage in general or mechanical contracting in this State without having first obtained a license as required by this chapter" (Emphasis added).² CNF violated the law when it bid on the Lee Correctional project and it would have violated the law if it actually performed work on the project.

In listing CNF, Harbert and Primesouth listed a subcontractor who lawfully could not "perform work or render service to the prime contractor to or about the construction". Section -3020 requires listing of one who will perform work. Therefore, Harbert and Primesouth have failed to list a mechanical subcontractor in accordance with

²It is not disputed that CNF fits the definition of "mechanical subcontractor" found in §40-11-10(2).

the Procurement Code. Under § 11-35-3020(2)(b)(iii), their bids are not responsive.³

Harbert and Primesouth's lack of bad faith in listing CNF is of no consequence. In Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146 (1986), the South Carolina Supreme Court upheld the Panel's decision that "Logan negligently or intentionally failed to list subcontractors in accordance with S.C. Code Ann. § 11-35-3020 (1976, as amended) and that, therefore, Logan's bid was nonresponsive." 351 S.E.2d, at 147 (Emphasis added).⁴

Harbert and PrimeSouth further argue that, even if they are nonresponsive, they can cure their deficient bids by withdrawing CNF and substituting contractors who are licensed in South Carolina. As applicable law they cite:

No prime contractor whose bid is accepted shall substitute any person as subcontractor

³See, In re: Protest of ECB Construction Company, Inc., Case No. 1989-7, in which the Panel held that a bidder who listed a roofing contractor who was not authorized to install the type of roof specified was nonresponsive because § 11-35-3020(b)(ii) requires listing of all subcontractors who will perform work valued at over a certain amount. An unqualified subcontractor will not be performing the work and, therefore, listing an unqualified subcontractor is the same as not listing any subcontractor.

⁴Although it is not determinative, the Panel notes that Harbert dealt with CNF for one week prior to listing it as a subcontractor. Given the testimony of the Executive Director of the State Licensing Board that his office stands ready to assist contractors by telephone, it is not unreasonable to assume that, during that time, Harbert had at its disposal the means to determine whether CNF was indeed licensed. Primesouth also had a copy of the roster of licensed contractors. Although the information included on the roster changes daily, CNF had not been licensed since 1989, some two years prior to the bidding in this case.

in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown."

(Emphasis added). Section § 11-35-3020(2)(b)(iii)(1976). Harbert and Primesouth argue that this section allows them to substitute a contractor for CNF because they have shown "good cause" and because the Department, as awarding authority, has approved the substitution.

The Panel rejected this argument in In re: Protest of ECB Construction Company, Inc., Case No. 1989-7, and finds no compelling reason to overturn that decision now. In that case, the Panel held that the substitution section cannot be used by a contractor who fails to properly list a subcontractor because it applies only when a bid has been accepted. ECB interprets "accepted" as used in §11-35-3020(2)(b)(iii) to mean "awarded." Under the Procurement Code and regulations, the State cannot award a contract to a nonresponsive bidder. See S. C. Code Ann. § 11-35-1520(10) (1990 Cum.Supp.) and Regulation 19-445.2070.

Harbert and Primesouth argue against interpreting the word "accepted" to mean "awarded." They urge that "accepted" in this instance is synonymous with "received and considered." Thus, in this case, Harbert and Primesouth's bids were received and read aloud at bid opening and listed

on the bid tabulation prior to discovery by the State of the unlicensed subcontractor problem.⁵

A review of the bidding procedure as a whole and recognition of the purpose of the subcontractor listing section compels rejection of this argument.

Section §11-35-1520(8), which is applicable to construction procurements, states:

Correction or Withdrawal of Bids; Cancellation of Awards. Correction or withdrawal of inadvertently erroneous bids before opening, withdrawal of inadvertently erroneous bids after award, or cancellation of awards or contracts based on such bid mistakes, may be permitted in accordance with regulations promulgated by the board. After bid opening no changes in bid prices or other provisions of bids prejudicial to the interest of the State or of fair competition shall be permitted. (Emphasis added).

⁵Harbert was actually issued a Notice of Intent to Award in its favor on April 5. However, this was after CNF had withdrawn its illegal bid and the project engineer had approved substitution of a licensed subcontractor. Harbert, therefore, may not rely on this Notice as evidence of its acceptance. For purposes of section -3020(2)(b)(iii), acceptance must occur before substitution is allowed.

Likewise, Harbert may not claim responsiveness or acceptance based on its being sent a copy of the certified bid tabulation pursuant to §11-35-3020(2)(b)(iv), which requires that all "responsive bidders be sent such copies. This section does not prohibit the State from sending nonresponsive bidders, such as Harbert, copies of the bid tabulation as well.

Under this section, no corrections or changes may be made to a bid after bid opening if they are prejudicial to fair competition or to the interests of the State.⁶

The subcontractor listing section has as its purpose the prevention of post-award bid shopping. Contractors must get quotes from subcontractors prior to bidding and must honor those quotes when, and if, awarded the contract. They may not use the fact of their award as a device to bargain the subcontractors down and thus deprive the State of savings and of knowing which contractors will be performing on the project.

Bid shopping is unfair to competition and often results in a loss of savings to the State.⁷ In light of its prohibition in §11-35-1520(8) against correction after bid opening which prejudices fair competition, the General Assembly could not have intended the substitution section to

⁶This is consistent with Regulation 19-445.2080, which allows correction of minor informalities or irregularities if such correction does not affect the relative standing of, or otherwise prejudice the other bidders and where it is advantageous to the State. The Panel has previously held in In re: Protest of Brown and Martin Company, Inc., Case No. 1983-4, that failure to list a subcontractor cannot be cured as a minor informality under Reg. 19-445.2080.

⁷See Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146 (1986). There is undeniable appeal to Harbert's argument that discarding its low bid costs the State money. However, as the Panel has noted before, this cost must be weighed against the need to maintain integrity and consistency in the procurement process. In re: Protest of National Computer Systems, Case No. 1989-13.

be as broad an exception as urged by Harbert and Primesouth.

As stated by the Panel in ECB Construction:

It would defeat this purpose [prevention of bid shopping] if a contractor could list any subcontractor, even an unqualified one, and get relief from its "mistake" by substituting another subcontractor In that case the contractor . . . would still be in a position to bargain with subcontractors after receipt of the contract and the State would still not know at the time the contract is awarded just who is going to be on the job.

Case No. 1989-7, at page 6.

Under the Panel's interpretation of § -3020(2)(b)(iii), a bidder must meet all requirements of the IFB, that is, be responsive and responsible, before the State may accept his bid, if low, and award him the contract. If a change in conditions occurs thereafter, such as a named subcontractor dies or refuses or becomes financially unable to continue performance, then substitution may be allowed for good cause shown and in the best interests of the State.

In this case, Harbert and Primesouth, however innocent, were not responsive in the first instance and the need for substitution was not caused by an unanticipated change in conditions. CNF was discernibly unlicensed at the time of bidding. The Panel does not believe that this case presents the proper facts to allow invocation of §11-35-3020(2)(b)(iii).

This conclusion is further bolstered by § 40-11-300 of the contractor licensing law which states:

It shall be a misdemeanor punishable in the discretion of the court for any architect, engineer, awarding authority, owner,

contractor or person acting therefor, to receive or consider any bids unless the bidder has first obtained the licenses provided for in this chapter

(Emphasis added). Under this section it was unlawful for Harbert and Primesouth to bid using CNF and it would be unlawful for the State to "receive and consider" such bids. Harbert and Primesouth cannot prevail in their interpretation of section -3020(2)(b)(iii) because the State would have to "accept", i.e., receive and consider, their bids listing CNF before substitution could be allowed. This acceptance would violate the contractor licensing law.

II. Responsiveness of Pizzagalli's Bid

In the second portion of the hearing, the Panel considered Primesouth's protest of Pizzagalli's bid for failure to respond to an alternate and for failure to list certain subcontractors. Prior to reaching the merits of Primesouth's protest, however, the Panel considered a challenge to Primesouth and Harbert's standing and to the timeliness of Primesouth's protest. Those issues are discussed in order below.

A. Standing of Harbert

CONCLUSIONS OF LAW

Pizzagalli contends that, because Harbert did not file a protest of the responsiveness of Pizzagalli's bid before the CPO, Harbert should not participate in the hearing before the Panel on this issue. The Panel disagrees.

Harbert appeared at the hearing before the CPO and participated to a limited extent.⁸ Harbert timely filed an appeal of that decision to the Panel under §11-35-4210(5), which provides that "any person adversely affected by the decision" may request a review by the Panel. Harbert, as the apparent low bidder, is adversely affected by the CPO's decision to rebid the contract.

When the CPO decides in favor of the protestant, the one adversely affected is more often than not ~~is~~ one who did not protest. Thus, appeal to the Panel is not limited to protestants.

Under the facts of this case, the Panel holds that Harbert is properly before the Panel on the issue of the responsiveness of Pizzagalli's bid.

B. Standing of Primesouth

Pizzagalli additionally challenged Primesouth's standing to protest Pizzagalli's bid because Primesouth's own bid had been declared nonresponsive in Pizzagalli's protest, which was heard first by the CPO.

Section 11-35-4210(1) provides that, "Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or

⁸The parties are in disagreement over the extent of participation. At the very least, it appears that Harbert attended the hearing and that its counsel assisted Primesouth's counsel, either on or off the record, in presenting the protest.

award of a contract may protest to the appropriate chief procurement officer."

Pizzagalli argues that Primesouth is not aggrieved because whether or not Pizzagalli is unresponsive, Primesouth, who is also nonresponsive, cannot be awarded the contract. In support of its argument, Pizzagalli cites several cases from the federal procurement area which interpret standing as requiring a direct economic interest in the outcome of a protest.

Primesouth argues that it is aggrieved and has the requisite interest in the outcome of the protest because it attacks the top eight of the remaining nine bids below it and, as a remedy, asks for rebid of the contract, in which it may participate and eventually win.⁹ Pizzagalli counters that such broad interpretation of "aggrieved" opens the door for protests by any member of the public who may claim a future interest.

The Panel agrees that § 11-35-4210(1) is not broad enough to confer protest standing on members of the public at large. However, the Panel does not agree that it opens such a door by interpreting Primesouth's interest in obtaining rebid as conferring standing.

In addition to being "aggrieved", the person protesting must also be an "actual or prospective" bidder. In In re:

⁹At this stage of the proceedings, the CPO has declared ten of eleven bidders nonresponsive and has ordered such a rebid.

Protest of Laurens County Service Council for Senior Citizens, Case No. 1990-18, the Panel found that a person could be a "prospective bidder" on a solicitation only until bid opening. After that, one must have been an actual bidder in order to protest. Thus, members of the public or taxpayers who cannot or did not bid on a project have no standing to challenge it.

Further, the Panel is not willing to shut out legitimate protestants simply because of the timing of the protest hearings. In this case, Pizzagalli filed its challenge to Primesouth's bid and was heard. Prior to the CPO's order declaring Primesouth nonresponsive, Primesouth properly protested Pizzagalli's and eight other bids. Before Primesouth's protest could be heard, the CPO issued his decision declaring Primesouth nonresponsive.

Primesouth was not stripped of protestant status at the moment the CPO declared it nonresponsive. The Panel will not allow an alleged unresponsive bidder, such as Pizzagalli, to escape scrutiny because of the fortunate timing of a hearing or decision.¹⁰

The Panel finds that Primesouth, as an actual, aggrieved bidder on this project, has standing to bring a protest of Pizzagalli's bid.

¹⁰Indeed, under Pizzagalli's argument, it would no longer have standing to challenge Primesouth and Harbert's bids before the Panel since the CPO has now declared Pizzagalli nonresponsive as well.

C. Timeliness of Primesouth

Finally, as a preliminary matter, Pizzagalli alleges that Primesouth failed to timely file its protest of Pizzagalli's alleged failure to bid on Alternate C16. In addition to those findings already set forth above, the Panel makes the following findings.

FINDINGS OF FACT

1. Primesouth sent a representative to the March 28, 1991, bid opening. That representative made notes of the bids as read aloud and communicated his notes to officials at Primesouth.
2. Primesouth's representative's notes on Alternate C16 indicate that Pizzagalli responded "no bid" on that alternate. (Defendant Pizzagalli's Ex. #1).
3. The certified bid tabulation prepared by the project engineer and received by Primesouth on April 8, 1991, indicate that Pizzagalli bid "\$0.00" on Alternate C16. (Record, Vol. I, p. 342).
4. Pizzagalli's actual bid on Alternate C16 is "no bid received" and "N/A". (Record, Vol. I, p. 158).
5. The instructions to bidders state, "A dollar amount shall be stated for each Alternate. . . .Do not use the terms "Not Applicable," "N/A" or any designation other than dollars amounts." (Record, Vol I., p. 158).
6. At the bid opening, Primesouth was the apparent low bidder on the base bid. No selection of alternates was announced at bid opening.

7. Primesouth received the Notice of Intent to Award to Harbert as the low bidder on the base bid plus Alternates C1, C6, C11, and C15 on April 8, 1991. (Plaintiff Primesouth's Ex. #1).

8. On April 12, Primesouth asked to view all the bids of its competitors, including Pizzagalli. Primesouth viewed such bids on April 15.

9. Primesouth filed its protest of Pizzagalli's response to Alternate C16 on April 16, 1991.

CONCLUSIONS OF LAW

Section 11-35-4210(1) requires a protestant to file its protest in writing within "ten days after such aggrieved persons know or should have known of the facts giving rise thereto."

Pizzagalli contends that Primesouth knew or should have known that Pizzagalli bid "no bid received", "n/a" in violation of the instructions to bidders at the March 28 bid opening when the bids were read aloud. Thus, Pizzagalli argues, Primesouth's April 16 protest is not within the ten-day limit.

The Panel disagrees. It is not clear from the evidence exactly what was read aloud at the bid opening for Pizzagalli's response to C16. Primesouth's representative recorded, "no bid". The Department's representative recorded, "no bid received". The certified bid tabulation of the project engineer records, "\$0.00" as the response.

Only a review of the actual bid of Pizzagalli could have revealed that the response is "no bid received", "n/a".

The Panel does not believe that Primesouth knew that Pizzagalli violated the instructions to bidders to enter a dollar amount and not to bid "n/a" until it viewed the bid of Pizzagalli on April 15.

Even more importantly, in order to have standing to protest, that is, to be "aggrieved", Primesouth could not be the low bidder as it reasonably believed it was until the State selected the alternates it desired and sent the Notice of Intent to Award the contract to Harbert.¹¹ Primesouth received this Notice on April 8. It protested on April 16, well within the ten-day limit.

D. Responsiveness of Pizzagalli

Having determined that Primesouth may pursue its protest of Pizzagalli's bid, the Panel now turns to the merits of that protest. In addition to the findings of fact already set forth above, the Panel makes the following findings.

¹¹In In re: Protest of Honeywell, Inc., Case No. 1985-4, the Panel stated, "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." Decisions of the South Carolina Procurement Review Panel, 1982-1988, pp. 209-210.

FINDINGS OF FACT

1. Pizzagalli's base bid is \$29,058,000. One and one half percent of that amount is \$435,870. Pizzagalli's base bid plus the selected alternates is \$34,170,000. One and one half percent of that amount is \$512,550.
2. Pizzagalli did not list a subcontractor to perform the fire sprinkler work required by the contract as part of the base bid. (Record, Vol. I, p. 158 and p. 355).
3. Neither Pizzagalli nor its listed mechanical subcontractor Clontz-Garrison is licensed to perform fire protection sprinkler work in South Carolina. This license is required in order to perform sprinkler work on the Lee Correctional project. S. C. Code Ann. § 23-45-50 et seq. (1976, as amended).
4. Primesouth received various bids for the sprinkler work including \$508,706 from Superior Fire Protection (Record, Vol. II, p. 34); \$507,859 from Atlantic Sprinkler Systems (Record, Vol. II, p. 42); \$554,498 from Gwinnett Sprinkler Co., Inc. These quotes are for the base bid only.
5. With the chosen alternates added in, the quotes Primesouth received on the sprinkler system are as follows: \$616,288 from Superior Fire Protection (Record, Vol. II, p. 34); \$616,810 from Atlantic Sprinkler Systems (Record, Vol. II, p. 42); \$660,098 from Gwinnett (Record, Vol II, p. 47).
6. Pizzagalli did not list a subcontractor on Alternate C13, which covers precast modular cell units. (Record, p. 355).

7. The specifications listed certain precast fabricator qualifications - 2 years successful experience, sufficient production capacity to meet job without delay, and membership in the Prestressed Concrete Institute or participation in its Plant Certification program. (Record, Vol. II, p. 53). Seven manufacturers were preapproved by the State. (Record, Vol. II, p. 26). Pizzagalli was not one of them and did not request to be preapproved.

8. Primesouth's quote on the precast modular work and materials was \$2,628,440, from Tindall Concrete Products, Inc. (Record, Vol. II, p. 31).

9. Pizzagalli did not bid a dollar amount for Alternate C16 for the Carrier Chiller/Air Handler units.

10. Climatic Corporation, the local authorized Carrier dealer, refused to bid to Pizzagalli on the Lee Correctional project for the stated reason that Carrier does not and would not build the air handling unit specified. (Record, Vol. II, p. 56).

11. The project engineer called all the bidders, including Pizzagalli, prior to bid day and advised that there might be a problem getting a quote for the Carrier unit on Alternate C16. The project engineer told all bidders, including Pizzagalli, to bid only a dollar amount on all alternates, regardless of the failure to receive a quote.

12. All bidders except McDevitt Street and Pizzagalli bid a dollar amount for Alternate C16 in amounts ranging from \$100,000 to \$11,000,000. (Record, Vol. I, p. 342-343).

13. Both Harbert and Primesouth bid Alternate C16 based on quotes from subcontractors.

14. Pizzagalli did not notify the State prior to bid opening of its problems getting a quote on the Carrier unit.

15. Alternate C13 for the precast cell units and C16 for the Carrier air handling unit were not selected by the Department as part of the contract.

16. Prior to bidding, Primesouth and Harbert obtained quotations from all subcontractors it intended to use on the job without regard to dollar amount with the exception of certain miscellaneous items which were estimated using previous experience.

17. The instructions to bidders state: "Failure to bid an alternate shall render the prime contractor's bid unresponsive. . . . A dollar amount shall be stated for each Alternate. . . .Do not use the terms "Not Applicable," "N/A" or any designation other than dollars amounts." (Record, Vol. I, p. 158 and Record, Vol II, pp. 22-23).

18. The IFB provides that Bids shall be rejected for failure to list a subcontractor and failure to bid an alternate. (Record, Vol I., p. 28).

CONCLUSIONS OF LAW

Primesouth contends that Pizzagalli is nonresponsive because it failed to list a subcontractor to perform the fire sprinkler work under base bid "C" or to perform the precast concrete work under Alternate C13. Primesouth also contends that Pizzagalli is nonresponsive for failure to properly bid Alternate C16 concerning the Carrier air handling unit.

Section 11-35-3020(2)(b)(ii), discussed above, is applicable to the first two issues raised by Primesouth. That section requires a bidder to list any subcontractors who will be performing work on the project in an amount exceeding 1 1/2% of the bidder's total bid. In this case that amount for Pizzagalli is either \$435,870 or \$512,550, depending on whether the base bid or base bid plus selected alternates is used.¹²

Primesouth first claims that Pizzagalli should have, but did not, list a subcontractor to perform the fire protection sprinkler work. Primesouth demonstrated that the quotes it received on the sprinkler work, including labor and materials, exceeded the 1 1/2% threshold for Pizzagalli's bid. Primesouth also showed that neither Pizzagalli nor its listed mechanical subcontractor,

¹²Pizzagalli raised the question whether "total bid" as used in §11-35-3020(2)(b)(ii) means base bid or base bid plus alternates. It is not necessary to decide that question in this case, however, because all the relevant quotes introduced exceed either amount.

Clontz-Garrison, is licensed to perform sprinkler work in South Carolina.

The Panel finds that Primesouth has presented prima facie evidence that Pizzagalli was required to list a subcontractor for the sprinkler work.¹³ It was incumbent on Pizzagalli to demonstrate either that it received quotes for the total work under the threshold, or that it intended to perform the work itself or that it intended to perform a portion of the work itself and subcontract the rest in an amount less than the threshold.

In the latter instance, Pizzagalli is required to have in hand before bidding quotes from subcontractors indicating that the amount to be contracted is below the threshold. In Case No. 1987-8 J.A. Metze & Sons, Inc., the Panel found:

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

¹³The initial burden of proving that Pizzagalli failed to list a subcontractor in accordance with 11-35-3020(2)(b)(ii) is on the protestant. Once the protestant has made a prima facie showing that the amount of work exceeds the threshold and that no subcontractor is listed, the burden shifts to the bidder who is challenged to demonstrate a sufficient reason why no subcontractor was listed, eg., the contractor received quotes prior to bidding which fell below the threshold or the contractor intends, and is capable of, performing the work itself.

The Panel believes that this sharing of the burden is consistent with the general rule that the burden of evidence is imposed on the party best able to sustain it; so that the party having peculiar knowledge of a fact or control of the evidence on a particular issue has the burden of evidence as to it. Martin v. Southern Railway Co., 240 S.C. 460; 126 S.E.2d 365 (1962). To the extent that In re: Protest of J. A. Metze & Sons, Case No. 1987-8, states or implies otherwise, it is hereby overruled.

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, Case No. 1987-8, p. 388-389.

Because Pizzagalli did not list a subcontractor for the work and because it is not licensed to perform the labor itself, it can be assumed that Pizzagalli intends to subcontract at least some portion of the work.¹⁴ Pizzagalli did not demonstrate that it had the required quotes from all subcontractors it intended to use on the sprinkler work in hand before bid opening.¹⁵ Thus, Pizzagalli has not shown compliance with the subcontractor listing section. The

¹⁴According to the CPO's decision, Pizzagalli presented evidence at the hearing below indicating that its intent was to purchase the materials itself and subcontract the labor. (Record, Vol. II, pp. 13-14).

¹⁵The CPO found on evidence presented to him that Pizzagalli priced the materials prior to bid opening. Pizzagalli did not receive any estimates on the labor but instead relied on an in-house estimate. (Record, Vol. II, p. 14).

Panel finds that Pizzagalli is nonresponsive for failure to list a subcontractor on the fire sprinkler work.

Similarly, Primesouth contends that Pizzagalli failed to list a subcontractor for Alternate C13, which covers precast modular cell units. Primesouth's quote from Tindall Concrete Products exceeded \$2.6 Million, clearly in excess of the threshold. The IFB listed specific requirements for fabricators who were to furnish precast units, including two years experience and sufficient plant capacity. Pizzagalli was not one of the seven precast fabricators who were approved in the IFB.¹⁶

Again, the Panel believes that Primesouth has presented prima facie evidence that Pizzagalli should have listed a precast subcontractor. Pizzagalli did not demonstrate that it had the capacity to perform the work itself or that it had quotes from subcontractors below the threshold prior to bidding.¹⁷ Therefore, the Panel finds that Pizzagalli is nonresponsive for failure to comply with §11-35-3020(2)(b)(ii).

¹⁶The CPO found, based on testimony before him, that Pizzagalli does not have a precast manufacturing plant but it does have employees with more than 2 years experience in precast concrete and who have been involved in the Plant Certification program. Pizzagalli's precast experience was in the \$200,000 - \$500,000 range.

¹⁷The CPO found on the evidence presented to him that Pizzagalli did not meet the fabricator requirements and did have the ability to perform the precast work itself.

Finally, Primesouth contends that Pizzagalli violated the requirements of the IFB when it responded to Alternate C16 by stating, "no bid received" and "n/a". Primesouth cites numerous sections of the IFB which provide that failure to bid an alternate shall render the bid nonresponsive and that only dollar amounts for each alternate will be accepted. The IFB specifically prohibits "Not Applicable" and "N/A" as a response to an alternate. (See, Record, Vol. I, p. 158).

Pizzagalli concedes its response does not comply with the instructions to bid a dollar amount. However, Pizzagalli argues that it was unable to obtain a bid from Carrier and that it had no choice but to bid "no bid received". Pizzagalli cites S. C. Code Ann. §11-35-30(1976), which requires good faith and "honesty in fact" in the negotiation of a contract under the Procurement Code.

Based on the evidence it appears that Pizzagalli did have problems getting a quote on Alternate C16. However, the project engineer anticipated these problems and advised all bidders, including Pizzagalli, to bid a dollar amount regardless of the availability of a quote. All bidders but McDevitt Street and Pizzagalli responded with dollar amounts. One bidder quoted \$11,000,000 in an obvious effort to comply without obligating itself to provide an unavailable product.

Given that the State was aware of the problem and made the decision to require a dollar amount anyway, which decision it communicated to the bidders, the Panel cannot find that Pizzagalli would have breached its duty of good faith toward the State had it quoted a dollar amount in this instance. The IFB required dollar amounts and forbid "N/A" as a response. Pizzagalli was not responsive to the IFB when it bid otherwise.

Pizzagalli additionally argues that, even if it is nonresponsive on Alternates C13 and C16, that omission is a minor technicality under Reg. 19-445.2080 because neither alternate was selected as part of the contract. A minor informality is defined as "a matter of form or some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured" Reg. 19-445.2080.

The Panel does not agree that Pizzagalli's omissions are minor simply because the alternates were not ultimately selected by the State. The IFB in numerous places states that failure to bid an alternate or to bid a subcontractor renders the bid nonresponsive. The Manual for Planning and Execution of State Permanent Improvements also lists failure

to bid an alternate as a reason for mandatory rejection of a bid. (Record, Vol II, p. 21).¹⁸

The State had a right to insist that all alternates be responded to so that it could evaluate all of its options from each bidder. If bidders can pick and choose which alternates to bid, the State might not get the wide range of choices it is seeking and will thus be hindered in its search for the most economical alternates for a particular project.

Under these circumstances, the Panel is not prepared to say that Pizzagalli's failure to comply with the IFB's requirements concerning alternates is a minor informality under Reg. 19-445.2080 simply because the alternates were not selected.

CONCLUSION

The Panel today declares Harbert, Primesouth, and Pizzagalli nonresponsive to the requirements of the IFB. The CPO, in his May 9 decision, also declared seven of the remaining eight bidders nonresponsive. They did not appeal this decision to the Panel.

The only bid remaining unchallenged is that of AMCA International Construction Corporation. Its bid is some \$5 Million higher than the low bid. The Department testified

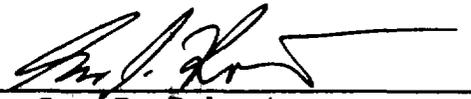
¹⁸ Although the mandatory nature of a requirement is not determinative on the question of whether it is a minor informality, it is evidence to be considered. See In re: Protest of National Computer Systems, Case No. 1990-13.

that its budget would not permit award in this amount. Therefore, the Department urges that it would be in the best interests of the State to cancel this solicitation and rebid the project. The Panel agrees.

For the reasons stated above, the Panel affirms the April 22 and May 9, 1991, decisions of the Chief Procurement Officer and orders that the solicitation be cancelled and the contract in question be rebid.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Gus J. Roberts
Acting Chairman

Columbia, S.C.

6-3-, 1991