



agreement. The agreed amounts of the Alternates are as follows:

Alternate No. 1:	\$ + 325,000.00
Alternate No. 2:	\$ + 175,000.00
Alternate No. 3:	\$ + 128,000.00
Alternate No. 6:	\$ + 285,000.00

DMH did not accept Alternates 1, 2, 3, or 6 within the 60 days as allowed by the Contract due to lack of funds.

Hay entered a contract (Subcontract) with Eldeco on October 28, 1993 for \$211,497.00, for the electrical work for the Project. (Record p. 111). Eldeco performed electrical work on the Project.

In a May 17, 1994, letter to Eldeco, Hay requested pricing on Alternates No. 1 and No. 2, since the time to accept the alternates had passed. On July 12, 1994, Eldeco provided a cost estimate for the electrical installation work which was priced per the latest edition of Means Electrical Cost Data (Means). In a July 12, 1994, letter to Eldeco, Hay stated that "...the Architect and Owner have a serious problem with your price increase of over 250% from the original Alternate bids." Hay also instructed Eldeco not to use Means to price the work and requested that it resubmit its pricing immediately. On July 15, 1994, Eldeco submitted an estimate which was generated by its in-house computer. The total for Alternate No. 1 was \$83,986.21 and \$10,177.71 for Alternate No. 2, which were close to the totals based on Means.

DMH instructed Hay to request pricing on the Alternates from other sources. Mancill Electric Company, Inc. (Mancill) quoted a price, based on Alternate No. 1 and Alternate No. 2, which was almost half of Eldeco's estimated price. In a July 29, 1994, letter to Hay, Mancill provided a "revised" bid of \$42,733.00 for this electrical installation which provided a deduct for \$2,640.00 for alternate fixtures and a deduct of \$1,527.00 to delete a conduit run to the telephone board. In a November 3, 1994, letter to Eldeco, Hay rejected the July

15, 1994, proposal and stated that DMH felt that Eldeco's prices were out of line for the work. Hay also stated that "as a result this change order work has been awarded to Mancill Electric."

In a November 18, 1994, letter to Hay, Eldeco claims that Hay has breached its agreement with Eldeco and that the "State Procurement Code" has been violated. In a November 23, 1994, letter to the CPO, Eldeco initiated a Resolution Proceeding on this contract controversy.

In a December 9, 1994, letter to Eldeco, Hay offered to cancel the Mancill subcontract and award the work to Eldeco, a total amount of \$43,733.00 less \$4,432.00, the value of work already performed by Mancill, resulting in a price of \$38,301.00. In a December 12, 1994, letter to Hay, Eldeco explained that Mancill's estimate was not detailed enough to evaluate and referred to Eldeco's estimate as very detailed, accurate and consistent with change order pricing. Eldeco further testified at the Panel hearing, that it could not evaluate Mancill's price estimate, as it was not sufficiently detailed, and neither Hay nor DMH contacted Eldeco to explain where on its detailed change order estimate, Eldeco was out of line.

The CPO conducted a hearing on January 11, 1995, and issued a decision on January 23, 1995. (Record p. 8-16). Eldeco appeals the CPO decision by letter dated February 2, 1995. (Record p. 3).

#### **CONCLUSIONS OF LAW**

Eldeco argues that the additional electrical work must be given to Eldeco under its subcontract with Hay. Article 7.1 of the Subcontract, which is required by Article 5.3.1 of the General Conditions of the Contract For Construction (General Conditions), provides as follows:

The Contractor binds itself to the Subcontractor under this Agreement in the same manner as the Owner is

bound to the Contractor under the Contract Documents. (Record p. 114)

Eldeco argues that this Article requires Hay, the Contractor, to utilize Article 7 of the Contract in dealing with Eldeco under the Subcontract and thus a change order or change directive under Article 7 of the Contract must involve Eldeco through the integration of Article 7.1 of the Subcontract. Because the Contractor has the right to be involved in the change order process under Article 7 of the Contract, the subcontractor has the same right to be involved in the change order process because of Article 7.1 of the Subcontract.

Eldeco is attempting to bring itself into the change order process with its argument that the Contract and Subcontract are integrated contracts, so that Eldeco has a right to be included in the change order decision. However, another article of the Subcontract directly addresses the subject of Change Orders. The Subcontract in Article 6.1 allows the Contractor to order "changes in the Work which are within the general scope of this Agreement. Adjustments in the contract price or contract time, if any, resulting from such changes shall be set forth in a Subcontract Change Order pursuant to the Contract Documents." [underline added] (Record p. 114). The Contract Documents in Article 7 of the General Conditions of the Contract For Construction state:

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents. (Record p. 88).

A change order under Section 7.1.2 of the Contract requires the agreement of the Owner, Contractor, Architect and, when required, the State Engineer. (Record p. 102). The change order for the electrical work awarded to Mancill contains the agreement of the required parties . The Panel finds that neither

the Contract nor the Subcontract requires the consent of the subcontractor to a change order, so the change order between Hay, DMH and the Architect for additional work was appropriate.

Eldeco also contends that the Contract requires the use of a change directive if agreement cannot be reached on a change order. Article 7.3.2 of the General Conditions of the Contract provides a "Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order." (Record p. 88). This contention is based on the same argument that Eldeco, the subcontractor, is required to be involved in the negotiation of the change agreement. As the Panel previously stated, the subcontractor is not required to be involved in a change order agreement, the appropriate parties agreed on the change order, so a change directive was not required.

Eldeco further argues that Hay was required to award additional work under the contract to Eldeco, and not allowed to bid shop for other subcontractors. A subcontractor may be substituted on a project for very limited reasons. S.C. Code Ann. section 11-35-3020(2)(b)(iii) (1993) provides:

No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except for one or more of the following reasons:  
...(i) with the consent of the using agency for good cause shown.

The CPO found that Code section 11-35-3020 (2)(b)(iii) applies only to the initial award and not to additional work. The Panel disagrees, as the Code Section does not contain words limiting the time frame of the requirement. The statute does allow substitution of subcontractors after the required approval is given. The Panel agrees with the CPO and finds that Hay obtained the approval required under the Code to award the additional work to a different

subcontractor. (Record p. 13). The "using agency", DMH, consented to substituting the electrical subcontractor based on the "good cause shown" of an increase in price estimate of almost 250% from the original price bid by Eldeco. The Panel agrees that a price increase of 250% from the original price bid on alternates is good cause to substitute a subcontractor. Once the subcontractor was substituted, the additional work was awarded based on a Change Order properly negotiated between the Owner, Architect, and Contractor, with approval of the State Engineer.

Eldeco also argues in its protest letter that the additional work is not within the scope of the original contract, and therefore is required to be bid under S. C. Code Ann. section 11-35-3020 (1993), which requires competitive bidding for construction contracts. S. C. Code Ann. section 11-35-3040 (1993), provides in part:

(1) Contract Clauses. State construction contracts and subcontracts promulgated by regulation pursuant to Section 11-35-2010(2) may include clauses providing for adjustment in prices, time of performance and other appropriate contract provisions including but not limited to: (a) the unilateral right of a governmental body to order in writing: (i) all changes in the work within the scope of the contract, and ...

(2) Price Adjustments. Adjustments in price pursuant to clauses promulgated under subsection (1) of this section shall be computed and documented with a written determination. The price adjustment agreed upon shall approximate the actual cost to the contractor and all costs incurred by the contractor shall be justifiable compared with prevailing industry standards, including reasonable profit. Costs...shall be arrived at through whichever one of the following ways is the most valid approximation of the actual cost to the contractor: ...

(iii) by agreement on a fixed price adjustment;

S. C. Code Ann. section 11-35-3040(1) (1993) allows contract clauses "providing for adjustment in prices" including "the unilateral right of a governmental body to order in writing all changes in the work within the scope of the contract". The additional work in the change order was originally listed as Alternates in the bid, and therefore was clearly within the scope of the contract. Under these provisions, DMH correctly used the change order provisions in the Contract to adjust the scope of work of the Contract, and add the cost as an agreed "fixed price adjustment".

For the foregoing reasons, the Panel finds that DMH properly replaced Eldeco as the electrical subcontractor and issued a change order for the additional work. Eldeco's protest is denied, and the CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:

  
Gus J. Roberts, Chairman

Columbia, SC

March 31, 1995.