

In the IFB, Specification 09900, subsection 2, discusses delivery orders, and provides, in part, that

[d]elivery or performance of the Work shall be made only as authorized by delivery orders. ... Except for any limitations on quantities in the Delivery Order clause or in the Schedule, there is not a limit on the number of orders that may be issued. The maximum dollar value of this Contract will not exceed \$200,000.00.

[Record p. 154]

The IFB also states that "Contractors shall be licensed in accordance with the provisions of Section 40-11-10 through 40-11-340 of the Code of Laws of South Carolina." [Record p. 33]. The "Contractor's Duties" listed under the Summary of Work in Section 01010, subsection C of the IFB, provides "[s]ecure and pay for, as necessary for proper execution and completion of work and as applicable at time of receipt of bids: ...(2) Licenses." [Record p. 116].

CNCRA is a state agency, established under authority of S. C. Code Ann. section 31-12-10, *et seq.* Pursuant to S. C. Code Ann. section 31-12-120 CNCRA is required to comply with the S. C. Consolidated Procurement Code. The testimony of Sean McDonell, an employee of CNCRA, establishes that CNCRA has a contract with the U.S. Navy to be the caretaker of the property at the Charleston Naval Complex, which also establishes that the provisions of the S. C. Consolidated Procurement Code must be followed. Mr. McDonell further testified that the Charleston Naval Complex is no longer an active military base, as it has been decommissioned, and the process of transferring the property to the state from the federal government has begun.

The bids on the project were opened on March 7, 1996. Palmetto Pavement Maintenance (Palmetto) submitted the lowest base bid of \$5565.00. [Record p. 20-25]. Palmetto was found to be nonresponsive for failure to have a

S. C. contractor's license and Notice of Intent to Award to Landmark Construction Company (Landmark) was posted. [Record p. 7]. Palmetto protested the intent to award on March 20, 1996. Palmetto does not dispute that it does not have a general contractor's license.

CONCLUSIONS OF LAW

Palmetto's protest letter raises two issues concerning why Palmetto was not required to have a South Carolina contractor's license, and therefore was "inaccurately determined to be non-responsive." [Record p. 13]. Palmetto argues that it is not required to have a contractor's license because the cost of the work bid under the IFB is below the threshold amount established in the definition of general contractors that are required to have a license. Palmetto also contends that the work is being performed on a military reservation or navy yard, and therefore, pursuant to S. C. Code Ann. section 40-11-340, Palmetto is exempt from the licensing requirements.

S. C. Code Ann. section 40-11-10 defines a general contractor as:

one who for a fixed price, commission, fee or wage undertakes or offers to undertake the construction or superintending of construction of any building, highway, sewer, grading, improvement, reimprovement, structure, or part thereof, when the cost of the undertaking is thirty thousand dollars or more. Anyone who engages or offers to engage in such undertaking in this State shall be deemed to have engaged in the business of general contracting in this State.

S. C. Code Ann. section 40-11-100 makes it illegal for a general contractor as defined in section 40-11-10 to perform work without a license.¹ Palmetto argues that it is not a general contractor under S.C. Code section 40-11-10, because it's

¹ S. C. Code Ann. section 40-11-300 provides that considering bids of unlicensed contractors is a misdemeanor, "punishable in the discretion of the court".

bid is below \$30,000.00, which is the threshold amount of the cost of work that requires a license. General Services counters that the project is an indefinite delivery/quantity contract, without limits on the number of delivery orders, and which may cost up to \$200,000.00 which is over the threshold amount that requires a general contractor's license.² To agree with Palmetto's argument, one would have to consider the project as individual parts, each under the \$30,000.00 threshold amount. The IFB does indicate that the work is only done by individual delivery orders. However, any one delivery order might be over the \$30,000.00 threshold. The project, as a whole, may cost up to \$200,000.00, which is above the threshold.

Palmetto argues that it would not charge more than the threshold amount on any one delivery order, and thereby it does not require a license. However, a 1964-65 Attorney General's Opinion, No. 1806, finds that breaking a project into two or more parts for the specific purpose of evading the spirit and intent of the contracting law is unlawful. Thus, manipulating the amount of work, or the cost of the work, in order to avoid the licensing requirement, violates the spirit of the law. While this project is not intentionally broken into parts to avoid the licensing requirements, looking at the project as individual orders, ignoring the fact that any one order might exceed the threshold amount, rather than looking at the full potential of the contract which exceeds the threshold, violates the spirit of the law. CNCRA may expend up to \$200,000.00 under the contract, and no restriction exists on the amount of any one expenditure. The S. C. Department of Labor, Licensing & Regulation (DLLR), the agency that oversees the Contractors' Licensing Board, which issues licenses and regulates contractors, has issued a written opinion that a general contractor's license would be

² The Panel notes that, when soliciting for this type of contract, it would be a better practice for an agency to state in the IFB that a general contractor's license is required.

required for an indefinite delivery contract where the total cost might be more than \$30,000.00.³ In light of these facts, the Panel finds that Palmetto is nonresponsive to the requirements of the IFB because it does not have a general contractor's license.

Similarly, Palmetto argues that the bulk of the contract work is for street sweeping work which would not exceed the \$30,000.00 threshold. However, the IFB titled "Road & Bridge Maintenance and Repair", provides for possible bridge work. Also, Mr. McDonnell testified that the budgetary estimate he prepared for CNCRA includes estimated bridge repair under "service calls" in the total amount of \$37,740.00. See, Appellant's Exhibit #2. Palmetto's argument again requires the project to be considered in individual parts. Under the terms of this IFB, the potential exists for any one delivery order to exceed the \$30,000.00 threshold, even if the bulk of the contract is for work under \$30,000.00. Without dispute, a delivery order over \$30,000.00 under the contract would require a general contractor's license to perform the work. As above, the Panel finds that Palmetto is nonresponsive to the requirements of the IFB because it does not have a general contractor's license.

Palmetto's second issue is that the contract for this project is exempt from the general contractors' licensing requirement under S. C. Code Ann. section 40-11-340, which provides:

[t]he provisions of this chapter do not apply to contracts being performed on military reservation work, navy yard work, marine training station work, or to licensed fire sprinkler, burglar alarm, or well drilling contractors.

³ The written opinion of the S. C. Department of Labor, Licensing & Regulation was entered into evidence without objection.

Palmetto contends that the work is being performed on a military reservation or navy yard, and therefore Palmetto is exempt from the licensing requirements. Palmetto attempted to prove ownership of the property as proof that the contract was exempt from the licensing requirements. However, General Services argues that the issue of ownership is not determinative, but the use of the properties is determinative of the issue of exemption. General Services further argues that the Charleston Naval Base is no longer a military reservation or naval base.

Mr. McDonnell testified that the base has been decommissioned and is not an active military base. CNCRA is a state agency and its purpose is to redevelop or reuse the Charleston Naval Base. Since the base is decommissioned, it has no active military purpose, but it must still be maintained while the transfer of the property to the State is completed. The U. S. Navy and CNCRA, as caretaker, have entered a cooperative agreement, in which the U. S. Navy has set aside funds that are given to CNCRA for redeveloping the base for other uses. CNCRA submits invoices monthly to the U. S. Navy, and must obtain U. S. Navy approval for any repairs over \$25,000.00. Ms. Jordan, of the State Engineers Office, testified that federal funding to state agencies is not unusual, and that the fact the property is federally owned does not make the property a military reservation or naval base. Ms. Jordan indicated that she requested an opinion on these issues be obtained from the Contractors' Licensing Board, and she agrees with the written opinion. DLLR's opinion letter indicates that the exemption of S. C. Code Ann. section 40-11-340 would not apply to decommissioned military facilities that have been turned over to state agencies such as redevelopment authorities. The Panel finds that Palmetto did not carry its burden of proof that it was not required to have a general

contractors' license to bid on this IFB because the contract was exempt as a military reservation or navy yard.

Palmetto's third protest issue points out the disparity between Palmetto's low bid and the next lowest bid, suggesting that because such a difference exists, it would be in the state's best interest to rebid the project. [Record p. 14]. Palmetto's final argument that the disparity in its bid and the next lowest bid should produce a rebid, is fruitless. Clearly a nonresponsive bid is not considered and the next lowest responsive, responsible bidder is awarded the contract. The disparity alone does not prove anything and does not suggest a rebid is in the State's best interest. At the hearing, the Panel granted General Services' motion to dismiss the part of this issue in which Palmetto alleges the disparity indicates a lack of clarity in the IFB, which should require a rebid. S. C. Code Ann. 11-35-4210 provides that any bidder "aggrieved in connection with the solicitation of a contract" must file a protest within fifteen days from the issuance of the IFB, which Palmetto did not do in this case. The Panel finds that Palmetto did not carry its burden of proof on the issue of the disparity in bids.

For the foregoing reasons, the Panel finds that Palmetto is nonresponsive to the requirements of the IFB for failure to have a general contractor's license and denies Palmetto Pavement Maintenance's protest.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY:



Gus J. Roberts, Chairman

Columbia, SC

July 3, 1996.