

STATE OF SOUTH CAROLINA,)
;)
COUNTY OF CHARLESTON.)

IN THE COURT OF COMMON PLEAS
CASE NO. 84-CP-10-144

FLORENCE CRITTENTON HOME,)
)
PETITIONER,)

IN RE: PROTEST OF FLORENCE CRITTENDON
HOME

VS.)

ORDER.

SOUTH CAROLINA PROCUREMENT)
REVIEW PANEL AND SENATOR)
HUGH K. LEATHERMAN, SR.,)
)
RESPONDENTS.)

This matter is before the Court on the Petition of the Florence Crittenton Home of Charleston, South Carolina (FCH) for judicial review pursuant to § 1-23-380, S. C. Code of Laws (1976) and of the December 19, 1983 Order of Determination of the Respondent South Carolina Procurement Review Panel.

FACTS

The facts underlying this action are essentially not controverted. The case arises from a dispute concerning the actions of the Department of Social Services (DSS) on a Request for Proposal (RFP) in August, 1983. DSS received two responses to its RFP, one from FCH and one from Florence Crittenton Services, Inc. (FCS) of Charlotte, North Carolina. After DSS evaluated the two proposals, FCH was offered a contract in which DSS would pay essentially what FCH proposed for each unit of service, but for fewer units than FCH proposed to provide. FCH in effect agreed to provide those services at that rate but filed a protest with the Chief Procurement Officer (CPO) pursuant to § 11-35-4120.

The CPO, in a written decision dated October 27, 1983, concluded that "FCH was aggrieved in connection with the award of this contract," and recommended that FCH apply to the Procurement Review Panel for reimbursement of bid preparation costs and other relief.

FCH then applied to the Panel for relief pursuant to § 11-35-4210(7), which provides for such applications when "a protestant should have been awarded the contract under a solicitation but is not" Neither FCS, DSS nor the Materials Management Office (Division of General Services) appealed the decision of the CPO, although DSS and the Materials Management Office did appear before the Panel at the hearing on FCH's request for relief. After hearing evidence from FCH and DSS, the Panel concluded that it had the power and duty to examine the merits of the CPO's decision. It then concluded that DSS's actions were proper, and vacated the CPO's decision in an Order of Determination dated December 19, 1983.

DISCUSSION

A.

The threshold issue before the Court is whether the Panel has the statutory authority to review a CPO's decision when none of the parties before the CPO have chosen to appeal his decision. If the Panel were to be considered an appellate court and the CPO a trial court, this Court would likely conclude that the merits of the CPO's decision were not properly before the Panel. But the Panel is not an appellate court, and the statute which creates it does not limit its authority in the way that an appellate court's review jurisdiction is usually limited. § 11-35-4410(5), which sets forth the Panel's jurisdiction, provides that the Panel "shall be vested with the authority to ... review all written decisions rendered under [§] 11-35-4210... ." (emphasis added). The Panel is further empowered

by that subsection to "establish its own rules and procedures for the conduct of its business....," and to "interview any person ~~its~~ deems necessary." This language on its face authorizes the Panel to examine any written decision rendered by a CPO under § 11-35-4210, regardless of whether any party who was before the CPO chooses to appeal the decision to the Panel.

This broad power of the Panel is, further confirmed by § 11-35-4410(1). That subsection lists the powers of the Panel as including:

... the responsibility of providing an administrative review of formal protests of decisions arising from the solicitation and award of contracts *** or any other decision, policy or procedure arising from or concerning the expenditure of state funds for the procurement of any supplies, services or construction... . (emphasis added).

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This provision thus authorizes the Panel, as does § 11-35-4410(5), to review any and all decisions related to procurements by the State. This latter responsibility is listed disjunctively with the duty to review bid protest decisions. Thus, the Panel does not sit merely to review decisions of chief procurement officers as contested awards. Further, the Court is of the opinion that the General Assembly deliberately chose to grant the Panel the broad powers set forth above.

B.

The Petition also raises questions as to the correctness on the merits of the Panel's decision, assuming the Panel has statutory authority to consider the merits, as this Court has concluded. The Court has considered the merits of the Panel's decision and concludes that it should be affirmed for the reasons set forth herein and for the other reasons set forth in the Order of Determination. FCH's complaint, in essence, was that it was not told in the RFP that funding availability might limit the award or that the award

might be split prorationally with another bidder. However, as the Panel correctly concluded, "[f]unding availability is an inherent prerequisite to any government procurement, and to require a statement that funding availability is a criterion would be to require a statement of the obvious." Order of Determination, p. 5. Likewise, FCH could not have claimed unfairness based on the proration of the award. The RFP stated that geographic distribution of the client population would be considered, and the award was prorated on that basis; indeed, the ratio between FCS and FCH was the same as it had been in the previous fiscal year

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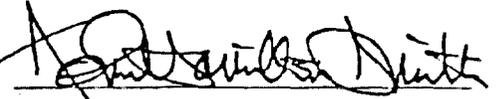
The Court recognizes that in cases such as this where the vendor of services is funded in large part through government funds, the unavailability of full funding may place the vendor in the situation of having to take what the government offers. However, any problems experienced by FCH as a result of the procurement in question were not problems with the procurement process, but with the nature of FCH's necessary reliance on government funding even in a lean year. Even though FCH provides an obviously worthwhile service, its funding needs and the needs of its clients do not translate into a requirement that the State must provide it with everything it proposes. The RFP told prospective bidders all they needed to know to bid intelligently, and the award was based on the stated factors and the factors which inhere in any government procurement.

CONCLUSION.

For the foregoing reasons, the Court concludes that the Procurement Review Panel was vested with statutory authority to review the decision of the Chief Procurement Officer and that the Panel was correct in vacating that decision. Accordingly, the Court affirms

the Panel's Order of Determination of December 19, 1983, in all respects.

AND IT IS SO ORDERED.



JOHN HAMILTON SMITH -
Presiding Judge
Ninth Judicial Circuit

SUMMERVILLE, SOUTH CAROLINA

June 18, 1984.

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