

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1988-13

IN RE:)
)
PROTEST OF OAKLAND JANITORIAL) O R D E R
SERVICE, INC.)
)
)

This case came before the South Carolina Procurement Review Panel ("Panel") on the protest of Oakland Janitorial Service, Inc. ("Oakland") of its disqualification from being awarded a contract for the provision of custodial services to the Department of Highways and Public Transportation ("Highway Department"). Present at the hearing before the Panel were Oakland, represented by M.M. Weinberg, III, Esq., of Weinberg Brown & McDougall; the Division of General Services, Materials Management Office ("MMO") represented by J. Patrick Hudson, Esq. and Alice Broadwater, Esq., of the South Carolina Attorney General's Office; and the Highway Department, represented by its General Counsel Victor S. Evans, Esquire.

Because of its holding in this case, the Panel accepted no evidence from MMO or the Highway Department. Therefore, the following statement of facts is derived from evidence elicited solely during the protestant's case.

FACTS

On May 3, 1988, MMO issued a bid solicitation for janitorial services for the Highway Department for one year beginning July 1, 1988. The bid solicitation required each bidder to list three references. The protestant Oakland

Janitorial Service submitted its bid with references on or around May 17, 1988.

On August 16, 1988, Oakland attended a thirty to forty-five minute meeting held at MMO's offices in Columbia. Abraham Alston, President of Oakland, and Johnnie Mae Gist, its Vice-president, represented Oakland at the meeting; Joe Fraley, Jim Culbreath, and Jim Bokanovich were present for MMO. According to Ms. Gist, Mr. Culbreath began the discussion by advising her and Mr. Alston that Oakland was not going to get the Highway Department contract. Ms. Gist testified that when Mr. Alston asked the reason, Mr. Culbreath replied that Oakland had received bad references, implying that McEntire Air National Guard Base was one of them. Mr. Alston stated that he was told that the bad references were from Charleston Air Force Base and, he thought, Williams Air Force Base.

Mr. Alston testified that even though it was clear to him that Oakland was not going to get the contract, he could not believe it because Oakland had used the same references to apply for an earlier larger contract which Oakland had won. According to Mr. Alston, Oakland had done no work for its references between the two contracts to account for the apparent change in their recommendations.

Although she asked, Ms. Gist did not receive copies of the bad references at that time or at any time prior to the hearing before the CPO. Ms. Gist acknowledges that the letter dated August 16, 1988 (Record, p. 50) was

hand-delivered at the meeting, however she does not remember the written determination of nonresponsibility (Record, p. 51) being attached. In any event, Ms. Gist admits that Oakland received the written determination by mail about a week after the August 16 meeting.

Mr. Alston testified that, some time after the August 16 meeting, he mentioned to Clarence Davis, an attorney retained by Oakland on an unrelated matter, that Oakland had been disqualified from obtaining a state contract and that he (Mr. Alston) could not believe it. Mr. Davis said that he would call MMO and find out about it. According to Mr. Alston, Davis never talked with him again about the Highway Department contract, however Mr. Culbreath told him that Davis had called MMO.

Ms. Gist, on the other hand, testified that Mr. Alston told her that he had talked with Mr. Davis and that Davis had called Joe Fraley who told him that Oakland was not going to get the Highway Department contract because of bad references. Ms. Gist remembered that this conversation took place about three to five days after the August 16 meeting. Ms. Gist herself never talked to Davis about the contract.

The Notice of Intent to Award the contract to Commercial Maintenance Service was issued on August 25, 1988, with the contract to become effective on September 12, 1988. (Record, p. 49). Although she does not remember when, Ms. Gist acknowledges that Oakland received the Notice of Intent to Award.

According to Ms. Gist, about a week to ten days after the August 16 meeting, Mr. Alston attempted to get in touch with state Senator Phil Leventis and left word with his office. Mr. Alston testified that Sen. Leventis returned his call some time later and that, after Alston explained his problem, Sen. Leventis told him he would talk to someone and get back to Alston. Sen. Leventis eventually advised Alston that Oakland had the right to protest and that it should retain counsel to help it.¹

Ms. Gist testified that, on or about September 9, Mr. Alston told her to call MMO to see what needed to be done to protest. Ms. Gist stated that she called Joe Fraley on Friday, September 9, and asked about the deadline for the right to protest. According to her, Mr. Fraley stated that he would have to look at the records. When he returned to the phone he stated that Oakland had until September 12, the following Monday, to protest. Ms. Gist testified that she sent Oakland's letter of protest (Record, p. 47) to Federal Express that day and received a guarantee that it would be delivered on Monday, September 12. The parties agree that the letter was received that Monday.

Mr. Alston stated that he entrusted the review and interpretation of contract and bid solicitation documents to Ms. Gist. Ms. Gist testified that although she has no legal

1. Despite Senator Leventis' advice, Oakland did not retain counsel to assist it in this case until September 23, four days prior to the hearing before the Chief Procurement Officer.

training she believes that she understands the bidding process. Ms. Gist stated that, while she did not know about the ten day period to file protests, she did realize that there was probably a deadline, maybe thirty days. According to her, she understood that Oakland could not just let the matter go indefinitely.

Under questioning by the Panel, Ms. Gist admitted that, although she had read the bid solicitation documents, she did not remember Instructions to Bidders number 12, which provides:

Any vendor desiring to exercise rights under Section 11-35-4210 (Right to Protest) of the South Carolina Consolidated Procurement Code should direct all correspondence to Chief Procurement Officer, Division of General Services, 1201 Main Street, Suite 600, Columbia, S. C. 29201.

(Record, p. 29). Ms. Gist testified that she now understands what procedure Oakland should have followed.

Issues

Oakland makes two arguments in the alternative. First Oakland argues that it did not receive the names of the references that were the reason for determination of nonresponsibility until the first hearing on September 27, 1988, and, therefore, did not have sufficient information to appeal until then. In the alternative, Oakland contends that, because Mr. Fraley at MMO told it that it had until September 12 (the effective date of the contract) to protest, MMO should be estopped to assert timeliness now.

Section 11-35-4210 of the Procurement Code provides:

Any actual or prospective bidder . . . who is aggrieved in connection with the solicitation or award of a contract may protest The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

The Panel has held in the past that a protestant does not need to know every minute fact involved in his protest in order to start the ten-day time limit running; it is enough that a party have reasons sufficient to support a protest. In Re: Protest of Computerland of Columbia, Case No. 1988-4.

In the Computerland case, Computerland had attended the bid opening and knew it was the apparent low bidder. Through independent research it had learned that its competitor could not qualify for the South Carolina preference. On March 4, it received the Notice of Intent to Award indicating that it did not have the contract. Computerland did not protest until March 16. Computerland argued that it had requested and was awaiting information on how the bids were evaluated before it protested. The Panel found that Computerland possessed enough information to file a protest on the date it received the Notice of Intent to Award.

The Panel has also held that a protest is not to be judged by highly technical or formal standards, it is enough that it in some way alert the parties to the general nature

of the grounds for protest. In Re: Protest of Sterile Services Corp., Case No. 1983-17.

In this case, both Ms. Gist and Mr. Alston testified that it was clear to them on August 16th that Oakland was not going to get the contract. Mr. Alston testified that on August 16 he was told that the bad references were Charleston Air Force Base and, he believes, Williams Air Force Base. Mr. Alston further testified that at that time he could not believe any of the references were bad because Oakland had gotten another contract using these same references.

While it is undisputed that Oakland did not receive copies of the references until the hearing before the CPO, this information was not essential for Oakland to raise the ultimate issue of its protest.² Indeed Oakland's September 9th protest letter prepared without benefit of copies of the references more than adequately puts in issue the question whether Oakland "is quite capable of performing the duties outlined in the contract." (Record, p. 47). The Panel finds that Oakland knew or should have known on August 16 of facts sufficient to state a protest. Therefore, Oakland's protest was due on or before August 26. Because it was not received until September 12, Oakland's protest was untimely.

Oakland's second argument is that MMO should be estopped to assert the ten-day limit because Mr. Fraley

2. The failure of the State to provide this information timely upon request may have been cause to postpone the hearing before the CPO.

advised Oakland that it had until September 12 to file a protest. Oakland's argument raises an issue of first impression for the Panel - whether the ten-day period for filing protests set forth in section 11-35-4210 should be considered an absolute bar or whether it may be waived by the consent or conduct of the parties.

Generally, in the absence of statutory language to the contrary, perfection of a review proceeding within the time limited by statute or rule is jurisdictional. Where the appeal is not taken within the time provided, jurisdiction cannot be conferred by consent or by waiver. See, 4 Am. Jr. 2d, Appeal and Error, 292. The South Carolina Supreme Court has long considered its ten-day period for filing a Notice of Intent to Appeal jurisdictional because "it is important to the administration of justice that there be no uncertainty" about when a matter has come to an end. Palmer v. Simons, 107 S.C. 93, 92 S.E. 23 (1917). The Supreme Court recently affirmed its holding that the ten-day period is jurisdictional even though the statute upon which the rule is based was repealed. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206 (1985).

The ten-day period for filing protests of the decisions of the state in procurement matters set forth in section 11-35-4210 is unconditional. There are no qualifying words such as "except for good cause shown." The Panel believes that it is essential to the operation of the government that challenges to its purchasing decisions be limited. If the

time for filing protests can be waived, the State will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of being liable to another vendor.

The Panel believes that in approving section 11-35-4210 as written the General Assembly recognized that, despite the hardship which might occasionally arise from strict application of the time period, on balance the public is better served if there are definite limits to the right to challenge state procurement decisions. For these reasons, the Panel finds that the time for filing protests set forth in section 11-35-4210 is jurisdictional and may not be waived by conduct or consent of the parties.³

Although its holding does not require it, the Panel additionally finds that, even if the filing period were not jurisdictional, Oakland has not shown that MMO should be estopped from asserting the time limitation. In Freeman v.

3. The Panel finds that the thirty-day limit is not applicable in this case but under the reasoning advanced above it must also be considered jurisdictional. The purpose of the thirty-day limit is to shorten the ten-day limit for persons learning of facts giving rise to a protest after the award. In In Re: Protest of American Telephone & Telegraph Company, Case No. 1983-12, the Panel explained, "Thus, for example, if a person learns of facts giving rise to a protest twenty-one days after the award, that person would have nine days (the remainder of the thirty-day period), rather than ten days to file his protest.

Fisher, 341 S.E.2d 136 (1986), the South Carolina Supreme Court summarized the defense of estoppel as follows:

To successfully assert the defense of estoppel, one must show that he was without knowledge, or any means of knowledge, of facts upon which he predicates a claim of estoppel. . . . Respondent's counsel could have discovered his erroneous construction of the statute by simply reading the plain language of the statute. The failure of one party to call to the attention of another party a fact equally within the knowledge of both forms no basis for an estoppel. . . . Moreover, estoppel may not be invoked to nullify a mandatory statutory restriction. . . . A party cannot claim reasonable reliance on a representation by another in the face of a clear statutory mandate.

(Emphasis added). 341 S.E.2d, at 137. In the Freeman case, the respondent argued that plaintiff should be estopped to assert the ninety-day limitation on applying for an appraisal of property in a foreclosure action because plaintiff's counsel failed to correct respondent's counsel when he misstated the law in his presence.

Further in Lovell v. C. A. Timbes, Inc., 263 S.C. 384, 210 S.E.2d 610 (1974), the Supreme Court noted that ignorance of the requirement of filing within a certain time is no legal excuse for failure to file within the time.

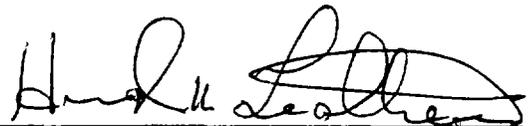
In the present case, as in Freeman, the mandatory time for filing is set forth plainly for anyone who chooses to read it. Further, in this case the bid instructions reference the appropriate section of the Procurement Code and refer a party wishing to exercise the right to protest to the Chief Procurement Officer. The evidence also shows

that if Oakland was confused about its rights it had access to counsel before the time period ran. Finally, the Panel notes that the ten-day period had already run before Oakland even made its inquiry concerning the time limit and allegedly received the misleading information. The Panel holds that Oakland cannot claim estoppel under the holdings in the Freeman and Lovell cases.

For the reasons set forth above, the Panel finds that the protest of Oakland Janitorial Service, Inc. is untimely and affirms the October 3, 1988 order of the Chief Procurement Officer.

IT IS SO ORDERED.

South Carolina Procurement
Review Panel

By: 
Hugh K. Leatherman, Sr.
Chairman

11-17-88, 1988
Columbia, South Carolina