

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1991-2

IN RE:)
)
PROTEST OF INTREX, INC.) O R D E R
_____)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on February 28, 1991, on the appeal by Intrex, Inc. ("Intrex") of a decision by the Chief Procurement Officer dismissing Intrex's protest of an award of a contract to supply forms to the Department of Highways & Public Transportation ("Highway Department").

Present at the hearing were Intrex, represented by its President, Jeffrey O'Cain; the Highway Department, represented by its General Counsel, Vic Evans, Esquire; and the Division of General Services, represented by Helen Zeigler, Esquire.

FINDING OF FACTS

On October 10, 1990, State Procurement issued an Invitation for Bids for a contract to print two million applications for registration of motor vehicles for the Highway Department. Bids were opened on November 7 and Columbia Business Forms was the apparent low bidder with a price of \$65,160. Intrex was the second low bidder at \$67,360.

Intrex properly claimed the preference given to products made, grown or manufactured in South Carolina by filling out and submitting the appropriate affidavit. (Record, p. 73). Columbia Business Forms did not claim the

that the preference was five percent, it would have immediately protested the award to Columbia Business Forms because its calculations would have revealed that Intrex was the ultimate low bidder.

Intrex claims that it thought the amount of the preference was three percent because, at some time in the past, State Procurement advised Intrex that the preference was three percent. On December 5, Intrex attended a seminar held by the Chief Procurement Officer for Information Technology at which Intrex learned that amount of the South Carolina product preference is five percent.

On December 18, Intrex received a Freedom of Information Act copy of Columbia Business Forms' bid. On December 19, Intrex protested the award to Columbia Business Forms to the Chief Procurement Officer on the grounds that State Procurement failed to apply the product preference to the benefit of Intrex. The Chief Procurement Officer found that Intrex failed to file its protest within the ten-day limit set forth in §11-35-4210(1) of the Consolidated Procurement Code and dismissed the protest. Intrex appeals that dismissal to the Panel.

CONCLUSIONS OF LAW

The issue before the Panel is whether Intrex filed its protest within the time limits of S. C. Code Ann. §

11-35-4210(1) (1976), which provides:

Right to Protest. Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or

South Carolina product preference but did claim the United States product preference. (Record, p. 49).

In determining the low bidder under the contract, State Procurement failed to add five percent to Columbia Business Forms bid as it should have in order to credit Intrex with the five percent product preference. If the preference had been properly applied, Intrex would have become the low bidder.

Instead, State Procurement issued a Notice of Intent to Award to Columbia Business Forms on November 16, 1990. Intrex received the Notice of Intent to Award on November 19.

According to Mr. Jerry Shealy, Intrex's Sales Representative, Intrex attended the public bid opening on November 7, 1990, and learned that Columbia Business Forms had bid \$65,160. Mr. Shealy stated that he went back to the Intrex Office that afternoon and calculated the expected bid results by applying the preference as he understood it.

Intrex mistakenly believed that the South Carolina product preference was three percent rather than five percent. After adding three percent to Columbia Business Form's bid, Intrex determined that Columbia Business Forms was still the low bidder.

Based on its misunderstanding of the amount of the preference, Intrex did not protest Columbia Business Form's bid when it received the Notice of Intent to Award on November 19. Mr. Shealy testified that, if Intrex had known

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

General Services and the Highway Department argue that Intrex knew or should have known of the facts giving rise to its protest on November 19 when it received the Notice of Intent to Award to Columbia Business Forms. They contend that Intrex is charged with knowing that the amount of the product preference is five percent and may not rely on any alleged misstatements by State Procurement.

Intrex claims that it did not learn of the facts giving rise to its protest until December 18, after it learned at a seminar that the product preference is five percent and after it received a copy of Columbia Business Forms' bid. Intrex argues that the past conduct of State Procurement misled Intrex as to the true amount of the preference.

The Panel holds that, under its previous decisions, Intrex, as a vendor doing business with the State, is charged with knowing what the law requires. (See, In re: Protest of Olsten Services, Case No. 1990-16, and the cases cited therein). Intrex was aided in this case by the Invitation for Bids which reprints verbatim the text of Reg. 19-446.1000, wherein the product preference is established as five percent. (Record, pp. 27-28).

Intrex admits receiving a copy of the IFB with the reprinted regulation, however, its argues that the IFB is unclear whether the five percent applies only to the product preference or to the resident vendor preference, as well.

The Panel does not believe that the IFB is confusing in this regard. The language of the regulation is captioned, "Regulations Governing the Purchase of South Carolina/United States Made Manufactured or Grown End-Product". The resident vendor preference is set forth in another section, appropriately captioned, "Resident Vendor Preference." (Record, p. 30). The resident vendor portion of the IFB makes two references to the section of the Procurement Code which sets forth the preference.

Intrex had the means and opportunity to determine the correct amount of the product preference and it may not reasonably rely on any alleged misstatements by State Procurement in that regard.¹

Because Intrex "should have known" that the amount of the preference is five percent, its time for protest began to run no later than November 19, when it learned that award would be made to Columbia Business Forms. As Intrex admitted, it would have protested immediately upon learning

¹See Oakland Janitorial Services, Inc., Case No. 1988-13, Decisions of the South Carolina Procurement Review Panel, p. 533. Intrex did not produce any evidence that State Procurement had misled it other than the testimony of Mr. Shealy that he believed that procurement officer B. M. Cave had sometime in the past stated that the preference was three percent.

of the award to Columbia Business Forms had it realized the true amount of the preference when it performed its preliminary bid calculations on the day of bid opening.

Intrex failed to file its protest within ten days of learning of the facts giving rise thereto.² Its protest is, therefore, untimely under §11-35-4210(1) and must be dismissed.

For the reasons stated above, the Panel affirms the January 15, 1991, decision of the Chief Procurement Officer and dismisses the protest of Intrex, Inc.

IT IS SO ORDERED.

Ten days

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
3-19-91, 1991

²Because the ten-day limit of §11-35-4210(1) applies in this case the thirty-day limit does not. See In re: Protest of American Telephone & Telegraph Company, Case No. 1983-12, Decisions of the South Carolina Procurement Review Panel, at p. 98.