

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1992-6

IN RE:	)	
	)	
PROTEST OF THE COMPUTER GROUP;	)	O R D E R
APPEAL BY THE COMPUTER GROUP	)	
	)	

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This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on May 13, 1992, on The Computer Group's appeal from a decision by the Chief Procurement Officer ("CPO") dismissing as untimely The Computer Group's protest of an award to SouthTec, Inc., of a contract to provide an office automation system to the South Carolina Arts Commission ("Arts Commission").

Present and participating at the hearing before the Panel were The Computer Group, represented by its employees David Wright and Mike Anderer; SouthTec, represented by David Eckstrom, Esq., the Arts Commission, represented by Jim Rion, Esq., of the South Carolina Attorney General's Office; and the Division of General Services, represented by Helen Zeigler, Esquire.

FINDINGS OF FACT

On April 9, 1991, the State issued a Request for Proposals (RFP) for an office automation system for the South Carolina Arts Commission. (Record, p. 65). Proposals were opened on May 14, 1991. The evaluation committee completed the technical evaluation and on September 23 vendors were asked to submit a best and final offer.

Best and final offers were accepted on October 8, 1991 and a benchmark test of the offered equipment was conducted on November 5, 1991. At the benchmark test, SouthTec was allowed to substitute a superior processor (486) for the processor it had offered in its proposal (386).

On November 13, 1991, the State issued a Notice of Intent to Award to SouthTec to take effect on December 2, 1991. (Record, p. 37).

On November 14, 1991, The Computer Group filed a Freedom of Information Act request for a copy of SouthTec's proposal that was responded to on November 22. During this time, The Computer Group engaged in discussions with the procurement officer in which it complained that the State had not properly considered all the optional features offered by The Computer Group, that SouthTec was allowed to substitute a processor different from that proposed at the benchmark test, and that SouthTec was not responsive to the initial offer and should not have been allowed to participate in the best and final stage of the proposal process.

As a result of these discussions, on December 2, 1991, the State extended the effective date of the Notice of Intent to Award indefinitely "pending a review by the Information Technology Management Office." (Record, p. 35).

After stopping the award, the State asked the evaluation committee to reevaluate the proposals as to

optional features and conducted a second benchmark using the processor offered in SouthTec's proposal.

As a result of this reevaluation, the scores of The Computer Group and SouthTec moved closer together. It was possible that the reevaluation could have resulted in The Computer Group rather than SouthTec's winning award of the contract.

On February 6, 1992, the State issued a new Notice of Intent to Award in a different amount to SouthTec. (Record, p. 35). The difference in amount came about because the second Notice of Intent to Award included the options left out of the first Notice.

On February 18, 1992, The Computer Group filed a protest of the award to SouthTec on the following grounds:

(1) SouthTec was not eligible to participate in the best and final process because it was not an "apparently eligible vendor based on all the selection criteria", as required by the Procurement Code, in that SouthTec was not responsive to the original offer;

(2) The best and final procedure requested only certain changes yet SouthTec was allowed to substantially change its entire proposal;

(3) SouthTec failed to specify required information for certain major components of its system;

(4) and (5) SouthTec's monitor and hard disk do not meet specifications or the State is unable to determine that they do because SouthTec failed to supply the required information.

(6) SouthTec was improperly and unfairly allowed to substitute a different platform computer for the performance test;

(7) The benchmark test does not represent an accurate picture of network speed;

(8) The State unfairly and improperly adjusted the evaluation procedure between the first Notice of Intent and the second Notice in order to make SouthTec responsive to the file transfer option;

(9) SouthTec's options considered in the reevaluation did not meet the award criteria;

(10) All of these failures on SouthTec's part make its entire bid not responsive.

(Record, pp. 29-31). The Computer Group eventually withdrew ground number 7.

The Computer Group sought to amend its original protest letter on March 20, 1992, after it received a second FOIA response. The additional protest grounds were that the second benchmark on SouthTec was not conducted properly and that The Computer Group was not allowed to participate in the second benchmark.

The CPO conducted a hearing on April 1, 1992. Prior to considering the merits of The Computer Group's protest, the CPO entertained SouthTec's motion to dismiss the protest as untimely filed under the time limits of the Procurement Code. The CPO granted SouthTec's motion and dismissed The Computer Group's February 18 and March 20 protests as untimely.

#### CONCLUSIONS OF LAW

Section 11-35-4210(1) of the South Carolina Procurement Code states that an offeror "who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer" by submitting a protest "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."

SouthTec argues that a Notice of Intent to Award was issued on November 13, 1991 and that The Computer Group received the response to its FOIA request by November 22. SouthTec contends that, therefore, The Computer Group knew all of the facts giving rise to its protest on the date it received the FOIA response on November 22. Thus, under section 11-35-4210 the ten-day deadline for filing a protest ran out December 2 and the thirty-day deadline expired on December 13, 1991. SouthTec argues that, because the Computer Group did not file its protest until February 18, 1992, it is untimely.

The Computer Group contends that its deadline for filing a protest in this case did not begin to run until the second and final Notice of Intent to Award was issued on February 6. The Computer Group argues that, when it initially raised its concerns about SouthTec, the procurement officer agreed with it, extended the original Notice of Intent to Award for an indefinite period of time, and ordered the proposals reevaluated and another benchmark test performed.

The Computer Group urges these actions on the part of the State, plus the alleged assurance by the procurement officer that no protest need be filed until after the

results of the new evaluation and test, delayed the Computer Group's deadline for filing until the new Notice was issued.

The CPO agreed with SouthTec that The Computer Group was required to file after the first Notice in November 1991 and that its protest was, therefore, untimely. As authority for his finding, the CPO cites the Panel's earlier decision, In re Protest of Oakland Janitorial Service, Case No. 1988-13, Decisions of the Procurement Review Panel 1982-1988, p. 533, for the proposition that the time for filing is jurisdictional and cannot be waived or forgiven because of the alleged bad conduct of the State.

In Oakland, the protestant claimed that someone from State Procurement told it that it did not need to file a protest until the contract effective date. The Panel held that, even if the State official had misled the protestant, the protestant was charged with knowing its rights under the law. The Panel further held that the time for filing is jurisdictional and must be met by the protestant in order for the Panel to have the authority to hear a case.

The CPO is correct in his statement of what the Oakland case stands for. However, the Panel believes that the CPO, for the most part, incorrectly applies Oakland in this case.

Section 11-35-4210(1) establishes a deadline for filing protests but only allows protests to be filed by aggrieved offerors or bidders (or prospective offerors or bidders). To that end, the Panel held in an early case that "It is axiomatic that the successful bidder does not have grounds

on which to protest the bids of unsuccessful bidders." In re: Protest of Honeywell, Inc., Case No. 1985-4, Decisions of the Procurement Review Panel 1982-1988, p. 205. The Panel believes this principle is sound in that it prohibits premature protests that may result in opinions that do not affect outcome and are advisory only.

The Computer Group does not argue that the only reason it failed to file within a certain time is because the procurement officer told it not to. Rather, the Computer Group is arguing that, before the original ten or thirty-day deadline ran out, the State suspended the Notice of Intent indefinitely and then ordered a new evaluation and new testing. Because a reevaluation could affect the ultimate outcome, The Computer Group did not know whether it or SouthTec would be the successful vendor.

Even though most of the alleged deficiencies in SouthTec's proposal that The Computer Group now protests were present and known to The Computer Group after the first Intent to Award was issued, The Computer Group did not have aggrieved status until the State made a final decision to award to SouthTec. That final decision took the form of the second Notice of Intent to Award.<sup>1</sup>

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<sup>1</sup>The Panel believes that this case is similar to In re: Protest of Fisher Scientific Company, Case No. 1990-7, in which the Panel found that Fisher's time to protest the composition of a market basket list did not begin to run until the list was final.

The Panel emphasizes that its holding in this case does not modify or overturn the holding in Oakland Janitorial Service that the time for filing a protest is jurisdictional and may not be waived by the State's alleged bad conduct. In this case, it is not the procurement officer's alleged advice on how long the Computer Group had to file its protest which is dispositive. It is that The Computer Group's aggrieved status changed when the State extended award and reevaluated the proposals and was not fixed until the second Notice was issued.

Further, the Panel's holding in this case does not affect the requirement that a prospective vendor must protest allegedly defective specifications within ten days of learning of the specifications and may not wait until after he loses the contract to complain. In that case, the prospective vendor is aggrieved when it learns that the specifications might prevent it from bidding or at least competitively bidding on the contract. See In re: protest of American Telephone & Telegraph Company, Case No. 1983-12, Decisions of the Procurement Review Panel 1982-1988, p. 95.

Finally, because The Computer Group's thirty-day time limit began to run on February 6, the amended protest grounds received on March 20 are not timely.

In reaching its decision, the Panel does not consider either the legal and factual merits of The Computer Group's grounds.

For the reasons stated above, the Panel reverses the April 14 decision of the Chief Procurement Officer in part and remands the case to him for consideration of the merits of The Computer Group's February 18 protest consistent with the above opinion.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

By: \_\_\_\_\_

Gus J. Roberts

Chairman

May 19, 1992  
Columbia, S.C.