

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1993-1

In re: )  
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Protest of Action Mailers; ) O R D E R  
Appeal by Action Mailers )  
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This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on January 22, 1993, on the appeal of Action Mailers from a decision by the Chief Procurement Officer ("CPO") dismissing Action Mailer's protest as untimely filed.

Present and participating in the hearing before the Panel were Action Mailers, represented by its owner, Patricia A. Scott; G & H Mail Services, Inc., represented by Robert J. Hayden; and the Division of General Services represented by James W. Rion, Esquire.

FINDINGS OF FACT

On September 10, 1992, the State sent a notice of termination to Action Mailers indicating that its current contract to presort first class mail for state agencies would be cancelled effective January 14, 1993, for convenience. The State had made the decision that barcoding rather than carrier route sorting would save more money for the State.

Shortly thereafter on September 14, 1992, the State issued an Invitation for Bids ("IFB") to provide barcoding and sorting services for first class mail of state agencies. Action Mailers received a copy of the IFB.

On September 22, 1992, in response to the State's actions, Action Mailers sent a detailed letter to Governor Carroll A. Campbell complaining that the actions of the State in cancelling Action Mailers' contract and rebidding it to require barcoding were unfair and not competitive. (Record, pp. 67-69). Although no carbon copies are indicated on the letter, Action Mailers hand-delivered a copy of the letter to the Materials Management Office on September 22.

In part the letter states:

I am requesting that this matter be looked into by your office independently of the men at GSA who are in charge of writing this contract. . . I would not go public on this scam without giving you a chance to look into this matter thoroughly.

(Record, p. 69).

On October 2, 1992, Action Mailers attended the mandatory prebid conference where the State discussed the reasons for requiring barcoding. Also discussed was the matter of a vendor being able to lease time on a barcoding machine rather than purchasing a machine. Action Mailers attempted to arrange lease time on several barcoding machines but was unsuccessful.

On October 15, 1992, the State issued Amendment #003 expanding on the ability of a vendor to subcontract barcoding work and setting standards for doing so. Action Mailers signed Amendment #003 on October 26, 1992.

On October 23, 1992, Action Mailers attended a nonmandatory meeting at which the State decided that post cards and oversized letters (called "flats") would be deleted from the requirement of barcoding. Amendment #004 to that effect was issued on October 26, 1992. Action Mailers signed this Amendment #004 on November 9, 1992.

On November 10, 1992, the State received bids and opened them. Action Mailers submitted a "No Bid" with the notation "Under protest. I feel this bid to be discriminatory, creates a monopoly and is an unfair labor practice which borders on a restraint of trade. I would like to have an appeal." (Record, p. 56). This notation was treated by the CPO as the protest of Action Mailers.

On December 10, in response to the CPO, Action Mailers wrote a letter clarifying its protest:

I am protesting the language used in the rebidding of the contract (in question), also the allowing of the vendor to eliminate from the contract wording the barcoding of other than letter sized mail, i.e., flat sized and post card sized mails, because of his inability to do this work. The wording of the contract also allows the creation of a monopoly, which the procurement code disallows, in S.C..

(Record, p. 23).

The CPO found all of Action Mailers' grounds for protest to be untimely filed under S. C. Code Ann. § 11-35-4210(1). Action Mailers' appeals to the Panel restating its

original grounds and raising several new grounds. (Record, pp. 3-4).

#### CONCLUSIONS OF LAW

##### 1. New grounds raised on appeal

In its appeal letter to the Panel dated January 1, 1993, Action Mailers appears to raise two grounds not raised before the Chief Procurement Officer. Those grounds are that the costs quoted in G & H Mail Service's bid are not accurate if barcoding of postcards and oversized letters is not required and that the appropriate method of soliciting these services would be to let two contracts and give agencies a choice. (Record, p. 4).

Prior to the hearing before the Panel, the Division of General Services and G & H Mail Service moved to dismiss the above two grounds because they were not timely filed under S. C. Code Ann. §11-35-4210(1). That section requires that a protestant file its grievance with the CPO in writing within ten days of when it knew or should have known of the facts giving rise to the grievance but in no circumstance after thirty days from notification of award of the contract.

The Panel granted the Motion to Dismiss because neither ground was filed in writing with the CPO and, in any event, both the ten-day and the thirty-day deadline had elapsed at the time the appeal letter containing the grounds was submitted to the Panel.

## 2. Barcoding Specifications/Creation of Monopoly

Action Mailers' first and third issues as stated in its December 10 clarifying letter are:

. . . I am protesting the language used in the rebidding of the contract in question. . . . The wording of the contract also allows the creation of a monopoly, which the procurement code disallows, in S.C.

(Record, p. 23). Action Mailers' original protest written on its "no bid" submitted on November 10, 1992, states, "Under protest I feel this bid to be discriminatory, creates a monopoly and is an unfair labor practice which borders on a restraint of trade. I would like to have an appeal."

(Record, p. 56)

General Services argues that these grounds are not timely raised by Action Mailers because they challenge the specifications of the IFB issued on September 14 and received by Action Mailers at least by September 22. General Services contends that Action Mailers knew or should have known by September 22 of the alleged effect of the specifications but did not protest until two months later on November 10, 1992.

Action Mailers admits that it knew of the alleged monopolistic effect of the specifications by September 22. However, it claims that it did protest the specifications in a timely manner in its September 22 letter to Governor

Campbell, which was hand-delivered to the Materials Management Office on the day it was written.<sup>1</sup>

The Panel holds that the September 22 letter to Governor Campbell is not a "protest" which meets the requirements of §11-35-4210(1). A review of the letter reveals no mention of Action Mailers' desire to initiate the protest process. To the contrary, Action Mailers indicates that it desires that the matter "be looked into by [the Governor's] office independently of the men at GSA who are in charge of writing this contract." Action Mailers also notes that it would not go "public" until the Governor's office had a chance to investigate the matter. Even though the letter was delivered to the Materials Management Office over which the Chief Procurement Officer presides, the Panel finds nothing in the letter that would reasonably indicate to the CPO that Action Mailers was filing a formal protest requiring his review.

The IFB received by Action Mailers clearly sets forth a vendor's right to protest (Record, p. 39). Further, Action Mailer's testified before the Panel that it had initiated at least one protest in the past. Indeed, Action Mailers' notation on its "no bid" ("Under protest . . . I would like to have an appeal") indicates that Action Mailers was familiar with the proper way to initiate a protest.

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<sup>1</sup>Ms. Patricia Scott, the owner of Action Mailers, testified that the same letter was sent to Senator Strom Thurmond.

Because this protest was not submitted to the CPO until two months after Action Mailers admittedly knew of the grounds of protest, the Panel holds that it is not timely under S. C. Code Ann. § 11-35-4210(1).

### 3. Deletion of Flats and Postcards From Barcoding

Action Mailers' second grounds of protest raised in its December 10, 1992 letter to the CPO contests "the allowing of the vendor to eliminate from the contract wording the barcoding of other than letter sized mails, i.e., flat sized and post card sized mails, because of his inability to do this work." Amendment #004 signed by Action Mailers on November 9 deleted flats and postcards from barcoding requirements.

The Panel finds this grounds of protest is also untimely under S. C. Code Ann. § 11-35-4210(1). Action Mailers knew or should have known of the effect of deleting flats and postcards from barcoding no later than November 9, 1992, when Action Mailers acknowledged receipt of Amendment #004. Nevertheless Action Mailers raised this issue for the first time on December 10, 1992, much later than the ten-day deadline.<sup>2</sup>

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<sup>2</sup>The Panel agrees with the CPO that, even a broad reading of the November 10 protest statement ("Under protest I feel this bid to be discriminatory, creates a monopoly and is an unfair labor practice which borders on a restraint of trade." (Record, p. 56)) does not encompass the issue of deleting flats and postcards.

For the reasons stated above, the Procurement Review Panel affirms the December 23, 1992, decision of the Chief Procurement Officer and dismisses the protest of Action Mailers as untimely.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

By: 

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Gus J. Roberts  
Chairman

Columbia, S.C.  
February 2, 1993