

been declared an emergency, and outlines a procedure for obtaining a "different lower aggregate bid for the overall project." The procedure involves a list of twenty-five (25) items, provided by the State, to be priced by the bidders as reductions from the bidder's base bid opened July 24, 1995. The deduction list was to be submitted by August 17, 1995. In a letter to the CPO on August 4, 1995, Morganti objected to the proposed procedure under the emergency procurement and requested further information. (Morganti August 4, 1995 Letter).

Morganti filed a formal protest of the proposed process on August 16, 1995. (Morganti August 16, 1995 Letter). Also on August 16, 1995, the Architect faxed a letter with revisions to the procedures under the emergency procurement. (Architect August 16, 1995 Letter). The letter provides that the "bid date and time are revised to Monday, August 21, 1995 at 2:00 p.m.", and the letter included a copy of the "Justification for Emergency Procurement". An August 16, 1995 letter to Marion Dorsey, Chief Procurement Officer (CPO) for Construction, from Richard Kelly, Executive Director of the Division of Operations of the Budget and Control Board, requests that the project not be delayed during the protest process. Pursuant to S. C. Code section 11-35-4210(7), the CPO signed a sentence stating "it is in the best interests of the State that the solicitation and award shall not be delayed." (CPO Written Determination). Morganti's protest of the emergency procurement procedures has not been addressed by the CPO as of this date.

On August 18, 1995, Morganti filed an appeal with the Panel, under S.C. Code section 11-35-4410(1)(b), requesting an "immediate hearing" concerning the CPO's "written determination that it is in the best interest of the State to proceed with a solicitation that is being protested by Morganti." Morganti

requests the Panel "stay the solicitation process pending resolution of the appeal and pending bid protest." (Morganti Appeal Letter).

CONCLUSIONS OF LAW

Morganti's appeal of the CPO's written determination comes under the jurisdiction of the Panel pursuant to S.C. Code Ann. section 11-35-4410(1)(b), which allows for review of

[r]equests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of the code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 1-35-4230, but was not, shall not be the subject of review under this paragraph.

A written determination by the CPO that it is in the best interest of the State to proceed with the solicitation and award under S.C. Code Ann. section 11-35-4210(7) is not subject to further review by the CPO under the protest procedures in S.C. Code Ann. section 11-35-4210(1). Thus, the CPO's written determination under S.C. Code Ann. section 11-35-4210(7) is subject to review by the Panel upon request for review under S.C. Code Ann. section 11-35-4410(1)(b).

The CPO clearly has the authority under S.C. Code Ann. section 11-35-4210(7) to lift the stay imposed by that section. However, the finality of the CPO's determination is subject to S.C. Code Ann. section 11-35-2410, which provides in pertinent part:

[t]he determinations required by... Section 11-35-4210(7) (Stay of Procurement During Protests. Decision to Proceed) shall be final and conclusive unless the are clearly erroneous, arbitrary, capricious, or contrary to law."

The issue before the Panel is whether the CPO's written determination to proceed with the procurement is clearly erroneous, arbitrary, capricious, or contrary to law.

Based on Morganti's appeal, General Services' response, and all of the attachments, the Panel concludes that the CPO's determination to proceed is, to a great extent, based on the declaration of an emergency procurement. The decision to declare the procurement an emergency is a significant part of the protest currently pending before the CPO. The issue of the determination to proceed is so interrelated to the issue of the decision to declare the procurement an emergency, the Panel cannot separate the issues.

The Panel does not have jurisdiction of the issue pending before the CPO. That issue was raised under S.C. Code Ann. section 11-35-4210(1) and must be dealt with under the procedures established in that section. S. C. Code Ann. section 11-35-4410(1)(b) does not give the Panel jurisdiction of issues that have been brought before the CPO under S. C. Code Ann. section 11-35-4210. The Panel cannot address the merits of the decision to declare an emergency procurement and the resulting procedures. Yet, to make a decision concerning the CPO determination to proceed, which is the issue before the Panel, the Panel must consider the merits of the declaration of an emergency procurement. Therein lies the problem. The Panel finds that a decision concerning the determination to proceed cannot be made without consideration of the merits of the justification for emergency procurement, and the merits of the justification cannot be considered by the Panel at this time. The Panel finds that, although it has jurisdiction of the issue raised, the issue is too interrelated to the issues pending before the CPO for the Panel to make a determination at this time.

For the foregoing reasons, the Panel dismisses the appeal of Morganti until such time as the CPO issues a decision on the pending issues of the

emergency procurement and resulting procedures. This does not preclude Morganti from re-filing this appeal after the CPO issues a decision on the pending protest.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

Aug. 24, 1995.