

six (6) of the Order, which has been replaced. Because the Panel amends the original Order, this Order On Motion For Reconsideration replaces the previously issued Order in this case.

FINDINGS OF FACT

On August 22, 1995, the Information Technology Management Office (ITMO) issued a Request For Proposals (RFP) for a Claims Processing System on behalf of the State Accident Fund. A pre-proposal site visit as well as the deadline for submitting questions was September 5, 1995. Proposals were originally scheduled to be opened October 2, 1995. Amendment #1 to the RFP, issued September 8, 1995, changed the opening date to October 10, 1995. Amendment #2 to the RFP was issued on September 20, 1995. Amendment #3 to the RFP, issued October 9, 1995, extended the opening date until further notice. Amendment #4 to the RFP, issued October 17, 1995, set the opening date at 2:30 p.m. on November 6, 1995. Amendment #5 to the RFP clarified that the cost limit for Phase I is to include all costs for the first two years. (Record p. 13 & 21). Amendment # 5 to the RFP has a run date of October 27, 1995, but apparently not issued until October 30, 1995. (Record p. 20 & 13).

The proposals were opened on November 6, 1995. Price Waterhouse (PW) admits it submitted its proposal "a couple of minutes late". (Record p. 4). The State rejected the proposal pursuant to S. C. Code Ann. Reg. 19-445.2070(H), which provides "any bid received after the procurement officer of the governmental body or his designee has declared that the time set for bid opening has arrived, shall be rejected...." On November 13, 1995, PW filed a protest on the grounds that it was "precluded from meaningful participation through its failure to receive appropriate copies of the addenda to the RFP". (Record p. 3). PW requests "the RFP be canceled and all proposals rejected in the best interest of the State pursuant to S. C. Code Ann. section 11-35-1710...."

(Record p. 4). The CPO conducted a hearing and, on December 13, 1995, the CPO issued a decision dismissing the protest for lack of standing. PW filed an appeal to the Panel dated December 21, 1995.

General Services filed with the Panel a motion to dismiss the protest for lack of standing and a motion for frivolous protest.

CONCLUSIONS OF LAW

Motion to Dismiss

The threshold issue for the Panel's determination is the standing of the Protestant, PW, to file a protest. The protestant's standing is based on S. C. Code Ann. section 11-35-4210(1), which provides for the protest rights of prospective and actual offerors as follows:

Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date of issuance of the Invitation For Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment thereto, if the amendment is at issue.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate CPO in the manner stated in subsection (2) below within fifteen days of the date notification of award is posted in accordance with this code.

General Services moves to dismiss PW for lack of standing as a prospective or actual offeror. General Services argues that a late proposal is the same as no proposal, and therefore, PW is not an "actual offeror" as required for standing to protest the award of the contract. Not in dispute are the facts that PW knew the date and time of the opening and that PW's proposal

was submitted after the opening time. PW argues that it is an actual offeror, because it did attempt to submit a proposal, which was rejected by the State. Because the State cannot legally accept a late bid or proposal, PW's late proposal cannot be considered for award and is in effect the same as not submitting a proposal. Therefore, PW's late proposal cannot confer standing as an "actual" offeror. PW does not have standing as an actual offeror to protest the award of the contract.

The Panel has not addressed the issue of an offeror's standing, after bid opening, as a prospective offeror claiming to be aggrieved by a solicitation document. PW argues that S. C. Code Ann. section 11-35-4210(1) allows prospective bidders or offerors fifteen days from the issuance of the solicitation document to protest the aggrieving solicitation document, and the statute does not limit that time frame. PW contends that the opening of the proposals does not cut that time frame short.

The Panel must agree with PW that S. C. Code Ann. section 11-35-4210(1), states, without limitation, that a prospective offeror has fifteen days to protest from the issuance of an amendment by which it is aggrieved. Amendment #5 to the RFP has a run date of October 27, 1995, but was apparently issued on October 30, 1995. PW filed a protest on November 13, 1995, within the time limit of fifteen days from issuance. Therefore, the Panel finds that PW has standing as a prospective offeror to protest the solicitation document, Amendment #5 of the RFP, and denies the motion to dismiss for lack of standing.

In concluding that PW has standing as a prospective offeror, the Panel distinguishes prior Panel findings. The Panel has addressed the issue of standing in several prior cases, and adds to it's prior holdings through the findings of this case.

The Panel's 1990 case, In re: Protest of Laurens County Service Council For Senior Citizens , Case No. 1990-18, first found that "no vendor can be a 'prospective offeror' within the meaning of 11-35-4210(1) after bids are opened" because "once bids are opened, no opportunity for a vendor to submit an offer" exists. The protestant in Laurens "decided not to submit a proposal". Thus, the protestant was found to lack standing as an actual offeror to protest the award of the contract to another vendor. After the opening, the protestant did not have the ability to submit a proposal to become an actual offeror with standing to protest the award. The threshold issue raised in Laurens was the protestant's standing to protest the award of the contract. S. C. Code section 1-35-4210(1), in 1990, provided protest rights to "any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract." The statute relied upon in Laurens was revised in 1993, and now clearly provides that a prospective offeror may protest the solicitation documents and an actual offeror may protest the award.

The Panel again addressed a bidder or offeror's standing, after the 1993 changes to the Consolidated Procurement Code, in Case No. 1994-5, In re Protest of Smith & Jones Distributing Co., Inc. and Case No. 1994-18, In re Winyah Dispensary, Inc. The Smith case is similar to the Laurens case in that the protestant is protesting the award of the contract, and the protestant did not file a bid. Smith & Jones Distributing Co., Inc. filed a "no bid", stating it would not participate in the bid, along with a letter protesting the solicitation documents. The CPO found the protest of the solicitation untimely and the CPO decision was not appealed to the Panel. The Smith case decided by the Panel involved a challenge to the award of the contract. The Panel found that the protestant did not have actual bidder status, having failed to submit a bid, and

further, relying on the logic of the Laurens decision, found that the protestant could not obtain actual bidder status after the bid opening.

The Panel's decision in Case No. 1994-18, In re Winyah Dispensary, Inc., can be distinguished from the case at hand, most significantly, in that the Winyah case involves a protestant that did not timely file its protest of the solicitation. The issue of protesting a solicitation document issued less than fifteen days from bid opening was not raised. Nonetheless, the Panel discusses specific language in the Winyah case in order to clarify the Panel's position on a prospective bidder or offeror's standing to protest a solicitation. The Winyah case states that "... after bid opening, a vendor that has not submitted a bid, has no standing to protest a solicitation or award." As stated, the issue was not raised and therefore the Panel's statement does not contemplate the opening of bids or proposals prior to fifteen days from the issuance of an amendment which may be protested within fifteen days. This language in the Winyah case is qualified by findings in the current case that the statute does not allow for the bid opening to limit the fifteen days allowed for protesting, and therefore, in limited circumstances, a bidder or offeror has prospective standing after bid opening, if the protest involves a solicitation document issued less than fifteen days from the opening date.

In the current case of Price Waterhouse's protest, the Panel finds that the bid opening date does not change the Protestants' fifteen day time period to protest the solicitation document. The Panel interprets the intent of S. C. Code Ann. section 11-35-4210(1) to allow a prospective bidder the full fifteen days to file a protest. No language indicates an exception. Price Waterhouse submitted a protest concerning its failure to receive Amendment #5, which was filed within fifteen days of the Amendment, but after the opening of the bids. The logic that a bidder or offeror cannot be "prospective" once bids are opened because no

opportunity to submit bids or proposals exists, is still sound logic. However, the protest of a solicitation document issued less than fifteen days from the bid or proposal opening might result in a resolicitation. The Panel previously found that an interest in resolicitation confers standing on protestants even if they are nonresponsive. See, Case No. 1992-15 In re: Transportation Management Services, Inc. and Case No. 1991-8&9 In re: Pizzagalli Construction, PrimeSouth Construction and Harbert Construction. The Panel finds that Price Waterhouse has standing to pursue a protest concerning the issuance of Amendment No. 5 of the RFP.

The Panel also considers the policy reasons for not opening bids until all possible times for protesting the solicitation have expired. If the bids or proposals are opened prior to the fifteen days allowed for filing a protest, the prices and/or terms of competitor's bids or proposals are unnecessarily exposed, while questions raised by a protest of the solicitation document might require a resolicitation. Therefore, the Panel suggests that it is a better practice for the State not to set any bid opening times prior to the fifteen day time period given to prospective bidders or offerors to protest the final solicitation document. S.C. Regulation 19-445.2030(4), which allows a "minimum of seven (7) days" to provide bidders a reasonable time to prepare a bid "unless a shorter time is deemed necessary for a particular procurement as determined in writing by the Chief Procurement Officer...." is not violated. The regulation establishes a minimum, not a maximum, and the Panel suggests that, as a matter of practice, it would be prudent to extend the minimum of seven days to a minimum of fifteen days, to allow for the expiration of the fifteen day protest period prior to opening of bids or proposals.

Because the Panel has clarified its position on the standing of a prospective offeror to protest a solicitation, as opposed to the standing of an

actual offeror to protest an award, and this clarification may affect the way the CPO views the merits of this case, this case is remanded. The Panel acknowledges that the CPO's decision discusses "protest issue reviewed". However, the Panel remands the case for the CPO's review of the issues of merit raised by the protestant at the previous hearing conducted by the CPO. The CPO is to conduct a hearing on the merits, if further hearing is necessary, and issue a decision explaining the action taken.

Motion for Frivolous Protest

General Services also filed a motion to find PW's protest frivolous based on the fact that the protestant failed to file its proposal on time. The law requires all late bids and proposals to be rejected after bid or proposal opening. However, this case presents facts that allow a protest of a solicitation document to be filed after bid opening, which upon review of the merits of the case, might result in a resolicitation. A resolicitation would allow for the submittal of a bid. In light of the Panel's ruling that PW has standing to protest the solicitation as a prospective offeror and that the case is remanded for review, the Panel denies the motion to find PW's protest frivolous at this time.

For the foregoing reasons, the Panel finds that Price Waterhouse has standing as a prospective offeror to protest Amendment #5 to the RFP and remands the case to the CPO as directed above.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

March 22, 1996.