

Statement of Intent to award the contract to Aramark on December 9, 1996. On December 23, 1996, Atlas filed a letter of protest with the CPO claiming that the evaluation of the proposals and the award to Aramark was arbitrary and capricious. On February 11, 1997, Atlas filed an amended letter of protest with the CPO. On February 12, 1997, the CPO held a hearing in which he dismissed Atlas' amended letter of protest for lack of jurisdiction because it was not filed within the fifteen day statutory period allowed for filing protests and dismissed the other issues raised by Atlas due to Atlas' failure to meet its burden of proof.

CONCLUSIONS OF LAW

The South Carolina Consolidated Procurement Code (Procurement Code) gives bidders the right to protest awards within fifteen days of the date notification of the award is posted. S.C. Code Ann. § 11-35-4210(1). This statute further reads:

A protest under subsection (1) above shall be in writing, submitted to the appropriate chief procurement officer, and shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. S.C. Code Ann. § 11-35-4210(2)

Atlas filed its first letter of protest within the fifteen day period allowed for filing protests. It alleged the evaluation of the proposals and the subsequent award to Aramark was arbitrary and capricious. In its letter, Atlas stated that it reserved the right to amend its protest which it did by filing a second letter of protest on February 11, 1997 in which it enumerated additional grounds for its protest. At the hearing, General Services moved to dismiss certain items in

Atlas' appeal due to vagueness or being untimely filed. The Panel granted the motion to dismiss as it pertained to any issues not raised within the fifteen day limit under §11-35-4210.

Atlas argues that its second letter of protest merely developed issues raised in its original letter. However, the amended letter did more than expand on the original issues as it added four new allegations that Aramark's proposal was non-responsive and a new issue of protest. The Panel finds that any new grounds for protest in the second letter are not timely filed pursuant to §11-35-42 and that the Panel does not have jurisdiction over these issues. In In re Protest of Blue Cross and Blue Shield of SC, Case No. 1996-9, Blue Cross and Blue Shield sought to raise additional issues of non-responsiveness after it had filed its letter of protest and after the fifteen day time limit had passed. The Panel held that it was "[an] attempt to allow BCBS to raise more issues of non-responsiveness at a later time, which is not permitted under the strict time limits established in Code Section 11-35-4210 for filing a protest."

Although the Panel is bound by the statute, the Panel finds that the way the law is currently written is patently unfair to bidders who seek to protest. The Procurement Code allows fifteen days for a protest to be filed that states with "particularity" the grounds of the protest. See S.C. Code Ann. § 11-35-4210(2). Also by statute, the State is given fifteen days to respond to any requests for documents pursuant to the Freedom of Information Act. See S.C. Code Ann. § 30-4-30. A protestant is therefore precluded from using information gained from its Freedom of Information request in drafting its protest if this information is

received after the fifteen day limit has passed as occurred in this case. However, until such time that there is an amendment to one of the statutes, the issue is one of jurisdiction and the Panel is bound by the law as written.

In the remaining issues before the Panel, Atlas argues that the evaluation of the proposals and the award of the contract to Aramark was erroneous, arbitrary, capricious, and/or contrary to law. Atlas claims that its proposal offered a higher commission rate, lower prices, more capital investment, and a superior plan overall. In addition, it claims that Aramark's proposal was non-responsive on one count and that the evaluators failed to take into account the fact that Atlas had been the food supplier at Trident for the past ten years. The basis of Atlas' argument is that the evaluation was unfair in that the weights assigned to the evaluation criteria were arbitrary and that the evaluations were scored in such a way as to justify the award of the contract to Aramark.

The RFP was structured such that the proposals would be evaluated on the following three criteria and points given accordingly: technical quality (45 points), organizational experience and capabilities (35 points), and financial (20 points). [Record p. 79-85] Aramark outscored Atlas in the first two categories but Atlas outscored Aramark in the financial category. However, since the financial category was the least important, Aramark's cumulative scores were higher and it received the award. Atlas argues that it should have been awarded all of the possible 20 points in the financial category since it clearly offered the lowest prices and that Aramark should have received a lower, adjusted score in the financial category. Atlas argues that this procedure was used in the RFP for

Midlands Technical College and that it should therefore be used in this evaluation. The Panel finds that the RFP for Midlands Technical College is a completely different RFP and its specifications are not relevant to the evaluation of the Trident RFP. The Panel finds that the evaluation instructions for the Trident RFP are clear and finds no evidence that the evaluators deviated from these instructions in any way.

Atlas further argues that the evaluators were biased and scored the evaluations to justify an award to Aramark. The three person evaluation panel consisted of one representative from Trident, MMO, and the Commission on Higher Education, as mandated by statute. At the hearing before the CPO, the evaluators testified that they evaluated the proposals independently and based their evaluations only on the evaluation factors in the RFP. At the hearing before the Panel, the evaluators were not called to testify and there is no evidence in the record that the evaluators were arbitrary and capricious in their evaluations.

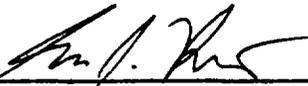
As to Atlas' claim in its appeal that Aramark's bid was non-responsive, no testimony was offered on this issue at the hearing. Furthermore, the RFP states, "If the proposal fails to conform to the essential requirements of the RFP, the State and the State alone will be the judge as to whether that variance is significant enough to consider the RFP non-responsive and therefore not considered for award." [Record p. 49].

At the conclusion of Atlas' case, General Services moved to dismiss Atlas' protest for failure to meet its burden of proof. The Panel finds that Atlas has

failed to meet the burden of proof and grants General Services' motion to dismiss.

For the foregoing reasons, the Panel dismisses the protest of Atlas Food Systems and Services and upholds the order of the CPO in as much as it is consistent with the Panel's findings herein.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, South Carolina

June 5, 1997