

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	CASE NO. 2001-4 (II)
In re:	)	
Protest of Weaver Company, Inc.	)	
	)	ORDER
	)	
Appeal by Weaver Company, Inc.	)	
	)	

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This matter came before the South Carolina Procurement Review Panel (Panel) on November 14, 2001 by way of motion from counsel for Myrtle Beach Air Force Base Redevelopment Authority (MBRDA) for Attorney's Fees and Expenses pursuant to S. C. Consolidated Procurement Code §11-35-4330(2). Present and participating in the hearing before the Panel were MBRDA, represented by Craig K. Davis, Esquire, and Weaver Company, Inc. (Weaver), represented by Joseph F. Singleton, Esquire. Keith McCook, Esquire, representing the Office of General Services of the Budget and Control Board (General Services) was present, but did not participate in the hearing.

**FINDINGS OF FACT**

On January 22, 2001 (revised February 15, 2001), MBRDA solicited sealed bids, using bidding documents prepared by it's engineer of record, Thomas & Hutton Engineering Company (T&H), for the following work which represents the Base Bid: *Site demolition, excavation of roughly 29 acres of lake, storm drainage installation (lake connecting pipes and control structures) grassing and related work on the former Myrtle Beach Air Force Base.* MBRDA included in the Bid Form the following two Bid Alternates (only the second bid alternate is relevant to this case):

ALTERNATE 1 - *Substitute rip rap for turf reinforcement mat (equivalent to Pyramat) at all locations shown on the drawings noting turf reinforcement.*

ALTERNATE 2 - *Delete site clearing, including disposal of all trees, shrubs and removal of stumps.*

On April 26, 2001, MBRDA posted a Notice of Intent to Award the contract to Cherokee, Inc. for the Base Bid only. The bid alternates were rejected. Weaver protested the award on May 9, 2001, contending that Weaver's net bid (the Base Bid minus the deductive amount for Bid Alternate 2) was less than the bid of Cherokee. Weaver requested that the Intent to Award be set aside and that Weaver be declared the lowest responsive and responsible bidder, or in the alternative, that the issue be submitted to the full Board of MBRDA so that consideration could be given to the information that the alternative could be contracted for at no cost. On May 22, 2001, the CPOC issued a decision without a formal hearing. On May 30, 2001, Weaver appealed the CPOC's decision to the Panel. On August 16, 2001, the Panel issued an order dismissing Weaver's appeal without a hearing.

### CONCLUSIONS OF LAW

#### ISSUE: WHETHER WEAVER'S PROTEST WAS FRIVOLOUS

S. C. Consolidated Procurement Code §11-35-4330 (Frivolous Protests) provides the following:

- (1) Signature on Protest Constitutes Certificate. The signature of an attorney or party on a request for review, protest, motion, or other document constitutes a certificate by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation.
- (2) Sanctions for Violations. If a request for review, protest, pleading, motion, or other document is signed in violation of this subsection on or after appeal to the Procurement Review Panel, the Procurement Review Panel, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the protest, pleading, motion, or other paper, including a reasonable attorney's fee.

The Panel has previously addressed sanctions under 11-35-4330 of the Code. In *Protest of Three Rivers Waste Authority*, Case No. 1996-4, the Panel found that the request for review was not frivolous where there were issues open to interpretation.

In *Protest of MTC Service Maintenance*, Case No. 1997-2, the Panel stated the following: "The Panel realizes the possible chilling effect application of the frivolous protest law may have on appeals to the Panel and the Panel does not desire to discourage appeals to the Panel. However, occasionally an appeal to the Panel will have no merit, and the Panel does not desire to see funds, entrusted to the State by tax paying citizens, wasted on such appeals ... No facts or law was presented by MTC to substantiate its claims concerning the CPO decision ... The Panel finds that MTC's appeal is frivolous as it is not grounded in fact and warranted by existing law."

In the present case MBRDA argues that Weaver filed its protest without any meritorious legal or factual basis, and continued the protest before the Panel. MBRDA further contends that the only purpose for such action must be for harassment, or to create unnecessary delay, or increase the cost of the procurement.<sup>1</sup> MBRDA did not assert any specific evidence that Weaver's protest was interposed for an improper purpose.

Weaver argues that the protest and request for review was reasonable and filed in good faith. Weaver further contends that they were seeking to exercise their rights under the Procurement Code and that no rare case of abuse, harassment, or improper purpose exists for finding their appeal frivolous.

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<sup>1</sup> MBRDA also asserted that Weaver was involved in a prior protest and request for review dealing with the same issue. Weaver's counsel asserted that the prior case did not involve his client. The Panel finds that Weaver's alleged involvement in a prior procurement is not relevant to this case. See *Protest of Two State Construction Co.*, Case No. 1996-2.

As stated in *Protest of MTC Service Maintenance*, the Panel realizes the possible chilling effect application of the frivolous protest law may have on appeals to the Panel and the Panel does not desire to discourage appeals to the Panel. The Panel finds that the facts of Weaver are distinguishable from *MTC*.

The Panel finds that Weaver's protest was well grounded in fact and that Weaver formed a belief, after reasonable inquiry, that the appeal was warranted by existing law. Unfortunately, the Panel found that Weaver's appeal issues were legally insufficient to state a claim for which relief could be granted. The Panel finds that Weaver's protest was not frivolous.

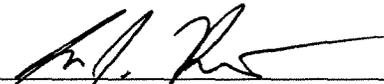
### CONCLUSION

For the forgoing reasons, the motion by MBRDA's counsel for Attorney's Fees and Expenses pursuant to S. C. Consolidated Procurement Code §11-35-4330(2) is hereby denied.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL**

BY: \_\_\_\_\_

  
**Gus J. Roberts, Chairman**

**Columbia, SC**

**December 5, 2001**