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| STATE OF SOUTH CAROLINA<br>COUNTY OF RICHLAND | ) | IN THE COURT OF COMMON PLEAS |
| Acta-Fax Business Machines,<br>Petitioner,<br>vs.<br>South Carolina Procurement Review Panel and Royal Business Machines, Inc.,<br>Respondents. | ) | Docket No. 84-CP-40-4427<br>IN RE: PROTEST OF ROYAL BUSINESS MACHINES<br>ORDER |
| Monroe Systems for Business,<br>Petitioner,<br>vs.<br>South Carolina Procurement Review Panel and Royal Business Machines, Inc.,<br>Respondents | ) | Docket No. 84-CP-40-4447 |

This matter came before this Court on November 13, 1984, pursuant to the petition of Acta-Fax Business Machines (hereinafter "Acta-Fax") dated November 1, 1984, the petition of Monroe Systems for Business (hereinafter "Monroe") dated November 7, 1984, and a Rule and Order to Show Cause executed by this Court on November 5, 1984. The Rule to Show Cause ordered the respondents to appear before me to show cause "why this Court should not issue an immediate order staying the October 25, 1984 Order of Determination of the South Carolina Procurement Review Panel that rescinded the contract of Acta-Fax Business Machines with the State of South Carolina and substituted Royal Business Machines, Inc. as the contractor thereto." Arguments came on to be heard in this Court before the undersigned on November 13, 1984.

## FACTS

This action arises from a dispute concerning the award of certain contracts by the State of South Carolina for plain paper copiers under

Bid No. 1-600-08/17/84-P (as amended, 1-600-08/24/84-P) for "plain paper copier for period from October 1, 1984, through September 30, 1985, and installed." "Royal was the apparent low bidder on Lot Nos. 1-6, 17, 18, 25, and 37 of the 63 lots bid upon, yet it was not awarded the contracts on those listed lots by the South Carolina Materials Management Office because that office decided that Royal's bid was not responsive to the bid invitation. Royal protested the award of these contracts to Monroe and Acta-Fax since Royal was the apparent low bidder, and Royal contended its bid was responsive. Royal proceeded under the South Carolina Consolidated Procurement Code Section 11-35-10, et- seq., through the review process, participating first in a "settlement conference" and then an "administrative hearing" with the Chief Procurement Officer (CPO) for the Materials Management Office, yet received no relief. Royal timely submitted its request for review to the South Carolina Procurement Review Panel (hereinafter "Panel") under S.C. Code Ann. Section 11-35-4210 and Section 11-35-4410. The Review Panel convened on October 22, 1984 to review the decision of the CPO. Present were representatives from Royal, the Materials Management Office, Acta-Fax, and Monroe. After interviewing witnesses, and reviewing relevant documents and the written decision of the CPO, the Panel issued its Order of Determination on October 25, 1984 in which it set forth its findings of fact and conclusions of law. The Panel found that Royal was a responsible and responsive bidder and was the lowest bidder on the lots listed above". Accordingly, the Panel ordered "that all contracts in Lots 1, 2, 3, 4, 5, 6, 17, 18, 25, and 37 for the contract period October 1, 1984, through September 30, 1985, shall be filled by Royal. Any execution of contracts under these listed lots prior to the date of this Order is hereby rescinded and Royal shall be substituted as the contractor." Following this Order of Determination, Acta-Fax and Monroe brought these actions as mentioned above.

## DISCUSSION

The threshold issue before this Court in consideration of whether an immediate order staying the October 25, 1984 Order of Determination of the South Carolina Procurement Review Panel should be issued is whether or not the petitioners have set forth a prima facie case for injunctive relief. Petitioners assert that they are not seeking injunctive relief, but rather are requesting an "immediate stay" of the October 25, 1984, Order of the Panel under S.C. Code Ann. Section 1-23-380(c). That provision provides: "the filing of the petition does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms." Petitioners assert that a stay under this provision is different from injunctive relief and therefore they need not make a prima facie showing of entitlement to injunctive relief in order to be granted the stay they seek.

Petitioners' position is without merit. The "immediate stay" they seek is in actuality an injunction and, like other types of injunctive relief, is discretionary with the Court. Parker v. South Carolina

Dairy Commission, 274 S.C.209, 262 S.E.2d 38 (1980). In Parker, a consumer advocate brought a declaratory judgment suit challenging an order of the Dairy Commission and seeking injunctive relief pursuant to Section 1-23-380 of the Administrative Procedures Act. In upholding the trial court's grant of injunctive relief the court noted that the stay of an agency decision by a court under Section 1-23-380 is the equivalent of a temporary injunction; "whether the temporary injunction was granted pursuant to Section 1-23-380 of the Code, or as a result of the Court's general authority in a declaratory judgment action, is of little consequence. In either instance, the judge is allowed a broad discretion. We find no abuse." See also, D. Shipley, South Carolina Administrative Law, p. 7-57 (1983).

Being injunctive in nature, a stay of an administrative determination requires a prima facie showing that (1) the petitioner has no adequate remedy at law; (2) the petitioner has a likelihood of success on the merits, and (3) the conduct sought to be restrained will cause irreparable harm. Greenwood County v. Shay, 202 S.C. 16, 23 S.E.2d 825 (1943); Williams v. Jones, 92 S.C. 342, 75 S.E. 705 (1912). The burden of proving the entitlement to injunctive relief is upon the party seeking it. E.g. Moss v. South Carolina State Highway Department, 223 S.C. 282, 75 S.E.2d 462 (1953). In the case at Bar, both petitioners have failed to allege or present facts sufficient to prove any of the elements necessary to constitute a cause of action for injunctive relief. Rather, in their submissions to this court, petitioners have relied on legal conclusions.

First, petitioners have failed to show that they have no adequate remedy at law in this case. Ample authority exists for the proposition that injunctive relief is not an appropriate remedy for a disappointed bidder, at least in the absence of a clear violation of duty by government officials, which has not been shown by petitioners in this case. As the Court stated in M. Steinthal and Company v. Seamans, 455 F.2d 1289(D.C. Cir. 1971), "the balancing of the public interest in free and fair competitive bidding... requires informed judgments by officials continuously faced with such decisions, not by the courts which are unfamiliar with, and ill equipped to handle, problems couched in these procurement policy terms." Id. at 1304. For those reasons and others, the Court in Steinthal denied injunctive relief, leaving the disappointed bidder to an action for damages. Accord, William F. Wilkey, Inc. v. Department of the Army, 357 F. Supp. 988 (D Md. 1973), aff'd., 485 F.2d 180 (4th Cir. 1973).

Nor have petitioners made a prima facie showing of irreparable harm. Any alleged harm that might be suffered by petitioners if a stay is not granted would be monetary, and is the same as the harm that Royal, the apparent lowest responsive bidder, would suffer if a stay were granted. Moreover, the public welfare will suffer if the award of the contracts in question by the Panel is stayed in that the taxpayers will be denied copiers for the lowest cost for the length of the stay. In balancing the equities between the parties involved,

this Court determines that petitioners have not shown a likelihood of irreparable harm.

Finally, Petitioners have not alleged or shown a likelihood of success on the merits in this case. At argument, they asserted that the Panel's standard of review of the Order of the CPO is such that the CPO's determination "shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law" pursuant to S.C. Code Ann. Section 11-35-2410. Petitioners assert that the Panel's Order of Determination made no finding that the CPO's decision was either clearly erroneous, arbitrary, capricious, or contrary to law, and thus the Panel exceeded its scope of review. However, the statutory language is clear under Section 11-35-2410 that the previously stated standard of review applies only to certain specific ministerial determinations which are listed in the provision. A review of the determinations listed reveals that the determination by the CPO in this case does not fall in any of these special categories and thus is not a determination which shall be final and conclusive unless clearly erroneous, arbitrary, capricious, or contrary to law. Thus, this assertion by petitioners as to the Panel's scope of review is without merit. Moreover, the language of Section 11-35-4410(5) clearly authorizes the Panel to hold its hearings de novo by specifically vesting the Panel with authority to take testimony and review documents. The General Assembly has clearly vested the Procurement Review Panel with broad discretion to protect the expenditure of public funds and thereby the taxpayers of this State. The Panel must grant such relief as is necessary to effectuate this and the other purposes set forth in Section 11-35-20.

The petitioners have failed to present a prima facie showing of the elements required to entitle them to an immediate stay of the Procurement Review Panel's Order of Determination. Thus, it is hereby ORDERED that Petitioners' request for a stay of the Panel's Order of Determination is DENIED.

It is further ORDERED that the Materials Managment Office shall immediately comply with the Order of Determination of the South Carolina Procurement Review Panel of October 25, 1984 and that all contracts in lots 1, 2, 3, 4, 5, 6, 17, 18, 25 and 37 for the contract period October 1, 1984 through September 30, 1985 shall be filled by Royal, and, as further provided in the Panel's Order of Determination, any contracts or purchases between Petitioners and the State of South Carolina under these lots that have previously been executed are rescinded.

IT IS SO ORDERED.

/s/ Lawrence E. Richter, Jr.
Lawrence E. Richter, Jr.
Presing Judge, 5th Judicial Circuit

Columbia, South Carolina
November 15, 1984

1984-7S

# THE SUPREME COURT OF SOUTH CAROLINA

APPEALED

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| EX PARTE: | South Carolina Division of General Services, | Petitioner, |
| IN RE: | Acta-Fax Business Machines, | Appellant-Petitioner |

v.

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| South Carolina Procurement Review Panel and Royal Business Machines, Inc., | Respondents, |

and

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| South Carolina Procurement Review Panel and Royal Business Machines, Inc., | Respondents, |

## ORDER

All parties in this matter have petitioned the Court to determine the scope of authority of the South Carolina Procurement Review Panel.

The Procurement Review Panel was created by the legislature to serve as an advisory body to the Budget and Control Board in protests arising under S.C. Code Ann. §§11-35-4210, 11-35-4220, and 11-34-4230 (Supp. 1983). It has no authority to make or rescind contracts, or to order the Division of General Services to do so. In protests arising under §11-35-4210, the Panel is empowered only to determine whether an unsuccessful bidder should have been awarded a contract, and to make recommendations to the Budget and Control Board for relief to the aggrieved bidder. §11-35-4210(7); §11-35-4410(5) (Supp. 1983). Additionally, §11-35-4210(6) provides that "the request for a review shall not stay the contract unless fraudulent."

It is therefore ordered that the portion of the Procurement Review Board's order of determination dated October 25, 1984, which purported to rescind existing contracts and to substitute Royal Business Machines, Inc. as contractor, is void.

/s/ C. Bruce Littlejohn A.J.

/s/ Julius B. Ness A.J.

/s/ George T. Gregory A.J.

/s/ David W. Harwell A.J.

/s/ A. Lee Chandler A.J.

COLUMBIA, SOUTH CAROLINA

December 17, 1984