

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1988-3

IN RE:)

PROTEST OF ZUPAN AND SMITH SAND &
CONCRETE COMPANY, INC.)

O R D E R

On April 13, 1988 the South Carolina Procurement Review Panel (the "Panel") issued its order in this matter awarding Clemson University contract number 9405 to the protestant Zupan Smith Sand & Concrete Company. On May 12, 1988 Metromont Materials Corp. ("Metromont") filed in the Circuit Court in Greenville County a petition for review of that order. On May 16, 1988 the Panel received Metromont's Motion for Rehearing on the facts and questions of law in this case. Metromont states a number of supporting grounds for its motion.

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The Procurement Code, S. C. Code Ann. §§ 11-35-10 et seq. (1976) is silent on whether an unsuccessful litigant can obtain a rehearing on a matter decided by the Panel. The Administrative Procedures Act ("APA") recognizes that rehearing by an agency may be a part of the administrative review process when it provides, "Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency, or, if a rehearing is requested, within thirty days after the decision thereon." § 1-23-300 (b). It is unsettled in South Carolina whether, in the absence of express statutory authority, an administrative agency has the inherent or implied power to rehear or otherwise reconsider a final decision made by it. Authorities from other jurisdictions are split on the

question. See 2 Am. Jur. 2d 522.

Generally, an agency has those powers which are expressly conferred plus those which are necessary by reasonable implication and those which are merely incidental to powers expressly granted. Section 11-35-4410 gives the Panel broad powers to perform its function as a reviewing body of state purchasing decisions, including the power to interview all persons, review all decisions, record all determinations and establish its own rules and procedures for the conduct of its business, including the holding of hearings. The Panel finds that it is within its inherent power to hold rehearings and otherwise reconsider decisions made by it.

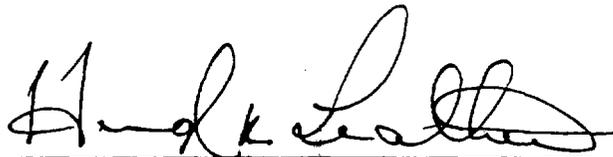
In the present case the Panel is disposed to grant Metromont's motion to hear arguments on the legal issues raised which were not fully developed at the initial hearing. At that hearing neither the Protestant nor Metromont were represented by attorneys.

Notwithstanding the above, the power to grant a rehearing exists only if the agency still retains jurisdiction over the case. See, e. g. Epps v. Bryant, 65 S.E.2d 112 (1951) (filing of notice of appeal stays any further action in the court below and an order modifying the order on appeal was void). See, also, Lebovitz v. Mudd, 289 S.C. 476, 347 S.E.2d 94 (1986); Johnson v. Brandon, 69 S.E.2d 594 (1952).

While the Panel is inclined to grant Metromont's Motion for Rehearing for the purpose of hearing arguments on the legal

issues raised therein, it is unable to because the filing of the complaint for review in the Circuit Court deprives the Panel of jurisdiction to entertain the motion. Should the Circuit Court relinquish jurisdiction to the Panel and provided that the question is not moot, Metromont's Motion for Rehearing on the questions of law arising in this matter is granted.

IT IS SO ORDERED.



Hugh K. Leatherman, Sr.
Chairman

MAY 19, _____, 1988
Columbia, South Carolina