

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1989-17

IN RE:)
 PROTEST OF GREGORY ELECTRIC COMPANY, INC.) O R D E R
)

This case originally came before the South Carolina Procurement Review Panel (the "Panel") on Gregory Electric Company's ("Gregory") appeal of a decision by the Chief Procurement Officer ("CPO") to award to Brock Electric Technology, Inc. ("Brock") a contract for the installation of an uninterruptible power supply system for the Department of Health and Environmental Control ("DHEC").¹ Gregory contended that Brock should not receive the contract even though it was the low bidder because Brock failed to comply with the requirement of the bid solicitation that bidders submit a list of references and qualifications with their bid package. The CPO found that, although Brock did not submit its qualifications with its bid as required,² the omission was a minor irregularity which could be cured pursuant to procurement Reg. 19-445.2080. That regulation provides:

A minor informality or irregularity is one which is merely a matter of form or some immaterial variation from exact

¹The uninterruptible power supply system is to insure that DHEC's laboratories and other offices are not affected in the event of power failures.

²Brock submitted its qualifications several hours later.

requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to bidders. The procurement officer shall either give the bidder the opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency where it is to the advantage of the State.

On January 2, 1990, the Panel issued its order affirming the decision of the CPO and dismissing the protest of Gregory.

On January 19, Gregory filed its appeal of the January 2 order of the Panel to the circuit court pursuant to the Administrative Procedures Act, S.C. Code Ann. §1-23-310 et seq. (1976). That case is currently pending as Case No. 90-CP-40-0348. As provided in §1-23-380(c), Gregory now petitions the Panel to grant a stay of its order until such time as the circuit court rules on Gregory's appeal.

A request for a stay pursuant to §1-23-380(c) is the same as a request for a temporary injunction. Parker v. South Carolina Dairy Commission, 274 S.C. 209, 262 S.E.2d 38 (1980). That is, the petitioner must make a prima facie showing that it has no adequate remedy at law, that it has a likelihood of success on the merits, and that the conduct sought to be restrained will cause irreparable harm. Greenwood County v. Shay, 202 S.C. 16, 23 S.E.2d 825 (1943). Further, in administrative cases, it is proper to take into

consideration as a fourth factor the effect of the requested stay on public interests. M. Steinthal & Co. v. Seamans, 455 F.2d 1289, 1303 (D.D.C. 1971) ("There is discretion under doctrines of public interest to withhold relief even assuming the private bidder cannot be made completely whole in damages.")

Gregory alleges in support of its motion to stay that it has no adequate remedy at law because the funds for the contract will be spent before it can receive an order from the circuit court. It has been repeatedly held, however, that injunctive relief is not the appropriate remedy for a disappointed bidder when public interest considerations are present and when a claim for damages is available. This is true even though the bidder is limited to recovery of bid preparation costs. M. Steinthal & Co., cited above. See also Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975); William F. Wilke, Inc. v. Dept. of the Army, 485 F.2d 180 (4th Cir. 1973); Acqua-Tech, Inc. v. U.S. Army Corps of Engineers, 564 F. Supp. 773 (D.D.C. 1983); Fairplain Development Co. v. Freeman, 512 F. Supp. 201 (N.D. Ill. 1981); General Electric Co. v. Kreps, 456 F. Supp. 468 (D.D.C. 1978); Acta-Fax Business Machines v. S.C. Procurement Review Panel, November 15, 1984 Order of Judge Richter, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 156; Paddock Equipment Co., Inc. v. U.S.C., June 14, 1984 Order of Judge Cox, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 131;

Martin Engineering, Inc. v. S.C. Procurement Review Panel,
November 4, 1983 Order of Judge Craine, Decisions of the
South Carolina Procurement Review Panel 1982-1988, p. 91.

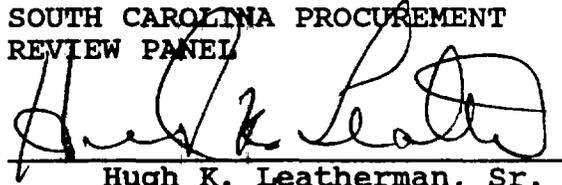
In this case Gregory does have an adequate remedy at law. The Procurement Code in § 11-35-4210 provides that a bidder who claims it should have been awarded a contract but is not may be awarded a "reasonable reimbursement amount, including reimbursement of bid preparation costs, and . . . such other and further relief as justice dictates" Because it has an adequate remedy at law, Gregory cannot show that it will be irreparably harmed if the stay is not issued.

Finally, the Panel believes that the public has a strong interest in having procurements of vital goods and services by the State proceed without disruption and delay. As stated by the Steinthal court, "It would be intolerable for any frustrated bidder 'to render uncertain for a prolonged period of time government contracts which are vital to the functions performed by the sovereign.'" 455 F. Supp., at 1303. The Panel is confident that in this case the corresponding public interest in having its procurement laws followed can be delved into and ultimately served by a damages action without the necessity of staying the performance of Brock's contract.

Because of its findings above, the Panel need not address whether Gregory has a likelihood of success on the merits of its appeal.

For the reasons stated, the request of Gregory Electric Company for a stay of the Panel's January 2, 1990 order is denied.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

1-26-, 1990
Columbia, South Carolina