

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
 Constable Security Patrol, Inc.)
 Appellant,)
 vs.)
 State Procurement Office,)
 Appellee.)

COURT OF COMMON PLEAS
 C/A NO. 90-CP-40-0728

IN RE: PROTEST OF CONSTABLES
 SECURITY PATROL, INC.

91 JUN 25 AM 10:59
 BARBARA A. SCOTT
 C. CLERK & C.S.
 ORDER

FILED

This case comes before the Court on the appeal by Constable Security Patrol, Inc. ("Constable") of an Order of the South Carolina Procurement Review Panel ("Panel"). Constable seeks judicial review pursuant to the Administrative Procedures Act, §§1-23-310 et seq., Code of Laws of South Carolina, 1976 (as amended).

FACTS

On August 25, 1989, an Invitation for Bids ("IFB") was issued by the State Procurement Office to provide unarmed security guard services to the University of South Carolina. The bids were opened on September 19, 1989. Constable Security Patrol, Inc. submitted the lowest dollar bid. Under §11-35-1520, Code of Laws of South Carolina, 1976, (as amended) contracts are required to be awarded to the lowest responsive and responsible bidder. The bid of Constable was found to be non-responsive to the bid specifications that required the bidders to have serviced a contract of 10,000 hours of service annually.

Handwritten initials/signature

On October 4, 1989, Albert Samra, President of Constable, was informed by Jimmy Culbreath of the State Procurement Office that his bid was being rejected by the State because it was non-responsive to the 10,000 hour requirement. By letter of October 6, 1989, Mr. Samra then requested that the reasons given by Mr. Culbreath for rejecting his bid be put in writing. This was done in a letter of October 10, 1989, from Joe Fraley to Mr. Samra.

By letter of October 10, 1989, Joe Fraley, the buyer for the procurement, responded to Mr. Samra with a written explanation of why his bid had been rejected. Mr. Samra received the October 10, 1989, letter and the Intent to Award the contract to another bidder several days after October 10, 1989. Mr. Samra filed a protest with the Chief Procurement Officer under §11-35-4210 of the Code on November 6, 1989.

Section 11-35-4210 of the Code sets forth the timeliness requirements for submitting procurement protests as follows:

(1) Right to Protest. Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer. The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

The Chief Procurement Officer ("CPO") and the Procurement Review Panel found that Constable had not submitted their protest within the time limits required by §11-35-4210. Both the CPO and the

Panel found that Mr. Samra knew of the issue giving rise to his protest as a result of the conversation with Mr. Culbreath on October 4, 1989, and that to be timely his protest should have been filed by October 14, 1989. Both the CPO and the Panel found that the letter of October 6, 1989, from Mr. Samra to Joe Fraley, the only written correspondence within the time limits set by §11-35-4210, was not a letter of protest.

DISCUSSION

Because this is an appeal pursuant to the Administrative Procedures Act, §§1-23-310 et seq., Code of Laws of South Carolina, 1976 (as amended), the standard of review applicable to this case is that set forth by the Supreme Court in Lark v. BI-LO, Inc., 276 S.E.2d 304, 306 (1981), that a finding by an administrative agency will be set aside only if it not supported by substantial evidence. "Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action."

The central issue in this case is whether the letter of October 6, 1989, from Mr. Samra to Joe Fraley is a letter of protest. Constable meets the timeliness requirements of §11-35-4210 only if this letter can be considered a protest letter.

Testimony was presented by both Mr. Samra and Messrs. Fraley and Culbreath concerning the circumstances surrounding the October 6th letter. Mr. Fraley testified as to the instructions

for filing Protests set forth in item 9 of page 15 of the IFB (Transcript of Record, p.45). He further testified as to his conversation of October 3rd with Mr. Samra, which preceded the writing of the October 6th letter (Transcript of Record, pp.48 through 51) and stated that the normal procedure that is followed upon receipt of a protest at the Materials Management Office is to rescind the Intent to Award so that the Protest can be resolved. (Transcript of Record, p.51, lines 3 through 21 and p.55, lines 12 through 14). In this case, Mr. Fraley testified that the Intent to Award was not rescinded because he did not have reason to consider this a protest. (Transcript of Record, p.51, lines 16 through 21, and p.55, lines 15 through 17). Furthermore, Mr. Fraley testified that he receives requests for information from bidders such as this on a frequent basis (Transcript of Record, p.56, line 25 and p.57, lines 1 and 2).

Additional testimony of events leading up to the October 6th letter was provided by Mr. Culbreath. Mr. Culbreath testified that his conversation of October 4th with Mr. Samra, which was the final conversation with Mr. Samra prior to the sending of the October 6th letter, was a cordial conversation and that Mr. Samra never indicated a desire to protest. (Transcript of Record, pp.61, 62 and 65).

After hearing all of this testimony and reviewing the letter itself, the Panel concluded on page 6 of its Order:

Constables' October 6 letter falls short of even the failed protest in AT&T and Computerland cited above. Constables' October 6 letter contains no statement of disagreement or protest or anything to indicate that Constable is dissatisfied with the State's actions. It simply recites that

Constables serviced the USC contract in 1985-86 for 17,986 hours. The letter does not request a "meeting", "review", "hearing", "interview", "investigation", or "discussion" or require any further action on the part of the State except to send copies of certain routine information. As Mr. Fraley testified, requests for information are frequently received and routinely handled by the State under the Freedom of Information Act and are not treated as protests. Finally, the October 6 letter is not directed to the CPO and is not addressed to the address for filing protests plainly set forth in the IFB. (Def.'s Ex. 1, p.14).

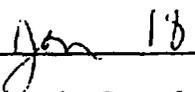
DECISION

This Court concludes that under the substantial evidence standard of review, the Panel's decision should be upheld. The record contains sufficient evidence upon which reasonable minds could conclude that the letter of October 6th was not a protest and that, therefore, Constable did not meet the time requirements of §11-35-4210, Code of Laws of South Carolina, 1976 (as amended). Because the Panel's Order is supported by substantial evidence, it should be upheld and the appeal of Constable Security Patrol, Inc. dismissed.

IT IS SO ORDERED.



Judge J. Ernest Kinard, Jr.
Presiding Judge
Fifth Judicial Circuit

 10, 1991

Columbia, South Carolina