

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1989-2

IN RE:)
)
PROTEST BY WILLIS CONSTRUCTION) O R D E R
COMPANY, INC.)
)
_____)

This case comes before the South Carolina Procurement Review Panel ("Panel") pursuant to S. C. Code Ann. §11-35-4230 (1976) on the appeal by Willis Construction Company, Inc. ("Willis") of the Chief Procurement Officer's ("CPO") decision to dismiss Willis' complaint against the Sumter Airport Commission for lack of jurisdiction.

The Panel declines to grant Willis' request for an interview with the Panel because the issue appears to be solely one of law. Counsel for both parties submitted written legal arguments in favor of their clients' positions and the Panel considered both submissions in making its decision.

DISCUSSION

On December 9, 1988, Willis applied to the Chief Procurement Officer for resolution of a controversy concerning the alleged breach of a contract between Willis and the Sumter Airport Commission. Willis applied pursuant to §11-35-4230 of the Consolidated Procurement Code, which provides in part:

(1) Applicability. This section applies to controversies between the State and a contractor or subcontractor when the subcontractor is the real party in interest, which arise under or by virtue

of a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation or other cause for contract modification or rescission.

(2) Authority. The appropriate chief procurement officer is authorized to settle and resolve a controversy described in subsection (1) of this section.

The Chief Procurement Officer in his decision dated January 4, 1989, declined to consider Willis' application because he found that § 11-35-4230 and the other provisions of the Consolidated Procurement Code did not apply to the Sumter Airport Commission because it is not a "governmental body" as defined in the Code.

In its appeal to the Panel, Willis makes several arguments against the CPO's decision. First, Willis argues that the Sumter Airport Commission is a governmental body subject to the Code. Section 11-35-40(2) states:

(2) Application to State Procurement. This code shall apply to every expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of funds

(Emphasis added). "Governmental body" is defined as:

[A]ny state government department, commission, council, board, bureau, committee, institution, college, university, technical school, legislative body, agency, government corporation, or other establishment or official of the executive, judicial or legislative branches of this State. Governmental body excludes the General Assembly and all local political subdivisions such as counties, municipalities, school districts or

public service or special purpose districts.

(Emphasis added).

Willis contends that because the Sumter Airport Commission was established by the General Assembly pursuant to 1951 Act 282 (codified at 1959 Code of Laws of South Carolina, § 2-431 et seq.), it is a "commission", "governmental corporation" or "other establishment" of the legislative branch and therefore a governmental body. Willis further argues that the powers conferred on the Sumter Airport Commission, such as the power of eminent domain (§ 28-2-10 et seq.), weigh toward its classification as a governmental body.

Willis' argument misses the point. Sumter Airport Commission may technically fit into one of the classifications urged by Willis. However, the definition of "governmental body" in § 11-35-310(18) specifically excludes all local political subdivisions such as municipalities, counties, public service or special purpose districts.¹

1951 Act 282 states "There is hereby created a Commission for the city and county of Sumter to be known as the Sumter Airport Commission". Under the enabling legislation and subsequent amendments, the members of the

¹That an entity may be an establishment of the Legislature but specifically excluded by § 11-35-310(18) as a local political subdivision is also illustrated by special purpose districts, which may be created by the General Assembly. Mills Mill v. Hawkins, 103 S.E.2d 14(1957).

Sumter Airport Commission are appointed by the Sumter city council and Sumter county council. The city and county of Sumter are authorized to fund the Commission as necessary to carry out its purposes. The Commission is empowered to own property and establish and maintain airports only in the county of Sumter. See, S. C. Code Ann. §55-9-30 (1976). Unlike all state construction projects which must be overseen by the Chief Engineer (§11-35-3010), construction at the Sumter Airport is the responsibility of Sumter city and county and the Sumter Airport Commission. S. C. Code Ann. § 55-9-190 (1976). By law, then, the Sumter Airport Commission is entirely local to Sumter and has no statewide powers.

While Sumter Airport Commission may be an "other establishment" of the Legislature it is undoubtedly also a local political subdivision.² The Panel finds that the Procurement Code does not apply to Sumter Airport Commission.

In the alternative, Willis argues that, even assuming Sumter Airport Commission is not a governmental body, the Panel has jurisdiction because of the South Carolina

²The Attorney General of South Carolina has opined that an airport commission is a special purpose district or local political subdivision. 85 Op. Att'y Gen. 36 (April 11, 1985).

Aeronautics Commission, which is also named as a party.³ Willis contends that, because the project in question is funded 5% by the State of South Carolina⁴ through the Aeronautics Commission, it involves an "expenditure of funds by this State under contract acting through a governmental body . . ."

Willis misinterprets the coverage of the Procurement Code. The State's "expenditure of funds" was in the form of a grant to Sumter County and is covered by an agreement which appears as Exhibit 3 to Willis' appeal document. The contract in controversy here is the one between Willis and the Sumter Airport Commission. The expenditure of funds under that contract is by a local political subdivision not by the State. That a portion of the funds for the project originally came from the State is irrelevant. The coverage of the Code is "irrespective of the source of funds." §11-35-40(2). Jurisdiction over a local dispute is not conferred on the Panel simply because some state funds are involved.

Finally, Willis argues that the Panel has jurisdiction under § 11-35-4230 because the contract provisions in question were "adopted and approved" by the Aeronautics

³Willis added the South Carolina Aeronautics Commission as a party when it appealed to the Panel and after the CPO rendered his decision.

⁴The rest of the funding comes from the Federal Aviation Administration (90%) and Sumter County (5%).

Commission and incorporated by reference into the agreement between Sumter County and the Aeronautics Commission. While, the Panel agrees with Willis that privity of contract with the State is not a prerequisite to invoking that section, it is a prerequisite that the controversy be between the State and the complainant.

Willis alleges that the Sumter Airport Commission in effect hindered its performance, required it to perform extra work, failed to grant extensions and refused to pay interest on late payments. Willis' original application for relief under §11-35-4230 does not even mention the Aeronautics Commission. Willis' dispute is plainly not with the State. If Willis is entitled to relief, it must seek it with the appropriate local authorities as designated in Sumter's procurement code or in the courts.

For the reasons stated above the Panel holds that it and the CPO are without jurisdiction to consider the complaint of Willis Construction Company, Inc. The January 4, 1989, decision of the CPO is affirmed. The appeal of Willis is hereby dismissed.

IT IS SO ORDERED.

South Carolina Procurement
Review Panel

By:


Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.
2-7, 1989