

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF DARLINGTON )

COURT OF COMMON PLEAS  
CASE NOS. 90-CP-16-62  
90-CP-16-262

MEDICAL ARTS PHARMACY, INC. )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
HUGH K. LEATHERMAN, SR., ET AL )  
 )  
Respondents. )

IN RE: PROTEST OF MEDICAL ARTS  
PHARMACY, INC.

O R D E R

REC'D  
AUG 11 1990  
11:59 AM

This case is before the Court pursuant to the Administrative Procedures Act (S.C. Code Ann. ~~§~~<sup>§</sup> 1-23-310 et seq. (1976)) on the appeal by Medical Arts Pharmacy of two related orders of the South Carolina Procurement Review Panel ("Panel"). S.C. Code Ann. ~~§~~<sup>§</sup> 1-35-4410 et seq. (1976) charges the Respondent Panel with the duty of providing final administrative review of disputes among vendors and the State over purchasing matters. The Respondent Hugh K. Leatherman, Sr., is chairman of the Panel. The Respondent Budget & Control Board, Division of General Services, is responsible for overseeing state procurement and for providing the initial administrative review of purchasing decisions.

FACTS

The Respondent Panel made the following findings of fact, which are undisputed by the parties. On September 6, 1989, an Invitation for Bids ("IFB") was issued for a one-year contract to provide pharmacy services to the South Carolina Department of Mental Retardation's

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Center. The IFB contained the following provision at Note C:

THE MINIMUM AMOUNT OF FEES QUOTED MUST  
BE AT LEAST "0". NO CREDIT OR NEGATIVE  
(-) AMOUNTS WILL BE CONSIDERED.

Two bidders responded to the IFB - the Petitioner Medical Arts Pharmacy and Pee Dee Pharmacy. Pee Dee bid a zero for every item under Lot A. Medical Arts bid a total of \$1309.24 per month.

On September 28, at the bid opening, Pee Dee's bid was announced as a "no bid" even though it was not. A "no bid" occurs when a bidder who does not want to bid on a particular project but who does wish to remain on the bidder's list returns a blank bid or a bid marked "no bid" or "-0-". In this case, Pee Dee's intent in bidding zero was to actually offer its services to the State free of charge.

After Pee Dee's bid was announced as a "no bid", Medical Art's president, Mike Rast, assumed that Medical Arts would receive award of the contract. On October 2, Joe Fraley, the state procurement specialist in charge of this procurement, called Mr. Rast to find out what information Medical Arts needed in response to a Freedom of Information Act request it had filed with its bid. Mr. Rast replied that Medical Arts did not need any information because it was the only bidder and was going to receive the contract. Mr. Fraley advised Mr. Rast that Medical Arts was not the only bidder because Pee Dee had submitted a bid. Panel

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found as a fact that Mr. Fraley described Pee Dee's exact bid to Mr. Rast during that phone conversation. Medical Arts denies this finding.

On October 3, Mr. Rast called Mr. Fraley twice, requested a copy of Pee Dee's bid, and stated that the State could not award the contract to Pee Dee because it was against federal law. Mr. Fraley testified that Mr. Rast faxed a copy of the law to him that afternoon.

After a series of follow-up phone calls, Mr. Rast obtained a copy of Pee Dee's bid by fax on November 17. On November 20, Medical Arts filed its protest to the Chief Procurement Officer, alleging as grounds:

1. Pee Dee's bid violates Medicare/Medicaid anti-fraud regulations because it makes no charge to the State for over-the-counter medications. Because of federal payments, this is in effect a negative bid prohibited by federal law and the IFB in this case.
2. Pee Dee's bid violates Medicare/Medicaid anti-fraud regulations because there is no charge for consultant services under Item 1 of the IFB.
3. Pee Dee's bid is confusing and should be rejected because at the opening of bids, the bid of Pee Dee was announced as a "no bid."

In an order dated January 10, 1990, the Panel found that Medical Arts' first two grounds were untimely filed under S.C. Code Ann. §11-35-4210(1)(1976) because Medical Arts knew or should have known of the facts giving rise to those grounds when the bid specifications were issued and, in no event, no later than October 3, 1989. The state procurement officer described Pee Dee's exact bid to Medical

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Arts' president and he faxed a copy of the federal law allegedly violated to the state procurement office.

The Panel found Medical Arts' third issue - that Pee Dee's bid was confusing - timely and remanded that issue to the Division of General Services for further development. In its second order dated April 10, 1990, the Panel found no merit to Medical Arts' claim that Pee Dee's bid was so confusing as to be nonresponsive to the requirements of the Invitation for Bids.

Medical Arts appeals both of the Panel's orders to the Court pursuant to the Administrative Procedures Act and these matters were consolidated for hearing, without objection, and heard on June 25, 1990. All parties were present and represented by counsel. After hearing argument by counsel, the Court, for the following reasons, overturns the January 10, 1990 order of the Panel and remands that matter to the Panel for hearing on the merits. The Court also affirms the April 10, 1990 order of the Panel.

#### CONCLUSIONS OF LAW

The standard of review applicable to this case is that enunciated 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 is unsupported 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

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action." Under § 1-23-380(g) of the Administrative Procedures Act, a court may also overturn an administrative agency if its findings or conclusions are contrary to statutory or constitutional law, in excess of the authority granted the agency, affected by other error of law, or are arbitrary or capricious.

In this case, the Panel found that grounds 1 and 2 of Medical Arts' protest as summarized above were untimely filed under § 11-35-4210(1) of the Procurement Code. That section provides:

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 facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

In finding Medical Arts' first two grounds untimely, the Panel construed Medical Arts' claim to be that the specification at note C was defective because it allowed the State to accept a face bid of "0" on all items in contravention of federal law. The Panel, therefore, held that Medical Arts knew or should have known of the facts giving rise to its protest when Medical Arts received the IFB containing note C on or around September 6. The Panel also found that, even assuming Medical Arts was not put on notice of its protest grounds by receipt of the IFB, it knew of the facts giving rise to its protest by October 3rd when

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the State described Pee Dee's bid to Medical Arts and Medical Arts provided the State with a copy of the federal Medicaid law allegedly violated.

The Court finds that the Panel has misconstrued the nature of Medical Arts' protest and has, therefore, incorrectly applied the applicable time limit in this case.

Medical Arts is not protesting the illegality of the specification rather, in its protest letter of December 11, 1989, Medical Arts claims that the State's acceptance of Pee Dee's bid on items 1 and 4 violates the specification itself because it is in effect a negative bid which is prohibited by Note C. Therefore, for purposes of the ten-day time limit, it was not enough for the Panel to determine when Medical Arts knew of Pee Dee's zero bid and of federal Medicaid law. It also should have determined when Medical Arts knew that Pee Dee's bid on items 1 and 4 was accepted by the State.

The record reveals that date to be November 13, 1989.<sup>1</sup> Pee Dee filed its protest on November 20 within the ten-day limit of §11-35-4210(1). The Panel erred in concluding that

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<sup>1</sup>According to Mr. Fraley, state procurement specialist, the Notice of Award to Pee Dee is dated November 6, 1989. (Transcript of January 8 hearing, p. 81, lines 12-13). Pee Dee's bid, found in the record at page 16, indicates on its face that it was accepted by the State on November 8, 1989. Mr. Rast testified that Medical Arts did not learn of the award to Pee Dee until November 13, when he called Mr. Fraley to check on the status of the solicitation. (Transcript of January 8 hearing, p. 50, lines 12-16).

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Medical Arts first two grounds were untimely. The January 10, 1990 order of the Panel is overruled and the matter is remanded to the Panel for hearing on the merits of Medical Arts' first two grounds of protest.

The Panel found that Medical Arts failed to present enough evidence to substantiate its third ground that Pee Dee's bid is confusing and should have been rejected as nonresponsive. Medical Arts withdrew its appeal on this finding at the hearing before this Court. The Court, therefore, affirms the April 10, 1990 order of the Panel.

IT IS THEREFORE ORDERED THAT the Panel's January 10, 1990, order is overturned and this matter is remanded to the Panel for hearing on the merits of Medical Art's first two grounds of protest.

IT IS FURTHER ORDERED THAT the Panel's April 10, 1990, order is affirmed and Medical Art's third ground of protest is dismissed with prejudice.

AND IT IS SO ORDERED.

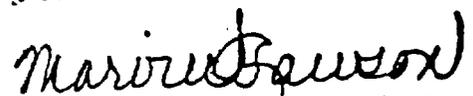


Judge C. Anthony Harris  
Fourth Judicial Circuit

Darlington, S.C.

July 27, 1990

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