

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

WIN Laboratories, Ltd.,)

IN RE: PROTEST OF WIN LABORATORIES, LTD.
Civil Action No. 92-CP-40-5225

Petitioner,)

v.)

ORDER

South Carolina Procurement)
Review Panel and The Computer)
Group, Inc., and the Office)
of General Services of S.C.)
Budget and Control Board)

Respondents.)

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BARBARA A. SCOTT
C.C.C. & G.S.

FILED

This matter comes before the Court on appeal of Petitioner WIN Laboratories, Ltd. ("WIN"), upholding Respondent Office Of General Services ("General Services") award to The Computer Group ("TCG") of a contract to supply the state with personal computers for a five-year period. For the reasons set forth below, this Court affirms the determinations, findings, and conclusions of the South Carolina Procurement Review Panel and dismisses petitioner's appeal.

BACKGROUND

The State, through General Services, issued an Invitation for Bids to allow State agencies to purchase, under a term contract, generic personal computers ("PCs") with a variety of configuration and feature options. General Services awarded TCG, of Columbia, South Carolina, the term contract and TCG has been supplying these PCs to the State for over two years.

WIN, of Virginia, protested five issues within the ten day protest period. The only protest issue before this Court

alleges that TCG underpriced its Digital Audio Tape ("DAT") drive product in its bid.

The Chief Procurement Officer ("CPO") heard the initial protest pursuant to the applicable regulatory scheme. At the hearing, and after the ten day protest period expired, WIN protested other new issues which the CPO held to be untimely under Section 11-35-4210 of the Procurement Code. The remaining issues on appeal derive from this set of untimely protest issues. WIN argues that the Panel should have changed its long standing application of the express terms of the statute, and grant it an extra day or more, because it made an incorrect assumption (that it did not receive TCG's entire bid). WIN did not investigate whether it had received TCG's entire bid within the ten day protest period.

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The CPO heard WIN's protest and denied it. He found WIN's argument that TCG's DAT drive price was too low to be without merit. He found that WIN's protest regarding product data was untimely and, therefore, denied it without reaching its merits. WIN then appealed the CPO's decision to the Panel. The Panel held extensive hearings on WIN's protests and also denied them. The Panel found that WIN's DAT drive claim was without merit. It found that the protest issue concerning product data was jurisdictionally untimely.

WIN then filed a Petition for Judicial Review of the Panel's order to this Court pursuant to the Administrative Procedures Act, S.C. Code Ann. § 1-23-310 et seq. (1986).

DISCUSSION

1. Untimely protest issues. WIN argues that its grounds of appeal were not untimely under Section 11-35-4210. This section reads as follows:

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.

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Consol. Procurement Code, S.C. Code Ann. §11-35-4210(1) (Law. Co-op. 1976). WIN's protest of the product alleged absence of material in the TCG bid and was made on the 11th day after TCG's bid was delivered to it. WIN argued that as long as the appeal was made within thirty days it was timely. This is an incorrect view of the law and is inconsistent with the construction repeatedly and consistently applied by the Procurement Review Panel that the ten day protest deadline set forth in Section 11-35-4210 is to be strictly applied and protests untimely thereunder are jurisdictionally deficient.

Ruling on an issue similar to this one, the Circuit Court for Richland County held in Chambers Medical Technologies of South Carolina v. South Carolina Procurement Review Panel, et al., No. 92-CP-40-4689 (Nov. 1992) that the period for bringing protests was to be strictly construed and applied it to preclude an out-of-time protest. The same rule applies here.

The purpose of the strictly enforced and consistently applied ten day protest period is to bring a quick end to protests of government purchasing decisions, so that the public's business

may be carried out.¹ A contrary approach would allow unhappy vendors to paralyze government with drawn out protests.

This Court must give great deference to the Panel's interpretation. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. South Carolina Bd. of Exam. in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987), citing Emerson Electric Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986). Furthermore, this Court concurs with the reasoning of the Panel and the Chambers Court.

Accordingly, the Court holds that the Panel correctly determined that WIN's protest issues were untimely.

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2. Extension of protest period. At the hearing before the Panel, the southern sales manager for WIN, admitted that he received TCG's entire bid on May 22nd, including additional information attached to the bid that he had not requested. He admitted before the Panel that if he would have examined the information concerning TCG's bid when he received it on May 22nd he would have been able to ascertain that the "literature" WIN claims was required was not present. Furthermore, he testified that at no time had he received any incomplete information from General Services when he had

¹ In Re: Protest of Oakland Janitorial Serv., Inc., S.C. Procurement Review Panel Case No. 1988-13, p. 540-41 (if strict adherence to the ten-day limit is not mandated, the State will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of being liable to another vendor); In Re: Protest of Computerland of Columbia, Inc., S.C. Procurement Review Panel Case No. 1988-4 p. 438 (General Assembly chose short time limit in recognition of the need for conducting state procurement in a timely, efficient manner).

requested it, and that he made no effort to contact General Services to find out if the information concerning TCG's bid was complete. Yet, although WIN claims that it believed the copy of TCG's bid it received from General Services was incomplete, and although it made no effort to contact General Services to ascertain whether it had received complete information, WIN waited eleven days after receiving the information to assert its protest concerning the allegedly incomplete bid. Allowing such an untimely protest, would defeat the finality purpose of the ten-day limit provided by Section 11-35-4210.

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The law does not allow WIN an additional protest period merely because WIN incorrectly assumed it did not receive the entire TCG bid, which it had been given on request. As the Panel properly found, and as the record indicates, there was nothing to prevent WIN from asking the State within the ten day period whether it had received the entire TCG bid. Also, if WIN believed that there was a chance that TCG may have been nonresponsive for lacking product data, it could have protested the issue within the ten day period while it conducted further investigation.

The Court affirms the Panel's decision that an extension of the ten day limitation period is not allowed.

3. Pricing of Digital Audio Tape ("DAT") drive. WIN argues that the DAT drive product by The Computer Group was artificially underpriced in TCG's bid. The Panel found this argument to be without merit.

An appeal from a determination of the Procurement Review Panel is governed by the provisions of the South Carolina Administrative Procedures Act. See Roper Hosp. v. Board of So.

Car. Dept. of Health and Env'tl. Control, 306 S.C. 138, 140, 410 S.E.2d 558, 559 (S.C. 1991) (appeal of decision of Department of Health & Environmental Control Board governed by S.C. Administrative Procedures Act which controls appeals from orders of state agencies).

Under the Administrative Procedures Act, the decision of an administrative agency must be sustained if there is substantial evidence to support it. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981) (decision of S.C. Industrial Commission in a Worker's Compensation case subject to substantial evidence rule). A court cannot substitute its judgment for that of the [agency] upon a question as to which there is room for a difference of intelligent opinion. Hamm v. American Tel. & Tel. Co., 302 S.C. 210, 394 S.E.2d 842 (1990) (findings of Public Service Commission could not be overturned upon a question as to which reasonable minds could differ); Chem Leaman Tank Lines v. South Carolina Pub. Serv. Comm'n, 258 S.C. 518, 189 S.E.2d 296 (1972) (order of Public Service Commission would not be set aside absent convincing showing that there was no evidence to support it).

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"Substantial evidence is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an agency's finding from being supported by substantial evidence." Hamm v. South Carolina Pub. Serv. Comm'n and Wild Dunes Util., Inc., 422 S.E.2d 118 (S.C. 1992) (quoting Lark, supra).

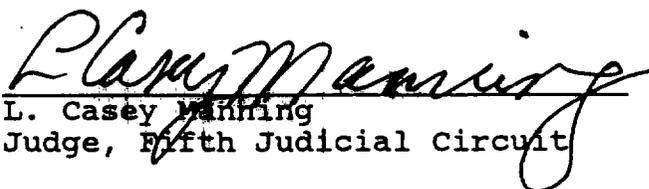
Because the Panel is responsible for administering procurement law in this State, this Court should give the Panel's decision to dismiss WIN's protests respectful consideration and great

deference. There is substantial evidence to support the Panel's decision. Evidence in the record showed that TCG was a large reseller and a high volume user of DAT drives, and had exceptional market leverage which would allow it to pass on savings to the State. TCG typically makes volume purchases and receives substantial discounts for doing so, especially when TCG has already been awarded a purchase order which it can present when approaching a prospective vendor. In fact, TCG personnel testified that it could purchase the DAT drive in dispute for approximately \$300 in such a large volume purchase, and that TCG anticipated a substantial decline in DAT drive prices for market reasons explained in the record, and passed on the benefit of that expected price decrease to the State.²

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The Court finds that there was substantial evidence to support the Panel's decision that WIN's claim of underpricing was without merit.

CONCLUSION

For the reasons stated above, the Court affirms the decision of the Procurement Review Panel and dismisses WIN Laboratories, Ltd.'s Petition for Review.


L. Casey Manning
Judge, Fifth Judicial Circuit

Columbia, South Carolina

January 18, 1995

² The record also showed that TCG's market analysis proved accurate as DAT drive prices had already started to fall significantly by the time the hearing was held.