

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1993-2

In re:)
)
Protest of Alamo Sales (USA), Inc.) O R D E R
Appeal by Alamo Sales (USA), Inc.)
_____)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on February 18, 1993, on the appeal of Alamo Sales (USA), Inc. ("Alamo"), from a decision by the Chief Procurement Officer ("CPO") to accept Alamo's withdrawal of its protest.

Present and participating in the hearing before the Panel were Alamo, represented by its Vice President, Marvin R. Morris; the Department of Highways and Public Transportation ("Highway Department"), represented by Glennith Johnson, Esq., and Barbara Wessinger, Esq.; and the Division of General Services, represented by James W. Rion, Esquire.

FINDINGS OF FACT

On August 27, 1992, MMO issued an IFB to procure heavy-duty rotary mowers for the highway department. On or before September 17, 1992, the protestant Alamo Sales responded. (Record, p. 21).

About October 12, 1992, the Highway Department decided to reject Alamo's bid because it determined that Alamo's mowers were of lighter construction than required. (Record, p. 65). On October 28, MMO issued a Notice of Intent to

Award indicating that Hardee Manufacturing Co., Inc., would be awarded the contract. (Record, p. 69).

On November 8, 1993, Alamo protested the rejection of its bid and the award to Hardee by letter signed by Chuck Koenen, government sales representative for Alamo. Mr. Koenen indicated a copy of his letter was sent to Mr. Bob Dupuy. (Record, p. 12). The CPO scheduled a hearing for Tuesday, December 15, 1992, and mailed a copy of the notice to Chuck Koenen at the address Alamo gave on its bid. (Record, p. 10).

The hearing sign-up sheet for a hearing eventually held on January 11, 1993, and the testimony before the Panel indicates that only Mr. Bob Dupuy appeared to represent Alamo. (Record, p. 19).

At the close of Alamo's case, the CPO stated, "What I'd like to do is recess for about ten minutes, have Alamo think about how they want to proceed on this and then we'll get back at say 10:25." (Prot. Ex. #2). Mr. Dupuy left the room and attempted to reach his superiors in Texas by telephone. He was not successful. Mr. Dupuy returned to the hearing room and, when asked by the CPO, "Mr. Dupuy, have you got some action you want to take?", he announced, "I contacted my people and what we're gonna do is . . . we're gonna drop the protest." (Prot. Ex. #2). At the request of the CPO, Mr. Dupuy then put the withdrawal in writing, as follows: "I representing Alamo Group retract protest on 1/11/93 for (13) 10' Rotary Mowers and (18) 15'

Rotary Mowers. Thanks /s/ Robert M. Dupuy 1/11/93."
(Record, p. 7).

Mr. Dupuy decided to withdraw Alamo's protest because he determined that he could not prove Alamo's primary assertion - that its mowers could meet the specifications - without actually showing the mower to the CPO, something he was unable to do at the time. The literature available did not address the points in question.

One day after the cancellation of the hearing, the Highway Department received the Final Award Report listing Hardee as the contractor. The Highway Department then entered into a contract with Hardee and, on January 19, placed two orders with Hardee.

On January 20, 1993, Alamo appealed to the Panel asserting that Mr. Dupuy was not authorized to withdraw the protest and requesting that Alamo be allowed to continue its protest on the merits.

CONCLUSIONS OF LAW

At the outset of the hearing before the Panel, the Highway Department and General Services moved to dismiss Alamo's appeal for lack of jurisdiction on the grounds that no written decision of the Chief Procurement Officer is appealed. Alamo contends that the requirement of a written decision is met because Mr. Dupuy reduced Alamo's withdrawal to a handwritten note (Record, p. 7).

Section 11-35-4210(5) confers jurisdiction on the Panel to hear appeals from any person adversely affected by "a

decision under subsection (3)." Subsection (3) [11-35-4210(3)] states, "If a protest is not resolved by mutual agreement, the appropriate chief procurement officer shall promptly issue a decision in writing within ten days. The decision shall state the reasons for the action taken." (Emphasis added). Section 11-35-4410(5) authorizes the Panel to "review all written decisions rendered under §11-35-4210" (Emphasis added). Finally, the South Carolina Supreme Court has stated, "[T]he scope of the Panel's review is limited to appellate review of written determinations, decisions, policies and procedures governed by the Procurement Code" (Emphasis added). --- S.C. ---, 420 S.E.2d 843 (1992).

The Panel does not believe that Alamo's statement of withdrawal, i.e., Mr. Dupuy's note, is the written decision referred to in the sections of the Procurement Code cited above. Mr. Dupuy's written statement, that "I representing Alamo Group retract protest on 1/11/93 for (13) 10' Rotary Mowers and (18) 15' Rotary Mowers. Thanks /s/ Robert M. Dupuy 1/11/93" is not a decision by the "appropriate chief procurement officer" which "state[s] the reasons for the action taken." The decision of the CPO appealed from - that

is, the decision to accept Alamo's withdrawal - is not in writing nor is it required to be.¹

The Panel concludes that no jurisdiction exists to hear Alamo's appeal in this case because no written subsection (3) decision has been issued.

The Panel notes for purposes of avoiding possible remand on appeal that it agrees with the Highway Department and General Services that Mr. Dupuy had the apparent authority to bind Alamo with his withdrawal and that the State was justified in relying on this apparent authority.²

For the reasons stated above, the Panel hereby dismisses the protest of Alamo Sales (USA), Inc.

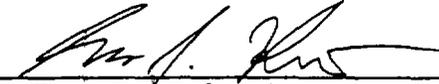
¹Section 11-35-4210(3) requires that a decision be reduced to writing only if "the protest is not resolved by mutual agreement." In this case, Alamo voluntarily agreed, presumably with the consent of all the parties, to withdraw its protest.

²A person is an apparent agent if there is a representation by the principal to the third party that the person has authority and if the third person relies on the representation and changes his position in reliance on the representation. Graves v. Serbin Farms, Inc., 306 S.C. 60, 409 S.E.2d 768 (1991). In this case, Alamo initiated a protest in order to obtain award of a contract. The notice sent to Alamo convening a hearing indicated, "all interested parties should attend" and that a decision would be rendered "based exclusively on the evidence presented at the review". (Record, p. 10). In response to this notice, Alamo sent Mr. Dupuy. At no time, did Mr. Dupuy or anyone else at Alamo indicate to the CPO that Mr. Dupuy's authority to represent Alamo at the hearing was limited in any way. Indeed, Mr. Dupuy represented otherwise when he signed a statement purporting to speak for Alamo on the withdrawal issue. Finally, the CPO in reliance on the withdrawal cancelled the hearing and the Highway Department in reliance on the withdrawal entered into a contract with Hardee and placed orders for mowers.

For the reasons stated above, the Panel hereby dismisses the protest of Alamo Sales (USA), Inc.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Gus J. Roberts
Chairman

March 23, 1993
Columbia, South Carolina