

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1994-19

In re:)
)
)
Protest of New-Way Cleaning Service;) ORDER
Appeal by New-Way Cleaning Service)
)

This case came before the South Carolina Procurement Review Panel (Panel) for hearing on January 5, 1995 on the appeal of New-Way Cleaning Service (New-Way) of a decision by the Chief Procurement Officer (CPO) denying New-Way's protest.

Present and participating in the hearing before the Panel were Peter Kinard, Jr. who does business as New-Way Cleaning Service, represented by Peter Kinard, Jr., its owner; S. C. Department of Mental Health, represented by Alan Powell, Esquire; and Office of General Services represented by Delbert Singleton, Esquire. A representative of Marshall Janitorial was present but did not participate.

FINDINGS OF FACT

On August 23, 1994, South Carolina Department of Mental Health (DMH) issued an Invitation For Sealed Bids (IFB) for supplies and labor to clean floors in certain areas of eight buildings. (Record p. 22-25). The IFB states:

Bidders Responsibility: Each Bidder shall fully acquaint himself with conditions relating to the scope and restrictions attending the execution of the work under the conditions of this bid. It is expected that this will sometimes require on-site observation. The failure or omission of a bidder to acquaint himself with existing conditions shall in no way relieve him of any obligation with respect to this bid or to the contract.

Amendment No. 1 to the IFB was issued on August 25, 1994, replacing existing pages 3 and 4. (Record p. 21). Amendment No. 2 was issued on

September 8, 1994, again replacing pages 3 and 4 of the IFB. IFB page 3 details procedure A and IFB page 4 details procedure B concerning specific procedures to be used for cleaning the floors. On September 20, 1994, bids from four vendors were opened. The Bid Tabulation Sheet indicates the following:

<u>Bidder</u>	<u>Procedure A</u>	<u>Procedure B</u>
Hay Hill	\$61,200.00	\$54,500.00
Colonial Bldg. Maint.	\$40,220.00	\$37,980.00
Marshall Janitorial	\$37,840.00	\$37,850.00
New-Way Cleaning Serv.	\$24,995.95	\$28,995.00

(Record p. 18).

DMH Memorandum for Record dated September 22, 1994, indicates that Mr. Kinard, the owner of New-Way Cleaning Services (New-Way), the lowest bidder, met with DMH. Mr. Kinard did not visit all eight of the buildings involved in the IFB. An undated letter from Mr. Kinard indicates that after the meeting with DMH, he realized that eight buildings are involved in the IFB, while New-Way's bid only includes seven buildings, and therefore, New-Way stated its request to increase its bid price. (Record p. 16). DMH Memorandum for Record dated September 27, 1994, indicates that Mr. Kinard met with DMH and requested to increase his bid price, while DMH explained the bid price cannot be changed after bid opening. (Record p. 15). DMH declared New-Way's bid nonresponsive on October 4, 1994. (Record p. 15). On October 5, 1994, DMH issued an intent to award the contract to Marshall's Janitorial. (Record p. 14).

By an undated letter, Mr. Kinard protested the award of the contract to Marshall's Janitorial. The letter is stamped received October 24, 1994, by Materials Management Office. (Record p. 12). The letter was sent certified mail, and the envelope is postmarked October 19, 1994. (Record p. 13). The CPO did not conduct a hearing, but spoke with the parties in an attempt to resolve the

protest. (Record p. 10). The CPO then issued a decision finding New-Way's protest untimely filed. (Record p. 5). The CPO decision was posted December 1, 1994, and Mr. Kinard protested the decision to the Panel on December 7, 1994. (Record p. 2).

CONCLUSIONS OF LAW

DMH filed a motion to dismiss New-Way's protest for lack of jurisdiction, due to the protest letter being untimely filed. Prior to the taking of testimony, the Panel heard motions from the parties. DMH also filed a written motion requesting the protest be found frivolous, sanctions be imposed, and DMH's costs and attorney's fees be assessed against New-Way.

S. C. Code Ann. Section 11-35-4210 (1993 Supp.) states the right to protest, in pertinent part, as follows:

(1) ...Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within fifteen days of the date notification of award is posted in accordance with this code.

(2) A protest under subsection (1) above shall be in writing, submitted to the appropriate chief procurement officer, and shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided. [Emphasis Added.]

The Panel in Case No. 1994-9, In re: Protest of Vorec Corporation, determined the protest letter, dated and filed on the sixteenth, rather than the fifteenth day, untimely. However, the Vorec case does not address the issue of whether the protest letter must be received or simply postmarked by the fifteenth day. This is the first case to raise this issue of timelines of receipt where the protest letter is

postmarked within the fifteen day limit, since the legislature's modification of the Consolidated Procurement Code in 1993.

The Vorec protest letter was actually dated after the fifteenth day. New-Way's protest letter is undated, but the envelope is postmarked October 19, 1994. The notice of award was posted October 5, 1994, and fifteen days from that date is October 20, 1994. Mr. Kinard placed his protest letter in the mail on October 19, 1994, but it was not received by the Materials Management Office of General Services until October 24, 1994. The Panel interprets the language of the statute which states "within fifteen days of the date notification of award is posted" and "submitted to the appropriate" CPO, the language underlined above, to mean a protest must be received within fifteen days, not simply postmarked within fifteen days.¹

In making its determination, the Panel looks at the changes made to the statute giving vendors the right to protest, S. C. Code Ann. Section 11-35-4210. The Panel notes that the legislature established a specific time to begin the right to protest, posting. Posting is on a specific day, and begins the time to protest for all vendors. The prior law stated a vendor's right to protest began when the vendor "knew or should have known" it was aggrieved. The prior law was less specific and open to interpretation, which the Panel often did based on the facts of different cases. The modifications to the code make a specific act and a specific date, posting, the start date for the time to protest to begin. The legislature, in modifying the procurement laws in 1993, clearly intended to make the time to protest a certain and specific time, so that the business of the state

¹ The Panel has dealt with this issue in prior cases, but has not addressed this issue since the 1993 changes to S.C. Code Ann. Section 11-35-4210. In re: Protest of YWCA of the Upper Lowlands, Inc., Panel Case No. 1989-23, states "the Panel has held in a previous case [Case No. 1988-2] that a protest is 'submitted' when it is deposited in the post office, properly addressed with postage paid." The Panel's prior holdings on this issue are no longer applicable in light of the changes to S.C. Code Ann. Section 11-35-4210.

could be timely finalized. Fifteen days from the date of posting is a specific date. If a protestant is allowed to simply drop the protest in the mail on the fifteenth day, the time frame then becomes uncertain.

The Panel finds that a protest must be received in the office of the appropriate chief procurement officer within fifteen days of the posting of the notice of award. S. C. Code Ann. Section 11-35-310(13) defines days as:

"Days" means calendar days. In computing any period of time prescribed by this code or the ensuing regulations, or by any order of the Procurement Review Panel, the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal holiday for the state or federal government, then the period shall run to the end of the next business day.

Fifteen days from the date of posting is November 20, 1994. New-Way's protest was not received by the CPO by November 20, 1994, within fifteen days from the date of posting the notice of award, and is therefore untimely filed. Because New-Way's protest is untimely filed, the Panel does not have jurisdiction to hear the merits of New-Way's protest.

The Panel also took under consideration DMH's motion requesting New-Way's protest be found frivolous, sanctions be imposed, and DMH's costs and attorney's fees be assessed against New-Way. S.C. Code Ann. Section 11-35-4330(1) states, in part:

The signature of an attorney or party on a request for review, protest, motion, or other document constitutes a certificate by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law....

The facts are undisputed that New-Way bid on only seven buildings, and requests to increase its bid price to include the eighth building. Clearly, New-Way cannot add the extra cost and change its bid price after bid opening, when all competitor's prices are known. Procurement Regulation 19-445.2085 (B) of the State Budget and Control Board states:

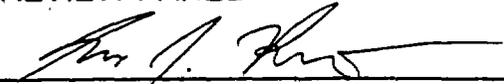
"to maintain the integrity of the competitive sealed bidding system a bidder shall not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid unless the mistake in the judgment of the procurement officer is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition."

The only remedy requested by New-Way, to change its bid price, is clearly not allowed by the law. The Panel finds that New-Way's protest is frivolous and sanctions New-Way \$500.00, which is waived. No other sanctions will be granted, including award of costs and attorney's fees.

For the foregoing reasons, the Panel finds that New-Way's protest is untimely filed under S. C. Code Ann. Section 11-35-4210. The CPO decision is upheld in as much as it is consistent with the Panel's findings. The Panel further finds that New-Way's protest is frivolous under S.C. Code Ann. Section 11-35-4330, and sanctions of \$500.00 are waived.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Gus J. Roberts, Chairman

Columbia, S.C.

Jan. 20, 1995.