



request for resolution of a contract dispute, under S. C. Code Ann. Section 11-35-4230, concerning funds held by Clemson as liquidated damages. The CPO conducted a hearing on August 19, 1994, and issued a decision on August 29, 1994, without addressing delay claims, which were found to be presented without notice. McCrory appealed the CPO decision to the Procurement Review Panel ("Panel") on September 7, 1994. The Panel delayed conducting a hearing until the CPO considered the issues concerning delay claims. The CPO issued a decision on December 21, 1994, which modifies the previous decision and includes a recalculation of liquidated damages. Both Clemson and McCrory request the Panel's review of the CPO decision, which has been assigned Case Number 1994-13 by the Panel.

By letter dated March 31, 1995, McCrory submitted to the CPO a request for contract resolution concerning Clemson's failure to pay for work completed. The CPO determined that he lacks jurisdiction of the issue, because of the case pending before the Panel. On April 28, 1995, McCrory requested review by the Panel of the CPO's determination. McCrory's request for review by the Panel has been assigned Case Number 1995-7, and consolidated with the existing Case Number 1994-13.

The Panel scheduled a hearing on Case No. 1994-13 and Case No. 1995-7, for the week of June 12 through June 16, 1995. On June 2, 1995, the hearing scheduled to begin June 12, 1995, was postponed until after August, 1995. In May, procedural questions were raised by the parties because both parties filed requests for review with the Panel, and legal counsel for the Panel issued a letter dated May 22, 1995, explaining the procedures the Panel will follow. This letter is in addition to the procedural memorandum issued to each party with the Record of the case, a compilation of the documents submitted as exhibits before the CPO. McCrory filed a Motion to Change the Procedure of the

Panel on May 26, 1995, and the Panel issued an Order denying the Motion on May 29, 1995. McCrory filed this Motion and Petition on May 31, 1995, in the Fifth Judicial Circuit.

### DISCUSSION

McCrory Construction Company's Motion for Emergency Relief and Petition for Writ of Mandamus are denied. McCrory contends that the procedures established by the Panel violate its due process rights. S. C. Code Ann. Section 11-35-4410(5) authorizes the South Carolina Procurement Review Panel to "establish its own rules and procedures for the conduct of its business, including the holding of necessary hearings." The Panel has adopted rules and procedures which are provided to all participants in the review process. The Panel allows opening arguments, opportunity to present witnesses, opportunity to cross-examine adverse witnesses, and closing arguments. The Panel also proceeds under the rules of evidence.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." Due process does not mandate any particular form of procedure, but is a flexible concept changing with the circumstances. Tall Tower, Inc. v. South Carolina Procurement Review Panel, 363 S.E.2d 683 (S.C. 1987). The Panel allows McCrory to present its case on the issues raised by McCrory in its initial request for contract resolution to the CPO. The Panel conducts a hearing with established procedures which provides the parties with an opportunity to be heard.

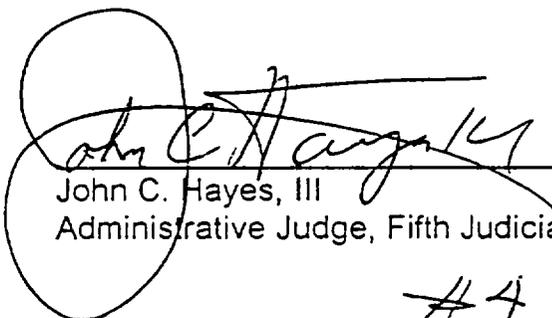
A demonstration of substantial prejudice is required to establish a due process claim. Id. McCrory argues that it is substantially prejudiced by the procedures established by the Panel. McCrory contends it is forced to present evidence first on issues where it is not the party appealing to the Panel and is not allowed to present rebuttal testimony. The Panel argues that the Panel's

hearing is *de novo* under S.C. Code Ann. Section 11-35-4410(1) and the issues for determination are established in the request to the CPO for resolution of a contract dispute, which requires the party initiating the review process to prove its case. Here McCrory knows the issues to be determined, is being afforded an opportunity to be heard by presenting witnesses, is given the right of cross-examination of adverse witnesses, is allowed opening and closing statements, and is afforded the protection of the rules of evidence. See Tall Tower, 363 S.E.2d 683. This Court finds that McCrory has not demonstrated the required substantial prejudice.

CONCLUSION

The Motion and Petition of McCrory are denied. The Court finds McCrory has not shown that the Panel's procedure works to its substantial prejudice.

IT IS SO ORDERED.

  
John C. Hayes, III  
Administrative Judge, Fifth Judicial Circuit

June 27th 1995  
Columbia, S. C.

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