

March 8, 1996, Chambers appealed the CPO's decision to the Panel. The cases have been consolidated.

On March 1, 1996, TRSWA requested the case be found moot because the underlying procurement being made by TRSWA has been canceled. On March 15, 1996, the Panel issued a letter to the parties allowing the parties to provide briefs on the legal question raised in the protest of TRSWA's Procurement Policy.

Case No. 1996-5: Appeal of CPO Decision

In its protest letter, Chambers raises several issues concerning TRSWA's intent to award a procurement for solid waste disposal. Chambers raises constitutional issues as well as alleging violation of statutes and regulations, and the nonresponsiveness of the intended awardee. The CPO found that the SC Consolidated Procurement Code does not apply to TRSWA, and therefore jurisdiction to consider the protest does not exist. After the CPO decision, but prior to the appeal to the Panel, TRSWA canceled the questioned solicitation, raising the issue of mootness.

Chambers' protest raises constitutional issues as well as issues concerning the specific procurement. The Panel has held in previous decisions, and once again finds that the Panel lacks the authority to declare a provision of law unconstitutional. See, Panel Case No. 1989-21 and Case No. 1990-2, In re: Protest of Smith Setzer and Sons, Inc., citing, South Carolina Tax Commission v. South Carolina Tax Board of Review, 299 S.E.2d 489 (1983); Panel Case No. 1991-14, In re: Protest of Wometco Food Services; Panel Case No. 1986-5, In re: Protest of American Scientific Products and Curtin Matheson Scientific. The Panel is not the appropriate venue for the constitutional issues raised.

The threshold question for determination by the Panel is whether the case on appeal from the CPO is now moot. The Panel finds that the remaining issues

concerning the procurement are moot due to the cancellation of the solicitation. Chambers argues that the Panel should consider the issues because the possibility of recurrence exists. However the protest issues are specific to the facts of this procurement. The South Carolina Supreme Court has stated "a case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy", which applies to this canceled solicitation. Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 195 S.E.2d 713 (1973). A Panel Order finding violation of a statute or regulation concerning TRSWA's procurement would have no practical legal effect. A decision by the Panel would not effect the outcome and therefore would only be advisory. The Panel does not issue advisory opinions, but resolves existing controversies. See, Panel Case No. 1992-18, In re: Protest of Chambers Medical Technology. Because the issues raised in the protest are moot, the Panel will not review the CPO determination of lack of jurisdiction over TRSWA.

Case No. 1996-4: Protest of TRSWA's Procurement Policy

Chambers argues that S. C. Code Ann. section 11-35-4410(1)(b) gives the Panel broad overview jurisdiction, which would include the review of political subdivisions' procurement policies, which are required under the S. C. Consolidated Procurement Code. S. C. Code Ann. section 11-35-50 states:

All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983. The Budget and Control Board, in cooperation with the Procurement Policy Committee and subdivisions concerned, shall create a task force to draft model ordinances, regulations and manuals for consideration by the political subdivisions. The expenses of the task force shall be funded by the General Assembly. The task force shall complete its work no later than January 1, 1982.

TRSWA argues that political subdivisions are not under the jurisdiction of the S.C. Consolidated Procurement Code, and S. C. Code Ann. section 11-35-50 only requires political subdivisions to adopt a procurement policy. TRSWA argues that the Code section does not provide for the review of a political subdivisions' procurement policy.

TRSWA further argues that S. C. Code Ann. section 11-35-4410(1)(b), under which Chambers is claiming jurisdiction, has a 15 day time limit, which starts to run from the time TRSWA adopted its procurement policy, and therefore the request for review is untimely filed. S. C. Code Ann. section 11-35-4410(1)(b) provides:

Requests for review of other written determinations, decisions, policies, and procedures as arise from or concern the procurement of supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations; provided that any matter which could have been brought before the chief procurement officers in a timely and appropriate manner under Sections 11-35-4210, 11-35-4220, or 11-35-4230, but was not, shall not be the subject of review under this paragraph. Requests for review under this paragraph shall be submitted to the Procurement Review Panel in writing, setting forth the grounds, within fifteen days of the date of such written determinations, decisions, policies, and procedures.

S. C. Code Ann. section 11-35-4410(1)(b) provides a time limit of fifteen days from the date of the written determinations, decisions, policies, and procedures. The Panel does not have jurisdiction to review TRSWA's Procurement Policy in this case, as Chambers' protest was not filed within the fifteen day time limit. Chambers participated in the procurement under TRSWA's Procurement Policy, and did not protest the Policy until after the award was made to another vendor. The issue raised is the adequacy of the

Procurement Policy of TRSWA, not the decision concerning the canceled procurement, so fifteen days from the decision to award under the solicitation is not timely to protest the Policy. Also, more than fifteen days have passed since TRSWA's Procurement Policy was adopted or amended. Since the Panel lacks jurisdiction under the fifteen day time limit, the issue of the Panel's review of a political subdivision's procurement policy is not addressed.

Attorney's Fees and Costs

TRSWA requests that attorney's fees and costs be assessed against Chambers, under S. C. Code Ann. section 11-35-4330(2) for filing a frivolous protest and request for review. The Panel denies the motion to find the request for review and appeal frivolous. TRSWA contends that neither the appeal nor the request for review are grounded in fact or warranted by existing law. However, the question of the Panel's review of procurement policies of local political subdivisions under S. C. Code Ann. section 11-35-50 and the issue of jurisdiction of TRSWA under the Consolidated Procurement Code are both issues that are open to interpretation and have not been previously decided by the Panel. The Panel finds that the filing of the request for review and the appeal are not frivolous and denies the request for attorney's fees and costs.

For the foregoing reasons, the Panel dismisses Chambers Development Co., Inc.'s protest.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

April 29, 1996.