

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	CASE NO. 2001- 3
In re:)	
Protest of Technology Solutions, Inc.)	
)	ORDER
)	
Appeal by Technology Solutions, Inc.)	
)	

This case came before the South Carolina Procurement Review Panel (Panel) on August 14, 2001 on appeal by Technology Solutions, Inc. (TSI) of a decision by the Chief Procurement Office (CPO). Present and participating in the hearing before the Panel were TSI, represented by Margaret A. Collins, Esquire, South Carolina Department of Public Safety (DPS), represented by Henry Wengrow, Esquire, and the Office of General Services of the Budget and Control Board (General Services), represented by Keith McCook, Esquire.

FINDINGS OF FACT

Between November 2 and 9, 1999, a representative of DPS' Information Technology Office placed telephone calls to vendors requesting quotes for hourly rates to be charged to DPS for the Y2k (year 2000) conversion of DPS' computerized testing system, the WANG Testing System. On November 9, 1999, TSI responded to DPS' request with a written offer to provide programmer services. There were four vendors who responded with the following offers:

- | | |
|------------------------------|------------------|
| 1. TSI | \$70.00 per hour |
| 2. Docusource | \$75.00 per hour |
| 3. Extra Mile Consulting | \$75.00 per hour |
| 4. Network Enterprises, Inc. | \$95.00 per hour |

On November 15, 1999, DPS telephoned TSI to advise them that they would receive the award for the programmer services. Also, on November 15, 1999, DPS's Procurement Office issued Purchase Order No. 00-200733 to TSI. Printed on the purchase order was the statement, "PROGRAMMING SERVICES FOR WANG PER ATTACHED SPECIFICATIONS CONTAINED IN TECHNOLOGY SOLUTIONS 11/9/99 QUOTE. NOT TO EXCEED \$8,400.00." On November 16, 1999 DPS provided TSI with a Request for Programming Services via e-mail. On November 17, 1999, representatives from DPS' Information Technology Office and TSI met face to face for the first time to discuss the project. On November 22, 1999, TSI received the purchase order issued by DPS.

DPS and TSI entered a contract for TSI to provide programmer services at \$70.00 per hour. DPS and TSI had regular meetings during the time those services were being provided. DPS provided TSI with documents that described the programming services and deliverables being requested by DPS and which described the project plan for the testing system. The document containing the project plan also contained a project timeline. [Record pp. 36 - 45] Modifications were made to the document which described the programming services. The contract was not completed within the timeline stated in the project plan document and TSI continued to work on the project beyond the timeline requested by DPS.

On April 10, 2000, TSI wrote Ron Moore requesting the resolution of a contract controversy between DPS and TSI dealing with the payment to TSI for the programming services provided. On January 23, 2001, TSI's request for resolution was supplemented with a letter from its attorney. On May 21, 2001, the CPO issued a decision. On May 31, 2001, TSI appealed the CPO's decision to the Panel.

CONCLUSIONS OF LAW

ISSUE I: WHAT WERE THE TERMS OF THE CONTRACT BETWEEN TSI AND DPS?

Under South Carolina Case Law, “there must be an offer and an acceptance accompanied by valuable consideration” to form a contract. *Carolina Amusement Co. v. Connecticut National Life Ins. Co.*, 437 S.E.2d 122, 125 (S.C. Ct. App. 1993). *Carolina Amusement* quoting the *Restatement (Second) of Contracts* § 29 (1981) states, “The offer identifies the bargained for exchange and creates a power of acceptance in the offeree.”

In *Weisz Graphics Div. of Fred B. Johnson Co., Inc. v. Peck Industries, Inc.*, 403 S.E.2d 146, (S.C. Ct. App. 1991), the South Carolina Court of Appeals held, “12-month release period became term of contract inasmuch as buyer’s offer did not expressly limit acceptance to terms of offer, 12 month-release did not materially alter terms of the contract, and buyer failed to give notification of objection to 12-month release within reasonable time.”

In the present case TSI argues that the CPO’s decision correctly cites the offer in this case as being made on November 9, 1999 and improperly concludes that the Purchase Order comprises the acceptance of such offer.

The Panel finds that the offer in this case was communicated on November 9, 1999 by TSI offering the programming services for \$70 per hour and that the acceptance occurred on November 15, 1999 by DPS’s Information Technology Office telephoning TSI advising TSI that it would receive the award and by DPS’s Procurement Office issuing Purchase Order No. 00-200733. The Panel acknowledges that the purchase order was not communicated to TSI until November 22, 1991. Upon receiving the purchase order, TSI continued to perform and sought no immediate clarification as to the contents of the purchase order. The Panel refers to the language of the South Carolina Court of Appeals in *Weisz* as persuasive authority as to how the receipt of the purchase order by TSI should be construed.

The Panel finds that upon receipt of the purchase order by TSI, the 120 hours and the \$8,400 total contract amount became terms of the contract inasmuch as TSI's offer did not expressly limit acceptance to terms of the offer. The purchase order did not materially alter the terms of the contract because the November 9, 1999 communicated offer and the November 15, 1999 communicated acceptance were silent as to total contract hours and price. Further, TSI failed to give notification to DPS of any objection to the 120 hours and the \$8,400 total contract amount within a reasonable time.

TSI argued before the Panel, through testimony from Cathy Lanier (TSI's owner and president), that no immediate objection to the purchase order was made because of its prior experience with other agencies in amending and /or requesting additional purchase orders and that TSI had no reason not to believe that more money could be available from other sources. In light of the fact that Ms. Lanier acknowledged that this was TSI's first time dealing with DPS and stated that TSI often works on an hourly basis taking directions from an agency or works side by side with a contracting agency, the Panel finds this argument unconvincing.

**ISSUE II: WHO WAS AUTHORIZED TO BIND OR TO MODIFY
THE CONTRACT BETWEEN DPS AND TSI?**

South Carolina Consolidated Procurement Code § 11-35-1550 (Small Purchases) (2)(c) provides the following:

Purchases from five thousand one dollars to ten thousand dollars. Solicitation of written quotes from a minimum of three qualified sources of supply must be made and documentation of the quotes attached to the purchase requisition. The award must be made to the lowest responsive and responsible sources.

Procurements) provides the following:

Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contracts shall be included in the contract file.

TSI argued that the agency represented the procurement for programming services as an emergency situation. This representation, according to testimony from Cathy Lanier, came from a conversation she had with Ron Bass, a network manager in DPS' Information Technology Office.

Dixie Deloach, manager of procurement services for DPS, testified that she was the chief procurement officer for DPS in this case and that no authority was delegated by her to anyone to represent that this procurement was an emergency procurement. Ms. Deloach also stated that DPS customarily notes "emergency procurement" on their purchase order when applicable. She further testified that this procurement was authorized as a small purchase under the code with a \$10,000 cap and that anything over that amount would be an unauthorized procurement.

Ron Bass testified before the Panel that he did not recall but he may have used the word emergency in his conversations with TSI because there was an urgency to have the programming services done based on the belief that the WANG testing system would fail at the end of the year.

The Panel finds that the method used by DPS in soliciting quotes for this procurement is consistent with the small purchases section of the code and obviously inconsistent with the emergency procurement section of the code. The Panel finds that TSI had participated in at least one emergency procurement with the state in the past and should have been familiar with the code requirements in § 11-35-1570. TSI failed to meet the burden of proof before the Panel that it had a reasonable basis for relying on a statement from Mr. Bass in characterizing this as an “emergency situation” that this was an emergency procurement.

In *State v. Peake*, 345 S.C. 72, 545 S.E.2d 840 (Ct. App. 2001) the Court of Appeals of South Carolina addressed the authority of state officers or agents by stating in part the following:

The State may be subject to estoppel where its officers or agents act within the proper scope of their authority. However, a governmental body cannot be estopped “by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.” (quoting *South Carolina Coastal Council v. Vogel*, 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987).

“The question is not one of intention, but of power; and, if the officer has not power to act, his action is not state action, and so affords no basis upon which to predicate estoppel against the state.” (quoting *Carolina Nat'l Bank v. State*, 60 S.C. 465, 38 S. E. 629 (1901).

In *Federal Crop Ins. Corporation v. Merrill*, 332 U.S. 380, 68 S. Ct. 1 (1947) the Supreme Court of the United State addressed the authority of government agents in Administrative Law and Procedure by stating in part the following:

What ever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority. And this is so even though ... the agent himself may have been unaware of the limitations upon his authority.

TSI argued before the Panel that it was requested and /or demanded to keep working, even after the agency acknowledged reaching the "Not to Exceed" amount. TSI continued work and claims payment is due for more than 300 hours over the written 120 hour contract amount. In regards to this argument by TSI, Ron Bass testified that he urged that the project be continued after December 15, 1999 because he did not realize that he should not continue. Mr. Bass also testified that he only became aware that the 120 hour limit had been reached when Mr. Westbrook mentioned it at a meeting. Mr. Westbrook, a supervisor at the Criminal Justice Academy section of DPS, was responsible for handling the financial end of the contract in regards to signing time sheets and the like. Mr. Westbrook testified before the Panel that David Loney, an employee manager of Information Technology services - responsible for marketing and sales at TSI, stated in meetings between DPS and TSI after the December 15, 1999 projected completion date that TSI would make good on the contract at no further cost. Mr. Westbrook further stated that Mr. Loney represented to him that time sheets were internal for TSI and not representative of an obligation to pay.

The Panel finds that the authority to bind or modify the contract between DPS and TSI rested in the hands of DPS' Procurement Office who issued the purchase order which along with TSI's quote represent the only written documentations of the terms of this contract. Ms. Deloach, DPS' procurement officer, testified that any work constituting hours exceeding \$8,400 was unauthorized. As stated in *Federal Crop* above, TSI took the risk of having accurately ascertained that Mr. Bass who purported to act for DPS stayed within the bounds of his authority by urging the continuance of work on this contract after the hour and price amounts in the terms of the contract were reached. This is so even though Mr. Bass may have been unaware of the limitations upon his authority.

Based on the evidence, the Panel finds that TSI failed to meet its burden of proof that payment above the \$8,400 contract amount is due. Estoppel is not applicable against the State here where the unauthorized and erroneous conduct or statements by a DPS Information Technology employee were relied on by TSI.

TSI testified that they have been in business for twelve years, have worked with twenty to twenty-five state agencies on contracts and currently is involved with approximately six state agency contracts. TSI should be familiar with change orders. Under South Carolina Consolidated Procurement Code § 11-35-210 (4), *"Change order" means any written alteration in ... period of performance, price ... or other provisions of any contract accomplished by mutual agreement of the parties to the contract.*" There is no evidence in the record that a change order was issued in this case.

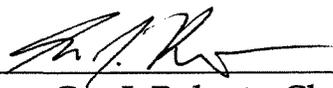
The Panel further finds that TSI failed to meet its burden of proof that DPS ratified the unauthorized procurement under Regulation 19-445.2015(1). No proof was presented that the procurement officer in this case was responsible for the person committing the act.

CONCLUSION

For the forgoing reasons, TSI's appeal is dismissed and pre-judgment interest is denied. Those portions of the CPO's decision that are consistent with this order are upheld.

IT IS SO ORDERED.

**SOUTH CAROLINA PROCUREMENT
REVIEW PANEL**

BY: 
Gus J. Roberts, Chairman

Columbia, SC

September 14, 2001

APPENDIX

The Panel finds it necessary to caution agencies in regards to their dealings with vendors. In doing so the Panel refers to § 11-35-20(f) of the Code which provides in part the following:

The underlying purposes and policies of this code are: ... to ensure the fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.

The Panel suggests that state agencies make it custom to inform vendors of the type of procurement being solicited to avoid the appearance of impropriety. This may be done orally and documented in memorandum form or stated in the initial pages of specification documents no matter what method of source selection is being used.

The Panel also hopes that vendors will take notice of this order and seek clarification at all stages of contractual dealings with the state. State agencies are charged with ensuring the fair and equitable treatment of all persons who deal with the procurement system and the Panel believes that state agencies are currently providing ample lines of communication for the public to inquire about almost anything.

It is the desire of this Panel that public confidence in the procurement process remain strong and that state agencies make every effort to safeguard the maintenance of a procurement system that reflects quality and integrity.