

|  |   |                           |
|--|---|---------------------------|
| STATE OF SOUTH CAROLINA                  | ) | BEFORE THE SOUTH CAROLINA |
|  | ) | PROCUREMENT REVIEW PANEL  |
| COUNTY OF RICHLAND                       | ) |                           |
|  | ) |                           |
|  | ) | CASE NO. 2002-3           |
| In re:                                   | ) |                           |
| Protest of                               | ) |                           |
| Business Systems of South Carolina, Inc. | ) |                           |
|  | ) | ORDER                     |
| Appeal by                                | ) |                           |
| American Specialty Office Products, Inc. | ) |                           |
|  | ) |                           |
|  | ) |                           |

---

On February 4, 2002, this matter came before the South Carolina Procurement Review Panel ("Panel") by way of an appeal letter from American Specialty Office Products, Inc. ("ASOP") requesting the review of a decision by the Chief Procurement Officer for Goods and Services ("CPO") which rescinded an award to ASOP and reawarded the contract to Business Systems of South Carolina, Inc. ("BSSC"). On February 15, 2002, the Panel received a Motion to Dismiss ASOP's appeal from the CPO that also moved for the Panel to reverse the remedy granted by the CPO's decision. The Panel considered this motion without a formal hearing on March 28, 2002.

**FINDINGS OF FACT**

On October 16, 2001, the Department of Mental Health ("DMH") issued an invitation for bids ("IFB") to acquire a vertical carousal filing system. On October 31, 2001, DMH issued Amendment No. 1. On November 8, 2001, DMH opened the bids received. The bids were as follows:

| <b><u>Bidder</u></b> | <b><u>Bid Amount</u></b> |
|----------------------|--------------------------|
| ASOP                 | \$14,821.50              |
| BSSC                 | \$15,566.75              |
| ASOP (Alternate Bid) | \$15,803.50              |

On November 16, 2001, DMH issued an award notice and a purchase order to ASOP. On November 28, 2001, the CPO received a protest letter from BSSC. On January 25, 2002, the CPO posted a decision rescinding the award to ASOP and reawarding the contract to BSSC. On February 4, 2002 ASOP appealed the CPO's decision. On February 15, 2002, the Panel received a Motion to Dismiss (without a hearing) ASOP's appeal from the CPO that also moved for the Panel to reverse the remedies granted by the CPO's decision. On March 7, 2002 the Panel received consent forms from the presidents of BSSC and ASOP consenting to the Panel deciding the CPO's motion without a hearing.

### CONCLUSIONS OF LAW

#### MOTION REQUESTING THE CPO'S REMEDY OF REAWARD TO BSSC BE REVERSED AND TO DISMISS ASOP'S APPEAL WITHOUT A HEARING

South Carolina Consolidated Procurement Code ("Code") §11-35-4310 provides in part the following:

(2) Remedies Prior to Award. If, prior to award of a contract, it is determined that a solicitation or proposed award of a contract is in violation of law, then the solicitation or proposed award may be:

- (a) canceled;
- (b) revised to comply with the law and rebid; or
- (c) awarded in a manner that complies with the provisions of this code.

(3) Remedies After Award. If, after an award of a contract it is determined that the solicitation or award is in violation of the law;

- (a) the contract may be ratified and affirmed, provided it is in the best interests of the State; or
- (b) the contract may be terminated and the payment of such damages, if any, as may be provided in the contract, may be awarded.

The contract between DMH and ASOP was entered into on November 16, 2001 when DMH posted the award and issued a purchase order. BSSC submitted its protest to the CPO on November 28, 2001. The protest was decided on January 25, 2002 after the contract was awarded, therefore, the remedies of §11-35-4310(3) apply.

In his decision, the CPO rescinded the award to ASOP and reawarded the contract to BSSC. [Record p. 12] In doing so, the CPO exceeded his authority and now moves for the Panel to reverse the remedy of reaward.

The Panel rules, as a matter of law, that by granting a remedy in violation of the provisions set forth in §11-35-4310 of the Code the CPO exceeded his authority. The portion of the CPO's decision granting the remedy of reaward to BSSC is reversed. The Panel having reversed the remedy of reaward, further rules that the issues raised by ASOP are moot.<sup>1</sup> The CPO's motion is hereby granted.

In his decision, the CPO stated his concern over the manner in which these specifications were presented for bid as follows: "A first reading of the specifications, with so many dimensional constraints, indicates that they could have been drafted to better facilitate competition while still meeting the state's needs. During the CPO's hearing, it became apparent that BSSC assisted DMH's program personnel in developing the specifications that were submitted to the DMH Purchasing Office, who used them in the IFB. Dimensional constraints are appropriate in specifications only if the constraints are real. However, in this case, there is no indication that there is any reason why the filing system cannot exceed 108" in height, 102" in width or 60" in depth. Further, there is no indication that the recessed toe panel is essential to DMH. Absent credible reasons for imposing these constraints in the specifications, if ASOP had protested the solicitation, they would have surely prevailed." While issues regarding the specifications were neither raised nor decided in this Order, the Panel echoes the CPO's concern over such restrictive specifications. The Panel cautions agencies to ensure the fair and equitable treatment of all persons who deal with the procurement system by fostering effective, broad-based competition when developing specifications.

---

<sup>1</sup> In Case No. 1996-4/1996-5, Protest of Three Rivers Solid Waste Authority; Appeal by Chambers Development Co., Inc., Protest of Chambers Development Co., Inc.; Appeal by Chambers Development, Co., Inc., the Panel found appeal issues concerning the procurement in question moot due to the cancellation of the solicitation and quoted the Supreme Court of this State as follows: "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy." *Mathis v. South Carolina State Highway Dept.*, 260 S.C. 344, 195 S.E.2d 713 (1973).

CONCLUSION

For the foregoing reasons, the substantive portions of the CPO's decisions are upheld, the remedy of reaward to BSSC is reversed, ASOP's appeal is dismissed as moot and the State is directed to re-issue an invitation for bids for this contract.

**IT IS SO ORDERED**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY: *Patricia T. Smith*

**Patricia T. Smith, Chairman**

**Columbia, South Carolina**

*April 24*, 2002.