

MOTION TO DISMISS

The IRF moved to dismiss American Southern for lack of the standing. Specifically, the IRF argues that American Southern failed to appeal the lack of standing found by the CPO on the two of the three issues in his order. Further, IRF argues that American Southern should be dismissed regardless because they were not aggrieved by the CPO's order. We deny the motion.

We do not find that the CPO found American Southern lacked standing. The language of his order discusses whether American Southern was aggrieved; however, the discussion is about the merit of their claims not whether they had standing to bring it. Nowhere in his order does the CPO find that American Southern lacked standing. Regardless, we do find that American Southern had standing to bring the appeal. American Southern bid on the emergency procurement and it was awarded to another company. This gives American Southern standing to bring an appeal.

FINDINGS OF FACT

The Budget and Control Board, through its Insurance Reserve Fund (IRF), insures all state vehicles by acquiring liability reinsurance through the private insurance sector. The most recent reinsurance contract expired on May 1, 2003. Prior to that date, an Invitation for Bids was issued seeking bidders for a new contract to be awarded for a three-year period. There were three amendments to the Invitation for Bids due to protests. Finally, on March 31, 2003, Amendment No. 4 postponed the bid opening indefinitely.

Because the contract was about to expire, the Budget and Control Board declared an emergency on April 10, 2003. On April 14, 2003, John Trussel, Assistant Director of the IRF, sent a letter to seven prospective bidders announcing the emergency procurement and inviting the seven to submit a quote for a one-year contract by Monday, April 24, 2003. (On April 16,

that date was corrected to Monday, April 21, 2003). Mr. Trussell testified that the one-year period was decided on because that was the shortest contract that was feasible to obtain coverage from a provider. He sought advice from the firm of Tillinghast-Towers Perrin and determined that anything less than a year would cause the risk to the insurer to greatly outweigh the benefit of the premium obtained. Therefore, he was concerned that he would get no bids. In fact, John Siebert of Capital City Insurance Co. testified his company would not have bid on a 90-day contract. Mr. Trussell said that if the IRF had solicited a bid and no one responded, he would have exhausted all of the time he had before May 1, 2003.

Before the quotes were received another company (not American Southern) protested the emergency procurement. On April 22, 2003, the CPO issued a written determination lifting the automatic stay. The award under the emergency procurement was awarded to the Davis-Garvin Agency for Capital City Insurance Company.

STANDARD OF REVIEW

South Carolina Code Ann. § 11-35-2410 sets out the standard of review in this matter. It states, “The determinations required by ...Section 11-35-1570 (Emergency Procurement)...and Section 11-35-4210(7) (Stay of Procurement During Protests, Decision to Proceed) shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law.” We used this standard previously in the case of In re: Protest of Morganti National, Inc.; Appeal of Morganti National, Inc., Case No. 1995-11. Morganti also involved an appeal of whether an emergency procurement was proper.

CONCLUSIONS OF LAW

Before the CPO and before us, the parties stipulated that the issues in this appeal are as follows:

1. Did the pending expiration of the IRF's contract for automobile liability reinsurance, coupled with the delays resulting from the protest process, justify the IRF's emergency procurement of such reinsurance?

2. If it is determined that an emergency existed, did the emergency procurement process fail to comply with the requirement that the procurement must be limited to those supplies, services, or construction items necessary to meet the emergency?

3. If it is determined that an emergency existed, did the emergency procurement process fail to comply with the requirements that it be "made with as much competition as is practicable under the circumstances" with the regard to the number of bidders that were included in the emergency process or with regard to the short deadline in which they were given to submit bids?¹

Section 11-35-1570, S.C. Code of Laws provides that,

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 contractor shall be included in the contract file.

The statute is supplemented by regulation. Section 19-445.2110 of the South Carolina Code of Regulations provides,

The Provisions of this regulation apply to every procurement made under emergency conditions that will not permit other source selection methods to be used.

A. An emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed by either the Chief Procurement Officer or the head of a governmental body or a designee of either office. The existence of such conditions must create an immediate and serious need for supplies, services, or construction that cannot be met through

¹ During the hearing, American Southern abandoned this 3rd issue. Therefore, this issue will not be discussed further.

normal procurement methods and the lack of which would seriously threaten: 1. the functioning of State government; 2. the preservation or protection of property; or 3. the health or safety of any person.

B. Emergency procurement shall be limited to those supplies, services, or construction items necessary to meet the emergency.

C. Any governmental body may make emergency procurements when an emergency condition arises and the need cannot be met through normal procurement methods, provided that whenever practical, approval by either the head of a governmental body or his designee or the Chief Procurement Officer shall be obtained prior to the procurement.

D. The procedure used shall be selected to assure that the required supplies, services, or construction items are procured in time to meet the emergency. Given this constraint, such competition as is practicable shall be obtained.

E. Competitive sealed bidding is unsuccessful when bids received pursuant to an Invitation for Bids are unreasonable, noncompetitive, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the delay required to resolicit competitive sealed bids. If emergency conditions exist after an unsuccessful attempt to use competitive sealed bidding, an emergency procurement may be made.

F. The Chief Procurement Officer or the head of the governmental body or a designee of either office shall make a written determination stating the basis for an emergency procurement and for the selection of the particular contractor.

First, American Southern argues that once the original solicitation for bid (not the emergency solicitation) was protested, the CPO should have lifted the stay that is normally imposed upon a protest. This would have allowed the normal procurement method to go forward instead of taking the drastic step of allowing an emergency procurement. (*See* Reg. 19-445.2110 (D) above which requires a finding that the need cannot be met through normal procurement methods). The, CPO upheld the IRF's position that there would not have been adequate time to complete the procurement prior to the expiration of the existing contract. The CPO also makes

the point that the lifting of a stay is in no way a normal procurement method. We conclude this holding is correct.

On March 31, 2003, it became clear to the IRF that the bid process had stalled. Attempts to move the process along in the form of amendments to the original Invitation for Bids had failed. Therefore, one month remained before the state fleet would lose its insurance coverage. Obviously, it appeared that even with a lifting of the stay that was in place because of protests, it would be very difficult to have an insurance company in place by May 1. If a company was not in place by May 1, the effect could be devastating. This is not necessarily the case with all state contracts and we certainly considered the seriousness of this contract in finding the emergency procurement decision was correct.

Secondly, American Southern argues that a one-year award under an emergency procurement was excessive and was more than necessary to meet the emergency, thus violating the regulation governing emergency procurements. (See Reg. 19-445.2110 (C) above which requires that the procurement be limited to those supplies, services, or construction items necessary to meet the emergency). The CPO's order found that a contract for automobile insurance for less than a year is not feasible. The CPO found that a 90-day contract as proposed by American Southern would be cost prohibitive even if an insurer would agree to do it. We find that the CPO's decision upholding the one-year contract was not erroneous, arbitrary, capricious, or contrary to law. There was sufficient evidence to show that a one-year contract was the shortest contract possible to meet the emergency.

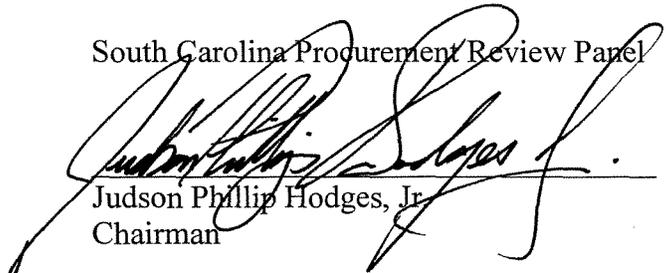
Because we find that the emergency procurement was proper, we also conclude that the lifting of the stay was necessary. To have determined that an emergency was necessary, but not have lifted the stay when protested, would have defeated the purpose of declaring an emergency.

ORDER

For the foregoing reasons, the Panel finds that the determination to solicit and award an emergency procurement and then to lift the stay when that procurement was protested was not erroneous, arbitrary, capricious, or contrary to law. Therefore,

IT IS HEREBY ORDERED that the decisions of the CPO as to the emergency procurement on July 21, 3003, and as to the lifting of the stay on April 29, 2003 are **AFFIRMED**.

South Carolina Procurement Review Panel



Judson Phillip Hodges, Jr.
Chairman

October 24, 2003