

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
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In re: )  
 )  
Protest of Companion Property and )  
Casualty Insurance Company; )  
 )  
Appeal of: Companion Property and )  
Casualty Insurance Company; )  
\_\_\_\_\_ )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 2004-4

**ORDER**

This case came before the South Carolina Procurement Review Panel (Panel) on appeal from a April 23, 2004, order of the Chief Procurement Officer (CPO) in which he dismissed a protest of Companion Property and Casualty Insurance Company (Companion) as untimely filed. The matter came before the Panel for a hearing on July 20, 2004. At the hearing before the Panel, Companion was represented by Stephen Bates, Esquire. Capital City Insurance Company was represented by Wade Mullins, Esquire. Keith McCook, Esquire, represented the CPO.

There were three motions made in the case:

1. A written Motion to Dismiss filed by Capital City in which it sought to dismiss the issues of the appeal that did not involve the timeliness of the protest;
2. A written Motion for Summary Judgment filed by Capital City;
3. A Motion for Summary Judgment made by Companion at the time of the hearing.

At the conclusion of the hearing, the Panel denied Companion's Motion for Summary Judgment, granted Capital City's Motion for Summary Judgment and then found that the Motion to Dismiss was moot in light of the granting of summary judgment. The reasons for granting the Motion for Summary Judgment are set out below.

## **Factual Background**

On January 27, 2004, the Materials Management Office (MMO) of the South Carolina Budget and Control Board issued an Invitation for Bids for a contract to provide automobile liability reinsurance for the South Carolina Insurance Reserve Fund. The contract would provide reinsurance to the Insurance Reserve Fund on vehicles owned and operated by governmental entities in the state for the period from 2004 to 2007. The solicitation stated that the bids were due on March 26, 2004, and the posting date for the Intent to Award would be April 9, 2004.

On March 24, the MMO issued Amendment 1 to the Invitation for Bids extending the bid opening date to March 31, 2004. The amendment still listed April 9, 2004 as the posting date of the Intent to Award. The Intent to Award ultimately was posted on April 6, 2004, on the MMO website. A copy of the Intent to Award was also mailed to the bidders via regular U.S. mail on that day. Companion states they could have received it as early as April 7, but confirms they did receive it. The Intent to Award which was mailed to the parties clearly states the posting date.

On April 19, 2004, A.M. Best downgraded Capital City's financial strength rating from A- to B++. An affidavit of Kevin Elmore, a director at Companion, was submitted at the motion hearing without objection. In the affidavit Mr. Elmore stated that he heard rumors of the downgrade between April 19 and April 22. He confirmed the rumor on A.M. Best's website on April 22. On that day he filed an appeal on behalf of Companion protesting the Intent to Award to Capital City based on the change in qualifications.

On April 23, 2004, the Chief Procurement Officer dismissed the protest as untimely filed. The CPO found that he lacked jurisdiction because the protest was not filed within fifteen days as required by S.C. Code Ann. §11-35-4210 (1). Companion appealed the CPO's order stating that the MMO failed to provide adequate notice of the posting date of the Intent to Award and

that the Intent to Award was misleading in setting forth the applicable protest period.

### **Discussion**

Capital City asserts there is no genuine issue of material of fact and that as a matter of law, the appeal should be dismissed. They argue that the law is clear and that the fifteen day protest period is inflexible. S.C. Code Ann. §11-35-4210 (1) provides in pertinent part:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection (2) below within 15 days of the date notification of award is posted in accordance with this code.

Companion makes two arguments that summary judgment should not be granted. First, Companion contends that the final phrase of §11-35-4210 is key in this matter. That phrase states that a protest shall be made within the time limit when posting of the award "...is posted in accordance with this code." Companion argues that since the award was not posted on the date stated in the Invitation for Bids or Amendment 1, that the time should commence from the date Companion received actual notice or the date upon which Companion could reasonably expected the Intent to Award to be posted. However, the failure of the MMO to follow the date previously set does not necessarily change the period for protest. There has to have been some prejudice to Companion by the early posting of the Intent to Award. "As a general rule, a party must establish prejudice as the result of another's failure to follow mandatory statutory procedure." Gardner v. South Carolina Department of Revenue, 353 S.C. 1, 14, 577 S.E.2d 190, 197 (2003). "Where a party receives inadequate notice, he must demonstrate prejudice resulting from the insufficient notice." Gardner at 197 (citing Ballenger v. South Carolina Dep't of Health and Env'tl. Control, 331 S.C. 247, 500 S.E. 2d 183 (Ct.App.1998)). Companion was not prejudiced. They contend that

confirmation did not come to Companion until April 22 and therefore, if the fifteen days ran from the date they received the notice, the protest would have been timely. However, Capital City was downgraded on April 19. Companion “heard rumors” sometime between the 19<sup>th</sup> and 22<sup>nd</sup>. Had Companion verified on the 19<sup>th</sup>, 20<sup>th</sup>, or 21<sup>st</sup>, and filed a protest instead of waiting until the 22<sup>nd</sup>, the protest would have been timely. Therefore, we are unable to see how the early posting of the Intent to Award prejudiced Companion.

Secondly, Companion argues that the Intent to Award was misleading. Although the protest was due on April 21, 2004, the Intent to Award had language at the top stating the award would become final on April 22, 2004 at 5:00 p.m. Companion claims this was misleading as to the time to protest. However, in the next paragraph, written very distinctly, the Intent to Award states, “Bidder’s right to protest as listed in Section 11-35-4210 in the South Carolina Procurement Code applies to this intent to award.” Section 11-35-4210 clearly states that the appeal must be made within fifteen days of the date the award is posted. The Panel previously decided this issue in In Re: Protest of Vorec Corporation; Appeal of Vorec Corporation, Case No. 1994-9. Vorec Corporation made an untimely protest and, like Companion, made an argument that the award document contained confusing language about when the award would become final. In that case we also pointed to the follow up language referring bidders to §11-35-4210 and quoted the South Carolina Supreme Court saying, “The South Carolina Supreme Court, in Lovell v. C.A. Timbes, Inc., 263 S.C. 384, 210 S.E. 2d 610 (1974), noted that ignorance of the requirement of filing within a certain time is not a legal excuse for failure to file within the required time.” Vorec at 3.

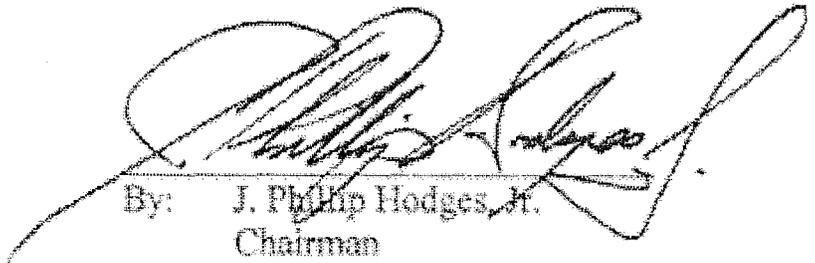
**Order**

Since there is no genuine issue of material fact,

**IT IS HEREBY ORDERED THAT** Capital City's Motion for Summary Judgment is **GRANTED**.

**AND IT IS SO ORDERED.**

**S.C. Procurement Review Panel**



By: J. Phillip Hodges, Jr.  
Chairman

This 3<sup>RD</sup> day of August, 2004