

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

IN RE:

Appeal of Petroleum Traders)
IFB No. 07-S7324)
CPO Order No. 2006-158)

ORDER
Case No. 2006-8

This matter came before the South Carolina Procurement Review Panel for a hearing on January 26, 2007. The Panel heard an appeal of the November 17, 2006, decision of the Chief Procurement Officer (CPO) by Petroleum Traders Corporation (PTC). The CPO issued an order upholding the decision of the Materials Management Office (MMO) to issue an Invitation for Bid (IFB NO. 07-S7324) for a statewide contract for ultra low sulfur diesel fuel and denying PTC's protest of that IFB. PTC sought further administrative review before the Panel.

At the hearing PTC was represented by Marcus Manos, Esquire, and Michael Elvin, Esquire, admitted *pro hac vice* by the South Carolina Supreme Court by letter dated January 23, 2007. The CPO was represented by Keith McCook, Esquire.

FINDINGS OF FACT

On September 15, 2006, MMO, of the South Carolina Budget and Control Board, issued IFB No. 07-S7324 seeking bids for delivery of ultra low sulfur diesel fuel and bio-diesel fuel. PTC protested the IFB on the grounds that the bid was overly restrictive, that the purchase of bio-diesel fuel was not in the best interest of the State, and that the State had modified a prior contract with PTC and was committed to purchase the fuel from

PTC.

In June 2006, MMO issued IFB No. 06-S7224 and 06-S7226 soliciting bids for the provision of low sulfur diesel fuel and unleaded gasoline. PTC was issued an Intent to Award on the bids however, the State subsequently cancelled the award. PTC appealed the cancellation to the Panel and the Panel reversed the cancellation and reinstated the award by Order dated August 17, 2006. On September 15, 2006, MMO issued IFB No. 07-S7324 for delivery of ultra low sulfur diesel fuel and bio-diesel fuel. In September 2006, PTC informed the State that suppliers were transitioning from low sulfur to ultra low sulfur diesel fuel and that low sulfur fuel was no longer available for purchase at the terminal that serves South Carolina. Because of this communication, PTC and the State entered into a Change Order to IFB No. 06-S7226 (contract for low sulfur diesel fuel).

The Change Order provided that,

“Due to the unavailability of #2 low-sulfur diesel fuel in some areas, Petroleum Traders agrees to fill such orders with ultra low-sulfur diesel fuel at the same price mark-ups as awarded in Contract #06-S7226-A12390. Beginning on Tuesday, September 26, the OPIS ultra low-sulfur diesel index will be used to calculate prices for orders of ultra low-sulfur diesel only. In areas with low-sulfur diesel available, orders placed for #2 low-sulfur diesel will be priced with the OPIS low-sulfur diesel index. Petroleum Traders agrees to stop filling orders for ultra low-sulfur diesel pursuant to this Change Order as soon as the Materials Management Office has established a new statewide contract for ultra low-sulfur diesel fuel. The Materials Management Office will provide a minimum of seven (7) days notice.”

MMO issued IFB No. 07-S7324 on September 15, 2006 seeking bids for the provision of ultra low sulfur diesel and bio-diesel fuel. PTC protested this IFB.

The CPO held a hearing on November 17, 2006 and found that the bid was not overly restrictive and that the state should proceed with the new IFB. The CPO also found that there was not a contract modification that would allow PTC to continue to provide the ultra low sulfur diesel fuel beyond what was allowed by the contract with PTC and the Change Order. As to the bid not being in the best interest of the State, the CPO granted a motion to dismiss this protest issue and took no evidence on this ground.

CONCLUSIONS OF LAW

Pursuant to S.C. Code of Laws Sec. 11-35-2730, "All specifications shall be drafted so as to assure cost effective procurement of the states actual needs and shall not be unduly restrictive." We find that IFB NO. 07-S7324 for the provision of ultra low sulfur diesel fuel and bio-diesel fuel is not overly restrictive. PTC argued that the possibility that all potential bidders would have to purchase the "bio" component from one source undermined the competitive bidding process. However, evidence was presented to the CPO that other representatives of the vendor community intended to bid. Suppliers of the "bio" component are also available in other states. There was also no requirement in the IFB that the supplier be located in South Carolina. If a potential bidder wished to obtain a seven (7) percent preference for use of a vendor in South Carolina, then the one source in South Carolina would have to be used. However, this was not a requirement of the bid. Potential bidders, Anita Hill and Michelle Shively, testified before the Panel that they would still bid on the IFB even if there was only one source of the "bio" material in

South Carolina because they have potential sources outside of South Carolina also. At the CPO hearing, evidence was presented that there was an interest by the vendor community to compete in the bid. The solicitation places no restrictions on where bidders should obtain their bio-diesel. The specifications do not require bidders to obtain their bio-diesel from producers in South Carolina. Therefore, we find that the specifications are not unduly restrictive.

PTC argues that it is not in the State's best interest to purchase bio-diesel fuel because it is more expensive and less reliable than ultra low sulfur diesel fuel. Prior to the CPO hearing, the State made a motion to dismiss this protest ground and it was granted. PTC argues that it should have been allowed to present evidence to the CPO concerning whether or not it was in the State's best interest to purchase bio-diesel fuel. We find that the CPO did not abuse his discretion in granting the motion and not taking evidence on this protest issue. The determination of what the State needs is totally within the realm of the State. The State has determined that it needs to purchase bio-diesel fuel. Regardless of whether the choice is a good one or not, the executive branch alone determines what types and categories of products it needs. See Protest of Helena Chemical Co., Case No. 2001-5 ("what is in the best interest of the State can only be determined by the State"). The Panel is not empowered to make a judgment as to whether an agency should purchase a particular item. Therefore, we find that the CPO did not abuse his discretion in dismissing this protest ground and that the State determines what is in its best interest to purchase.

On September 5, 2006, PTC was awarded a statewide contract on Solicitation

No. 06-S7226 to provide low sulfur diesel fuel. PTC informed the State that it was unable to fill some orders on this contract due to the unavailability of low sulfur diesel fuel and agreed to fill the order with ultra low sulfur diesel fuel. On September 25, 2006, PTC and MMO executed a Change Order for this contract wherein PTC agreed to stop filling orders for ultra low sulfur diesel fuel as soon as MMO had established a new statewide contract for this fuel. The State wanted to issue a new Invitation for Bid for the ultra low sulfur diesel fuel because the contract with PTC was only for low sulfur diesel fuel. On September 15, 2006, the State did issue a new IFB No. 07-S7324 for the provision of ultra low sulfur diesel fuel and biodiesel fuel. From September 18, 2006 to approximately September 21, 2006, invoices from PTC indicate that some state agencies accepted delivery of ultra low sulfur fuel. PTC argued that this delivery and acceptance of the ultra low sulfur fuel was a contract modification of their bid No. 06-S7226 and therefore the State could not issue the new Bid No. 07-S7324. We do not find that there was a modification of the contract which would thereby allow PTC to continue to provide the ultra low sulfur fuel, except as provided for by the Change Order.

The Change Order specifically states that, "Petroleum Traders agrees to stop filling orders for ultra low sulfur diesel fuel pursuant to this Change Order as soon as Materials Management Office has established a new statewide contract for ultra low sulfur diesel fuel." This order was signed by Vicki Himes, Vice President of PTC, on September 25, 2006. The language is clear and unambiguous. PTC agreed to stop filling the orders once MMO established a new contract and MMO was attempting to solicit new bids by issuing

IFB No. 07-S7324. PTC further argued that their contract, No. 06-S7226, was modified when some agencies accepted the ultra low sulfur fuel and that PTC then became the provider of the ultra low sulfur fuel and no new bid should have been issued. We do not find this argument persuasive. First, a Change Order had been issued with clear language that PTC would stop filling the orders for ultra low sulfur fuel once the State established a new contract. Second, no person with authority for the State agreed to modify the contract to the extent argued by PTC. PTC argued that the agencies that accepted the orders in effect modified the contract. However, the agencies accepting delivery of the fuel had no authority to modify the contract PTC had with the State. A private party has no right to public funds received as a result of the unauthorized conduct of a government employee. Service Management, Inc. v. State Health and Human Services Finance Commission, 298 S.C. 234, 379 S.E.2d 442, Heyward v. S.C. Tax Commission, 240 S.C. 347, 126 S.E.2d 15 (1962). Parties entering into agreements with the state assume the risk of ascertaining that he who purports to act for the state stays within the bounds of his authority. Federal Crop Ins. Corp., 332 U.S. 380, 68 S.Ct.1. The unauthorized conduct of a state employee may not be construed as a waiver on the part of the State. Carolina National Bank v. State of South Carolina, 60 S.C. 465, 38 S.E. 629 (1901). We find that the acceptance of delivery of ultra low sulfur diesel fuel by some agencies did not act as a modification of the contract with PTC. The agencies that received the fuel had no authority to modify the contract with PTC. There is no written documentation that the

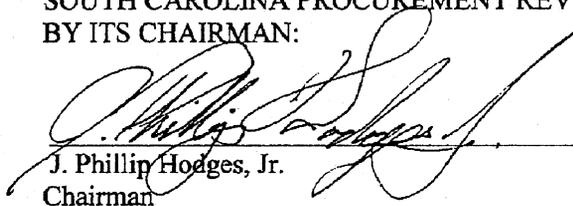
State and PTC agreed to modify the contract, other than to the extent expressed by the Change Order. Further, the contract PTC had with the State under Bid No. 06-S7226 clearly states that Cooper Marlowe is the Procurement Officer and that any document signed or otherwise agreed to by persons other than the Procurement Officer shall be void and of no effect. Further, per Bid No. 06-S7226, no contract or other agreement containing contractual terms or conditions could be signed by any using governmental unit. There was no evidence presented that Mr. Marlow and PTC modified the contract under Bid No. 06-S7226 that would have allowed PTC to convert its contract to provide low sulfur diesel fuel into a contract to provide ultra low sulfur diesel fuel, other than that provided by the Change Order, which clearly set out the terms of the change. We find that there was no modification of the contract between PTC and the State, other than that expressed by the Change Order, that would indicate that PTC was to become the provider of ultra low sulfur fuel without the solicitation of a new bid by the State. We further find that the acceptance of fuel by some agencies did not act as a contract modification in contradiction of the clear contract language and Change Order.

ORDER

For the reasons stated above, we find for the State and that IFB No. 07-S7324 for a statewide contract for ultra low sulfur diesel fuel and biodiesel fuel should proceed.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL
BY ITS CHAIRMAN:



J. Phillip Hodges, Jr.
Chairman

This 3RD day of FEB 2007