

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE:	)	
	)	Case No. 2010-1
Protest of Mid-Atlantic Drainage, Inc.;	)	
Gossett Concrete Pipe Co., Inc.;	)	
Southeastern Concrete Products; and	)	
Americast	)	
	)	
Appeal of Concrete Designs, Inc.	)	
	)	
IFB# 5400001026	)	
	)	

---

This matter came before the South Carolina Procurement Review Panel (the Panel) by way of an appeal letter from Concrete Designs, Inc. (Concrete Designs), dated December 30, 2009, requesting administrative review of the Chief Procurement Officer's (CPO's) December 7, 2009, decision granting the protests of Mid-Atlantic Drainage, Inc., Gossett Concrete Pipe Co., Inc., Southeastern Concrete Products, and Americast (the Protestants). On January 15, 2010, the CPO filed a motion to dismiss Concrete Designs' appeal before the Panel for lack of jurisdiction. On January 27, 2010, Concrete Designs filed a response to the CPO's motion to dismiss. By letter dated January 27, 2010, the Panel provided the parties and the Protestants with the opportunity to file further responses and any supporting affidavits or documentation regarding the issue of jurisdiction. On February 1, 2010, the Panel received a letter from Southeastern Concrete Products indicating its support of the CPO's motion to dismiss. On February 8, 2010, the CPO filed a supplementary motion to dismiss for lack of jurisdiction accompanied by an affidavit and a copy of a December 3, 2009, letter from the CPO. On February 9, 2010, the Panel received an affidavit from Concrete Designs. Finally, on February 17, 2010, the Panel received a supplemental memorandum from Concrete Designs. The Panel now issues this order

without conducting a hearing based on the threshold issue of jurisdiction. The Panel issues this decision based on the initial record; the motions and responses; applicable statutory and case law; and the Panel's established procedures.

### **Findings of Fact**

Through this solicitation, the Materials Management Office (MMO), sought "to establish a Statewide Term Contract for a source or sources of supply for the purchase and delivery of Reinforced Concrete Culvert Pipe" on behalf of the South Carolina Department of Transportation (SCDOT). The invitation for bids was issued on July 29, 2009, and one amendment was issued on September 4, 2009. The Protestants filed letters of protest shortly after the Intent to Award was posted on October 2, 2009. The Intent to Award was suspended on October 8, 2009, and the CPO conducted a hearing on November 23, 2009, to resolve the issues of protest. Representatives for the Protestants, SCDOT, and MMO all attended the hearing. Mr. James A Kidd, representing Concrete Designs, also attended the hearing. During this hearing, the CPO informed all of those present that he would post his decision on the website maintained by MMO at [www.sc.mmo.gov](http://www.sc.mmo.gov) by the end of the day on December 3, 2009. He also explained that his decision would be listed on the website under CPO decisions and that he was the CPO for goods and services.

On December 3, 2009, the CPO sent a letter to all of those who had been present at the November 23rd hearing informing them that his administrative review was delayed, but that he would post his decision at [www.mmo.sc.gov](http://www.mmo.sc.gov) by the end of the day on December 7, 2009. The CPO sent this letter via email to the email addresses provided by the representatives, including Mr. Kidd, at the November 23rd hearing. The CPO did in fact post his decision on the MMO website on December 7, 2009.

On December 23, 2009, a notice cancelling the Intent to Award was posted on the South Carolina Procurement Information Center (SCPIC) website at <http://webprod.cio.sc.gov/SCSolicitationWeb/contractSearch.do?solicitation=5400001026>. A copy of the CPO's December 7th decision was also posted to that same website on December 23rd. In an affidavit submitted to the Panel, Mr. Kidd averred that he monitored the SCPIC website after the November 23rd hearing before the CPO. In his affidavit, Mr. Kidd neither denies receiving the CPO's December 3rd letter, nor explains why he did not monitor the MMO website for the CPO's decision.<sup>1</sup> After observing the notice cancelling the intent to award on the SCPIC website, Mr. Kidd filed his letter requesting further administrative review on December 30, 2009.<sup>2</sup>

#### **Conclusions of Law**

Under the Procurement Code, a party seeking to appeal a CPO's decision to the Panel must do so within ten days of the date the decision is posted. S.C. Code Ann. § 11-35-4210(6) (Supp. 2008). The Procurement Code defines "days" as calendar days. S.C. Code Ann. § 11-35-310(13) (Supp. 2008). Furthermore, the Panel has previously ruled that an appeal of a CPO's decision must be filed within the statutory time frames to confer jurisdiction to the Panel. *In re: Protest of Betz Dearborn*, Case No. 1999-8 (February 2, 1999).

---

<sup>1</sup> In its supplemental memorandum filed on February 17th, Concrete Designs asserts that Mr. Kidd did in fact monitor the MMO website and that is where he accessed the webpage which prompted him to file an appeal. If he had followed the directions given at the hearing, he would have navigated from the MMO homepage to the page containing the CPO decisions. The link to those decisions appears about halfway down the MMO home webpage. In any event, the CPO's December 3rd letter provided ample notice that the decision would be posted on December 7th, which it was. It was incumbent on Mr. Kidd to contact MMO if he was having trouble locating the CPO's decision on December 7th.

<sup>2</sup> Although Mr. Kidd indicates he filed his appeal letter on December 29, 2009, the letter itself is dated December 30, 2009. Furthermore, the CPO's administrative assistant declared in an affidavit submitted to the Panel that she received the appeal letter by email and facsimile transmission on December 30, 2009. Copies of the email and the facsimile transmission were also submitted to the Panel. For the purposes of this decision, the Panel finds that the appeal letter was filed on December 30, 2009.

As noted above, the CPO informed all interested parties, including Mr. Kidd, which website to monitor for his decision both at the November 23rd hearing and through his December 3rd letter. Moreover, the CPO posted his decision on the designated website on December 7, 2009. Therefore, as calculated by the Procurement Code, the time to appeal that decision ran until the close of business on December 17, 2009. Because Mr. Kidd did not file his appeal letter until December 30, 2009, well beyond the time frame specified by law, the Panel concludes that it lacks jurisdiction to consider Concrete Designs' appeal.<sup>3</sup>

### Conclusion

For the reasons stated above, the Panel finds Concrete Designs' appeal is not timely filed and grants the CPO's motions to dismiss the appeal for lack of jurisdiction.

IT IS SO ORDERED.

SOUTH CAROLINA PROCURMENT REVIEW PANEL  
BY ITS VICE CHAIRMAN

  
\_\_\_\_\_  
Willie D. Franks  
Vice Chairman

Columbia, South Carolina  
This 18<sup>th</sup> day of February, 2010.

---

<sup>3</sup> The Panel regrets any confusion caused by re-posting the CPO's December 7th decision on the SCPIC website on December 23. However, that re-posting in no way changed the statutory deadline for appealing the December 7th decision because such deadlines cannot be waived by the conduct or consent of the parties. *In re: Protest of Printmasters Professional Printers, Inc.*, Case No. 2008-3 (November 21, 2008).