

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER ON MOTION FOR
IN RE: Caption Colorado, LLC v.	)	FEES AND COSTS
Office of Regulatory Staff	)	
(Contract Controversy)	)	Case No. 2010-7
	)	
	)	
	)	
	)	
	)	
	)	

---

This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on December 13, 2010. On September 13, 2010, the Chief Procurement Officer (the CPO) issued an order in which he ruled in favor of the South Carolina Office of Regulatory Staff (ORS) in a contract controversy filed by Caption Colorado, LLC. No appeal was taken from this order, but ORS filed a motion with the Panel to recover the attorney’s fees and costs it incurred defending itself in the contract controversy.

In the hearing before the Panel, Craig K. Davis, Esquire, and Florence P. Belser, Esquire, represented ORS. Melissa J. Copeland, Esquire, and John E. Schmidt, III, Esquire, represented Caption Colorado. Keith C. McCook, Esquire, represented the CPO.

**Findings of Fact**

Beginning with its formation in January of 2005, ORS became responsible for overseeing a statewide project which provided real-time closed captioning for news broadcasts and other designated programming in four media markets in South Carolina.<sup>1</sup> From September 2005 through February 2006, the South Carolina Association for the Deaf (SCAD) provided closed

---

<sup>1</sup> The CPO recited a thorough history of the closed captioning program in his September 13th order. Many of the facts detailed in his order are irrelevant to the issue currently before the Panel. Therefore, the Panel has chosen to address that history in a summary fashion, referring the reader to the CPO’s order for further detail.

captioning services for ORS under a six-month emergency procurement contract. Although SCAD held the contract with ORS, SCAD's subcontractor, Caption Colorado, actually performed the closed captioning. After the emergency procurement contract expired at the end of February 2006, SCAD and Caption Colorado continued to provide closed captioning services for ORS without a formal written contract until the arrangement was terminated by ORS effective March 1, 2009. On March 10, 2009, Caption Colorado, citing its status "as subcontractor on the contract to provide closed captioning services to the State of South Carolina," filed a request for resolution of a contract controversy with the CPO. The basis of its claim was that it had received only one business day's notice of the termination of its services, which was "commercially unreasonable" and "certain to cause Caption Colorado substantial damages."

Caption Colorado's attorney, John E. Schmidt, III, testified in the hearing before the Panel. He testified that he reviewed the facts supporting Caption Colorado's claim and researched existing law prior to drafting and filing the request for resolution with the CPO. Mr. Schmidt explained he determined Caption Colorado had standing to bring a claim against ORS as a subcontractor who was a "real party in interest." Mr. Schmidt testified that this decision was also supported by Panel precedent which had recognized a subcontractor's right to request resolution of a contract controversy even though the subcontractor was not in privity of contract with the State. As for Caption Colorado's claim that it had not been given "commercially reasonable notice" of the termination of its services, Mr. Schmidt relied on a general provision which imposes an obligation of good faith and fair dealing in every contract governed by the

Procurement Code. Finally, Mr. Schmidt testified that he filed the contract controversy claim with every intention of winning the case on behalf of his client, not for any improper purpose.<sup>2</sup>

## **Conclusions of Law**

### **I. Preliminary Motions**

#### **A. Caption Colorado's Motion to Dismiss**

The Panel first considered Caption Colorado's motion to dismiss ORS's motion to recover costs and fees. Caption Colorado's motion to dismiss was based on the following two grounds: (1) section 11-35-4330, the statutory section allowing recovery of attorney's fees and costs does not apply to contract controversies; and (2) Caption Colorado's claim, at the time of filing, was based on its standing as a "real party in interest" as defined by statute and Panel precedent. As to the first point, the Panel agreed with Caption Colorado that section 11-35-4330 does not use the phrases "contract controversy" or "request for resolution"; however, the section does use the phrase "pleading, motion or other document." The Panel concluded that a "request for resolution" is properly considered to be a "pleading" and that it has the authority to consider sanctions in contract controversy claims under section 11-35-4330. As to the second point, ORS's allegation that Caption Colorado's contract controversy claim was frivolous raises a factual issue which must be heard by the Panel. Accordingly, the Panel denied both grounds of Caption Colorado's motion to dismiss.

---

<sup>2</sup> Although the Panel allowed the testimony of several expert witnesses regarding the legal standard of care, it has not considered such testimony in reaching its decision. The Panel notes that it does not have the authority under the Procurement Code's sanction provision to decide the issue of whether an attorney has met the requisite standard of care.

## **B. Motion to Limit the Scope of the Panel's Inquiry**

As noted above, the State's procurement of statewide real-time closed captioning for news broadcasts and other designated programming has had an extensive and arguably controversial history. In briefing the issue of costs and fees before the Panel, ORS sought to link Caption Colorado's contract controversy claim to protests involving itself, SCAD, and Country World Productions and to a separate circuit court action involving itself and SCAD. At the Panel hearing, the CPO and Caption Colorado argued that the Panel should not consider testimony and other evidence relating to separate protests and litigation because such evidence was irrelevant to the issue of whether ORS was entitled to recover costs and fees based on Caption Colorado's contract controversy claim. The Panel agreed and ruled that its inquiry would be limited to the contract controversy claim and that it would not consider any prior protest hearings or separate judicial proceedings. *Cf. In re: Protest of Oracle USA, Inc.*, Panel Case 2007-10 (December 17, 2007) ("[P]rocurements not protested to the Panel are outside of its jurisdiction and irrelevant to a subsequent protest in a separate solicitation.")

## **II. ORS's Motion for Costs and Fees**

Under the Procurement Code, the Panel has the authority to impose sanctions consisting of "the reasonable expenses incurred because of the filing of the . . . pleading . . . including a reasonable attorney's fee." S.C. Code Ann. § 11-35-4330(2) (2010). In considering a request to impose sanctions, the Panel must determine if a pleading has been signed by a party in violation of subsection (1) of the applicable statutory provision. *Id.* Subsection (1) provides that an attorney's signature on a pleading

constitutes a *certificate* by the signer that the signer has *read the document*, to the best of his knowledge, information, and belief formed *after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law*, and it is not

interposed for an improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation.

S.C. Code Ann. § 11-35-4330(1) (2010) (emphasis added). On the rare occasions when a party has sought to recover costs and fees, the Panel has expressed a concern about balancing the possible chilling effect of imposing sanctions with the cost of meritless appeals. *See, e.g., In re: Protest of MTC Service Maintenance*, Panel Case 1997-2 (February 28, 1997) (recognizing the possible chilling effect of imposing sanctions, but noting “occasionally an appeal to the Panel will have no merit, and the Panel does not desire to see funds . . . wasted on such appeals.”). However, the Panel has also declined to find appeals frivolous if either the facts or the law are subject to interpretation. *See In re: Protest of Three Rivers Solid Waste Authority*, Panel Cases No. 1996-4 and 1996-5 (April 29, 1996) (declining to find an appeal frivolous where the Panel had not previously addressed the Procurement Code’s application to political subdivisions, leaving the question of jurisdiction open to interpretation) and *In re: Protest of Two State Construction Co.*, Panel Case No. 1996-2 (April 1, 1996) (wherein the Panel declined to find a protest frivolous where the state supreme court’s case on which the movant relied was factually distinguishable; the protest involved responsiveness and the subcontractor listing requirement).

The dispute currently before the Panel is in an unusual posture because the underlying ruling of the CPO has not been appealed by Caption Colorado. In the absence of a direct appeal, the Panel is constrained from reviewing that decision on its merits. Although the CPO ultimately ruled in favor of ORS by distinguishing the facts of *Graduate Science* from those of Caption Colorado’s position as a subcontractor, the Panel is persuaded by Mr. Schmidt’s testimony that he conducted a reasonable inquiry and acted in good faith in filing a contract controversy claim on Caption Colorado’s behalf. The Panel finds that *Graduate Science*’s definition of “real party

in interest” was subject to interpretation; therefore, Caption Colorado’s claim cannot be considered frivolous based on Panel precedent. Based on the reasons discussed above, the Panel denies ORS’s motion for costs and attorney’s fees.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY:   
**C. BRIAN MCLANE, SR., CHAIRMAN**

This 12<sup>th</sup> day of January, 2011.

Columbia, South Carolina