

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	ORDER
IN RE: Protest of PC&C Enterprises,)	MOTION TO DISMISS
LLC; Appeal by PC&C Enterprises,)	Case No. 2012-1
LLC)	
)	
IFB No. SB10353)	
(SCDOT Annual Contract for LED)	
Blankout Signs – Statewide))	
)	
)	

This matter is before the South Carolina Procurement Review Panel (the Panel) pursuant to a request for further administrative review by George W. Pennington, owner of PC&C Enterprises, LLC (PC&C Enterprises). PC&C Enterprises protested the South Carolina Department of Transportation’s (SCDOT’s) intended award of a statewide contract for LED blankout signs to RAI Products, Inc. (RAI). On February 13, 2012, SCDOT filed a motion to dismiss Mr. Pennington’s request for further administrative review for failure to comply with Panel procedures, failure to prosecute, and lack of standing. The Panel requested further briefing on SCDOT’s motion from Mr. Pennington, the Chief Procurement Officer (the CPO), and RAI. The Panel now issues this order regarding SCDOT’s motion to dismiss based on the record before it, the parties’ briefs, and Panel precedent and procedure.

Findings of Fact

This protest and appeal involve an invitation for bids (IFB) issued by SCDOT to procure an annual statewide contract for LED blankout signs. Only two bids were received in response to the IFB, and SCDOT’s bid tabulation sheet notes that the bidders submitting the bids were George Pennington/PC&C Enterprises and Rosenblatt & Associates. Record at PRP99. The

signature page of the bid form has several fields which must be filled out by a bidder, one of which contains the following description at the top of the field:

NAME, ADDRESS, PHONE, FAX NUMBER AND EMAIL OF OFFEROR
(Full legal name of business submitting the offer)

Record at PRP74. In this field, Mr. Penington entered his name, "George W. Penington," and provided an address of "2199B Doris Drive, Charleston, SC 29401."¹ *Id.* Additionally, Mr. Penington wrote "PC&C Enterprises, LLC" under the parenthetical description seeking the "[f]ull legal name of the business submitting the offer." *Id.* Another field on the bid signature page gives Mr. Penington's title as "Owner." *Id.* In the actual signature field, Mr. Penington signed his name over the following admonition: "Person signing must be authorized to submit binding offer to enter contract on behalf of Offeror named above." *Id.* The signature page also requested a taxpayer identification number, and Mr. Penington entered a number in this field that is in the format of a Social Security number. *Id.* Under this number he also wrote "Vendor #7000124529."² *Id.* Finally, in the bidding schedule portion of the bid, where the bidders were asked to submit their pricing, Mr. Penington wrote "PC&C Enterprises George W. Penington" as the company name. Record at PRP85.

After SCDOT posted its notice of intent to award the contract to RAI on October 14, 2011, Mr. Penington sent an e-mail to SCDOT's procurement officer, Margaret J. Oswald, indicating that a protest was being filed by e-mail. Record at PRP44. The e-mail to Ms. Oswald contained the following signature block:

¹ The zip code provided in this field on the form, 29401, is different from the one provided in three other fields on the form, where it is listed as 29414. A search of the United States Postal Services' website revealed the correct zip code for 2199B Doris Drive, Charleston, SC, to be 29414. The Panel takes judicial notice that 29414 is the correct zip code pursuant to South Carolina Rule of Evidence 201(b)(2).

² The Panel's attorney searched the state vendor database maintained by State Procurement and confirmed that state vendor number 7000124529 is registered in the name of George W. Penington with an address of 2199 B Doris Drive, Charleston, SC 29414. The Panel takes judicial notice of this fact as well. SC R. Evid. 201(b)(2).

George W Penington
Construction Consultant
PcC Enterprises, LLC Vendor #7000124529

Id. Thereafter, on October 17, 2011, Mr. Penington sent an e-mail to Ms. Oswald and a mailbox entitled “Protest-MMO”³ serving as the official notice of a protest and setting for the grounds for that protest. Record at PRP42. This e-mail was closed with the following signature block:

George W. Penington
Construction Consultant
Construction Group

Id. The e-mail was addressed to “Chief Procurement Officer” and indicated copies of the e-mail were sent to “Andre V. Woods, Market Director for PC&C Enterprises and George W Penington.” Record at 42.

As CPO for Supplies and Services, Voight Shealy conducted a hearing to resolve the protest on December 8, 2011, and issued a decision denying the protest on December 19, 2011. The CPO’s written decision bore the following title: “In the Matter of Protest of: PC&C Enterprises, LLC” and was assigned a case number of 2011-140. Record at PRP5. The CPO’s decision notes that PC&C Enterprises was represented by George Penington, Andre Woods, and Jacqueline Brown, none of whom are licensed to practice law in South Carolina.⁴

On December 29, 2011, Mr. Penington e-mailed the CPO to indicate he desired further administrative review of the protest before the Panel. The reference line of his appeal letter contained the following information:

IN THE MATTER OF: Protest
Solicitation No.: SB10353
Annual Contract for LED Blankout Signs – Statewide for Dept. of Transportation

³ The Intent to Award notice provides the following address for submitting a protest by e-mail: protest-mmo@mmo.state.sc.us. Record at PRP41.

⁴ A business is not required to retain a lawyer to represent it in hearings before the CPO. See “Protests Before the Chief Procurement Officers,” a brochure made available on the Procurement Services website and which may be accessed at http://procurement.sc.gov/webfiles/MMO_Legal/Documents/CPOHearingPmphlt.pdf.

George W. Penington Vendor #7000124529
CASE NUMBER: 2011-140

Record at PRP15. Along with his appeal letter, Mr. Penington attached an affidavit requesting that the Panel's \$250.00 filing fee be waived because of hardship. Record at PRP21. In his affidavit, Mr. Penington also asserted that he did not have to retain a lawyer because he was acting as a sole proprietor, not an incorporated business. *Id.*

After receiving the appeal letter and initial record from the CPO, the Panel requested that Mr. Penington submit another affidavit supporting his request for a fee waiver. The Panel received the requested notarized affidavit on February 10, 2011. That affidavit contained the following statement:

I was invited to bid this job and as required by law had to bid this job in my name as the registered vendor according to SCDOT. If I won the bid then I could apply to change and add PC&C Enterprises to the South Carolina Enterprise Information System (SCEIS) vendor registration for tax reasons. I had to use my Social Security Number as the Taxpayer Identification and the **Vendor # 7000 12459. Vendor name: George W Penington Registered Vendor – South Carolina Enterprise Information System (SCEIS) vendor registration (See Page 1 and Page 3 of Exhibit #2 on file)[.]**

Affidavit of George W. Penington dated February 10, 2012 (on file with the Panel) (emphasis in original). After reviewing Mr. Penington's affidavit, the Panel waived the filing fee on February 15, 2012. Letter from Christie M. Emanuel to all parties dated February 15, 2012 (on file with the Panel).

While the Panel was considering Mr. Penington's request for a fee waiver, SCDOT filed its motion to dismiss on February, 13, 2012. In support of its motion, SCDOT attached a certified copy of the Articles of Organization for a Limited Liability Company named PCC Enterprise Company, LLC. SCDOT's Motion to Dismiss dated February 13, 2012, Attachment 1 (on file with the Panel). These articles of organization were filed with the South Carolina

Secretary of State and listed George W. Penington as the company's agent. *Id.* In addition, the business address listed on the business filing is 2199 Doris Drive, Suite B, Charleston, SC 29414. *Id.*

Conclusions of Law

In its motion to dismiss, SCDOT contends that the appeal currently before it should be dismissed because Mr. Penington has not hired a licensed South Carolina lawyer to represent the interests of PC&C Enterprises as required by Panel precedent and procedure. Moreover, SCDOT asserts that Mr. Penington lacks standing to request further administrative review before the Panel because he was not the actual bidder on the solicitation. In opposition to SCDOT's motion, Mr. Penington argues that he submitted the bid as an individual vendor, using the state vendor number registered in his own name. Additionally, Mr. Penington contends that the Panel's decision to waive the filing fee necessarily recognized his right to represent himself as a sole proprietor and that SCDOT's motion is "[an] inappropriate issue to consider." The CPO did not take a position regarding whether or not the bid was submitted by Mr. Penington as a sole proprietor or by Mr. Penington on behalf of PC&C Enterprises. However, the CPO noted that the confusion surrounding the issue was largely Mr. Penington's own making because he signed the bid documents as if he were acting on PC&C Enterprises' behalf but he has at times omitted the company's name in his correspondence related to his protest and appeal to the Panel.

The Procurement Code vests the Panel with the authority to establish its own rules and procedures. S.C. Code Ann. § 11-34-4410(4)(a)(i) (2011). Pursuant to this authority, the Panel long ago adopted a policy that incorporated businesses must be represented by licensed South Carolina counsel. *See* Panel's Procedural Memorandum, "Representation" (a copy of the Panel's memorandum is forwarded to all parties when a request for review is received and may also be

accessed at http://www.mmo.sc.gov/webfiles/MMO_Legal/Documents/PanProc.pdf); *see also In re: Protest of The Interchange*, Panel Case No. 2000-10(II) (Order for Motion to Rescind Dismissal) (June 6, 2001). As noted by SCDOT, this requirement is consistent with South Carolina law. *See State v. Wells*, 191 S.C. 181, 5 S.E.2d 468 (1939) (finding that a corporation is not a natural person and must be represented in legal matters by a licensed attorney). To determine how this procedural rule applies to the current case necessarily requires a factual finding regarding whether Mr. Penington submitted a bid on his own or on his company's behalf. Viewing all of the evidence before it, the Panel finds that Mr. Penington intended to bind PC&C Enterprises in the event he was awarded the contract. In particular, the Panel relies on the facts that he included the company's name throughout the bid, that he identified himself as the company's owner on the bid signature form, and that he admitted in an affidavit submitted to the Panel that he planned to substitute the company as the vendor if he were to be awarded the contract.⁵ In short, the Panel finds that PC&C Enterprises was the actual bidder for the statewide LED blankout sign solicitation.⁶ Therefore, the Panel finds that Mr. Penington must retain an attorney licensed to practice in South Carolina to represent the interests of PC&C Enterprises in any claim before the Panel. However, the Panel denies SCDOT's motion to dismiss the appeal at this time.

⁵ The Panel expresses no opinion regarding whether or not such a practice is allowed under the Procurement Code.

⁶ Although SCDOT has urged the Panel to dismiss this appeal because PC&C Enterprises, not Mr. Penington, was the actual bidder, the Panel notes that it is not unusual to have a company's officer file the initial request for further administrative review. When that happens, the Panel's practice is to inform the officer that an attorney must be retained to represent the company's interests and to allow them ten (10) business days to retain counsel. Because SCDOT filed its motion prior to the Panel issuing a decision regarding Mr. Penington's fee waiver request, this normal course was not followed. The Panel also notes that in waiving the filing fee it never reached the question of whether or not Mr. Penington could represent himself before the Panel.

Consistent with its current practice, the Panel will allow Mr. Penington ten (10) business days from the date of this order to retain legal counsel to represent PC&C Enterprises and have such counsel file a notice of appearance with the Panel. The failure to retain counsel will risk dismissal of PC&C Enterprises' appeal.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: 

C. BRIAN MCLANE, SR., CHAIRMAN

This 2nd day of April, 2012.

Columbia, South Carolina