

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE:	)	
Appeal by Palmetto Traffic Group, LLC	)	Case No. 2014-3
	)	
	)	
RFP No. 5400006878	)	
Traffic Data Collection Services for the	)	
South Carolina Department of Transportation)	)	

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This matter is before the South Carolina Procurement Review Panel (the Panel) for further administrative review pursuant to sections 11-35-4210(6) and 11-35-4410(1) of the Consolidated Procurement Code (the Procurement Code). The South Carolina Department of Transportation (SCDOT) conducted the solicitation at issue before the Panel seeking to acquire traffic data collection services; the solicitation was divided into two lots, Lot A and Lot B. SCDOT posted an intended award of Lot A of in favor of Quality Counts, LLC, on February 21, 2014. Palmetto Traffic Group, LLC (Palmetto) protested this intended award to the Chief Procurement Officer (the CPO), and the CPO dismissed Palmetto’s protest for lack of standing on May 29, 2014. Palmetto filed a request for further administrative review with the Panel on June 9, 2014, and the Panel scheduled the matter for a hearing on July 22, 2014.

Prior to the scheduled Panel hearing, the CPO and Quality Counts each filed motions to dismiss, or alternatively, for summary judgment, asking the Panel to dismiss the appeal of Palmetto on the grounds that it lacked standing to protest as a matter of law. Palmetto filed a cross motion for summary judgment asking the Panel to find as a matter of law that the protest provision contained in section 11-35-4210(1)(b) of the Procurement Code affords protest rights to subcontractors such as itself. With the consent of the parties, the Panel entertained the

motions by conference call on July 21, 2014 and now issues this order. John E. Schmidt, III, Esquire, represented Quality Counts. E. Wade Mullins, III, Esquire, represented Palmetto. Amanda T. Taylor, Esquire, represented SCDOT, and W. Dixon Robertson, III, Esquire, represented the CPO.

### **Findings of Fact**

In their respective motions, the parties all submit that the following undisputed facts are relevant to the question of standing:

1. Short Counts, LLC (“Short Counts”) was an actual offeror on this solicitation. (June 9, 2014, appeal letter, page 2).
2. Short Counts identified the “Name of Offeror” on the cover sheet of its proposal as “Short Counts, LLC.” [Record at] PRP141.
3. Palmetto was not an actual offeror.
4. Brad White, Palmetto’s owner, testified at the CPO’s hearing that his company would be a subcontractor to Short Counts if Short Counts were awarded the contract.

Quality Counts’ Motion to Dismiss or, Alternatively, for Summary Judgment in Case No. 2014-3, July 8, 2014; Chief Procurement Officer’s Motion to Dismiss or, Alternatively, for Summary Judgment in Case No. 2014-3, July 11, 2014; and Palmetto Traffic Group’s Memorandum in Support of Its Motion for Summary Judgment and in Opposition to the Defendant’s Motion for Summary Judgment in Case No. 2014-3, July 16, 2014. Palmetto also offers as an undisputed fact that “Short Counts identified [Palmetto] as a subcontractor as required by the Solicitation requiring offerors to identify subcontractors as part of their offers.” Palmetto Traffic Group’s Memorandum, *supra*, at 2. The Panel finds that this fact is supported by documents in the record before it. Record at PRP106; PRP140; PRP143; PRP145; PRP152 – PRP153. In addition, the Panel notes that Palmetto’s intention to be bound by the provisions of Short Counts’ offer was

indicated in the cover letter signed by Short Counts' owner. Record at PRP143. Finally, the Panel finds that Palmetto filed a timely protest of the intended award of Lot A to Quality Counts on February 25, 2014. Record at PRP79.

### Conclusions of Law

The Panel has considered and ruled on summary judgment motions in the past. *Appeal by Qmatic, Inc.*, Panel Case No. 2012-3 (June 28, 2012); *Appeal of Triad Mechanical Contractors*, Panel Case No. 2006-7 (October 19, 2006). Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 386, 475 S.E.2d 747, 748 (1996). As noted above, the parties agree that the material facts are undisputed. Therefore, the question before the Panel is whether one of the parties is entitled to judgment as a matter of law.

The sole issue presented by the parties' various motions for summary judgment is whether Palmetto, as a subcontractor, has standing to protest the intended award to Quality Counts under the Procurement Code. The Procurement Code establishes protest rights in section 11-35-4210(1), which provides in pertinent part:

(a) A prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest to the appropriate chief procurement officer in the manner stated in subsection 2(a) within fifteen days of the date of issuance of the Invitation for Bids or Requests for Proposals or other solicitation documents, whichever is applicable, or any amendment to it, if the amendment is at issue. An Invitation for Bids or Request for Proposals or other solicitation document, not including an amendment to it, is considered to have been issued on the date required notice of the issuance is given in accordance with this code.

(b) *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 section (2)(b) within ten days of the date award or notification of intent to award, whichever is earlier,

is posted in accordance with this code; except that a matter that could have been raised pursuant to (a) as a protest of the solicitation may not be raised as a protest of the award or intended award of a contract.

S.C. Code Ann. § 11-35-4210(1)(a) and (b) (2011) (emphasis added).

The parties agree that subsection (1)(a) allows a prospective subcontractor to protest a solicitation's requirements regardless of whether that subcontractor ultimately participates in the solicitation. The parties also agree that "actual bidder [or] offeror" under subsection (1)(b) requires the submission of a bid or offer on the subject solicitation in order to have standing to protest. However, they disagree about the meaning of "actual . . . subcontractor" as used in subsection (1)(b). Palmetto argues that the plain language of subsection (1)(b) affords protest rights to a subcontractor identified in an offer or bid submitted to the State in response to a solicitation. Quality Counts and the CPO contend that the definitions of "contractor" and "subcontractor" contained elsewhere in the Procurement Code<sup>1</sup> and the RFP itself limit standing under subsection (1)(a) to a subcontractor who is under contract to a prime contractor who has a contract with the State to perform the services sought in the solicitation. In other words, under this interpretation, the only time a subcontractor could protest an award or intended award would be when the prime contractor submitted an offer naming that subcontractor and that offer resulted in an award or intended award. For the reasons discussed below, the Panel agrees with Palmetto that the plain language of section 11-35-4210(1)(b) provides protest rights to subcontractors.<sup>2</sup>

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<sup>1</sup> The CPO cited the definitions of "contractor" and "subcontractor" as provided in section 11-35-310 of the Procurement Code. S.C. Code Ann. § 11-35-310 (2011). Under these definitions, a "contractor" is "any person having a contract with a governmental body," and a "subcontractor" is "any person having a contract to perform work or render service to a prime contractor as part of the prime contractor's agreement with a governmental body." § 11-35-310(10) and (30). In citing these provisions, however, he omitted this prefatory language: "Unless the context clearly indicates otherwise[.]" § 11-35-310.

<sup>2</sup> The Panel notes that it has never addressed the precise issue of a subcontractor's protest rights under section 11-35-4210(1)(b). The Panel decision that the CPO cited in his order, *In re: Protest of Cathcart and Associates, Inc.*, Panel Case No. 1990-13 (December 4, 1990), involved a subcontractor who sought to intervene in a protest on

Ascertaining the legislature's intent is the cardinal rule of statutory interpretation. *Jones v. State Farm Mutual Automobile Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005). Furthermore, such intent "should be ascertained primarily from the plain language of the statute." *Id.*, 612 S.E.2d at 723 (citations omitted). Moreover, "[t]he language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Id.*, 612 S.E.2d at 723. Finally, there is no need to consider rules of statutory construction if the statutory language is clear and unambiguous. *Id.*, 612 S.E.2d at 723 (citations omitted).

Clearly, the general purpose of section 11-35-4210 is to establish protest rights at two distinct points in time: (1) after a solicitation is issued when members of the identified classes are aggrieved by the terms of the solicitation; and (2) after an award or intended award is posted when members of the identified classes are aggrieved either because they did not receive the award or intended award the contract or because the awardee or intended awardee was not entitled to such award or intended award. Thus, to have standing to protest under section 11-35-4210(1), one must be both a member of the identified class and aggrieved.

The plain language of subsection 11-35-4210(1)(b) includes an "actual subcontractor" as a member of the identified class. Furthermore, an "actual subcontractor" who is also "aggrieved" is one whose prime contractor is not the awardee or intended awardee.<sup>3</sup> Thus, to give meaning to the words used by the legislature in harmony with the general purpose of section 11-35-4210, the Panel finds that an "actual subcontractor" under subsection 11-35-4210(1)(b) is

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appeal to the Panel and did not consider the question of whether section 11-35-4210(1) would have allowed the subcontractor to file a protest before the CPO in the first instance. Thus, the Panel finds the *Cathcart* decision inapplicable to Palmetto's situation.

<sup>3</sup> The Panel notes that an "aggrieved" contractor or subcontractor under the protest provision will never be able to fit the definitions of "contractor" and "subcontractor" provided in section 11-35-310. Surely the legislature did not intend to confer protest rights under conditions which could never be met. Thus, the Panel concludes that section 11-35-310's definitions do not apply to the protest provision contained in section 11-35-4210(1)(b) because the context of the protest provision "clearly indicates otherwise." The Panel also notes that protest rights are established by statute and cannot be limited by more restrictive language in an RFP or other solicitation.

one who has been identified in an actual bid or offer.<sup>4</sup> Because Palmetto was clearly identified as a subcontractor in Short Counts' offer, the Panel finds that Palmetto is a member of the identified class of persons entitled to protest under section 11-35-4210(1)(b). Furthermore, because Short Counts did not receive the intended award, the Panel also finds that Palmetto is also "aggrieved" in connection with the intended award. Therefore, the Panel concludes that Palmetto had standing to protest the intended award and that Palmetto is entitled to judgment as a matter of law.

For the reasons stated herein, the Panel hereby grants Palmetto's motion for summary judgment and denies the motions of Quality Counts and the CPO. Furthermore, the Panel reverses the decision of the CPO dismissing Palmetto's protest and remands it to him for further consideration in accordance with the Procurement Code.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL  
BY:**

  
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C. BRIAN MCLANE, SR., CHAIRMAN

This 31<sup>st</sup> day of July, 2014.

Columbia, South Carolina.

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<sup>4</sup> The Panel notes that this interpretation is consistent with the commonly understood meaning of "actual bidder or offeror" as being a person who has submitted a bid or offer.