

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1985-5

IN RE:)
)
PROTEST BY CHARLESTON COUNTY)
SCHOOL DISTRICT)
_____)

O R D E R

APPEALED

JURISDICTION

This protest arises under S.C. Code Ann. Section 11-35-70, as amended by Act 493 (1984), and Section 11-35-4410(1) (1976 & Cum. Supp.) Both parties agreed that the case was properly before the S.C. Procurement Review Panel, (hereinafter the Panel) as a hearing by the Panel promotes the purposes of the S.C. Consolidated Procurement Code (hereinafter CPC) promotes consistency in procurement policies and complies with the doctrine of administrative exhaustion.

The first purpose of the CPC set forth at 11-35-20 is "to consolidate ... the law governing procurement by this state. The Panel, to accomplish this goal, must take jurisdiction of an "inter-agency" procurement dispute just as it would with a bidder protest against an agency. To do otherwise places the bidder group of procurement cases under the grievance channels of Article 17 of the Code while the interagency group would have to be raised by means of court injunction. Such divergence would defeat the purpose of the CPC and undermine the purposes of the broad jurisdiction granted to the Panel by S.C. Code Section 11-35-4410(1) (1976 & Cum. Supp.).

The Charleston County School District (hereinafter the District) protested the decision of General Services pursuant to S.C. Code Section 11-35-4410(1). That section provides:

There is hereby created the South Carolina Procurement Review Panel (Review Panel) which shall be charged with the responsibility of providing an administrative review of formal protests of decisions arising from the solicitation and award of contracts, the debarment or suspension of a person from the consideration for award of a contract, a decision concerning the resolution of a contract or breach of contract controversy, or any other decision, policy or procedure arising from or concerning the expenditure of state funds for the procurement of any supplies, services, or construction procured in accordance with the provisions of this code and the ensuing regulations. (emphasis added).

The decision of General Services not to approve the small purchase limit of the District is a "decision ... arising from or concerning the expenditure of state funds for the procurement of any supplies, services, or construction." Pursuant to the clear, unambiguous language of Section 11-35-4410(1), the Panel has jurisdiction to provide an administrative hearing for the protest of the District. An unambiguous statute will be given effect according to the clear meaning of its language. Citizens and Southern Systems, Inc. v. S.C. Tax Commission, 280 S.C. 138, 311 S.E. 2d 717 (1984); Helfrich v. Brashington Sand & Gravel Co., 268 S.C. 236, 233 S.E. 2d 291 (1977). Words used in a statute are to be given their plain and ordinary meanings. Worthington v. Belcher, 274, S.C. 366, 264 S.E. 2d 148 (1980).

The circuit courts of South Carolina have recognized the broad powers granted to the Panel. In the case of Florence Crittenton Home v. South Carolina Procurement Review Panel and Senator Hugh K. Leatherman, Sr. (Case No. 84-CP-10-144), Judge John Hamilton Smith considered the scope of the Panel's jurisdiction. In that case Judge Smith ruled on the issue of whether the Panel could sua sponte review the decision of a hearing officer when none of the parties to the hearing had chosen to appeal the hearing officer's decision. Judge Smith held that "the Panel is not an appellate court, and the statute which creates it does not limit its authority in the way that an appellate court's review jurisdiction is usually limited." Judge Smith went on to comment that the "broad power of the Panel is further confirmed by Section 11-35-4410(1)". This provision thus authorizes the Panel ... to review any and all decisions related to procurements by the State."

Finally, the exercise of the Panel's jurisdiction is consonant with the policy behind the exhaustion of administrative remedies requirement in this State. In almost all instances, the exhaustion of administrative relief is a prerequisite to relief in a court of law or equity. Ex Parte Allstate Insurance Company, 248 S.C. 550, 151 S.E. 2d 849 (1966); Henderson v. Celebreeze, 239 F. Supp. 277 (D. S.C. 1965). This is not just a procedural rule, but rather a recognition of the fact that administrative review procedures,

unlike those of the judicial branch, may concentrate on specific areas of policy or practice of state agencies. The Panel is a specially-constituted entity which is uniquely capable of dealing with procurement policy. Unlike any court, it comprises representatives from government and industry, chosen for their expertise in procurement.

There is no question that the District is governed by the provisions of Act 493 of 1984 and continues to be so governed under the amendments, Act 109 of 1985.

Act 493 of 1984 provides:

Notwithstanding any other provision of law, any school district whose budget of total revenues as shown in the most recently published annual report of the State Superintendent of Education exceeds seventy-five million dollars annually is subject to the provisions of Chapter 35 of Title 11, Code of Laws of South Carolina, 1976 (South Carolina Consolidated Procurement Code); provided, however, that if a district has its own procurement code which is in the written opinion of the Division of General Services of the State Budget and Control Board substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the district is exempt from the provisions of the South Carolina Consolidated Procurement Code except for a procurement audit which shall be performed every three years by the Division of General Services. (emphasis added)

The amendments in 1985 do not alter Act 493 for the purposes of this protest.

The District has submitted proposed procurement regulations to General Services as is required by Act 493 (1984) as

amended. Included in those proposed regulations is a provision which provides that any purchase of less than \$1,000.00 does not have to be bid competitively. General Services rejected this "small purchase limit" as not being "substantially similar" to the provisions of the CPC. The present regulations enacted pursuant to the CPC provide for a \$500.00 limit on small purchases. Additionally, the two other school districts which have submitted procurement plans were required to utilize \$500.00 as the small purchase limit. The School District, pursuant to S.C. Code Section 11-35-4410 (1976, as amended), has protested the decision of General Services not to approve the \$1,000.00 small purchase limit.

PROCEDURAL HISTORY

The District submitted its procurement code for review by General Services on or about July 13, 1984. No testimony in the record indicates the actual date but the record contains a detailed response to the District's submission from Tony Ellis, Director of General Services, to Emory Haselden, Deputy Superintendent for Operations dated August 3, 1984. In a four page list, Mr. Ellis details those portions of the District's proposed code which he believes must be modified to obtain his department's certification that the District's procurement code is substantially similar to that of the State. Such

certification allows the Charleston School District to operate under its adopted Code rather than the CPC (Act 493, 1984; Act 109, 1985)

On September 26, 1984, the district protested the decision of General Services to deny it certification to operate under its own procurement code because its code included a small purchase limitation of \$1,000.00. According to testimony at the hearing all other points raised in Mr. Ellis' letter of August 3, 1984, had been resolved to the satisfaction of both the District and General Services.

DISCUSSION

General Services has taken the position that the size of the small purchase limitation, the amount of the purchase below which competitive bidding is not required, is one of the prime elements insuring competition, fairness, and savings under the CPC. They further rely on the adoption, pursuant to the CPC, of a regulation, Budget and Control: 19-445.2100, setting a \$500.00 maximum for state purchasing of secured without at least one competitive quotation. This regulation, printed below, has the force of law as to the operations of agencies required to operate under the CPC.

19-445.2100. Small Purchases and Other Simplified Purchasing Procedures.

A. Authority.

Any procurement under this Regulation not exceeding \$2,499.99 may be made by governmental bodies provided, however, that procurement requirements shall not be artificially divided by governmental bodies so as to constitute a small purchase under this Subsection ...

B. Competition and Price Reasonableness.

(1) Purchases Not in Excess of \$500.00. Small purchases not exceeding \$500.00 may be accomplished without securing competitive quotations if the prices are considered to be reasonable. The purchasing officer shall annotate the purchase requisition: "Price is fair and reasonable" and sign. Such purchases shall be distributed equitably among qualified suppliers. When practical, a quotation will be solicited from other than the previous supplier prior to placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchases "not in excess of" may more than offset potential savings in detecting instances of overpricing; therefore, action to verify the reasonableness of the price need be taken only when the procurement officer of the governmental body suspects that the price may not be reasonable, e.g., comparison to previous price paid, personal knowledge of the item involved.

2) Purchases from \$500.01 to \$1,499.99. Solicitations of verbal or written quotes from a minimum of two qualified sources of supply shall be made and documented that the procurement is to the advantage of the State, price and other factors considered, including the administrative cost of the purchase. Such documentation shall be attached to the purchase requisition.

3) Purchases from \$1,500.00 to \$2,499.99. Solicitation of written quotations from three qualified sources of supply shall be made and documented that the procurement is to the advantage of the State, price and other factors considered, including the administrative cost of the purchase. Such documentation shall be attached to the purchase requisition. When prices are solicited by telephone, the vendors shall be requested to furnish written evidence of their quotation.

The District has taken the position that they have up until this time operated with a small purchase limitation of \$1,000.00. They argue that the increased scrutiny for purchases in excess of \$500.00 but less than \$1,000.00 will cost more than there is potential for savings in these purchases. They further argue that this one deviation in their Code as a whole, after modification at the request of General Services, is insufficient to cause their proposed code to fail the substantially similar test of Act 493 (1984), Act 109 (1985).

The District provided the following testimony in support of its position:

- 1) that the district was unaware of any complaints against its current use of the \$1,000 small purchase limit by vendors.
- 2) that its annual audits reveal no purchasing problems.
- 3) that the district made 16,000 purchase orders per year of which 84% are under \$500; approximately 2,200 are between \$500-\$1,000; and approximately 300 are above \$1,000.00.
- 4) that under the current procedure 98% of the purchases [but not 98% of the dollars spent] take place without bidding.
- 5) that two persons operate the district's procurement office, both of them certified specialists in procurement.
- 6) that each of the 16,000 purchase orders is reviewed by one or both of these persons.
- 7) that orders above \$1,000.00 or which appear "unreasonable" to the procurement specialist are subjected to more scrutiny, either calling for additional information or other bids or, in large purchases, publication of a solicitation for bids.

The record is devoid of information from which one could conclude that the costs of further scrutiny of purchases between \$500 - \$1,000 would be greater than the savings. No witness had studied whether an additional employee would be necessary in the procurement office. No witness had information as to the dollar value of purchases less than \$500 or falling between \$500 and \$1,000. The District offered no evidence: that adoption of the \$500 limit on small purchases would be an onerous burden on present personnel; that it would require additional personnel; or that it would result in lower efficiency and greater cost for purchases.

The Panel recognizes that Act 493 (1984) as amended requires of the District only substantial similarity, not identity, to the CPC. The small purchase limits are not merely procedural matters within the structure of the CPC but are the essence of its requirement for competitive bidding. A proposed procurement Code simply cannot be substantially similar if it deviates by 100% from the small purchase requirements adopted by the State in regulation 19-445.2100.

FINDINGS OF FACT

1) Charleston County School District is required to adopt a procurement code which in the opinion of General Services is substantially similar to the S.C. Consolidated Procurement Code or be governed by the CPC.

2) The District submitted a proposed code for its governance to the Division of General Services.

3) General Services has refused to certify the District's Code as substantially similar to the CPC because it has a \$1,000 rather than a \$500 small purchase limit.

4) The District has not presented evidence that compliance with the \$500 limit will cost more than its potential savings.

CONCLUSIONS OF LAW

1) The requirements of price competition are the essence of the CPC. S.C. Code Ann. Section 11-35-20 (c), (g), (1976 Code & Cum. Supp.)

2) A regulation has the force of law except where it alters or adds to a statute, Soc. of Prof. Journalists v. Sexton, ____ S.C. ____, 324, S.E. 2d 313, 315 (1984).

3) The regulations concerning competitive pricing are an integral part of the Code. These neither alter nor add to the statutory authority to make purchases less than \$2,500.00 without competitive sealed bidding. S.C. Code Ann. Section 11-35-1520(1) (1976 & Cum. Supp.)

4) To be "substantially similar" under Act 493 (1984) as amended a district's code must comply with the dollar limitations set out in 19-445.2100.

THEREFORE, the Panel finds that the District's proposed code is not substantially similar to the CPC. It is so ordered.

Copy

Hugh K. Leatherman
Chairman

January _____, 1986