



5) The South Carolina Code of Laws §11-35-1210 (3) requires that all procurements are subject to the appropriate provisions of the Code "especially regarding competitive procurement methods and non-restrictive specifications" and the requirement of this Section has not been met in the above-referenced matter, thus rendering the award to Tall Tower, Inc. (WSCS) null and void.

6) The rationale offered in support of the ETV Commission award regarding the technical orientation of the towers and cost of the two bids was based on incorrect and inaccurate information. Media General will present data and information from engineering and other experts to support this contention.

7) Any award and contract by the Educational Television Commission to Tall Tower, Inc. (WSCS) in this matter is null and void under the decision of Duncan v. Charleston 60 S.C. 532 (1901), at page 558, as Mr. John Rivers, Jr. is a member of the Educational Television Commission and is also the President and stockholder of Tall Tower, Inc.

8) The rationale offered in support of the ETV Commission's decision and the Budget and Control Board's ratification of that decision to award the lease to Tall Tower, Inc. includes the allegation that Media General's tower location would be more costly because of the orientation of the Media General tower towards Georgetown and the Pee Dee area as opposed to the orientation of the Tall Tower, Inc.'s tower towards Charleston (See attached Order of the Chief Procurement Officer of March 10, 1986 at pages 8-10).

This criteria was improperly considered by the Educational Television Commission and the Budget and Control Board for the reasons that:

a) Media General was never notified that the orientation of the tower was a factor upon which the ETV Commission would rely in its decision-making, let alone that it was the chief technical criteria upon which the proposals were judged.

b) If this criteria was properly a factor, Media General's tower orientation should have been evaluated as superior to Tall Tower, Inc.'s, in terms of cost and quality, because under all previous criteria adopted by the Educational Television Commission for the Charleston Tall Tower project, top priority was given to projecting a stronger signal to Georgetown and the Pee Dee area so as to avoid constructing another ETV tower in Georgetown. Media General's tower orientation gives a vastly superior signal to the Georgetown and Pee Dee area while offering a signal

to Charleston which well surpasses the criteria adopted by the Educational Television Commission for the Charleston market.

The relief requested by Media General is:

- 1) A re-award of the Educational Television Commission transmission tower lease to Media General.
- 2) If re-award to Media General is not granted, a re-bid of the ETV transmission tower lease.
- 3) Reimbursement of bid preparation costs and other costs associated with this grievance.

Letter of Protest to Chief Procurement Officer, Richard Campbell from Dwight Drake and Jean Toal, March 19, 1986.

The Panel, in rendering a decision, must render findings of fact and conclusions of law on each of the grounds of the protest.

#### 1. THE CONDUCT OF MR. RIVERS (7)

The protestant in this proceeding presented no evidence to contradict the findings of fact or the conclusion of law of the Chief Procurement Officer (CPO) as to Mr. Rivers' actions in this matter. In fact persons participating in the negotiations for the State said flatly Mr. Rivers was not participating in ETV's judgments. (Tran. IV at 562, 588, 604 compare Mr. Rivers testimony VI at 1058-61; 1063, 1086). The Panel therefore adopts the findings and conclusions of the CPO as to Mr. Rivers' conduct.

In Article 7, §8-13-460 of the law governing rules of conduct, certain actions are required by public officials where a decision would affect his financial interest. These actions are as indicated below:

Any public official or public employee who, in the discharge of his official duties, would be required to take action or make a decision which would substantially affect directly his personal financial interest or those of a member of his household, or a business with which he is associated, shall instead take the following actions.

(a) Prepare a written statement describing the matter requiring action or decisions, and the nature of his potential conflict of interest with respect to such action or decision.

(b) Not applicable.

(c) ... If the public official is a member of the governing body of any agency, commission, board, or of any county, municipality, or other political subdivision, he shall furnish a copy to the presiding officer and to the members of that governing body, who shall cause such statement to be printed in the minutes and shall require that the member be excused from any votes, deliberations, and other actions on the matter on which the potential conflict of interest exists, and shall cause such disqualification and the reasons therefor to be noted in the minutes.

The CPO finds that Mr. John Rivers, member of the ETV Commission and President of TT/WCSC did abstain from voting on the budget request entitled "Special Item Request - \$1,000,000" for the Charleston Tall Tower as defined in Stipulation Exhibit #4. It is also found that Mr. Rivers as defined in Stipulation Exhibit #11, did comply with §8-13-460(c) as previously defined.

The CPO finds that in those decisions concerning ETV's tower selection and subsequent recommendations to the BCB, Mr. Rivers was not in attendance and abstained from any voting on the matter. This is supported by Stipulation Exhibits #15, #16, and #32.

The CPO was not provided evidence of any other decisions made by Mr. Rivers which affected this contract. In decisions which involved the competitive negotiation of this lease, the CPO finds that Mr. John Rivers did not participate. The decision of ETV to recommend WCSC for the transmission tower lease did not include Mr. Rivers as a participant.

7. The laws governing rules of conduct for public officers, as defined in §8-13-460, were adhered to by Mr. John Rivers.

II. APPLICATION OF SECTION 11-35-1590 and 11-35-1210  
TO THIS PROCUREMENT (3) (4) (5)

The protestant's argument here is an argument on the law. In its simplest form it is the allegation that because the Budget and Control Board has no regulation which purports to carry out the provisions of §11-35-1590(3)C that no lease contract entered under the provisions of §11-35-1590 is valid.

This question is currently being litigated by the identical parties in the Circuit Court, Charleston Television, Inc. v. S.C. Budget & Control Board, S.C. ETV, and Tall Tower, Inc., 86-CP-40-1233. The Court in that case has issued a temporary injunction. The defendants in the action have appealed to the South Carolina Supreme Court for a supersedeas.

It is inappropriate for the Panel to rule on an issue of law, not central to its determination, when that issue will be determined by the Courts.

No evidence and no argument was presented on the application of §11-35-1210 to this procurement. In fact all parties stipulated (#49 p. 12 of Stipulations) that ETV was not "certified" to do its own real estate leasing. The language cited by protestants requires agencies which are "certified" to comply with the Code as to "competitive procurement methods and non-restrictive specifications." Because ETV is not a "certified" agency under R. 19-445.2120 this Code Section is inapplicable.

## THE AWARD OF THE CONTRACT (1) (2) (6) (8)

### A. The Solicitation

ETV, during the period of the last sixteen years, has sought the availability of a transmitting facility in the Charleston vicinity to enhance their television and radio network capacity and quality. ETV pursued this objective in collaboration with MG, TT/WCSC and WCIV, Inc. (the third commercial station in Charleston) The stations encountered legal, administrative and regulatory obstacles which created lengthy delays and resulted in changed business circumstances.

During the course of time from 1967 to the present, ETV's anticipated role in this project changed from joint venturer to potential lessee. Although ETV's role changed, it continued to seek space on a transmitting tower to satisfy its long stated objective. This effort was conducted exclusively with the only known source - the joint venturers, all the Charleston stations, and their successors in interest - until a business disagreement between the parties of the joint tower venture caused a termination of their arrangement and changed the market conditions. (Tran. IV at 608-613, 618-19)

On July 19, 1985, by a copy of a correspondence between Jim Linen (MG) and John Rivers (TT/WCSC), ETV was advised of a potential new source to satisfy its transmission requirements. (See Stipulation Exhibit #6). On September 19, 1985, Mr. Peter E. Broadbent (MG) acknowledged ETV's desire to discuss leasing

space on MG's proposed transmission facility. (See Stipulation Exhibit #8.) On September 26, 1985, Mr. James W. Rion, Office of the Attorney General, acknowledged receipt of Mr. Broadbent's letter and forwarded a copy of it to Henry J. Cauthen, Executive Director of ETV. (See Stipulation Exhibit #9.) It is so stipulated that lease negotiations began with MG following the issuance of Mr. Broadbent's letter. (See Proposed Stipulation #16).

During the period from late September, 1985, to December 6, 1985, negotiations proceeded. TT/WCSC and MG concluded this process with the formal submission of priced proposals to ETV for the space desired by ETV to meet its transmission requirements.

On November 25, 1985, MG submitted a proposal to ETV containing payment plans as defined in Stipulation #22. On December 4, 1985, TT/WCSC submitted to ETV a proposal as defined in Stipulation #23. On December 6, 1985, MG submitted an additional proposal designated as Plan Number 1, the ten-year, all inclusive proposal which it had not submitted on November 25, 1985. Each vendor was given the same opportunity for submission of costs in relation to seven (7) different costing categories.

ETV evaluated these proposals using criteria as indicated below:

1. Technical and engineering advantages;
2. Past performance;
3. Value of facilities and location;
4. Cost to the State.

ETV determined that WCSC had the most advantageous proposal to the State in accordance with the evaluation criteria. ETV identified WCSC as offering the lowest cost proposal to the State and the accepted plan allowed a degree of leverage over the entire 50 year lease period.

DGS submitted an agenda item to the BCB recommending that the BCB approve the ETV decision to accept the WCSC lease proposal. After discussion and review of ETV's determination the BCB approved the lease for a period of fifty years under Cost Plan #5.

The CPO did not find evidence in the record of his proceeding which declared MG to be non-responsive in the negotiation procedure used by the GSA and ETV. If MG had been considered non-responsive, the need for negotiation and submission of a final costed proposal was unnecessary. MG was a party in the negotiation process, was given the opportunity to discuss terms, made a formal presentation and submitted a cost proposal associated with their respective lease agreement. Mr. Broadbent, attorney for MG, was aware throughout this period of time from September through December, 1985 that ETV, through its attorneys, was also negotiating with TT/WCSC on substantially the same basis. He knew there was competition for the lease. (Tran I at 169) DGS and attorneys for ETV intended for there to be competition for the lease. (Tran. II at 311) The Panel affirms these findings of fact and conclusions of law as found by the CPO based on the evidence before it.

Because the method used by the Parties was not competitive sealed bidding no party to the negotiation could or should have believed that price alone would be determinative of the award. Exhibit 19 of the Stipulations is the cost comparison of the proposals as developed by ETV and the Property Division of General Services. Having solicited and received multiple payment plans ETV was obviously considering method of payment in its choices to determine the offer most advantageous to the State.

#### **B. The Award**

The protestant MG alleges that ETV rejected its bid on inaccurate and incorrect information and further that its bid was prepared and presented without knowledge of the criteria on which it would be judged.

Mr. Robert Sutton, the chief executive officer of the MG broadcast group, who was the company official executing the purchase of the Charleston station in 1983 and who authorized negotiation with ETV on the lease in 1985, testified that neither he nor his employees was never supplied with any technical specifications about tower orientation. (Trans. I at 190, 192, 199-200)

In a face to face meeting with ETV on November 24, 1985, representatives of MG who were preparing their final lease proposal were given no technical information on ETV's

engineering and orientation needs. (Trans. I at 192, II at 231, 234, 334) MG employees further testified that had MG known of these criteria it could have made adjustments to conform its tower at no additional cost to itself in the planning and development stage. (Trans. II at 343, 383, 472)

ETV responds that the proposal selected was technically superior in orientation, provided a signal to preferred areas, required less technical adjustment for ETV and thus less initial cost. The evidence in the record is equivocal on these technical aspects. Experts for each sides produced estimates of time, cost, efficiency and maintenance of an antenna mounted on each of the two towers as well as coverage of the signal. (Trans. III at 476, 556, V at 732, 735, 747)

The critical issue is not the evaluation of these experts' opinions and the choice of one expert's opinion over the other. The issue is whether ETV ever unequivocally explained to Media General, a ready and willing offeror, what technical requirements actually would be used to evaluate the costs and advantage to ETV.

No witness for any party could point to any document as specifically and clearly conveying to Media General the information that ETV needed a tower oriented at 315° N so that its antenna could be attached to a leg of the antenna at that orientation. Documents were exchanged among the commercial stations which noted the 315° mark and the configuration of the joint venture site restricted tower construction to this orientation. (Trans. II at 441, 444, 461) However, none of these documents originated with ETV.

Further, though the engineers for ETV and MG had discussion on technical specifications in November, 1985, (Testimony of A. Hill and C. Bowers) Mr. Bowers for ETV could not point to any document ETV sent to MG after MG purchased the station in 1983 containing ETV's technical specifications for its tower use. (Tran V. at 802)

Mr. Broadbent, attorney for MG testified that he had reviewed all of MG's files and the files of its predecessors in interest "in connection with this Tall Tower proposal". (Trans. I at 48) However, he had no knowledge of any particular technical specifications determined by the parties to the joint venture or to the later leases. Further, in negotiating with members of the Attorney General's Office representing ETV, no technical requirements for tower orientation were given to him nor was any such information sought (Trans. I at 132-33, 149). However, it is the degree of divergence of MG's tower from this 315° orientation which is the source of greater initial cost to ETV should it select the MG Tower for its antenna. (Testimony of Mr. Bowers) MG's engineering consultant, David Steele and Jim Zimmerman, its controller (Trans. II at 236) testified that had MG known of this specification it could have selected the site and designed the tower to accomodate this specification.

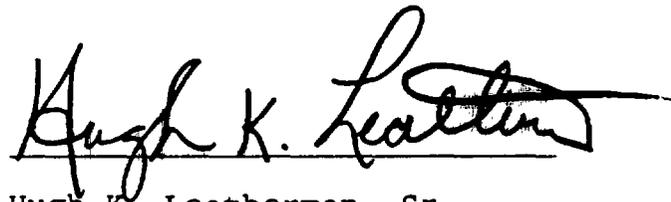
#### CONCLUSION

Because there is no evidence that ETV ever made available to MG information on the technical superiority of the 315°

orientation or that it provided information to offerors which would allow them to consider this as a cost item in formulating an offer, the Panel rules that the tower lease should be re-bid. The Panel denies MG's request that it award the contract to MG because the evidence supports ETV's contention that there will be additional cost to it in selection of the MG tower site rather than the TT/WCSC site as these proposals currently stand. (Tran. VI at 983, V at 732)

The Panel denies MG's request for bid preparation costs and the costs of its protest as should MG obtain the contract on re-bid the award of these costs in addition to the bid would give to MG more than the benefit of the bargain.

IT IS SO ORDERED.



Hugh K. Leatherman, Sr.

May 20, 1986