STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1989-15

IN RE:

PROTEST OF FIRST HOSPITAL PRODUCTS, INC.

This case comes to the South Carolina Procurement Review Panel ("Panel") on the appeal by First Hospital Products, Inc., of a August 24, 1989, decision of the Chief Procurement Officer ("CPO") finding the protest of First Hospital not timely under S. C. Code Ann. § 11-35-4210 (1976). Because this issue has been decided by the Panel in a previous case, the Panel issues this order without a hearing.

FACTS

It appears from the decision of the CPO that the Invitation for Bids in this case was issued on April 11, 1989. The contract was to furnish and deliver hospital chart caddy carts, binders and labels to the Department of Health and Environmental Control's office throughout the State. When the bids were opened, First Hospital was the low bidder, followed by Kare Medical, Red Line Medical Supply and Carstens Health Industries.

Both First Hospital and Kare Medical were determined to be nonresponsive and on July 17, 1989, an intent to award was issued to Red Line Medical Supply. According to the CPO and apparently undisputed by First Hospital, on July 19th the Materials Management Office ("MMO") spoke to First

Hospital by telephone. At that time MMO advised First Hospital that its bid was nonresponsive and the reasons therefore. First Hospital was also advised that Red Line Medical Supply would receive the contract.

First Hospital, in its appeal to the Panel states:

> We called [MMO] to request the specifics on "How to file a protest with that (sic) State of South Carolina". We complied exactly with her instructions. We even asked "Is there anything else we should know?" She said, "No!" Therein, she failed to advise us of Section 11-35-4210(1) of the South Carolina Procurement Code - Right to Protest. And, she failed to advise us, or refer us to proper personnel who could have advised us properly on the laws of the State of South Carolina.

(Letter of September 12, 1989, from First Hospital to James J. Forth, Jr.).

It is apparently undisputed that First Hospital submitted its protest in this matter on August 1, 1989, when it deposited it in overnight mail to the Chief Procurement Officer.

CONCLUSIONS OF LAW

The CPO found that, because First Hospital knew or should have known of the facts giving rise to its protest on July 19, 1989 when it was advised by MMO of its nonresponsiveness and the reasons therefore, First Hospital's August 1, 1989, protest was untimely under §11-35-4210(1). That section provides:

> Any actual or prospective bidder . . . who is aggrieved in connection with the solicitation or award of a contract may

> protest . . . . The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

(Emphasis added).

The CPO did not address First Hospital's contention that MMO failed to advise it of the time constraints of protesting under the Procurement Code. The Panel finds that that issue is controlled by In Re: Protest of Oakland Janitorial Service, Case No. 1988-13.

In the Oakland case, the protestant was disqualified from receiving a contract with the State Highway Department because of bad references and was advised of this fact on August 16, 1988. The Notice of Intent to Award the contract was issued on August 25, 1988, with the contract to become effective on September 12, 1988. (Record, p. 49). On or about September 9, Oakland called MMO to inquire how to file a protest. According to Oakland, MMO advised it that it had until September 12, the effective date of the contract, to protest. Oakland submitted its protest by Federal Express to arrive September 12. The CPO found Oakland untimely because it failed to submit its protest with ten days of first learning of the facts giving rise to the protest.

Oakland argued that MMO should be estopped to assert the ten-day limit because MMO advised Oakland that it had until September 12 to file a protest. The Panel found as follows:

Oakland's argument raises an issue of first impression for the Panel - whether the ten-day period for filing protests set forth in section 11-35-4210 should be considered an absolute bar or whether it may be waived by the consent or conduct of the parties.

Generally, in the absence of statutory language to the contrary, perfection of a review proceeding within the time limited by statute or rule is jurisdictional. Where the appeal is not taken within the time provided, jurisdiction cannot be conferred by consent or by waiver. See, 4 Am. Jr. 2d, Appeal and Error, 292. . . .

The ten-day period for filing protests of the decisions of the state in procurement matters set forth in section 11-35-4210 is unconditional. There are no qualifying words such as "except for good cause shown." The Panel believes that it is essential to the operation of the government that challenges to its purchasing decisions be limited. If the time for filing protests can be waived, the State will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of being liable to another vendor.

The Panel believes that in approving section 11-35-4210 as written the General Assembly recognized that, despite the hardship which might occasionally arise from strict application of the time period, on balance the public is better served if there are definite limits to the right to challenge state procurement decisions. For these reasons, the Panel finds that the time for filing protests set forth in section 11-35-4210 is jurisdictional and may not be waived by conduct or consent of the parties.

Although its holding does not require it, the Panel additionally finds that, even if the filing period were not jurisdictional, Oakland has not shown that MMO should be estopped from

asserting the time limitation. In Freeman v. Fisher, 341 S.E.2d 136 (1986), the South Carolina Supreme Court summarized the defense of estoppel as follows:

> To successfully assert the defense of estoppel, one must show that he was without knowledge, or any means of knowledge, of facts upon which he predicates a claim of estoppel.... Respondent's counsel could have discovered his erroneous construction of the statute by simply reading the plain language of the statute. The failure of one party to call to the attention of another party a fact equally within the knowledge of both forms no basis for an estoppel. . . Moreover, estoppel may not be invoked to nullify a mandatory statutory restriction. . . . A party cannot claim reasonable reliance on a representation by another in the face of a clear statutory mandate. (Emphasis added). 341 S.E.2d, at 137.

Further in Lovell v. C. A. Timbes, Inc., 263 S.C. 384, 210 S.E.2d 610 (1974), the Supreme Court noted that ignorance of the requirement of filing within a certain time is no legal excuse for failure to file within the time.

Under the Oakland case, it is of no import that MMO failed to advise First Hospital of the correct time for filing its protest. Persons doing business with the State under the Consolidated Procurement Code are charged with knowledge of the provisions of the Code, including the time limitations on protests.

For the reasons stated above, the Panel affirms the August 24, 1989, decision of the Chief Procurement Officer

and dismisses the protest of First Hospital Products as untimely.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

Hugh L. Leatherman, Sr.

Columbia, S.C.
Sept 26, 1989