



mailed it to all offerors except PEBSCO on June 13, 1990. (Record, p. 29).

The State did not send PEBSCO a copy of the Final Award Report because the State confused PEBSCO with another Ohio vendor. On the vendor response sheet the State lists PEBSCO as "Nationwide, Columbus, Ohio" (Record, p. 31) (PEBSCO's address is Two Nationwide Plaza, Columbus, Ohio). The State apparently sent the report intended for PEBSCO to National Deferred Compensation of Columbus, Ohio. PEBSCO is not affiliated in any manner with National Deferred Compensation.

William J. Murphy, PEBSCO's regional Vice-President, testified that Tom DeLoach, the State Procurement officer in charge of this contract, advised Mr. Murphy's secretary in a telephone conversation on June 14, 1990, that Johnson had won the contract. Mr. Murphy's secretary told him that Johnson had won the contract on that same day or the next day.

On June 21, 1990, Mr. Murphy called Mr. DeLoach and inquired about the specific pricing of Johnson's winning proposal. Mr. DeLoach then read the entire contents of the Final Award Report to Mr. Murphy, except for the sentence advising that the effective date of the contract was June 29, 1990. (Record, p. 28). Mr. DeLoach advised Mr. Murphy that the component pricing he asked for could only be obtained by means of a Freedom of Information Act request. Mr. Murphy stated that as a result of this conversation,

PEBSCO decided to look into the award and gather further information.

Mr. DeLoach also told Mr. Murphy at this time that the Final Award Report had already been sent to PEBSCO's president. However, because of the mix-up in companies, in fact, no report had been sent.

On June 29, when PEBSCO still had not gotten the Final Award Report, Mr. Michael Studebaker, PEBSCO's Vice-President for Development, called Mr. DeLoach and requested a copy of the award report. According to Mr. Studebaker, PEBSCO had learned of its right to protest from a competitor that day.<sup>1</sup> PEBSCO had also learned that the effective date of the contract was June 29.

According to Mr. Studebaker, PEBSCO was under the mistaken belief that June 29 (the effective date of the contract) was the last day to file a protest. Therefore, PEBSCO faxed a letter containing the following paragraph to State Procurement on June 29th:

PEBSCO hereby reserves all rights to protest under Section 11-35-4210, the State's decision to award the deferred compensation program coordinator, administrator and marketer contract to Johnson and Higgins. We will follow this letter with a more definitive statement of PEBSCO's protest in this regard.

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<sup>1</sup>Mr. Studebaker admitted that PEBSCO saw, or should have seen, the provision of the Request For Proposals which sets forth the right to protest. (Panel Ex. #1, p. 18). The Request for Proposals was issued on April 16, 1990, and received by PEBSCO shortly thereafter.

(Record, p. 22). PEBSO claims that it did not have facts sufficient to state the grounds of its protest on June 29 because it needed the component pricing information which it could only get by Freedom of Information Act Request.

PEBSO received a copy of the Final Award Report on July 9, 1990.

On that same day, the Chief Procurement Officer sent a letter to PEBSO as follows:

I have received your letter dated June 29, 1990, in regards to the Request for Proposals to provide a deferred compensation program for the State of South Carolina. Your letter does not raise an issue or grievance as required per Section 11-35-4210 of the South Carolina Consolidated Procurement Code (see attached). The Code requires that all issues of protest appear in writing and, therefore, I will consider all issues of protest on that basis.

(Emphasis added) (Record, p. 20). Mr. Studebaker testified that PEBSO interpreted the last sentence as a promise by the CPO to hear PEBSO's protest when grounds were stated in a PEBSO's later letter.

On July 24, 1990, PEBSO filed a Freedom of Information Act request for copies of the proposals of all the offerors. On July 25, State Procurement Officer Dixie Jacobs advised Mr. Murphy by telephone of the component costs of Johnson's proposal. (Record, p. 24). After talking further with State Procurement, PEBSO amended its request on July 31, 1990, to ask for only Johnson's proposal.

On July 30, PEBSO sent what it intended as a supplemental protest letter to the Chief Procurement Officer. That letter stated:

This letter is a follow up to my letter dated June 29, 1990 to the Chief Procurement Officer concerning PEBSO's protest of the award of the contract ... to Johnson and Higgins. Pursuant to South Carolina Procurement Code Section 11-35-4210, PEBSO believes that it should have been awarded the contract to provide these services. PEBSO was the most responsive and responsible offeror with the offer most advantageous to the State.

Based in part upon, the four award criteria listed in part IX of South Carolina's Request for Proposal dated March 19, 1990, PEBSO should have been chosen the successful offeror. Applying each of the State's four criteria: (A) contractor's experience and reliability, (B) proposed methods of performances, (C) cost and efficiency and (D) expertise of contractor's personnel, PEBSO should have been rated the highest offeror.

(Record, p. 19).

On August 15, without a hearing, the CPO found PEBSO's protest untimely. PEBSO appealed the decision of the CPO to the Panel on August 28, 1990.

#### CONCLUSIONS OF LAW

PEBSO first claims that the Chief Procurement Officer denied it due process by failing to conduct a hearing before deciding that PEBSO's claim is untimely. PEBSO alleges that it should have been afforded the opportunity to present evidence because the facts in this case are susceptible to more than one interpretation.

Assuming without deciding that PEBSCO's position is correct, the Panel finds that the de novo hearing held by the Panel afforded PEBSCO its due process rights and adequately cured any alleged errors committed by the CPO in that regard.

PEBSCO also contests the finding by the CPO that PEBSCO failed to file a protest within the time limits of S. C. Code Ann. §11-35-4210(1), which provides:

Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer. 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 circumstances after thirty days of notification of award of contract.

The CPO held that the June 29 letter reserving PEBSCO's right to protest and promising a more definitive statement of PEBSCO's grounds at a later date does not meet the requirements of a formal protest within the meaning of the above section because it states no grounds in writing. The CPO further found that, even if the June 29 letter qualifies as a protest, PEBSCO failed to file it within the ten days of learning of the award to Johnson on June 14. Finally, the CPO found that the July 30 letter, which is clearly a protest, is not timely because it was submitted more than thirty days after the Final Award Report was issued on June 13, 1990.

PEBSCO argues that the June 29 letter is sufficient to state a protest<sup>2</sup> and that it was filed within the ten-day limit because mere notice of the award to Johnson did not give PEBSCO sufficient facts to file a protest. According to PEBSCO, the ten-day limit did not begin to run until at least July 25, when PEBSCO learned the component pricing information for Johnson's bid. PEBSCO characterizes its July 30 letter as supplementing its June 29 protest to include grounds based on the component pricing information obtained on July 25.

The threshold question is whether the letter of June 29 constitutes a protest within the meaning of §11-35-4210. The Panel holds that it does not.

In so holding, the Panel relies on its earlier decision in Sterile Services Corporation, Case No. 1983-17, in which the Panel found:

Sterile argued before the Panel that since its notice was in writing and made all concerned aware that a protest existed, Sterile could validly argue any ground of protest. The Panel disagrees. While the Panel does not intend to require that the specificity of protests be judged by highly technical or formal standards, the Panel concludes that §11-35-4210(1) does require that the protest must in some way alert the parties to the general nature of the

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<sup>2</sup>PEBSCO's Vice-President, Michael Studebaker admitted under cross-examination that PEBSCO was unsure at the time it sent the June 29 letter whether the letter qualified as a protest.

grounds for protest. Since the present protest was admittedly devoid of any statement from which it could be reasonably deduced that the OSHA-20 form was intended to be a ground of protest, the Panel must conclude that the initial requirements of §11-35-4210(1) were not met.

Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 100-101.<sup>3</sup> The Panel agrees with the State's argument that allowing a vendor to "reserve its right to protest" with grounds to follow at some later date is contrary to both the literal requirements of §11-35-4210(1) and its intent to provide some finality to protests of procurement matters.

Because the June 29 letter is not a protest, the Panel must decide whether PEBSCO's protest letter of July 31, which does set forth grounds, was filed within the time limits set by the Code. The Panel holds that PEBSCO's July 31 protest is not timely under the thirty-day cutoff and, therefore, does not address the ten-day limit.

The Procurement Code provides that a protest "shall be submitted in writing within ten days after such aggrieved persons know or should have known of facts giving rise thereto, but in no circumstance after thirty days of

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<sup>3</sup>See also, In re: Protest of Constables Security Patrol, Inc., Case No. 1989-19; In re: Protest of Computerland of Columbia, Case No. 1988-4, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 433; In re: Protest of AT&T, Case No. 1983-12, Decisions of the Procurement Review Panel, Page 95.

notification of award of the contract." (Emphasis added).  
Section 11-35-4210(1). The thirty-day period is a final cutoff of the right to protest and is intended to provide some security to the State that it may enter into contracts free from challenge.

General Services argues that PEBSCO's July 31 protest is not timely because it was filed more than thirty days after the issuance of the Final Award Report on June 13. PEBSCO argues that its July 31 letter is timely because it did not actually receive the written Final Award Report until July 9, 1990.

For purposes of this case, the Panel does not need to consider either of these dates as dispositive. The Procurement Code begins the thirty-day period upon "notification of award of contract." Although the Code specifies that the protest must be in writing, there is no requirement that notification of award be written.

In this case, it is undisputed that PEBSCO learned of the award on June 14 when Mr. Murphy's secretary telephoned State Procurement and then notified Mr. Murphy. At the very least, PEBSCO was notified of the award on June 21 when State Procurement officials read Mr. Murphy substantially all of the contents of the Final Award Report. The Panel holds that PEBSCO's actual knowledge that it was not going to receive the contract and that Johnson was satisfied the

"notification of award" requirement and starts the thirty-day time limit running.<sup>4</sup>

Because the only valid protest by PEBSCO was filed more than thirty days after June 21st, it is not timely.

For the reasons stated above, the Panel affirms the result reached by the Chief Procurement Officer in his decision dated August 15, 1990 and hereby dismisses the protest of Public Employee Benefits Services Corporation.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL



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Hugh K. Leatherman, Sr.  
Chairman

Columbia, S. C.  
October 4, 1990

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<sup>4</sup>"When a person knows of a thing he has 'notice' thereof, as no one needs notice of what he already knows." Walker v. Preacher, 185 S. C. 462, 467, 194 S.E. 868, 870 (1938). Compare, Hamm v. S. C. Public Service Commission, 287 S. C. 180, 336 S.E.2d 470(1985)(Administrative Procedures Act must be read to require written notice of an agency decision before appeal time runs.); Frink v. National Mutual Fire Ins. Co., 90 S. C. 544, 74 S.E. 33 (1912)("Notice must be personal unless otherwise provided by law."); But cf., Botany Bay Marina Inc. v. Townsend, 296 S. C. 330, 372 S.E.2d 584, 586 n. 3 (1988)("The Board of Adjustment's decision that [actual] notice is required before the appeal period begins to run could bring about the death knell to finality in administrative decision-making. The logic of the Board's decision would require county governments to promulgate or disseminate notice of every zoning permit to unknown and undefined classes of persons and business entities.").