

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Hitachi Data Systems)
Corporation,)

Docket No. 90-CP-40-4433

Plaintiff,)

vs.)

Hugh K. Leatherman, Grady L.)
Patterson, Luther L. Taylor,)
Jules J. Hesse, Roy E. Moss,)
Kiffen R. Nanney, Gus J.)
Roberts, and Carol Baughman)
as members of the South)
Carolina Procurement Review)
Panel, and the South Carolina)
Procurement Review Panel,)

ORDER

RECEIVED

STATE OF SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

DATE APR 08 1991

Defendants.)
_____)

This action was commenced by Plaintiff for a declaratory judgment as to the jurisdiction and right of the South Carolina Procurement Review Panel ("Panel") to conduct an announced investigatory hearing and to enjoin that hearing until this Court renders a decision. It appears that the Panel postponed its hearing pending this decision so the request for injunctive relief is moot. Therefore, the sole issue before this Court is the jurisdiction question.

The relevant facts are undisputed. Since 1985, the South Carolina Department of Social Services ("DSS") has been the "seat" agency responsible for the operation of the Electronic Parent Locator Network ("EPLN"). EPLN is composed of ten

southeastern states, each of whom furnishes basic personal information on its citizens to a data bank which is used by the member state agencies to locate parents and spouses who are delinquent in support payments which otherwise have to be made by the state welfare programs. The EPLN program is primarily funded by the federal government, with the balance shared equally by the member (user) states. From the outset, South Carolina had subcontracted the operation of the data bank to a computer subsidiary of CSX.

In the spring of 1990, the member states decided to bring the computer operation of the EPLN data base "in house" to DSS at no additional cost, thereby eliminating the role of the CSX subsidiary. In order to accomplish this change, it was necessary for DSS to acquire a new mainframe computer capable of handling the existing network and any additional states who might become user members. The procurement of this new computer is the source of this controversy.

Specifications for a lease/purchase acquisition were prepared, listing Amdahl, IBM and HDS mainframe equipment and related equipment as acceptable. Invitations to bid, including the specifications, were mailed out by the Materials Management Office of the Division of General Services on April 18, 1990, and subsequently advertised by the Information/Technology Management Office. Amdahl refused to bid. IBM accepted the Invitation but subsequently also declined to bid. HDS submitted a bid which was

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accepted by the Materials Management Office on May 9, 1990, effective May 25, 1990. The award was not objected to by any party nor was there a formal protest of the award. No review was requested or occurred. No written decision was ever issued by a Chief Procurement Officer as to the DSS procurement or the procedures employed. The mainframe computer and related equipment was delivered to DSS in Columbia.

The federal investigation of the South Carolina Legislature became public in mid-July, 1990, and the ensuing publicity quickly engulfed the FBI informant, Ron Cobb. Because HDS and its predecessor National Advanced Systems (NAS) had retained Cobb as a lobbyist since 1985, NAS and HDS and its successful computer sales to South Carolina governmental agencies in recent years immediately became suspect and the subject of press speculation. The DSS mainframe procurement award was so questioned in the media that SLED and the FBI began an investigation at the Governor's recommendation.

This publicity first prompted the Panel's inquiry of facts from HDS and the involved state agencies. The Panel then notified HDS and the others on September 13, 1990, that it would conduct a hearing before it to be held on October 8, 1990. In scheduling the hearing, the Panel advised that "[the] Procurement Review Panel has decided to conduct an administrative hearing to determine whether any violation of the procurement code occurred in this [the DSS] procurement." The same letter stated "[A]s a

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result of this hearing, the panel may affirm the actions of the state or may order that the contract be re-bid." The notice prompted this action for a declaratory judgment as to the jurisdiction and right of the Procurement Review Panel to hold the October 8 investigatory hearing.

Thereafter, the lease/purchase by DSS of the HDS mainframe computer was abandoned, the HDS claims resolved and the EPLN computer de-installed and removed from the DSS premises. However, the Panel refused to abandon the investigatory hearing and thus this dispute remains ripe for resolution.

APPLICABLE LAW

This case presents the question of whether the South Carolina Procurement Review Panel has the authority sua sponte to investigate a straight competitive bid procurement and to instigate remedial action, in the absence any protest or objection on the part of the bidders or the involved state agencies.

The Panel was created by the South Carolina Consolidated Procurement Review Code enacted in 1981 to provide for the administration and regulation of all state government procurements. 1981 S.C. Acts, Part 1, No. 148, §11-35-10 et seq, 1976 Code of Laws. The Panel is a creature of the Legislature and has only the investigatory powers specifically granted it by statute:

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The power of an administrative agency to investigate requires the same statutory authority as any other administrative action. Its powers to investigate and elicit information are therefore derived from and limited by the authorizing statutes. (Citations omitted).

Ex Parte Allstate Insurance Company, 248 S.C. 550, 563, 151 S.E.2d 849, 853 (1966). Thus, we must then turn to this statute to determine the Panel's authority.

The authority and powers of the Panel are set forth in the second of two Subarticles of Article Seventeen captioned "Legal and Contractual Remedies." Subarticle I of Article Seventeen of the Procurement Code is headed "Resolving Protests" and covers three areas of contract disputes -- (1) protested solicitations and awards (§11-35-4210); (2) the debarment or suspension of private contractors (§11-35-4220); and (3) contract controversies (§11-35-4230). Each of these sections requires a controversy or dispute between a contractor and the State, either in the form of a protest (§11-35-4210(1)), a notice of debarment (§11-35-4220(2)) or a breach of contract, mistake, misrepresentation or other cause for contract modification or revision (§11-35-4230(1)).

In all three areas of these Subarticle I contract controversies, the authority to hear and resolve the dispute is vested in "the appropriate chief procurement officer". §§11-35-4210(2), 4220(2), 4230(2). In each case, the Chief Procurement Officer is directed to issue a written decision stating the reasons for the action taken. §§11-35-4210(3),

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4240(4), 4230(3). This written decision of the Chief Procurement Officer is "final and conclusive" unless the contractor "...requests a review in writing ... to the Procurement Review Panel within ten days of the decision." §§11-35-4210(5), 4220(6), 4230(5).

The second Subarticle of Article Seventeen, captioned "Review Panel," contains only §11-35-4410, which in seven subsections defines the Procurement Review Panel and grants it authority to review these "written decisions." Subsection (1) "Creation" 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 or award of a contract, a decision concerning the resolution of a contract or breach of contract controversy . . .

Subsections (2), (3), and (4) provide for the Panel's membership, a chairperson, meetings and administrative support from the Budget and Control Board ("Board").

Subsection (5), "Jurisdiction," addresses a Subarticle 1 controversy:

Notwithstanding the provisions of §§1-23-10 et seq. or any other provision of law, the panel shall be vested with the authority to interview any person it deems necessary, review all written decisions rendered under §§11-35-4210, 11-35-4220, and 11-35-4230, and record all determinations. The panel shall establish its own rules and procedures for the conduct of its business, including the holding of necessary hearings.

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Like subsection (5), subsection (6), "Procedures," also refers to Subarticle 1 disputes:

If a chief procurement officer forwards a grievance, filed under the provisions of §11-35-4210(5), to the Review Panel, the Chairman shall convene the Review Panel within ten days to conduct an administrative review of the determinations rendered under §§11-35-4210, 11-35-4220, and 11-35-4230.

Subsection (7) makes a Panel determination ". . . final as to administrative review." The Panel's primary function is then to provide an administrative review of "decisions" involving Subarticle (1) controversies.

Ⓒ This case does not involve a Subarticle (1) controversy. Since there is no "aggrieved" "bidder, offeror, contractor, or subcontractor" and there was no "protest to the appropriate chief procurement officer." §11-35-4210(1). Likewise there is no "debarment" (§11-35-4220) and no "breach of contract, mistake, misrepresentation, or other cause of contract modification or rescission." §11-35-4230.

Furthermore there are no "written decisions rendered ..." under those sections to be reviewed pursuant to subsection (5) of a §11-35-4410, so that subsection (5) is inapplicable as a source of jurisdiction here. Similarly, there is no "grievance" forwarded by a chief procurement officer pursuant to subsection (6) of §11-35-4210, so that subsection furnishes no authority for the planned hearing. Finally the DSS procurement involves no "formal protests of decisions arising from the solicitation and award of contracts, the debarment ... of a

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person ..." or "a decision concerning the resolution of a contract ..." under subsection (1) of §11-35-4410 on which to ground the proposed hearing. Thus subsections (5) and (6) and the first clause of subsection (1) of §11-35-4410 do not authorize the planned Panel investigation.

The Panel contends that its source of legislative authority for the investigative hearing is the last clause of subsection (1) of §11-35-4410 which, in context, 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 ...

* * *

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.

The Panel argues that the proposed sua sponte investigative hearing is warranted by the language giving it "administrative review of . . . any other decision, policy or procedure." It contends that in construing a statute, the questioned language (other decision, policy or procedure) should be given its ordinary and popular significance. Investors Premium Corp. v. South Carolina Tax Commission, 260 S.C. 13, 193 S.E. 2d 642 (1973).

However, in construing a statute, the Court is not governed by the apparent meaning of words in one clause, sentence or part of a statute; rather, on consideration of the whole Act, the

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words are to be read in light of the conditions and circumstances as they appeared to the legislature and the purpose sought to be accomplished. City of Spartanburg v. Leonard, 180 S.C. 491, 186 S.E. 395 (1936); Simmons v. City of Columbia, 250 S.C. 163, 311 S.E. 2d 732 (1984).

A review of the procurement structure established by the 1981 Code shows that the Legislature never contemplated such a broad supervisory role for the Panel. Overall responsibility for the matters of procurement policy, oversight and implementation are vested in the Board and the Board is given the non-delegable duty to promulgate all regulations to implement the Procurement Code. §11-35-540. However, the administrative duties and responsibilities for the operation of procurement functions for South Carolina state government, with defined exceptions, are vested in the Division of General Services under the Budget and Control Board. §11-35-510.

The Code establishes three new offices within the Division of General Services to administer the procurement process: Information Technology Management which conducts all procurements involving information technology (§11-35-820), State Engineer for all construction related procurements (§11-35-830), and Materials Management for all other procurements (§11-35-810). The head of each of these offices is designated a Chief Procurement Officer, with responsibility for all procurements in the area assigned to that office -- i.e. information technology, construction and all

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other. The Board retains responsibility for certain dollar levels of individual governmental unit purchases (§11-35-1210), the collection and dissemination of data (§11-35-1220) and overall investigative and auditing plans (§11-35-1230), with certain exceptions for accounting, legal and individual services (§§11-35-1250 through 1270). In every day practice, each of these three Chief Procurement Officers administers the Procurement Code in his area and makes or approves the final decisions, determinations and certifications required by the many code provisions. See e.g. §11-35-2410 and §11-35-2720. Always, however, final administrative responsibility lies with the Board. §11-35-540(4).

Nowhere, in this carefully structured procurement scheme, is there any room for a broad investigatory and supervisory function for the Panel of the type it now claims, with power to nullify routine uncontroverted procurements and direct re-awards or re-bidding. It is inconceivable that, by the obtuse language of the second clause of subsection (1) of §11-35-4410, the Legislature intended to grant this body, whose primary function is administrative review, such vast powers which directly conflict with the tailored administrative responsibilities elsewhere delegated by the Code to the Budget and Control Board, the Division of General Services and the various chief procurement officers.

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The practical implications of a decision permitting the broad powers the Panel claims here would be striking. No state procurement would be immune from the investigatory whims of the Panel. No procurement would be final. Presumably at any time during the life of any state contract, that contract could be investigated, terminated, or ordered re-bid or re-awarded on new conditions dictated by the Panel. Undoubtedly, if the Panel prevails in the power claims it makes here, the ensuing awareness of the marketplace will be reflected by sharply increased prices for all future South Carolina state procurements.

The Legislature never intended to create such a role for the Panel by the second clause of subsection (1) of §11-35-4410. The Panel was established under Article Seventeen which addresses "Legal and Contractual Remedies." As its very name indicates, the function of the Panel is "to review" procurement disputes as the final administrative step in the remedial process. Its purpose was succinctly stated in Subsection (3) of §11-35-4410:

... to afford a swift resolution of the controversy submitted to it.

All code references to the Panel are in the context of matters brought to it in some form of protest or appeal (§11-35-4410(1), (3) and (6), §11-35-4210(5) and (7), §11-35-4220(6) and §11-35-4230(5)) and all involve "decisions," a term whose connotation necessarily involves disputes or controversies. 11A Words and Phrases, p.5. The "other decisions" of the second

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clause of Subsection (1) of §11-35-4410 must be read in the context of Subarticle I decisions. As such, that term in the second clause merely gives the Panel administrative review of the myriad other determinations required throughout the procurement process.

Examples of such "decisions" (or "determinations") throughout the Code include decisions to reject enlistment on bidder's list, specifically made appealable (§11-35-1520(3)); decisions to permit the correction or withdrawal of bids or to cancel awards or contracts because of bid mistakes (§11-35-1520(8)); chief procurement officer determinations that the use of competitive sealed bids is not practical or advantageous (§11-35-1531); decisions of which competitive sealed proposals are most advantageous (§11-35-1530(7)); determinations that time or circumstances do not permit the delay required to re-solicit bids so as to permit the use of contract negotiations (§11-35-1540); decisions that only one source of a required supply, service, or construction item exists (§11-35-1560); determinations of the basis of an emergency or the selection of a particular emergency source (§11-35-1570); determinations of bidder nonresponsibility (§11-35-1810(2)); decisions that cost or pricing data requirements may be waived (§11-35-1830(3)); and decisions as to types of contracts (§11-35-2010(1) and §11-35-2030(2)).

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These "decisions" (and "determinations") are required to be retained and documented (§11-35-210) and are made final and conclusive, unless contrary to law (§11-35-2410), just as are the "controversy" decisions of Subarticle (1). §§11-35-4210(5), 11-35-4220(6), and 11-35-4230(5). Likewise, they all involve some exercise of reasoning or judgment in reaching a conclusion which is the basis for the future action permitted. Furthermore, these "decisions" (or determinations) will frequently involve disputed controversies, particularly where competition is present. They are the "any other decisions" to which the second clause of Subsection (1) of §11-35-4410 refers.

On the other hand, the DSS procurement involved only the automatic acceptance of a competitive sealed bid, without alteration or correction. §11-35-1520 (7). The lowest bid meeting the published criteria is required to be accepted (§11-35-1520 (10)) without the exercise of any judgment or powers of reason. There can be no controversy as to which is the lowest bid, except in the case of ties, which are automatically resolved by the residence of the supplier, the locale of the manufacturer, or a flip of the coin. §11-35-1520 (9). The routine acceptance of the lowest competitive sealed bid simply does not involve a "decision" (or "determination") within the meaning of that term in the second clause of Subsection (1) of §11-35-4410, or elsewhere throughout the Procurement Code.

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The Supreme Court aptly summarized the true role of the Panel in Tall Tower v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987):

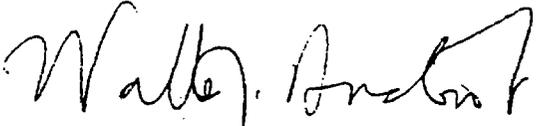
The Panel is charged with conducting an administrative review of formal protests of decisions arising from the solicitation and award of contracts pursuant to the Procurement Code. 363 S.E.2d 683, 685.

If the Legislature intended the Panel to fulfill the broad investigatory role it now pursues, it has not said so with sufficient clarity in the existing statutes. Such expansive authority, inconsistent with the design of the Procurement Code and its primary role of an administrative appellate review body, will not be implied from the obscure "catch all" phrase on which the Panel relies.

For the above stated reasons, I find that the South Carolina Procurement Review Panel is an administrative review body, not an investigative one. As such, its scope of authority is limited to the appellate review of written determinations and decisions brought to it by way of protest or application as set forth in the Procurement Code.

IT IS SO ORDERED.

Columbia, SC
April 5, 1991


Honorable Walter J. Bristow
Judge, Fifth Judicial Circuit

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