

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1993-21

In re:

Protest of Beaufort-Jasper E.O.C., Inc.,)
Berkeley-Dorchester Counties Economic)
Development Corp.,)
Lowcountry Community Action Agency, Inc.,) **ORDER**
Orangeburg-Calhoun-Allendale-Bamberg)
Community Action Agency, and)
Charleston County Human Services)
Commission, Inc. ("Protestors");)
Appeal by "Protestors")

This case came before the South Carolina Procurement Review Panel (Panel) for hearing on October 6, 1993, on the appeal by Beaufort-Jasper E.O.C., Inc., Berkeley-Dorchester Counties Economic Development Corp., Lowcountry Community Action Agency, Inc., Orangeburg-Calhoun-Allendale-Bamberg Community Action Agency, and Charleston County Human Services Commission, Inc. (Protestors) of a decision by the Chief Procurement Officer (CPO) dismissing Protestors' protest.

Present and participating in the hearing before the Panel were Protestors represented by Paul Tecklenberg, Esq. and Elizabeth Holderman, Esq.; Transportation Management Services, Inc. (TMSI) represented by Michael Montgomery, Esq.; Health and Human Service Finance Commission (HHSFC) represented by Deirdra Singleton, Esq.; and Division of General Services represented by James Rion, Esq.

FINDINGS OF FACT

The State issued a Request For Proposals (RFP) on April 5, 1993, to provide Medicaid transportation services for the Health and Human Services

Finance Commission. (Record p. 98). The RFP in Part VII states "the Provider shall have access to state vehicles...." (Record p. 111). Amendment #001 to the RFP was issued on April 27, 1993, to answer questions raised and "clarify and amend". (Record p. 90). Question and Answer number five of Amendment #001 states:

...Will private for profit corporations have access to State vehicles in violation of Article X, Section 11, of the South Carolina Constitution?

Answer: According to Dept. of Motor Vehicle Management, the vehicle must be used for State business only.

Amendment #002 to the RFP was issued on May 4, 1993, to clarify some information in the first amendment. (Record p. 95). The RFP's were opened on May 18, 1993. The Intent to Award to TMSI was issued on June 28, 1993.

On July 6, 1993 Protestors filed their protest of the Intent to Award to TMSI. (Record p. 82). Although Protestors' protest letter states their intent to submit further issues of protest, Protestors indicated that no further issues would be raised. The protest letter states in pertinent part, "the award to TMSI violated Article X, Section 11 of the South Carolina Constitution because the vehicles provided pursuant to part VII of the RFP cannot be provided to private for-profit corporations." (Record p. 82). TMSI raised the issue of timelines as well as other legal issues that would bar a hearing on the merits. The CPO presented the issues raised by TMSI to Protestors and letters were exchanged discussing the legal issues. The CPO did not conduct a hearing, but on August 27, 1993, issued a decision based on the "matters of law and record which the parties addressed fully and well in discussion and letters." (Record p. 10).

CONCLUSIONS OF LAW

The issue of a timely filed protest is jurisdictional under the Panel's decision In re: Protest of Oakland Janitorial Service, Inc., Case No. 1988-13,

Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 533, and many subsequent decisions. If the protest is not filed in the time frame established by Code Section 11-35-4210(1), the Panel does not have jurisdiction to determine the merits of the protest issue. Timelines is determined by Code Section 11-35-4210(1), which states:

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 circumstance after thirty days of notification of award of contract.¹

TMSI and the State argue that Protestors knew or should have known when they received the RFP the facts of their protest that the RFP specification allowing the use of state vehicles by for-profit organizations violates the SC Constitution. TMSI and the State further argue that if Protestors did not know when they received the RFP, the answer to question number five (5) in Amendment #001 to the RFP sufficiently notified Protestors of the facts giving rise to their protest. Protestors argue they were not aggrieved until they knew they did not receive the contract and a for-profit corporation would, which was when they received the Intent to Award. Protestors argue that they timely filed their protest letter within 10 days of receipt of the Intent to Award.

The Panel agrees with the State and TMSI that the Protestors knew or should have known that a provision of the RFP was allegedly unconstitutional, at the time the RFP was issued, or at least when Amendment #001 was issued.

¹This procurement was solicited prior to July 1, 1993, and therefore is under the Consolidated Procurement Code before the changes made by the new provisions of the State Government Accountability and Reform Act of 1993.

Therefore, Protestors should have filed their protest within ten (10) days from their receipt of the RFP.

The previous year, award of the Medicaid transportation procurement was made to for-profit organizations, at which time the Protesters filed a protest with the CPO on the same ground raised in this hearing, that the award to a for-profit organization is unconstitutional. Because of the previous procurement, it is reasonable to expect Protestors to have knowledge that for-profit organizations were involved in this procurement. The RFP did not exclude for-profit organizations from submitting proposals. Neither did the RFP limit the procurement to state agencies or quasi-governmental organizations. Furthermore, the answer to amendment one can be reasonably construed to explain that the for-profit organizations submitting proposals will not be considered in violation of the South Carolina Constitution.

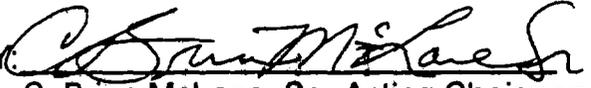
With the previous knowledge that the Protestors had of the involvement of for-profit organizations in the procurement of Medicaid transportation, they should have known that the RFP in question was open to for-profit organizations. If Protestors believe the specification in the RFP is unconstitutional, then it was unconstitutional from the issuance of the RFP. Protestors do not claim to be aggrieved because they were not the intended contract recipient, which would not be known until the issuance of the Intent to Award. Protestors claim to be aggrieved by the unconstitutionality of a specification of the RFP, which was or should have been known upon receipt of the RFP.

Although not dispositive, the Panel notes that it declines to hear constitutional issues, as it has in the past. The Panel feels that it is not the proper forum for the consideration of issues of constitutional import. Therefore the Panel would not hear the merit of Protestors' issue even if timely filed.

For the foregoing reasons, the Panel dismisses the Protestors' protest as untimely and upholds the decision of the Chief Procurement Officer consistent with the above findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
C. Brian McLane, Sr., Acting Chairman

Columbia, SC
10/20/, 1993