



Kelly) as agents for the State House Committee, and makes them "responsible for the administration and implementation of the State House renovation project." [Record p. 123]. This committee of three will hereinafter be referred to as the Renovation Committee. The authority of the Renovation Committee is also detailed, to include the authority to "manage and make all necessary decisions that may arise with regard to every aspect of the project..." [Record p. 123]. The Office of General Services, a part of the Division of Operations of the Budget and Control Board (General Services), performed project management services on the project. Stevens & Wilkinson, Inc. (S&W) is the Project Architect/Engineer.

Four companies were prequalified under S.C. Code Ann. Section 11-35-1825 to bid on the State House Renovation Project. Bids for the project were opened on July 24, 1995, with the following base bid results:

Morganti National, Inc. (Morganti)	\$43,595,000.00
McDevitt- Street- Bovis, Inc. (McDevitt)	\$43,623,000.00
Caddell Construction Co., Inc. (Caddell)	\$45,127,000.00
Ellis-Don Construction, Inc. (Ellis)	\$46,387,500.00

[Record p. 49].

All of the bids were more than \$10 million over the projected budget of \$33 million for the project. Morganti was informed in a July 27, 1995, letter that the bids were referred to the State House Committee for review and consideration, and therefore an Intent to Award would not be issued immediately. [Record p. 78]. In fact, an Intent to Award was not issued.

Frank Caggiano's testimony reveals that the bidding of the Project was intended to be complete in June of 1995. The General Assembly had authorized General Services to issue up to \$35 million in debt for the Project. Thus, funds would be available to sign a contract on the Project, and the General Assembly

could then be provided the full project cost during the next legislative term. Delays resulted in the July opening date of the bid, while the debt authorization expired at the end of the fiscal year, June 30, 1995. After June, the only funds available for the project was \$13 million cash, the amount remaining from the \$17 million authorized by the General Assembly in the spring of 1995 to begin the project.

The testimony of Mr. Kelley, Mr. Caggiano, and Senator Verne Smith reveals that several conversations took place after the bids were opened on July 24, 1995, and prior to the August 2, 1995, letter to the bidders that explains an emergency procurement had been declared. The members of the Renovation Committee communicated with the Chairman of the State House Committee and other leadership of the General Assembly concerning the fact that the project would exceed the anticipated cost, as well as the fact that the State House had been vacated and its residents relocated. The result of these conversations was for the legislative leadership to commit to attempting to obtain additional funding necessary to complete the State House Renovation Project, so long as an attempt was made to determine the areas of the project where there could be some reduction in the cost without changing the scope of the project.

Senator Verne Smith, Chairman of the State House Committee, testified that he spoke with several key legislators concerning the bids being \$10 million over the project's budget. His conversations resulted in a decision that unnecessary items, which did not effect the historical preservation and overall scope of the project, should be deleted in an attempt to reduce the cost of the project. The request for additional funding could then be presented to the General Assembly after attempts were made to reduce the cost of the project.

The State House Committee is required by law to complete the State House Renovation project by the 1998 session of the General Assembly, and

"General Services must submit to the State House Committee, schedules that will accomplish these time frames." [Record p. 121]. Testimony establishes that a re-bid of the project, following the bid opening on July 24, 1995, would involve at least four months to make modifications and get the new solicitation to bidders, as well as four to six weeks to allow for responses. The State House was vacated in June 1995, and the asbestos removal was substantially complete by mid-October 1995.

After discussions during the week of July 24, 1995, the Renovation Committee determined that an emergency existed and discussed how it should proceed under an emergency procurement. It was decided the Architect/Engineer would prepare a list of items that the bidders could deduct from their original bid. Testimony reveals that a great deal of discussion went into the decision on how to proceed with the emergency process.

The Project Architect/Engineer, S&W, issued a letter to the bidders on August 2, 1995, explaining that the bids were "significantly over the anticipated project budget." [Record p. 44]. The letter further explains that the procurement has been declared an emergency, and outlines an emergency procedure. The procedure involves a list of twenty-five (25) items, provided by the State, to be priced as deductions from the bidder's original July 24, 1995, base bid. [Record p. 44-48]. The deduction list was originally to be submitted by August 17, 1995. A letter of August 16, 1995, revised the August 2nd letter, changing the "bid date and time" to Monday, August 21, 1995, as well as making other changes. Wayne Redfern of S&W testified that, although a subjective process of allowing the bidders to list their own areas of cost savings as deductions was considered, the final process, as outlined in the August 16, 1995 letter to bidders, was an objective process. All of the bidders' deductions would be accepted as opposed to the State picking and choosing deductions. Also, the same subcontractors

were required to be used, so that shopping prices with subcontractors would not be a factor. The August 16, 1995, letter also included a copy of the justification for the declaration of an emergency. [Record p. 99].

The "Justification For Emergency Procurement", dated August 4, 1995, and signed by Richard Kelly states the reasons for the declaration of an emergency. [Record p. 96-98]. Mr. Kelly testified that he was out of town July 24, 1995, when the bids were opened, however he was in contact with his office. Mr. Kelly was in communication with Mr. Caggiano, among other people, during the week of July 24, 1995, concerning the project. The Justification For Emergency Procurement was signed on August 4, 1995, but the decision to declare an emergency was made prior to that date. Mr. Kelly testified that he wrote out the attachment to the Justification in an attempt to further explain the emergency conditions that existed.

Also on August 4, 1995, Morganti objected to the procedure outlined in the August 2, 1995, letter and requested information on the nature of the "emergency". [Record p. 85-86]. Morganti filed a formal protest of the process on August 16, 1995. [Record p. 90]. Morganti filed additional grounds of protest on August 18, 1995, based on the Architect's August 16, 1995, letter revising the emergency procurement process. [Record p. 101]. Morganti attempted to have the emergency procurement stopped until its protest of the procedure could be heard, but did not prevail. [Record p. 116]. Morganti did not participate in the emergency procurement process.

The procurement process continued, and the low bidder in the emergency process is Caddell at \$40,265,192.00. [Record p. 202-204]. On August 22, 1995, Caddell was requested to clarify several items on its list of deductions. [Record p. 31-32]. The State House Committee and Caddell entered a contract on August 24, 1995. [Record p. 50-56]. After the contract was signed, testimony

shows that the State discussed with Caddell the reductions in price and was satisfied the scope of the project would not be effected.

## CONCLUSIONS OF LAW

### MOTIONS

#### I. Motion To Dismiss For Lack of Standing

It is undisputed that Morganti did not participate in the emergency procurement process. The Panel has clearly held that a protestant must be an actual bidder in order to have standing to protest. However, the Panel has not previously decided the issue of standing in light of the facts presented in this case. This case involves a sealed bid procurement which was declared an "emergency procurement" after the sealed bids were opened. The Panel is urged to consider the emergency process utilized in this case as a completely separate procurement, in which Morganti did not participate. An emergency procurement, in some circumstances, might be a separate procurement. Sometimes an emergency procurement is for a portion of the original intended procurement. However, because of the very unique circumstances of this case, as discussed herein, the State declared an emergency for the procurement of the entire renovation project. The State used the original bid as a basis for the emergency process and requested deductions from the original bidders. The Panel finds that the emergency process utilizing deductions from the original bid is actually a modification of the original procurement, of which Morganti was an actual bidder. The emergency process used is a continuation of the original bid, with modifications due to emergency conditions, and not an entirely separate procurement. The Panel finds that Morganti is an actual bidder on the project, and has standing to protest the process.

Further, the Panel does not find merit in the argument that Morganti lacks standing to protest the manner and method of an emergency procurement under

the language of S. C. Code Ann. Section 11-35-1770, which begins "[N]otwithstanding any other provision of this code...." S. C. Code Ann. Section 11-35-1770 requires that emergency conditions exist and that the method or process be as competitive as possible when a decision to proceed with an emergency procurement is made. The existence of emergency conditions and the procedure used in the emergency procurement are Morganti's protest issues in this case. An emergency procurement under S. C. Code Ann. Section 11-35-1570 is clearly subject to review, as S. C. Code Section 11-35-2410 provides that the determination to make an emergency procurement "shall be final and conclusive unless [it is] clearly erroneous, arbitrary, capricious, or contrary to law." The Panel finds that Morganti has standing to protest the procurement made under emergency procedures for the State House Renovation Project.

## II. Motion to Dismiss For Lack of Jurisdiction

The argument is made that S. C. Code Ann. Section 60-12-90 deprives the Panel of jurisdiction by providing that the State House Committee's "policy and decisions" concerning any renovations of the State House "shall be final", which provides the Committee with the final authority to decide the issues before the Panel. The Panel disagrees. Putting that language into the context of the rest of the statute provides a different meaning. The statute provides:

Notwithstanding any provision of law to the contrary, the State House Committee shall cause the Department of Archives and History to review and comment on any proposal or alterations or renovations to the State House or that area designated as the capitol complex. The policy and decisions of the State House Committee, with regard to any proposal for or the administration of any project or program for the maintenance, alteration or renovation of the State House or that area designated as the capitol complex, shall be final.

The statute requires the State House Committee to consult with the Department of Archives and History about the preservation of the State House. The statute provides that in the in the context of consultation about historical preservation, the decision of the Committee is final. The motion to dismiss for lack of jurisdiction based on S.C. Code Ann. Section 60-12-90 is denied.

Further argument is made that the Panel's review of this matter violates Article I, Section 8 of the Constitution of South Carolina which establishes the separation of powers between the branches of government.<sup>1</sup> The Supreme Court has found that "the legislative department makes the laws; the executive department carries the laws into effect; and the judicial department interprets and declares the laws." McLeod v. McInnis, 278 SC 307, 295 SE2d 633 (1982). The State House Renovation Project is unusual in that a committee of legislators is given the authority to make decisions concerning the procurement of renovations to the State House. The argument is that a state agency of the executive branch of government, the Panel, acting in a quasi-judicial role, does not now have jurisdiction to review the decisions of the committee of legislators. However, the State House Committee proceeded to procure construction services under the Consolidated Procurement Code and therefore is subject to the provisions of the Consolidated Procurement Code, including the protest procedures outlined in S.C. Code Ann. Section 11-35-4210. The Panel does not believe the State House Committee, because it consists of legislators, is above the law established in the Consolidated Procurement Code.

Further, the Panel is reviewing the declaration of an emergency and the process used in the emergency procurement. Richard Kelley, in his capacity as

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<sup>1</sup> The Panel has previously ruled that it is not the proper forum to determine issues of constitutional import. However, the constitutional question raised here does not involve the merits of the issues, but goes directly to the jurisdiction of the Panel. The Panel must determine if it has jurisdiction of a case if the Panel's jurisdiction has been questioned.

Director of the Division of Operations of the Budget and Control Board, signed the justification of emergency procurement. The process utilized in the emergency procurement was determined by the Renovation Committee. The Renovation Committee does not consist of legislators. Further, the decisions under review, whether made by legislators or not, are not decisions concerning the creation of laws, which is the power of the legislative department. Thus, there is no mingling of the powers of the executive and legislative branches of government. The Motion to dismiss for lack of jurisdiction based on Article I, Section 8 of the South Carolina Constitution is denied.

### III. Motion for Directed Verdict

Morganti protests the determination that emergency conditions existed and the emergency process utilized by the State. As a remedy, Morganti requests that Caddell's contract be canceled and the contract be awarded to Morganti at its original bid price, or, in the alternative, for monetary damages of bid preparation costs, attorney's fees and lost profits. [Record p. 5]. The Panel takes this opportunity to reiterate the Panel's position as stated in Procurement Review Panel Case No. 1988-6, In re: Protest of Homer L. Spires, which expresses the Panel's belief that emergency procurements are subject to very close scrutiny.

#### A. Emergency Conditions

Morganti contends that an emergency did not exist, and the "Justification for Emergency Procurement" does not comply with the requirements of the law. Regulation 19-445.2110 (F), provides that:

competitive sealed bidding is unsuccessful when bids received pursuant to an Invitation for Bids are unreasonable, noncompetitive, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not

permit the delay required to resolicit competitive sealed bids. If emergency conditions exist after an unsuccessful attempt to use competitive sealed bidding, an emergency procurement may be made. (Emphasis added) [Record p. 15]

Morganti's low bid exceeded the available funds, and circumstances, as explained in the Justification for Emergency Procurement and testimony, did not allow for the time required to resolicit. Therefore, if emergency conditions existed at the time bids were opened on July 24, 1995 and thereafter, an emergency procurement was properly declared.

S. C. Code Section 11-35-1570 discusses emergency procurements as follows:

Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may make or authorize others to make emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file. (emphasis added) [Record p. 14]

The statute requires emergency procurements only under emergency conditions as defined by regulation, and with as much competition as practical. Regulation 19-445.2110(B) defines "emergency condition" as follows :

an emergency condition is a situation which creates a threat to public health, welfare, or safety such as may arise by reason of floods, epidemics, riots, equipment failure, fire loss, or such other reason as may be proclaimed by either the Chief Procurement Officer or the head of a governmental body or a designee of either office. The existence of such conditions must create an immediate and serious need for supplies,

services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten: (1) the functioning of State government; (2) the preservation or protection of property; or (3) the health or safety of any person. (emphasis added) [Record p. 15]

Morganti argues that the Committee's concerns of "cost, schedule and historic preservation" as stated in the Justification for Emergency Procurement do not come under the definition of emergency conditions that create a threat to public health, welfare, or safety. General Services argues the law that a regulation cannot expand or reduce what the Code allows, and the Code includes "critical economy and efficiency" as reason for declaring an emergency.

The Panel agrees with General Services' analysis. Although the definition of emergency in the regulation does not specifically define emergency in terms of "critical economy and efficiency", the Code uses this language in describing circumstances in which an emergency may be declared. The definition in the regulation does provide the very broad and inclusive language of "such other reason as may be proclaimed", which would clearly include critical economy and efficiency. The definition of emergency conditions in the regulation, read in conjunction with the statute, includes critical economy and efficiency as factors which may arise to create emergency conditions.

General Services points out that the General Assembly mandates the completion of the State House Renovation project by the 1998 session. Also considered are concerns of accelerated deterioration in the State House, if left vacant for several months. Further economy and efficiency considerations include additional costs of rent and storage expenses for the legislative and executive branches of government that have been moved into temporary offices. The General Assembly was moved from the State House to space leased from USC for \$500,000.00 per year, for a two year period. The move of the

Governor's office and other offices located in the State House caused the shift of other state agencies to different office space, some of which is being commercially leased. Costs also include storage for some items from the State House. A combination of these factors affect "critical economy and efficiency".

If emergency conditions exist, the Regulation also requires that it "must create an immediate and serious need for supplies, services, or construction that cannot be met through normal procurement methods and the lack of which would seriously threaten: (1) the functioning of State government; (2) the preservation or protection of property; or (3) the health or safety of any person." When the competitive sealed bid was unsuccessful, there existed an immediate and serious need for construction because of the deterioration of the vacant State House, as well as, the inflexible time frame. The time frame did not allow for procurement of the needed construction through the usual methods of procurement. Also, the failure to provide the necessary construction would threaten "the preservation or protection of property", as required by Regulation 19-445.2110(B). For all of the foregoing reasons, the Panel finds that emergency conditions existed after the opening of the bids on July 24, 1995, and an emergency procurement was properly declared under the Consolidated Procurement Code.

#### B. Emergency Procurement Process

Morganti argues that the process utilized under the emergency procurement was an invitation for bid shopping. Morganti further believes the State's effort to reduce the contractor's price after competitive bid is illegal and improper. [Record p. 22-23].

General Services contends that the process utilized created a level playing field in which the same bidders were given the same list of deductions, with rules that disallowed changing subcontractors, and required the entire list of

deductions to be accepted by the State. General Services argues that it is in compliance with the Code's requirement that "emergency procurements shall be made with as much competition as is practicable under the circumstances." SC Code section 11-35-1570. The circumstances only allowed for a short time frame in which to reduce the cost of the Project, and cost reductions were solicited competitively.

The Panel agrees that as much competition as was practicable under the circumstances was utilized in the emergency process. Because of the statutorily mandated time frame, the need to request further funding, and the vacancy of the State House, the Renovation Committee was required to decide how to proceed under emergency conditions. Under the mandated deadline and in light of the deterioration of the vacant State House, clearly enough time to change the scope of the project and re-bid it, did not exist. However, the need to request additional funds remained an issue. The project could not continue without the support of key legislators to request further funding. The request for additional funding was predicated on efforts to reduce the cost of the project, without substantially changing the scope of the project. Thus, the need existed to establish an emergency process to reduce the cost of the project. Even in emergency conditions, the State must seek competition. By including all of the original vendors, the State fostered competition and treated each vendor equally. The many unique circumstances which create the emergency conditions in this case, and require the State House Renovation Project to proceed without delay and at a lower cost, combine to make the procedure used an acceptable solution to the emergency conditions. The Panel finds that the emergency procurement process utilized in these circumstances was not illegal.

Morganti's protest letter further argues that the emergency procurement process went beyond the scope of the emergency, in violation of the law.

Regulation 19-445.2110 provides that "emergency procurement shall be limited to those supplies, services, or construction items necessary to meet the emergency." In this case the emergency need is for construction of the entire Project. Regulation 19-445.2110(F) contemplates just such a need, where a bid is unsuccessful because "the low bid exceeds available funds as certified by the appropriate fiscal officer, and time or other circumstances will not permit the delay required to resolicit competitive sealed bids". Such an unsuccessful solicitation may require an emergency procurement of the entire project if emergency conditions exist, as in this case. The Panel finds that the emergency procurement does not go beyond the items necessary to meet the emergency.

### C. Negotiations

Morganti argues that if the bids exceeded the budget, the State should have negotiated with Morganti as the low bidder. General Services argues that Morganti's base bid was more than 5% greater than the available funds, as well as the proposed budget, so S.C. Code Ann. Section 11-35-1540(1) prohibits negotiations. S.C. Code Ann. Section 11-35-3020(2)(d)(1) provides in pertinent part:

When bids received pursuant to an invitation for bids exceed available funds or were not independently reached in open competition and it is determined in writing by the chief procurement officer or his designee that time or other circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section with the lowest responsible and responsive bidder, provided that the lowest base bid does not exceed available funds by an amount greater than five percent of the construction budget established for that portion of the work. (emphasis added) [Record p. 16-17]

General Services argues that Morganti's \$43.5 million bid exceeded available funds of \$13 million, as well as the \$33 million proposed budget, by more than

five percent (5%).[Record p.132] Clearly, the bids are in excess, by more than five percent (5%), of available funds at the time bids were opened, ruling out the possibility of negotiations. Further, the declaration of an emergency procurement required the use of as much competition as practicable. Negotiations are not the most competitive process under the circumstances of this emergency procurement.

D. Burden of Proof

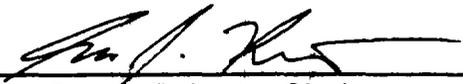
The protesting party has the burden to prove the issues of its protest. The protestant must prove its case by a preponderance of the evidence. S. C. Code Ann. Section 11-35-2410 provides that the decisions made under Section 11-35-1570 concerning the declaration of emergency procurements, "shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law." The Panel finds that Morganti has not proven the declaration of an emergency and the process utilized under the emergency conditions were erroneous, arbitrary, capricious, or contrary to law. In fact, the weight of the evidence shows that the process was well thought out, and within the boundaries of the law.

For the foregoing reasons, the Panel finds that Morganti has not proven its issues of protest. The Motion for Directed Verdict is granted, Morganti's protest is denied, and the CPO decision is upheld in as much as it is consistent with the Panel's findings.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY:

  
Gus J. Roberts, Chairman

Columbia, SC

November 17, 1995.