

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER ON DISPOSITIVE MOTIONS
IN RE: Appeal by Public Consulting	)	
Group, Inc., and Request for Review of	)	Case No. 2018-2
Determination to Lift Automatic Stay by	)	
Public Consulting Group, Inc.	)	
	)	
Solicitation No. 5400013926	)	
Multi-Vendor Integrator for South Carolina	)	
Department of Health and Human Services	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on May 21, 2018, pursuant to a request for review by Public Consulting Group, Inc. (PCG) under sections 11-35-4210(6); 11-35-4410(1)(a); and 11-35-4410(1)(b) of the Consolidated Procurement Code (the Procurement Code). The dispute before the Panel involves a solicitation issued by the South Carolina Department of Health and Human Services (DHHS) seeking the services of a Multi-Vendor Integrator (MVI) to provide project management oversight related to DHHS's acquisition of Replacement Medicaid Management Information System (RMMIS) components that will be integrated into a new Medicaid Enterprise System. In its April 10, 2018 letter to the Panel, PCG sought further administrative review of two written determinations of the Chief Procurement Officer (the CPO) related to the MVI solicitation. First, PCG asked the Panel to review the CPO's April 2, 2018 decision in which he dismissed PCG's protest as untimely. Second, PCG asked the Panel to review the CPO's April 4, 2018 written determination lifting the automatic stay and allowing DHHS's intended award to Cognosante Consulting, LLC (Cognosante), to proceed without further delay.

Prior to the Panel's May 21st hearing, the Panel entertained a motion from Cognosante to bifurcate the issues before the Panel and to continue the portion of PCG's case related to the

automatic stay. In the interests of judicial economy and to allow the parties additional time to review documents produced in response to subpoenas before a merits hearing on the automatic stay issue, the Panel granted Cognosante's motion. Thus, the May 21st hearing was limited to the issue of the timeliness of PCG's protest, which presented a pure question of law.

At the May 21st hearing, PCG was represented by Charles T. Kimmett, Esquire; Mark D. Davis, Esquire; Courtney E. Walsh, Esquire; and Erik T. Norton, Esquire.<sup>1</sup> Cognosante was represented by R. Bryan Barnes, Esquire; and Alexander B. Ginsberg, Esquire.<sup>2</sup> Byron R. Roberts, Esquire, appeared on behalf of DHHS. W. Dixon Robertson, III, Esquire; and Manton M. Grier, Jr., Esquire, represented the CPO.

### **Findings of Fact**

For the purposes of the dispositive motions before it, the Panel finds that the following facts are undisputed:

1. DHHS issued the MVI solicitation on August 8, 2017. Record at PRP46 – PRP149.
2. Section 2.20 PROTESTS of the solicitation document provided:

Any prospective bidder, Offeror, Contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest within fifteen days of the date of issuance of the applicable solicitation document at issue. Any actual bidder, Offeror, Contractor or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. See clause entitled "Protest – CPO". [Section 11-35-4210] [02-2A085-1]

Record at PRP71.

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<sup>1</sup> Mr. Kimmett and Mr. Davis are both licensed to practice law in the District of Columbia. At the Panel's request, they applied for *pro hac vice* admission with the South Carolina Supreme Court; such application was certified to the Panel by Supreme Court letter dated May 2, 2018.

<sup>2</sup> Mr. Ginsberg and Ms. C. Joël Van Over (who also represented Cognosante but did not appear at the Panel's hearing) are both admitted to practice law in the state of Virginia. The South Carolina Supreme Court certified Ms. Van Over's *pro hac vice* application by letter to the Panel on May 2, 2018, and Mr. Ginsberg's application on May 7, 2018.

3. Section 2.39 PROTEST – CPO – ITMO ADDRESS of the solicitation document provided:

Any protest must be addressed to the Chief Procurement Officer, Information Technology Management Office, and submitted in writing

(a) By email to protest-itmo@itmo.sc.gov,

(b) By facsimile at 803-737-0102, or

(c) By post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201. [02-2B120-1]

Record at PRP77.

4. The RFP does not define the term “days.”

5. At 15:00:00 on the designated opening date of October 10, 2017, DHHS opened offers from PCG, Cognosante, and other offerors. Record at PRP46; PRP150; PRP229.

6. On February 23, 2018, DHHS posted a Notice of Intent to Award the MVI contract to Cognosante. Record at PRP241. This notice provided that the award would become final at 08:00:00 on March 6, 2018 “[u]nless otherwise suspended.” Record at PRP241.

7. The Notice of Intent to Award includes a notice of the right to protest that uses the same language quoted above at paragraph 2 and gives the same information regarding where to file a protest quoted above at paragraph 3. Record at PRP241.

8. At 6:56:37 p.m. on March 5, 2018, PCG e-mailed a protest letter to the CPO at the e-mail address noted above: protest-itmo@itmo.sc.gov. Record at PRP13. PCG’s protest letter was attached to the e-mail. Record at PRP14 – PRP15.

9. On April 2, 2018, the CPO issued an order granting PCG’s protest. Record at PRP18 – PRP24.

10. At 6:54:00 p.m. on April 2, 2018, the CPO sent an e-mail vacating his first protest decision, noting that he had “overlooked that the original protest . . . was submitted after close of business on the tenth day after [DHHS] issued its intent to Award.” Record at PRP10. The CPO attached to this e-mail a new decision dismissing PCG’s protest for lack of jurisdiction because the original protest was not timely filed. Record at PRP11 – PRP12.

11. PCG appealed the CPO’s dismissal of its protest to the Panel on April 10, 2018. Record at PRP39 – PRP44.

### Conclusions of Law

This Panel's jurisdiction to conduct a *de novo* review of the CPO's dismissal of PCG's protest is established by section 11-35-4410(1)(a) of the Procurement Code. S.C. Code Ann. § 11-35-4410(1)(a) (2011). The question of the timeliness of PCG's protest presents a pure question of law that can be decided on the undisputed facts above. Cognosante and the CPO have moved for dismissal of PCG's appeal on the grounds that PCG's protest was not received by the CPO until after the close of business on the tenth day following the posting of the intent to award. PCG has moved for summary judgment on the grounds that its protest was timely filed in accordance with sections 11-35-4210(1)(b) and 11-35-310(13) of the Procurement Code. For the reasons discussed below, the Panel agrees with PCG and grants the portion of its motion asserting that PCG's protest was timely filed. [Argument II, pp. 8 - 11, Appellant Public Consulting Group's Motion for Summary Judgment].<sup>3</sup>

Under the protest provision of the Procurement Code, an actual offeror who is aggrieved by an intended award "shall protest to the appropriate chief procurement officer in the manner stated in subsection (2)(b) *within ten days* of the date . . . notification of intent to award . . . is posted in accordance with this code . . . ." S.C. Code Ann. § 11-35-4210(1)(b) (2011)(emphasis added). Subsection 2(b) notes that the protest "must be in writing and must be *received by* the appropriate chief procurement officer within [ten days of the posting of the notification of intent to award]." S.C. Code Ann. § 11-35-4210(2)(b) (2011) (emphasis added). In addition to these two statutory provisions, the Procurement Code defines the term "days" as "calendar days" and provides in pertinent part:

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<sup>3</sup> This Panel has entertained and granted motions for summary judgment when it is clear there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *In re: Appeal by Palmetto Traffic Group, LLC*, Panel Case No. 2014-3(II) at 3.

In computing any period of time prescribed by this code or the ensuing regulations, or by any order of the Procurement Review Panel, the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal holiday for the state or federal government, then the period shall run to the end of the next business day.

S.C. Code Ann. § 11-35-310(13) (2011).

In this case, the notice of intent to award was posted on February 23, 2018. Thus, in accordance with section 11-35-310(13), the designated period began to run on February 24, 2018, and the tenth, or final, day of the designated period for filing a protest was March 5, 2018. March 5th of this year fell on a Monday. Thus, the last sentence of section 11-35-310(13), which refers to “the end of the next business day,” does not apply in this case.<sup>4</sup>

Because the last sentence of section 11-35-310(13) does not apply, the question before the Panel is whether a specific time is prescribed by the use of the term “calendar day.” The Panel finds that the plain language of the first sentence of section 11-35-310(13) does not indicate specific hours. Therefore, the Panel is compelled to conclude that the “calendar day” referenced by this provision begins and ends at midnight.<sup>5</sup> See *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 112, 662 S.E.2d 40, 42 - 43 (2008) (wherein the Supreme Court observed that various rules may prescribe differing methods for computing time and held that “the answer we supply

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<sup>4</sup> In his order and his motion to dismiss PCG’s appeal, the CPO relies on Panel precedent finding that an appeal to the Panel from a CPO’s protest decision must be filed by the close of business on the tenth day of the designated period. *Protest of Palmetto Unilect, LLC*, Panel Case 2004-6; see also *Protest of Pee Dee Regional Transportation Services*, Panel Case No. 2007-1 (finding that an appeal received by the CPO after 5:00 p.m. on the day of the deadline where the tenth day fell on a Saturday was untimely). However, both of those cases interpreted the last sentence of section 11-35-310(13), which specifically refers to “the end of the next business day.” Furthermore, those cases both involved the filing of appeals with the Panel, not the filing of a protest with the CPO in the first instance. For these reasons, the Panel finds that its precedent is not controlling in this case. The Panel also notes that since its decisions in the *Palmetto Unilect* and *Pee Dee Regional* cases, the chief procurement officers have included a notice of right to appeal to the Panel with their written determinations. This notice of right to appeal places all parties on notice that an appeal to the Panel “must be filed by 5:00 PM, the close of business” on the last day of the designated period. Record at PRP16; PRP35. If the RFP or the Intent to Award notification in this case had included a similar notice, perhaps the Panel would have reached a different result here.

<sup>5</sup> If the General Assembly had intended the protest period to end at the close of business when the tenth day of the designated period falls on a day not a Saturday, Sunday, or legal holiday, surely it would have so provided.

today is that where a time prescription mentions only the passage of a number of days, a ‘day’ means a calendar day, beginning and ending at midnight.”). In this case, PCG filed its protest before midnight on the tenth day by e-mail, a manner deemed acceptable by the RFP and the Intent to Award notification. Moreover, the CPO has not disputed that the e-mail was actually received by him at 6:56:37 PM. Therefore, the Panel finds that it was error for the CPO to dismiss PCG’s protest on the grounds of untimeliness.

**Conclusion**

Therefore, for the reasons set forth above, the Panel hereby grants the portion of PCG’s motion for summary judgment arguing that its protest was timely under the applicable provisions of the Procurement Code. In so doing, the Panel also denies the CPO’s and Cognosante’s motions for dismissal of PCG’s appeal on the grounds of the untimeliness of PCG’s protest. Finally, the Panel remands the protest portion of PCG’s case to the CPO for further consideration in light of its decision and in accordance with the provisions of the Procurement Code.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

**BY:**



**C. BRIAN MCLANE, SR., CHAIRMAN**

This 4<sup>th</sup> day of June, 2018.

Columbia, South Carolina