STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND) CASE NO. 1990-1

IN RE:)
PROTEST OF SCHOLAR CHIPS SOFTWARE, INC.) O R D E R
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on March 29, 1990, on the appeal by Scholar Chips Software, Inc. ("Scholar Chips") of a decision by the Chief Procurement Officer ("CPO") dismissing Scholar Chip's protest as untimely.

Present at the hearing were Scholar Chips, represented by M. Elizabeth Crum, Esq., and Elizabeth A. Holderman, Esq.; the Division of General Services, represented by Helen T. Zeigler, Esq.; and the Department of Education, represented by George Leventis, Esquire. Also present but not participating as a party was Media Flex, Inc., represented by its president Harry Chan.

FINDINGS OF FACTS

On October 16, 1989, the Information Technology Management Office of the Division of General Services issued a Request for Proposals ("RFP") on a library information management system for the Department of Education. (Record, p. 167). Proposals were received on November 17, 1989.

The Notice of Intent to Award to Media Flex, Inc. was issued on December 4, 1989, to become effective on December 20th. (Record, p. 18).

Mr. Bernard Jeffcut, President of Scholar Chips, testified that, on December 4th, he talked with Venis

Manigo, the state procurement specialist in charge of this procurement, and was informed that a Notice of Intent to Award had been issued to Media Flex. Ms. Manigo testified that during the course of that conversation she advised Mr. Jeffcut that Scholar Chips had been found nonresponsive. According to Mr. Jeffcut, he told Ms. Manigo at that time that Scholar Chips intended to appeal the award to Media Flex and she advised that the deadline for appeal was December 20th. Ms. Manigo denies that she ever advised Mr. Jeffcut or Scholar Chips that their deadline for protesting was December 20th.

In any event, on December 6, Ms. Manigo faxed Scholar Chips a document entitled, "DETERMINATIONS AND FINDINGS", which indicated that Scholar Chips was nonresponsive because it "did not conform with the requirements of Part III, Section 2. Scholar Chips did not indicate or acknowledge their understanding of the requirements contained in the paragraphs of Section 3 (General Mandatory Requirements), by responding to the requirement immediately following the respective paragraph, as instructed." (Record, p. 22).

Because of illness, Mr. Jeffcut did not pick up the written determination of nonresponsiveness until December 8th. On that day he also contacted a Columbia law firm, outlined the facts of Scholar Chips' case and asked the firm to file Scholar Chips' protest. According to Mr. Jeffcut, the attorneys agreed to undertake representation of Scholar Chips. Mr. Jeffcut testified that he told Scholar Chips'

attorneys at that time and later that Ms. Manigo said December 20th was the last day to file Scholar Chips' protest.

According to Mr. Jeffcut, Scholar Chips' attorneys contacted him on December 11th and advised that, because of a conflict of interest, they could no longer represent Scholar Chips.

The next day Mr. Jeffcut contacted a second Columbia law firm and requested that that firm file Scholar Chips' protest and represent it. According to Mr. Jeffcut, the second law firm agreed and he told them of the facts of Scholar Chips' case, including Ms. Manigo's alleged advice about the deadline for filing the protest.

On December 13, Mr. Jeffcut had a follow-up meeting with Scholar Chips' new attorneys at which he directed them to file the protest at the earliest opportunity. Mr. Jeffcut testified that, again on December 14, he told the attorneys to file the protest as soon as possible and was advised that the protest was ready to go.

Ms. Shirley K. Moss, an employee of Scholar Chips testified that she contacted Scholar Chips' new attorneys on December 18th to find out whether the protest letter had been delivered and, if not, to direct that it be sent as soon as possible. She called the attorneys again on December 19th and also Ms. Manigo and learned that the letter had not been sent. On December 20th, she called the attorneys and learned that the letter had been

hand-delivered to state procurement. She also called Ms. Manigo on that date to verify delivery.

The record indicates that the CPO received Scholar Chips' protest dated December 19th on December 20, 1989. (Record, pp. 11-12). The Intent to Award was rescinded on December 20th in response to Scholar Chips' protest. (Record, p. 16).

The CPO in his decision dated January 16, 1990, held that the protest of Scholar Chips was not timely under S.C. Code Ann. § 11-35-4210(1)(1976), which requires that a protest be filed within ten days of the date the protestant knows or should have known of the facts giving rise to his protest. The CPO found that Scholar Chips knew or should have known of its grounds for protest on December 6th when Ms. Manigo faxed a copy of the determination of nonresponsibility to it.

Scholar Chips appeals this finding of untimeliness to the Panel.

CONCLUSIONS OF LAW

Scholar Chips concedes that it did not file its protest within the ten-day limit set forth in S. C. Code Ann. §11-35-4210(1)(1976).[1] Rather it argues that the ten-day

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[1]That section provides: "Any actual or prospective bidder... who is aggrieved in connection with the solicitation or award of a contract may protest . . . . The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or

(Footnote Continued)

limit should not be applied in this case but should be waived for good cause. In making this argument, Scholar Chips is mindful that it is arguing against past decisions of the Panel which hold that the ten-day limit is jurisdictional and may not be waived.

This case presents no reason to reverse or modify the Panel's previous decisions on this issue and and the Panel holds that In re: Protest of Oakland Janitorial Service, Inc., 1988-13, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 533, is controlling in this case.

In Oakland, the protestant argued that the State should be estopped to assert the ten-day limit because a state procurement specialist erroneously advised it of the final date for protest. In refusing to apply waiver or estoppel, the Panel held:

> Oakland's argument raises an issue of first impression for the Panel - whether the ten-day period for filing protests set forth in section 11-35-4210 should be considered an absolute bar or whether it may be waived by the consent or conduct of the parties.
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> Generally, in the absence of statutory language to the contrary, perfection of a review proceeding within the time limited by statute or rule is jurisdictional. Where the appeal is not taken within the time provided,

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(Footnote Continued)
should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

> jurisdiction cannot be conferred by consent or by waiver. See, 4 Am. Jr. 2d, Appeal and Error, 292. The South Carolina Supreme Court has long considered its ten-day period for filing a Notice of Intent to Appeal jurisdictional because "it is important to the administration of justice that there be no uncertainty" about when a matter has come to an end. Palmer v. Simons, 107 S.C. 93, 92 S.E. 23 (1917).
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> The ten-day period for filing protests of the decisions of the state in procurement matters set forth in section 11-35-4210 is unconditional. There are no qualifying words such as "except for good cause shown." The Panel believes that it is essential to the operation of the government that challenges to its purchasing decisions be limited. If the time for filing protests can be waived, the State will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without the danger of being liable to another vendor.
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> The Panel believes that in approving section 11-35-4210 as written the General Assembly recognized that, despite the hardship which might occasionally arise from strict application of the time period, on balance, the public is better served if there are definite limits to the right to challenge state procurement decisions. For these reasons, the Panel finds that the time for filing protests set forth in section 11-35-4210 is jurisdictional and may not be waived by conduct or consent of the parties.

Oakland, p. 540-541.

Additionally, the Panel finds in the case at bar, that, even if the filing period were not jurisdictional, Scholar Chips has not shown that the State should be estopped from

asserting the time limitation or that it should be waived. As stated in Oakland:

> In Freeman v. Fisher, 341 S.E.2d 136 (1986), the South Carolina Supreme Court summarized the defense of estoppel as follows:
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> To successfully assert the defense of estoppel, one must show that he was without knowledge, or any means of knowledge, of facts upon which he predicates a claim of estoppel. . . . Respondent's counsel could have discovered his erroneous construction of the statute by simply reading the plain language of the statute. The failure of one party to call to the attention of another party a fact equally within the knowledge of both forms no basis for an estoppel. . . Moreover, estoppel may not be invoked to nullify a mandatory statutory restriction. . . . A party cannot claim reasonable reliance on a representation by another in the face of a clear statutory mandate. (Emphasis added). 341 S.E.2d, at 137.
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> Further in Lovell v. C. A. Timbes, Inc., 263 S.C. 384, 210 S.E.2d 610 (1974), the Supreme Court noted that ignorance of the requirement of filing within a certain time is no legal excuse for failure to file within the time.

Oakland, pp. 541-542.

The mandatory time for filing protests is set forth plainly in § 11-35-4210 for anyone who chooses to read it. The evidence in this case is that Scholar Chips was represented by no less than two law firms during the time

the ten-day limit was running.[2] Scholar Chips had more than ample means to apprise itself of its protest rights without relying on the alleged misstatements of the State procurement officer. The Panel holds that Scholar Chips' cannot claim estoppel or waiver in this case under the holdings of the South Carolina Supreme Court in Freeman and Lovell.

As part of its case before the Panel, Scholar Chips moved that the Panel exercise its special authority to hear this case without the need of a protest. This jurisdiction is given by §11-35-4410, which states:

> There is hereby created the South Carolina Procurement Review Panel ... which shall be charged with the responsibility of providing an administrative review of formal protests of decisions . . . or 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 provisions of this code and the ensuing regulations.

The Circuit Court has interpreted this section to allow the Panel to hear the merits of a decision by the CPO even though the parties had appealed only the remedy. In re: Florence Crittendon Home, Order of Judge John Hamilton

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[2]Both of the law firms involved have appeared before the Procurement Review Panel on more than one occasion and should be well informed on the Procurement Code. Scholar Chips' present (and third) counsel was not secured until after the hearing before the CPO.

Smith, Decisions of the South Carolina Procurement Review Panel 1982-1988, pp. 112-113. The Panel has also exercised this authority to investigate and review a pending procurement. In re: Architectural Services Contract for the Replacement of Central Correctional Institute, Case No. 1989-5.

In support of its motion that the Panel review this case, Scholar Chips set forth certain allegations, most of which concerned events that occurred during the first attempted procurement of this contract. Even if true, none of these allegations rises to the level of those which prompted the Panel to investigate the matter of In re: Architectural Services Contract. Also in this case, unlike in Florence Crittendon Home or In re: Architectural Services Contract, the protestant failed to file its protest of the second RFP in a timely manner and it has never filed a protest of the first cancelled RFP. The special review authority of the Panel was not meant to be used by protestants to circumvent the time requirements of §11-35-4210(1).

The Panel recognizes that the General Assembly has given it broad review authority where state procurements are concerned. However, that authority is discretionary. The Panel chooses not to exercise it in this case.

For the reasons set forth above, the Panel affirms the January 16, 1990, decision of the Chief Procurement Officer and dismisses the protest of Scholar Chips Software, Inc.

IT IS SO ORDERED.

South Carolina Procurement
Review Panel

By: _____
Hugh K. Leatherman, Sr.
Chairman

April 10th, 1990 ~~1988~~
Columbia, South Carolina