

<b>State of South Carolina</b>	)	<b>Before the Chief Procurement Officer</b>
	)	
<b>County of Richland</b>	)	<b>Decision</b>
	)	
<b>In Re:</b> SC Office of Regulatory Staff vs. Country World Productions, Inc. dba U.S. Captioning Company	)	<b>Case 2009-218</b>
	)	
<b>Contract Controversy:</b> Contract 4400000254, Real Time Closed Captioning of News Broadcasts	)	<b>Posted: February 19, 2009</b>
	)	<b>Mailed: February 19, 2009</b>
	)	
_____	)	

The South Carolina Consolidated Procurement Code provides the exclusive means of resolving a controversy between a between a governmental body and a contractor which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession. The South Carolina Office of Regulatory Staff (ORS) requested resolution of a contract controversy arising from Contract 4400000254, Real Time Closed Captioning of News Broadcasts awarded to Country World Productions, Inc. dba U.S. Captioning Company (CW). (Attachment 1) The Chief Procurement Officer held a hearing with regard to this matter on February 2, 2009. Present at the hearing were representatives from ORS, CW, and the Information Technology Management Office (ITMO).

### **Findings of Fact**

Solicitation Issued	January 4, 2008
Amendment 1	January 28, 2008
Amendment 2	February 12, 2008
Protest by SCAD	February 13, 2008
Amendment 3 Suspending Solicitation Process	February 14, 2008
CPO Decision	April 10, 2008
Appeal of CPO Decision	April 18, 2008
Procurement Review Panel Decision	June 17, 2008
Amendment 4 Restarting Solicitation	May 15, 2008
Protest by SCAD	May 21, 2008
Amendment 5 Suspending Solicitation Process	May 22, 2008
Amendment 6 Protest Resolved, Restarting Solicitation	June 23, 2008
Amendment 7 Extending Opening Date	July 1, 2008
Intent to Award	August 11, 2008
Protest by SCAD	August 21, 2008
Stay of Award	August 21, 2008
CPO Decision	September 12, 2008
Procurement Review Panel Decision	December 18, 2008
Contact Awarded	December 18, 2008
Issuance of Purchase Order by ORS	January 8, 2009
Initial Request for Contract Controversy Resolution	January 9, 2009
ORS Notification to CW Not to Proceed	January 9, 2009
Supplemental Request for Contract Resolution	January 20, 2009

## **Background**

This contract was awarded as a result of Invitation for Bids (IFB) 540000137, issued on January 4, 2008, to provide real-time closed captioning of news broadcasts. The Code requires that award be made to the responsible bidder offering the lowest responsive price. (§11-35-1520(10) and Regulation 19-445.2065) The solicitation required the contractor to begin real-time closed captioning of daily news broadcasts three times per day in each of the four major media markets; Trident, Pee Dee, Midlands, and Upstate within 30 days of award. (Exhibit 1 at page 11) The original solicitation and the subsequent award were protested and appealed to the Procurement Review Panel by the incumbent provider, the South Carolina Association for the Deaf (SCAD). In each case, the protest was denied. SCAD also protested Amendment 4 and subsequently withdrew that protest.

After resolution of all appeals, the final Statement of Award was issued, and a contract was formed, on December 18, 2008. The parties agreed to begin performance on January 19, 2009. On January 8, 2009; ORS attached purchase order Number 00397, dated January 7, 2009, along with a copy of the original solicitation, amendments, and CW's bid response, to an email that was sent to CW and ITMO. Neither CW nor ITMO were able to access the purchase order attached to the email and requested another copy from ORS. ORS refused to provide CW or ITMO a legible copy of the purchase order. A copy of the Purchase Order was presented at the hearing before the CPO. (Exhibit 4)

Also on January 8, 2009, CW requested a change order. In its bid (Exhibit 3 at page 4), CW indicated that it had arrangements with five television stations; WCBD-TV - Charleston, SC (Exhibit 6), WSPA-TV - Greenville, SC (Exhibit 7), WIS-TV - Columbia, SC (Exhibit 8), WYFF-TV - Greenville, SC (Exhibit 9), and WBTW-TV - Myrtle Beach, SC, through which it intended to provide 90.5 hours of captioning services. The requested change order was to add 19.5 hours of service per week (at the request of ORS) and transfer 16.5 hours per week allocated to WYFF to WSPA in the Upstate region and 24.5 hours per week allocated to WIS to another station in the Midlands region. CW indicated that the transfer of hours to other stations was related to problems WYFF and WIS were having terminating contracts with SCAD, the previous provider under this contract. On January 13, 2009, CW advised the ITMO procurement manager, Sam Hanvey that WIS would indeed be participating in the contract.

On January 9, 2009, ORS filed this request for resolution of a contract controversy complaining that CW was well aware of alleged relationships between SCAD and some major television stations in the State and misrepresented its ability to provide services through these stations when submitting its bid; that CW had an obligation under Regulation 19-445.2125(G) to determine the availability of the stations prior to submission of its bid, and that its failure to do so violates the obligation of good faith imposed by §11-35-30 of the Code. ORS also advised CW to take no further actions regarding this contract pending

resolution of the contract controversy filed with the CPO. In its supplemental filing on January 20, 2009, as clarified at the outset of the hearing before the CPO, ORS contends that the listing of the stations allegedly under contract to SCAD was a misrepresentation by CW warranting contract recession and that ORS refused to agree to any proposed contract change orders.

### **Discussion**

There was no requirement in the bid that specific television stations be utilized or that contracts be in place with the television stations prior to bid opening. In responding to Question 7 in Amendment one, the State made it clear that bidders were not required to utilize specific television stations. In response to Question 8 in the same amendment the State authorized the use of multiple stations in the same region. Further, in response to Question 10, the State reiterated that the award would be based on price alone without regard to the number of stations.

Four television stations are alleged<sup>1</sup> to currently be under contract to SCAD for the provisioning of closed captioning services; WIS - Columbia, WYFF - Greenville, WCSC - Charleston, and WBTW - Florence/Myrtle Beach. ITMO and ORS were aware of these alleged relationships well before the solicitation was issued, evidenced by a May 23, 2007 letter from ORS Deputy Director Katie Morgan to ITMO procurement manager Sam Hanvey. (Exhibit 16) CW included three of those stations, WIS, WYFF and WBTW, in its bid after receiving commitments via email (Exhibits 7, 8 & 9) that the stations would work with CW in the event CW were the successful bidder. Regulation 19-445.2125(G)(1) addresses the responsibility of subcontractors and clearly indicates that generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors. CW exercised due diligence by contacting the stations prior to bid submission and the issuance of the Intent to Award this contract to CW on August 11, 2008, is evidence that the State determined CW a responsible bidder, which would should have included any concerns about its subcontractors, since the responsibility of a contractor must be ascertained prior to notice of award or intent to award under §11-35-1810(1)<sup>2</sup> and Regulation 19-445.2125(D).<sup>3</sup> There is no basis for ORS' claim of misrepresentation nor a violation of Regulation 19-445.2125(G)(1) when the facts giving rise to the claim were well known to the State prior to a determination of responsibility by the State.

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<sup>1</sup> During previous appearances before the CPO, SCAD repeatedly claimed that the stations were under exclusive contract to SCAD, but refused to provide evidence of those contracts when requested by the CPO.

<sup>2</sup> §11-35-1810(1) Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.

<sup>3</sup> 19-445.2125.D. Duty Concerning Responsibility.

Before awarding a contract or issuing a notification of intent to award, whichever is earlier, the procurement officer must be satisfied that the prospective contractor is responsible. The determination is not limited to circumstances existing at the time of opening.

The fact that CW contacted the stations prior to submission of its bid and received assurance that the stations would work with CW in the event CW received the contract award and the fact that the solicitation did not require formal contracts with the stations prior to submission of the bid, is evidence of a good faith and the observance of reasonable commercial practices by CW. There is no basis for ORS' claim of a violation of the duty of good faith imposed by §11-35-30.

CW's bid indicated that it intended to provide 90.5 hours per week of captioning services. Apparently during discussions between the parties after award ORS requested CW increase the total number of hours to 115 per week. CW's bid also indicated that it would provide captioning services in the Midlands region through WIS and in the Upstate region through two stations, WYFF and WSPA. Both WIS and WYFF indicated that they were having contractual problems with their existing provider, SCAD. CW requested a change order increasing the number of captioning hours to 115, transferring the WYFF captioning hours to WSPA, and substituting another station in the Midlands region for WIS. ORS refused to consider this change order request pending a determination by the CPO that the State could enter into change orders in light of §11-35-1520(6) dealing with bid acceptance. The issues with WIS were apparently resolved and CW amended its change order request to delete the WIS substitution on January 13, 2009. ORS refused to consider the amended request.

First, §11-35-1520(6) addresses bid acceptance and evaluation. The admonition that bids be accepted unconditionally and without alteration or correction is intended to maintain the integrity of the bidding process and has no applicability to post award contract administration. If the Code intended to prohibit any deviation from the original bid, there would be no provisions for contract change orders or contract modifications. Any reliance on this section of the Code as a basis for denying a change order request is without merit. ORS actually requested an increase in the number of captioning hours per week beyond that stated in CW's bid which would have required a change order. A change order as provide in §11-35-310(4) is appropriate so long as it is not a change that modifies the general scope of the original solicitation or resulting contract.

### **Determination**

This matter is before the Chief Procurement Officer for an administrative review pursuant to Section 11-35-4230. "This section applies to controversies between a governmental body and a contractor . . . which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recession." Section 11-35-4320 sets forth the "[r]emedies available in a contract controversy brought under the provisions of Section 11-35-4230." According to that section, "[t]he appropriate chief procurement officer . . . may award such relief as is necessary to resolve the controversy *as allowed by the*

*terms of the contract or by applicable law.*" The only relief sought by ORS is rescission of the contract and, if circumstances allow, award to the next lowest responsive and responsible bidder. To support its request, ORS cites to Regulation 19-445.2125(G) (dealing with responsibility), Section 11-35-30 (good faith), Section 11-35-1520(6) (bid acceptance), Section 11-35-2210 (inspection of vendor's facilities), and case law regarding an action for negligent misrepresentation. As discussed above, these laws are not grounds for legal relief, except to the extent these laws might relate to the claim for negligent misrepresentation. Accordingly, to the extent ORS relies on these laws as separate grounds for relief, those claims are dismissed for failure to state a claim for which relief can be provided. Further, the CPO finds these laws were not violated.

ORS' argued its remaining claim as one for negligent misrepresentation with rescission of the contract as the appropriate relief.<sup>4</sup> Neither party provided much in the way of legal authority regarding the proof necessary to justify rescission of a contract on the grounds of misrepresentation. Nevertheless, misrepresentation is a ground for rescission. *Southeastern Associates, Inc. v. S-C Motor Inn Corp.*, 265 S.C. 339, 218 S.E.2d 422 (1975) ("We conclude that the misrepresentations as to the sewage system, alone, entitled the plaintiff to a rescission of its contract . . ."), *State Farm Mut. Auto. Ins. Co. v. Turner*, 303 S.C. 99, 399 S.E.2d 22 (Ct. App. 1990) ("A rescission of a contract is allowed when there is evidence of misrepresentation or concealment.").<sup>5</sup> Misrepresentation requires a false statement. E.g., *Smothers v. Richland Memorial Hosp.*, 328 S.C. 566, 493 S.E.2d 107 (Ct. App. 1997) ("*Smothers contends Dr. Brown's statements that there is 'nothing else left in you that shouldn't have been left in you' and that Smothers should not have any more problems are material misrepresentations upon which he relied when executing the release. However, Dr. Brown testified that he intended to leave the surgical clip in Smothers's body, and Smothers failed to prove this was a false statement. Furthermore, Smothers failed to prove that Dr. Brown's statement about Smothers's future condition was more than an honest expression of opinion.*"). The CPO finds that CW made no false statements. Accordingly, ORS' request is denied.<sup>6</sup>

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<sup>4</sup> "Rescission is an "abrogation or undoing of [a contract] from the beginning, which seeks to create a situation the same as if no contract ever had existed.'" *Boddie-Noell Properties, Inc. v. 42 Magnolia Partnership*, 344 S.C. 474, 544 S.E.2d 279 (Ct. App. 2000). Rescission is a remedy, not a cause of action. Rescission can be granted in an action for either tort or contract. ORS did not expressly allege or argue breach of contract. However, to the extent that a violation of the duty of good faith under section 11-35-30 might be grounds for a breach of contract action, the CPO finds that CW did not violate its duty of good faith. Even if it had, the CPO finds the equitable relief of rescission would not be an appropriate remedy on the facts alleged. If for no other reasons, rescission as a remedy for breach of contract is appropriate only if the breach is so substantial and fundamental as to defeat the purpose of the contract, which is clearly not the case here. *Davis v. Cordell*, 237 S.C. 88, 115 S.E.2d 649 (1960) ("Breach of a contract, to justify its rescission, must be so substantial and fundamental as to defeat the purpose of the contract.").

<sup>5</sup> See, generally, *Smothers v. Richland Memorial Hosp.*, 328 S.C. 566, 493 S.E.2d 107 (Ct. App. 1997), *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984), *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (Ct. App. 1983).

<sup>6</sup> As an aside, one issue raised relates to the refusal of ORS to agree to the request of CW to execute a change order with respect to the specific stations CW intends to use in each of the four designated media markets. A "Change Order" is defined as "any written alteration in specifications, delivery point, rate of delivery, period of performance,

Consistent with this order, the parties are encouraged to move forward expeditiously in performing their respective obligations under their contract.

For the Information Technology Management Office



Michael B. Spicer  
Chief Procurement Officer

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price, quantity, or other provisions of any contract. . . .” S.C. Code Ann. § 11-35-310(4). While the IFB (under section IV) asked that bidders identify providers of service in each of the media markets, including television stations and captioners, this information was sought only to facilitate an evaluation of the vendor's responsibility. The specific identity of each provider was not a material term of the agreement. (It would be ludicrous to think that a change order would be required before a captioner could be replaced or substituted if that was how the informational requirement was intended since captioners are often interchanged and commonly replaced throughout the performance of such a contract as conditions require.) However any doubt about the contract’s requirement was certainly clarified in Amendment One. See, Amendment One to the IFB at responses to questions 7, 8, and 10. The Amendment made very clear that the State did not require the bidder to utilize specific television stations in each of the four media markets nor was the successful bidder limited to only one station in each market and as a result, a substitution of stations or the changing of stations is not an alteration of the contract such that a change order is necessary. As a result, there is no need for a ruling on the matter of whether ORS should have consented to a change order *when none is required*. The issue is therefore dismissed.

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

**FILE BY CLOSE OF BUSINESS:** Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

**FILING FEE:** Pursuant to Proviso 83.1 of the 2008 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

**LEGAL REPRESENTATION:** In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).