

STATE OF SOUTH CAROLINA)
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COUNTY OF RICHLAND)
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In re:)
Protest of Companion Property &)
Casualty Insurance Company;)
Appeal by Rooney, McArthur &)
Suggs, Incorporated)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 2000-1

ORDER

This case came before the South Carolina Procurement Review Panel (Panel) for a hearing on March 23, 2000 on appeal by Rooney, McArthur & Suggs (RMS) of a decision by the Chief Procurement Officer (CPO) finding RMS a non-responsible bidder, sustaining the protest of Companion Property & Casualty Insurance Company (Companion) and canceling the award to RMS of a contract to provide 100% re-insurance on a fleet of vehicles maintained by governmental entities for the Insurance Reserve Fund. Present at the hearing were RMS, represented by John E. Schmidt, III, Esquire and Melissa J. Copeland, Esquire; Companion, represented by Daniel T. Brailsford, Esquire; and The Office of General Services of the Budget and Control Board (General Services), represented by Keith McCook, Esquire.

FINDINGS OF FACT

On October 25, 1999, the Materials Management Office(MMO) of the Office of General Services issued an invitation for bids (IFB) to provide 100% reinsurance on a fleet of vehicles maintained by governmental entities for the Insurance Reserve Fund. [Record pp. 14-39] Amendment No. 1 to the IFB was issued on November 3, 1999 [Record pp. 40-43] Amendment No. 2 to the IFB was issued on November 23, 1999. [Record pp. 44-50] Eleven bids were opened on December 7, 1999. [Record pp. 73-74]

RMS bid a total price of \$12,908,536.00 and Companion bid a total price of \$13,224,858.00. [Record p. 73] On December 13, 1999 MMO posted the notice of intent of intent to award to RMS. [Record p. 75] Companions protest of the intent to award was received by MMO on December 28, 1999.

The relevant portion of the IFB states "Any reinsurer submitting a bid ... must be licensed as insurer in the state of South Carolina." [Record p. 21] The relevant statutory law to be considered in this case is S. C. Code of Laws Ann. § 38-46-20 and § 38-46-30.¹ Companion's protest letter asserted the following issues relevant to this appeal: 1) RMS was not a responsible bidder because RMS is neither licensed nor otherwise capable of providing the reinsurance products specified in the invitation for bids and 2) If American Southern (American) is construed as the bidder then the bid was non-responsive since the Agency is not licensed in South Carolina as a re-insurance intermediary. The CPO sustained Companion's protest finding that while American is licensed in South Carolina as an insurer or reinsurer, RMS is not licensed as an insurer, a reinsurer, or a reinsurance intermediary manager. The CPO further found RMS to be a non-responsive bidder and instructed the State Procurement Office to cancel the award to RMS and determine the next lowest responsive and responsible bidder.

RMS's appeal is based on the following three issues: 1) Companion Property & Casualty Insurance Company lacked standing to protest, 2) The CPO's decision is clearly erroneous, arbitrary, and capricious in that RMS was not required by the Solicitation of by law to be a licensed reinsurance intermediary-manager, and 3) RMS

¹ Chapter 46, The Reinsurance Intermediary Act, Title 38 of the South Carolina Code of Laws was not included in the record. However, it was made available for review by the Panel and all parties at the hearing.

was in fact the lowest responsive and responsible bidder. RMS further submitted a motion to dismiss on the ground that Companion Property & Casualty Insurance Company lacked standing to protest.

CONCLUSIONS OF LAW

MOTION TO DISMISS

RMS moves to dismiss the protest of Companion Property & Casualty Insurance Company dated December 2, 1999 on the grounds that the named protestor lacks standing to protest under S. C. Code of Laws Ann. § 11-35-421 (1) in that it was not an “actual bidder” or offeror as required by law. In support of this motion RMS asserts that a bid was submitted by, signed by, and the South Carolina vendor preference was claimed by Companion Property & Casualty Insurance **Group**. RMS further asserts that Companion’s protest should be dismissed because the bid of Companion Property & Casualty Insurance **Group** was submitted by a bidder which is not a legally cognizable entity, lacks the capacity to contract, has no license whatsoever in South Carolina, and is not a resident vendor. RMS presented a certificate of No Record from the Secretary of State in regards to Companion Property & Casualty Insurance Group and submitted Case No. 1990-4, *Protest of ACMG, Inc.*, for review by the Panel.

Companion Property & Casualty Insurance Company asserts that under S. C. Code of Laws Ann. § 38-55-20 an insurer may elect to use a trade name in the conduct of its business if the insurer also clearly discloses it’s proper or corporate name on it’s policies, contracts of insurance, and other documents filed with the Department of Insurance. Companion further asserts that the bid submitted under Companion’s trade

name, Companion Property & Casualty Insurance Group, was binding upon Companion Property & Casualty Insurance Company, the actual bidder.

MMO and Companion contend that Case No. 1990-4, *Protest of ACMG, Inc.* is distinguishable from the present case because that case dealt with two separate companies one based in Ohio and the other based in South Carolina. The Panel agrees.

The Panel finds persuasive three sections of the record as follows: 1) Companion uses a letterhead showing Companion Property & Casualty Insurance Group and Companion Property & Casualty Insurance Company in the upper left hand corner (Record p. 61), 2) Companion's Monthly Financial Report contains headings with both Company and Group in it (Exhibit #10, Record pp. 78-80) and 3) Companion's Articles of Incorporation are in the name of Companion Property & Casualty Insurance Company (Record pp. 87-89). The Panel finds that Companion Property & Casualty Insurance Group is a trade name of Companion Property & Casualty Insurance Company, the actual bidder with standing to protest. The motion to dismiss on the grounds that the named protestor lacks standing is hereby denied.²

ISSUE TWO: APPLICABILITY OF THE REINSURANCE INTERMEDIARY ACT

RMS contends that it was not required by the solicitation or by law to be a licensed reinsurance intermediary-manager. S. C. Code of Laws Ann. § 38-46-20 provides the following:

- (6) Reinsurance intermediary-broker means a person, other than
an officer or employee of the ceding insurer, who solicits,

² RMS submitted a motion to dismiss Companion's protest for a lack of standing. Therefore, the Panel considers the denial of the motion to dismiss as the ruling on ISSUE ONE of RMS's appeal which was also based on standing.

negotiates, or places reinsurance cessions or retrocessions on behalf of a ceding insurer without the authority or power to bind reinsurance on behalf of a ceding insurer without the authority or power to bind reinsurance on behalf of the insurer.

- (7) Reinsurance intermediary-manager means a person who has authority to bind or manage all or part of the assumed reinsurance business of a reinsurer, including the management of a separate division, department, or underwriting office, and acts as an agent for the reinsurer whether known as a reinsurance intermediary-manager or other similar term.

In support of this contention by RMS, Gerald M. Finkel, Esquire, was qualified as an expert witness in the area of Insurance Law. Mr. Finkel testified that he had read the relevant statute and was of the opinion that RMS did not qualify as a broker or as a manager under the Reinsurance Intermediary Act. Mr. Finkel further stated that he was of the opinion that RMS did not need a reinsurance intermediary license to submit a bid with American as they did under the facts of this case.

General Services contends that RMS was required to hold a reinsurance intermediary license. Gwen Fuller, Esquire, of the South Carolina Department of Insurance issued an opinion letter and testified that after considering the information obtained from General Services, it appeared to her that RMS was acting as a reinsurance intermediary-manager. However, Ms. Fuller declined, at the hearing before

the Panel, to make a definitive determination as to whether the bid relationship between RMS and American fell under the Reinsurance Intermediary Act.

The panel finds that under the terms of Solicitation No. 00-S2641 RMS was not required to have a reinsurance intermediary-manager or broker license. The panel recognizes that relevant statutory law must be considered and followed in conjunction with the Procurement Code. The Reinsurance Intermediary Act became effective in 1992 and it appears that this statute may affect the process by which some insurance contracts will be solicited. The Panel suggests that in the future General Services make a determination prior to issuing IFB's in the area of insurance as to whether this statute must be adhered to and include necessary provisions in the specifications informing vendors.

ISSUE THREE: WHETHER RMS WAS RESPONSIVE AND RESPONSIBLE

RMS and American Southern assert that they submitted a joint bid for Solicitation 00-S2641 (See Record p. 51). Mr. Virgil Carlsen was qualified as expert in State Procurement. Mr. Carlsen testified that nothing in the code or the solicitation in question prohibits an agent from bidding jointly with an insurance company. Mr. Carlsen pointed out that the solicitation itself contains a form that requires the Agency Name and the Company Name. [Record p. 55] S. C. Code of Laws Ann. § 11-13-20, Purpose and Policies of the Consolidated Procurement Code, states in part the following:

- (f) to ensure fair and equitable treatment of all persons who deal with the procurement system which will promote increased public confidence in the procedures followed in public procurement.

Mr. Carlsen further testified that re-bidding a contract under these circumstances could harm the state because vendors may lose faith that the state will offer free and open competition. Under the current solicitation nine of the eleven bids were from agencies acting as joint participants with insurance companies.

RMS further introduced into evidence the prior contract for 100% reinsurance on a fleet of vehicles maintained by governmental entities for the Insurance Reserve Fund. Under that contract the Davis Garvin Agency was awarded the contract as the agent and American Southern was the insurance company.

General Services and Companion contend that the joint bid characterization by RMS and American Southern raises a new issue which is not properly before the Panel. The Panel disagrees. The Panel declines to recognize that a joint venture was entered into by RMS and American, but finds that they were joint participants in submitting the bid to the State which goes to the issue of responsiveness and responsibility. This issue is properly raised in RMS's appeal.

The relationship between the agent and insurance company was clear and acceptable to General Services in 1987 and the same type of relationship is at issue in the present case. The Panel finds Rooney, McArthur & Suggs, Agent, and American Southern Insurance Company, Company, responsive to the IFB because all of the relevant forms were completed and submitted in their proposal. [Record pp. 51-58]

The Panel further finds Rooney, McArthur & Suggs, Agent, and American Southern Insurance Company, Company, responsible because American is licensed as an insurer in the State of South Carolina as required by the IFB. [Record p. 57]

A moral obligation is a duty which is valid and binding in conscience and according to natural justice, but is not recognized by the law as adequate to set in motion the machinery of justice; that is, one which rests upon ethical considerations alone, and is not imposed or enforced by positive law. Black's Law Dictionary 556 (5th ed. 1983). The Panel finds that the State has a moral obligation to honor the vendor preference it gave to the RMS-American bid. There is evidence in the record that American sought guidance from General Services as to how the South Carolina vendor preference could be obtained. American received information from General Services and thereafter relied on it.

CONCLUSION

For the foregoing reasons, the decision of the Chief Procurement Officer is reversed, the Panel finds that RMS met it's burden of proof, and the State is hereby ordered to reinstate the award of Solicitation 00-S2641 to RMS.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY:


C. Brian McLane, Vice Chairman

Columbia, SC

April 20, 2000