

South Carolina Procurement Review Panel

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July 15, 2002

To Whom It May Concern;

Enclosed you will find a copy of the Panel Order in Case No. 2002-9. This is a copy of the original signed Order and there are some minor typographical and technical corrections, but the substance of the Order is the same as the previously distributed one.

Sincerely,

A handwritten signature in black ink that reads "Emily Howard". The signature is written in a cursive, flowing style.

Emily Howard,
Attorney for the Panel

cc: Keith McCook, Esq.
John Schmidt, Esq.
Michael Montgomery, Esq.

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	
)	
)	CASE NO. 2002 - 9
In re:)	
Protest of PS Energy)	
)	ORDER
Appeal by PS Energy)	
)	

This case came before the South Carolina Procurement Review Panel ("Panel") for a hearing on June 25, 2002 on appeal by PS Energy ("PSE") of a decision by the Chief Procurement Officer ("CPO"). Present and participating in the hearing before the Panel were PSE, represented by John E. Schmidt, III, Esquire and Melissa J. Copeland, Esquire, ONYX-Mansfield ("Mansfield"), represented by Michael H. Montgomery, Esquire and the CPO for Goods and Services, represented by Keith McCook, Esquire.

FINDINGS OF FACT

On January 11, 2002, the Materials Management Office ("MMO") issued a request for proposals ("RFP") to procure services for a Fuel Management System including a fuel card for use by all state employees, statewide. The scope of the RFP covered a global solution to the State's procurement of gasoline. On January 24, 2002, MMO conducted a pre-proposal conference. On February 5, 2002, MMO issued Amendment No. 1. On February 22, 2002, MMO opened the proposals. A committee evaluated the proposals and the total scores received by the offerors were as follows:

<u>Offeror</u>	<u>Score</u>
Mansfield	6731
PSE	6666

On March 22, 2002, MMO posted its notice of intent to award to Mansfield. On April 3, 2002, the CPO received PSE's letter of protest. On April 26, 2002, the CPO's decision was posted. All protest issues raised by PSE were denied. On May 6, 2002, PSE appealed the decision of the CPO to the Panel.

CONCLUSIONS OF LAW

STIPULATION

PSE's appeal letter contained in pertinent part the following four issues:

- 1) Mansfield was a non-responsible bidder. Mansfield does not have the material resources, qualifications and experience they professed to have in their bid ... Mansfield's proposal contained a material misrepresentation of its capabilities regarding the Wright Express ("WEX") card.
- 2) Mansfield's proposal was non-responsive to mandatory and essential requirements of the Solicitation. Mansfield was non-responsive to sections 6.6 and 6.7 of the RFP.
- 3) Mansfield's misrepresentations and omissions rendered this evaluation arbitrary and capricious. Scoring by the evaluators in Sections 7.3 and 7.5 was rendered arbitrary and capricious because each evaluator impermissibly and due to Mansfield's misrepresentations and omissions evaluated Mansfield on their purported ability to use WEX cards. Due to Mansfield's material omissions from their proposal, the evaluators could not have scored Mansfield's proposal based on the mandatory and essential contents of the proposal itself.
- 4) Mansfield's proposal cannot form the basis for the contract with the State ... Mansfield's proposal was so incomplete in regard to statewide coverage, that there is no meeting of the minds with regard to the most essential component of this job - coverage ...¹

¹ PSE withdrew issue number four upon acceptance of the stipulation by the Panel.

At the beginning of the Panel hearing, the parties submitted a stipulation that misrepresentation was not a matter of responsiveness, not a matter of responsibility, and not a matter that makes the evaluators' actions arbitrary or capricious. Instead, misrepresentation is a matter of Good Faith and should result in rejection of a bid/proposal when the misrepresentation is made in bad faith or materially influences an agency determination or evaluation. The Panel accepted the stipulation and the first three issues stated above with minor modifications remained for consideration.²

MOTIONS

The CPO made a Motion in Limine, joined by Mansfield, to dismiss as untimely an issue alleged in PSE's June 24, 2002 Hearing Memorandum with regard to Mansfield misrepresenting the number of locations of which the WEX card could be used. The CPO argued that the only issue of misrepresentation raised by PSE in its protest letter was that Mansfield misrepresented its "capabilities regarding the WEX card," and "indicated they were authorized to use products offered by WEX... ." The Panel found that the issue regarding Mansfield misrepresenting the number of locations at which the WEX card could be used was sufficiently incorporated in PSE's timely allegation that Mansfield's proposal contained a material misrepresentation of its "capabilities regarding the WEX card" and particular enough to give notice that this issue would be decided. The Panel denied this motion.

² Issue number one addresses misrepresentation with no reference to responsibility. Issue number two addresses Mansfield being non-responsive to section 6.6 of the solicitation. Issue number three addresses arbitrary and capricious scoring by the evaluators.

Mansfield made a Motion to Dismiss, joined by the CPO, PSE's issue regarding misrepresentation because there was no misrepresentation. Mansfield argued as persuasive authority the following: "The general rule is that [torts based on misrepresentation] must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events." *Tom Hughes Marine, Inc., v. Honda*, 219 F.3d 321 (2000). The Panel found that PSE's issue regarding Mansfield's misrepresentation presented questions of fact to be determined by the Panel during the course of the de novo hearing. The Panel denied this motion.

Mansfield made a Motion to Dismiss as untimely, joined by the CPO, any new matter raised in PSE's appeal letter, specifically, an issue regarding the Notice of Intent to Award not being properly posted. The Panel found that no issue relating to the posting of the Notice of Intent to Award was raised in PSE's protest letter and that the CPO addressed no such issue. The Panel granted this motion.

Mansfield made a Motion to Dismiss as vague, joined by the CPO, PSE's issue regarding Mansfield's responsiveness to section 6.6. of the RFP. Mansfield argued that this issue was not stated with enough particularity to give notice of information as to how or why PSE contended that Mansfield failed to respond to this section which contains multiple requirements and that the issue was so vague as to be jurisdictionally defective. PSE argued that this issue was sufficient to put Mansfield on notice as to the issue to be decided. The Panel agrees. Further, PSE argued that the Panel has long held that "so long as a Protestant raises the general nature of its grounds, the Panel believes that it is proper that the specifics of such grounds be developed before the CPO." *Protest of MEGG Corporation of Greenville, Case No. 1992-9*. The Panel stated in *MEGG* that "whether a protest is specific enough ... is not to be judged on highly technical or formal standards." The Panel concluded that PSE met the bare minimum of what is required under §11-35-4210 (2) in articulating this issue. The Panel denied this motion.

ISSUE I: DID MANSFIELD'S PROPOSAL CONTAIN A MATERIAL MISREPRESENTATION
OF ITS CAPABILITIES REGARDING THE WEX CARD?

PSE argued that Mansfield made a material misrepresentation about its then current relationship with WEX by providing in its proposal that: *"ONYX Mansfield will be the Prime Contractor and will be working with either of these companies and our price will be the same, no matter which card is used,"* [Record p. 103] and by indicating as follows in the Joint/Subcontractor section of its proposal: *"Joint Venture for the Fleet Card has been intentionally left blank until the State decides which card they want to use whether it is Wright Express or Voyager."* [Record p. 154] Further, PSE contended that it was undisputed that as of the time of its proposal submission, Mansfield did not have the authority to make a binding offer of the WEX card, yet the above stated sections clearly indicate that such a relationship was in place as of that time.

At the close of the appellant's case-in-chief, Mansfield, joined by the CPO, made a Motion to Dismiss Issue I.³ No present or pre-existing fact was presented at the hearing before the Panel that supported this allegation of misrepresentation. The Panel found that this issue was predicated on unfulfilled promises or statements as to future events and in the absence of any evidence that Mansfield intentionally made false statements of fact this argument must fail. The motion was granted.⁴

³ Mansfield made a Motion for a Directed Verdict which the Panel treats as a Motion to Dismiss for failure to meet the burden of proof. (See *Protest of MTC Service Maintenance, Case No. 1997-2*)

⁴ PSE also asserted that Mansfield misrepresented 3892 WEX facilities as the number of locations and analyzed through use of the WEX card. PSE stated this number is false as it contains many duplicates. This allegation is not addressed in the body of the Panel's Order because the Motion to Dismiss the underlying issue of misrepresentation was granted. However, the Panel notes that PSE failed to meet its burden of proving this allegation beyond a preponderance of the evidence. In fact, PSE's own witness, Livia Whisenhunt, cleared up the reason for duplicates in the list submitted by Mansfield which was obtained from WEX's website when she testified that locations with pay-at-the-pump and pay-inside capabilities are listed separately although they are located at one facility.

**ISSUE II: WAS MANSFIELD'S PROPOSAL NON-RESPONSIVE TO MANDATORY
AND ESSENTIAL REQUIREMENTS OF THE SOLICITATION,
SPECIFICALLY SECTION 6.6 OF THE RFP?**

South Carolina Code §11-35-1410 (7) provides the following:

Responsive bidder or offeror means a person who has submitted a bid or offer which conforms in all material aspects to the invitation for bids or request for proposals.

South Carolina Code Annotated Regulation 19-445.2070 (A) provides:

Any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected.

PSE contends that Mansfield's proposal was not responsive to the following (stated in relevant part) mandatory and essential section of the RFP:

6.6 ... Therefore, in order for an offeror to be considered, they must document that they have (card provides access to) currently existing within the State of South Carolina at least one thousand five hundred (1,500) facilities, currently capable of transmitting level 3 data. Among these one thousand five hundred (1,500) facilities the State requires a minimum of five (5) sites in each of the forty-six (46) separate counties which are open twenty-four (24) hours a day, seven (7) days a week. Additionally, offeror's card must provide similar access to commercial facilities nationwide. The total number of level 3 data capable commercial facilities must be at least ninety-five (95) percent of the total number of sites accepting the Offeror's card prior to contract implementation ... Offeror must submit with their proposal, documentation of compliance with this requirement. This documentation shall include a complete list including the site name, address, and brand affiliation where applicable, the total number of currently available commercial facilities, and the total number of these facilities capable of transmitting level 3 data ...

PSE presented testimony that Mansfield did not provide a complete list including the site name, address, and brand affiliation where applicable, the total number of currently available commercial facilities, and the total number of these facilities capable of transmitting level 3 data.

During the hearing before the Panel it was established that Mansfield provided documentation that WEX has a total of 3,892 facilities and that Voyager has a total of 5,319 facilities available in the State which accept their respective cards. Mansfield's documentation also provided that of these numbers the total number of level 3 facilities for WEX was 98% and 100% for Voyager. [Record p. 95] Further, Mansfield provided documentation of how many facilities are in each county of the State that accept the Voyager card. Mansfield did not provide the name, address, and brand affiliation for each site accepting the Voyager card. [Record p. 97] For sites accepting the WEX card, Mansfield provided a copy of a listing from WEX's website containing the name, address, and brand affiliation for 100 sites only. [Record pp. 98-101] However, Mansfield's proposal did provide the State with the websites for the WEX and Voyager cards and stated that full listings are available online. [Record p. 103]

The question to be decided by the Panel is, Was Mansfield's omission of the complete listings of the name, address, and brand affiliation for each site accepting these cards mandatory and essential or a minor informality?

South Carolina Code §11-35-1520 (13) provides in part the following:

Minor Informalities and Irregularities in Bids. A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, and the correction or waiver of which would not be prejudicial to bidders. The procurement officer shall either give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency when it is to the advantage of the State. Such determination shall be in writing.

The Panel has addressed what constitutes a minor informality as well as what is mandatory in prior cases. See *Protest of American Sterilizer Co.*, Case No. 1983-2 (failure to include a mandatory, enforceable affidavit of non-collusion is a minor informality), *Protest of National Computer Systems, Inc.*, Case No. 1989-13 (a requirement is not essential simply because the RFP states that it is mandatory) and *Protest of Gregory Electric Company*, Case No. 19-89-17(II) (failure to include documents regarding vendor's qualifications is a minor informality, despite being mandatory).

The term "essential" is defined by Black's Law Dictionary as that which is required for the continued existence of a thing. The Panel finds that the complete listings of the name, address, and brand affiliation for each site accepting these cards is not required for the continued existence of Mansfield's being responsive to the RFP. In keeping with the holding in *National Computer Systems* this requirement in section 6.6 of the RFP is not essential simply because the RFP states that it is mandatory. Further the Panel finds that Mansfield's omission was an immaterial variation from the exact requirements of the RFP having no effect or merely a trivial or negligible effect on total bid price, quality, quantity, or delivery of the supplies or performance of the contract, thereby, a minor informality. In fact, the State provided testimony through Wanda Dixon, State Procurement Manager for this Solicitation, on how Mansfield was determined to be responsive. This is a case where the State already has a contract for gasoline that includes the use of the WEX card, and the State knows the facilities where the WEX card is accepted.⁵ The Panel finds that the CPO's decision satisfies the writing requirement of §11-35-1520 (13) and that the waiver of this omission by the State would not be prejudicial to bidders.

⁵ The State having knowledge of what facilities in the State accept the WEX card is credible evidence that asking for a complete listing of such facilities in the current RFP is a matter of form.

The Panel takes this opportunity to reiterate its statement in *Protest of Gregory Electric Company*, Case No. 19-89-17(II) and once again *cautions the State's procuring agencies to review solicitation documents carefully to insure that only essential requirements are stated in absolute or mandatory terms so as not to [reduce] the effect of such language upon the [offerors]*.

**ISSUE III: WAS SCORING BY THE EVALUATORS RENDERED ARBITRARY
AND CAPRICIOUS DUE TO MANSFIELD'S MISREPRESENTATIONS AND OMISSIONS
BECAUSE EACH EVALUATOR IMPERMISSIBLY EVALUATED MANSFIELD
ON THEIR PURPORTED ABILITY TO USE WEX CARDS?**

PSE argued that Mansfield's misrepresentations and omissions rendered this evaluation arbitrary and capricious. Scoring by the evaluators in Sections 7.3 and 7.5 was rendered arbitrary and capricious because each evaluator impermissibly and due to Mansfield's misrepresentations and omissions evaluated Mansfield on their purported ability to use WEX cards. Due to Mansfield's material omissions from their proposal, the evaluators could not have scored Mansfield's proposal based on the mandatory and essential contents of the proposal itself.

The Panel established the basic framework for review of evaluator's conduct in *Coastal Rapid Public Transit Authority*, Case No. 1992-6 as follows:

The determination by the State [of] who is the most advantageous offeror is final and conclusive unless clearly erroneous, arbitrary, capricious or contrary to law ... The burden of proof is on [the protestant] to demonstrate by a preponderance of the evidence that the determination in this case has such flaws ... The Panel will not substitute its judgment for the judgment of the evaluators, who are often experts in their fields, or disturb their findings so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased.

PSE presented the testimony of only one evaluator, W. J. McCormack.⁶ Mr. McCormack testified about the process he used to evaluate and score the proposals. The Panel previously addressed the lack of bias of one evaluator in *Protest of First Sun EAP Alliance, Inc.*, Case No. 1994-11. In *First Sun* the Panel stated, "*First Sun questions the lack of bias of Dr. Frank Raymond, one of the evaluators. However, the Panel does not need to determine the issue of Dr. Raymond's alleged bias, because with or without bias, the outcome of the award is not effected. Nor has First Sun shown that Dr. Raymond's alleged bias in any way effected the scores of the other evaluators ... If Dr. Raymond's scores are removed from the totals, Family Service still has a higher total score than First Sun. Neither the RFP nor the law, requires a specific number of evaluators on the evaluation committee. Therefore, the results of the remaining four evaluators would be valid without Dr. Raymond's scores. If an evaluator's score is erroneous, arbitrary, capricious or even biased, but it does not effect the outcome of the award, [then] it may not effect the finality of the award. The Panel does not condone any actions of evaluators that are other than clearly fair and unbiased, but the Panel recognizes the State's need to procure goods and services in a timely manner.*"

Analogous with *First Sun*, PSE asserted that Mr. McCormack's scoring was arbitrary and capricious and could not have been derived based on the mandatory and essential contents of the proposal itself. Here the Panel does not need to determine the issue of Mr. McCormack's alleged arbitrary and capricious scoring, because with or without Mr. McCormack's scores, the outcome of the award was not effected. PSE did not show that Mr. McCormack's alleged arbitrary and capricious scoring in any way effected the scores of the other evaluators. If Mr. McCormack's scores are removed from the totals, Mansfield (Total Score 5793) still has a higher total score than PSE (Total Score 5711). [See Record pp. 222 and 223] Neither this RFP nor the law, requires a particular number of evaluators on an evaluation committee.

⁶ With the testimony of only one evaluator in evidence (whose scores become irrelevant when removed from the total), no evidence was presented for the Panel to address the allegation that the evaluation was arbitrary and capricious because the vendors were given equal scores though one fully complied with the laborious requirements of the RFP and the other did not.

Therefore, the results of the remaining six evaluators would be valid without Mr. McCormack's scores. At the close of the appellant's case the CPO, joined by Mansfield, made a Motion to Dismiss Issue III. This motion was based on Panel precedent and long standing law that harmless error is not grounds to reverse or in this case not grounds to find the evaluation arbitrary and capricious. Based on Panel precedent as set forth above, this motion was granted.

CONCLUSION

For the foregoing reasons, the appeal of PSE is dismissed, those portions of the CPO's decision consistent with the Panel's findings are upheld, and the State is ordered to proceed in a manner consistent with the Procurement Code.

IT IS SO ORDERED

SOUTH CAROLINA PROCUREMENT REVIEW PANEL

BY: Willie D. Franks
Willie D. Franks, Vice Chairman

Columbia, South Carolina

July 3, 2002.