

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL

ORDER

IN RE:)
)
Protest of Nalco Company;)
Appeal of Garratt Callahan.)

Case No. 2004-7

This matter came before the South Carolina Procurement Review Panel for a hearing on December 9, 2004. The Panel heard the matter on a request for review of the October 25, 2004, written determination of the Chief Procurement Officer (CPO). The CPO's order was appealed to the Panel by Garratt Callahan. At the hearing before the Panel, Nalco Company was represented by Elizabeth Crum, Esquire, and Edward Givens, Esquire. Garratt Callahan was represented by John Schmidt, Esquire. Keith McCook, Esquire, represented the Chief Procurement Officer.

All parties agreed at the time of the hearing to limit the appeal to the issue on which the CPO cancelled the award to Garratt Callahan: whether the evaluations of the proposed engineering improvements were clearly erroneous and contrary to law.

Pursuant to prior cases of this Panel, Nalco bears the burden of proof since the Panel hears the matter *de novo* and Nalco was the original protestant. In re: Protest of McCrory Construction Co., Inc.; Appeal by McCrory Construction Co., Inc., (Order for Motion to Change Panel Procedure), Case No. 1994-13 and Case No. 1995-7.

Findings of Fact

On May 3, 2004, the Materials Management Office (MMO) of the South Carolina Budget and Control Board issued a Best Value Bid seeking to procure water treatment services for The Citadel. On May 17, 2004 a pre-bid conference was held at The Citadel. On May 20, 2004, the

MMO issued Amendment 1 giving answers to the questions raised during the pre-bid conference. On May 24, 2004, the MMO issued Amendment 2 correcting some of the answers previously provided. On June 1, 2004, MMO opened the bids. The bids were then given to evaluators to consider and assess points pursuant to the provisions in the solicitation. As stated in the Best Value Bid, cost would account for up to 60% of the points awarded. Garratt Callahan was the low bid on cost and pursuant to the MMO formula received 60 points. Nalco received 51.31. Then, the evaluators graded the parties on experience, qualifications and references. Finally, the evaluators looked at the criteria at issue now -- Proposed Engineering Improvements -- which accounted for 10% of the awarded points.

Bidders could submit as many or as few proposed engineering improvements as they desired. The points, up to ten, were then given by the evaluators based on the evaluation of proposed improvement(s) submitted. Garratt Callahan submitted four proposed engineering improvements. In shortened form, Garratt Callahan's proposals included: seeking evaporation credit; switching to a solid bromine feed for the cooling towers; implementing an alternative for slug feeding the non-oxidizing biocide in the cooling tower to eliminate it being done by hand; and increasing the number of boiler cycles.

On July 30, 2004, the MMO posted an Intent to Award to Garratt Callahan. The total composite scores for the two parties were: Garratt Callahan 266.00 and Nalco 265.93. The other two companies had lower point totals and are not involved in this case. Nalco protested the award to the CPO. Nalco's contention was and continues to be that these are not improvements either because they were already taking place or they would not be feasible as proposed.

On October 25, 2004, the CPO found as a result of Nalco's protest that the evaluations had been erroneous because they awarded points to Garratt Callahan for items that were not "proposed engineering improvements."

Two of the three evaluators, Jack Voges and Bob Williamson, testified at the Panel hearing. Voges is the Boiler Supervisor at The Citadel and appeared to be the person most familiar with the boilers and water treatment for the school. He awarded Garratt Callahan six out of ten points for its proposed improvements. Bob Williamson is the Risk Management Officer for The Citadel and awarded Garratt Callahan eight out of ten points. Both explained the reasons for the points they gave Garratt Callahan. Both testified that they evaluated the bids based on their understanding of the criteria in the solicitation.

Conclusions of Law

"The purpose of best value bidding is to allow factors other than price to be considered in the determination of award for specific goods or services based on pre-determined criteria identified by the State." S.C. Code Ann. Section 11-35-1528 (2). "The best value bid shall state the factors to be used in determination of award and the numerical weighting for each factor." S.C. Code Ann. Section 11-35-1528 (5). These factors are considered by the evaluators assigned to evaluate the bid.

"Awards must be made to the responsive and responsible bidder whose bid is determined, in writing, to be most advantageous to the State, taking into consideration all evaluation factors set forth in the best value bid." S.C. Code Ann. Section 11-35-1528 (8). In this matter the evaluation found that bidder to be Garratt Callahan. The Panel has long-standing history that it will not re-evaluate a bid and will defer to the judgment of the evaluators.

The determination by the State 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.

In re: Protest of Santee Wateree Regional Transportation Authority; Appeal by Santee Wateree Regional Transportation Authority, Case No. 2000-5 (quoting Protest of Coastal Rapid Public Transit Authority, Case No. 1992-16.

Further, Santee Wateree cited other cases in which the Panel held this way. They are: Appeal of Travelsigns, Case No. 1995-8; Appeal of First Sun EAP Alliance, Inc., Case No. 1994-11; Appeal of NBS Imaging Systems, Inc., Case No. 1993-16; and Appeal of Coastal Rapid Public Transit Authority, Case No. 1992-16.

Nevertheless, in this case Nalco argues and the CPO found that the evaluators did not follow what was set out in the instructions for the evaluation process. The CPO found some points had been awarded in a clearly erroneous manner. We disagree. In reviewing the evidence in this case, it is clear that Nalco is asking this Panel to review the points given to Garratt Callahan for proposed engineering improvements. All of the evidence centered on the question of whether the proposal was actually an engineering improvement -- could it be done? Was it already being done? There was testimony and evidence to answer these questions both "yes" and "no." However, the evaluators were in the best position to determine how valid the proposed improvements were. For us to consider the testimony and review written evidence and then to decide if an "improvement" was offered by Garratt Callahan, would require this Panel to delve into areas of engineering improvement evaluation where all of the precedent says not to go.

Clearly, this would require the Panel to substitute its judgment for that of the evaluators. The evaluators were chosen because of their expertise or relationship to the water treatment system. We accept the points they gave for proposed engineering techniques. The CPO stated in

his order that all of Garratt Callahan's engineering improvements were undermined by the testimony. However, a preponderance of the evidence has not shown that the evaluations were erroneous or contrary to law.

"The Panel has held that the evaluation process does not need to be perfect so long as it is fair." Santee Wateree, supra (quoting NBS Imaging Systems, Inc., supra). Further, there has been no showing that the evaluators were arbitrary or capricious in their evaluations or were in any way biased.

Order

Based on the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that the award to Garratt Callahan be reinstated.

AND IT IS SO ORDERED.



Willie D. Franks

Vice Chairman, SC Procurement Review Panel

This 5th day of January, 2005