

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1983-5

IN RE:)
)
PROTEST BY GENERAL SALES COMPANY) O R D E R
INC.)
)
)

This matter is before the South Carolina Procurement Review Panel (hereinafter "Review Panel") for administrative review pursuant to Section 11-35-4210(5) and Section 11-35-4410(5), South Carolina Code of Laws (1976), as amended, as a result of a Determination issued by the Acting Materials Management Officer and a Request for Review of that Determination.

FINDINGS OF FACT

On or about February 4, 1983, the Medical University of South Carolina received bids for the purchase of "The Hobart No. 1712-R Meat Slicer or an acceptable equal". The specifications listed ten criteria or product requirements transposed directly from the specifications published by the Hobart Corporation for the No. 1712-R Slicer.

Bids were received from six bidders with two bidders submitting bids on the Hobart and on alternate products. The Protestant, General Sales Company, Inc., submitted a bid on the Hobart No. 1712-R Meat Slicer for \$2,375.00, on the Fleetwood No. 6125 for

for \$1,675.00 as Alternate No. 1, and on the Universal No. 8512 for \$1,495.00. The low bidder on the Hobart No. 1712-R Meat Slicer was Florence Restaurant Supply, Inc. with a bid of \$2,325.00.

The Medical University of South Carolina Procurement Officer determined that the Fleetwood No. 6125 and other alternates bid were not acceptable and not equal in quality, durability, and performance.

By letter dated May 6, 1983, the Protestant, General Sales Company, Inc., filed a Protest with the Acting Materials Management Officer alleging the use of (1) closed specifications, (2) biased information, and (3) lack of compliance with the requirements of the South Carolina Consolidated Procurement Code. A hearing was held on May 18, 1983, by the Acting Materials Management Officer and a Decision, dated May 26, 1983, was issued denying the Protest filed by General Sales Company, Inc., and finding that the specifications in issue were not unduly restrictive, that the rejection of the alternates was based on a consideration of ownership and operation, and that the applicable provisions of the South Carolina Consolidated Procurement Code and pertinent Regulations had been complied with.

A Request for Administrative Review was received by the Materials Management Office and was forwarded for filing with the Procurement Review Panel. By consent and Notice, the Administrative Review of the Decision issued by the Acting Materials Management Officer was held on June 29, 1983.

Senator Setzler disclosed to all parties that he had associated Protestant's legal counsel in an entirely unrelated matter and the Panel Chairman, Senator Leatherman, disclosed that he

had retained the Respondent's legal counsel on an entirely unrelated matter. No objections were made, and no motions for recusal were entered.

Section 11-35-1520(1), South Carolina Code of Laws (1976), as amended, requires that contracts of \$2,500.00 or more must be awarded by competitive sealed bidding. This contract was not required to be competitively bid. However, if the requirements of the Consolidated Procurement Code are voluntarily assumed, those requirements must be complied with.

The Invitation for Bids must include the specifications for the product sought and all contractual terms and conditions applicable to the procurement, Section 11-35-1520(2), South Carolina Code of Laws (1976), as amended. Only the evaluation criteria set forth in the Invitation for Bids may be used in the evaluation of the bid, Section 11-35-1520(7), South Carolina Code of Laws (1976), as amended. The contract is required to be awarded to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the Invitation for Bids, Section 11-35-1520(10), South Carolina Code of Laws (1976), as amended.

The term "specifications" is defined under South Carolina Consolidated Procurement Code Regulation 19-445.2140(4) as follows:

Specification means any description of the physical, functional, or performance characteristics, or of the nature of a supply, service, or construction item. A specification includes, as appropriate, requirements for inspecting, testing, or preparing a supply, service or construction item for delivery. Unless the context requires otherwise, the terms "specification" and "purchase description" are used interchangeably throughout the Regulations.

The purpose of specifications is to serve as the basis for procuring

a product or service which is both adequate and suitable for the State's needs in a cost effective manner taking into account:

- (1) Initial acquisition costs;
- (2) The cost of ownership; and
- (3) The cost of operation.

Specifications must clearly describe the State's requirements without being restrictive in nature. South Carolina Procurement Code Regulation 19-445.2140, Subsection B.

Sole Source Procurement is when there is only one source for the required product, Section 11-35-1560. South Carolina Procurement Code Regulation 19-445.2015, Subsection B, states that Sole Source Procurement is not permissible unless there is only one single supplier for the item or service sought. Since there are many suppliers for the Hobart Meat Slicer No. 1712-R, this obviously was not a Sole Source Procurement item.

The question was also raised during the hearing as to whether or not the specifications in question were Functional Specifications or Technical Specifications. Regulation 19-445.2140 (c) defines Functional or Performance Specifications as emphasizing functional or performance criteria while limiting the design or other detailed physical descriptions to those necessary to meet the needs of the State. Using agencies are required to attempt to include the principal functional performance needs to be met by the product or service sought. A Functional or Performance Specification requires a bidder to furnish an item that will perform a specific task rather than a carefully described item. A Functional or Performance Specification would describe pieces per hour, inches per minute, or some

other measurable output, and should set out the desired operating parameters, as well as weight limitations or dimensions if these are necessary. The Functional or Performance Specification describes the functions to be achieved by a product and the end result is the priority consideration.

A Technical Specification sets out the special needs of the purchaser. Technical Specifications state the specific tolerances, necessary dimensions, and any other information identifying critical performance characteristics and produce requirements with preciseness and accuracy.

A Design Specification is a detailed specification which sets out the requirements of the item to be purchased by detailing the characteristics that the product must possess. The specification is so detailed that it describes how the product is to be manufactured and is most commonly used in construction of buildings, highways, and structures of all kinds.

A Proprietary Specification is a specification analagous to the Brand-Name Specification. The criteria listed in such a specification can only be satisfied by one specific product. South Carolina Procurement Code Regulation 19-445.2140, Subsection A, Item 1, defines a Brand-Name Specification as meaning a specification limited to one or more items by manufacturers' names or catalogue number.

A "Brand-Name or Equal" Specification is a specification which uses one or more manufacturers' names or catalogue numbers to describe the standard of quality, performance, and other characteristics needed to meet the State's requirements and which provides for

the submission of equivalent products, South Carolina Procurement Code Regulation 19-445.2140, Subsection A, Item 2.

Specifications are clear and accurate detailed descriptions of the technical requirements for the purchase of supplies, equipment or services. Specifications define the minimum requirements for the quality and construction of a desired product. The specification before the Panel is a "Brand-Name or Equal" Specification. The technical requirements found in the specification were directly transposed from the manufacturer's product literature. The evidence before the Panel demonstrates that the product description was utilized in a restrictive manner. The bid of the Protestant appears, from the evidence on the record, to have been rejected due to minor differences in design, construction, and features which do not affect the suitability of the product for its intended use. "Brand-Name or Equal" Specifications should set out all known acceptable brand name products. The specification before the Panel did not list any other brand names. Where a purchase description is used, bidders must be given the opportunity to offer products other than those specifically referenced if those other products will meet the needs of the State in essentially the same manner as those referenced. It should always be clear that a "Brand-Name or Equal" description is intended to be descriptive not restrictive and is merely to indicate the quality and characteristics of the product that will be satisfactory and acceptable. Products offered as equal must, of course, meet fully the salient characteristics and product requirements listed in the Invitation for Bids.

In the case before the Panel, the alternate product, the

Fleetwood Model No. 6125, appears to be substantially similar and equivalent to the Hobart Model No. 1712-R Meat Slicer in characteristics and standards of quality.

Therefore, it is the finding of the Procurement Review Panel that while the specification in issue was not unduly restrictive, and biased information was not relied on in the award of the contract, the transposition of the exact characteristics of the Hobart Model No. 1712-R to the specifications in the Bid Invitation and the subsequent utilization of those absolute criteria in evaluating the alternate bid on the Fleetwood Model No. 6125 Slicer was restrictive and in violation of South Carolina Procurement Code Regulation 19-445.2140, Subsection B, in application.

CONCLUSIONS OF LAW

1. Under South Carolina Procurement Code Regulation 19-445.2140, the "Brand-Name or Equal" Specification before the Panel was not unduly restrictive.

2. That biased information was not utilized in making the product determination.

3. That the application of the criteria listed in the specification denominated as "Brand-Name or Equal" was violative of the intent of the South Carolina Consolidated Procurement Code and pertinent Regulation in that the Medical University of South Carolina did not use these specifications as establishing a trade-known range of quality, but rather applied those criteria strictly to secure a specific article.

It is the Decision of the Procurement Review Panel that the Protestant should have been awarded the contract under the

solicitation. The Protestant is ordered to submit an affidavit setting out those costs incurred in the preparation of its bid.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



SENATOR HUGH K. LEATHERMAN,
CHAIRMAN

July 21, 1983.