

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1984-6

IN RE:)
)
PROTEST BY MILLER TIRE SERVICE)
)
)
)

O R D E R

This matter is before the panel for administrative review pursuant to Sections 11-35-4210(5) and 11-42-4410(6), South Carolina Codes of Laws of 1976, as amended, as a result of a Determination issued by the Chief Procurement Officer for Materials Management and a Request for Review of that Determination.

FINDINGS OF FACT

1. The State Procurement Office on March 22, 1984, solicited competitive bids for tire recapping services for the South Carolina Department of Education. Bids were opened on April 10, 1984, and Miller Tire Service was the apparent low bidder.

2. Page 10 of the Bid Invitation sets forth requirements for testing the rubber proposed to be used. Under "Testing", Paragraph A, the Bid Invitation stated:

Recap Rubber samples of the apparent low bidder selected by the State, will be submitted for testing to an independent testing laboratory, also selected by the State. After evaluation, the contract will be awarded if the rubber passes the initial test. (Emphasis added).

3. Miller, the apparent low bidder, submitted a single sample of each of two types of rubber called for by the specifications. Upon testing by an independent laboratory, both samples failed to meet the specifications.

4. State Procurements then obtained samples from the second lowest responsible bidder, White Tire Company. Upon being tested, White's samples also failed to meet the specifications.

5. By the time both bidders' samples had been rejected, State Procurement became concerned that some provision needed to be made to insure that enough tires would be on hand for the opening of the school year. In order to meet the perceived need, State Procurement set up a meeting with Miller and White together on July 23, 1984, to determine under what circumstances, if any, the original solicitation and bids thereunder could be salvaged. At the meeting, however, it was disclosed by Miller that Miller had recapped enough tires under the old contract price to satisfy the immediate needs of the Department of Education. State Procurement nevertheless asked both White and Miller whether they would extend their prices under the March, 1984, solicitation, and both agreed to do so.

6. The disclosure that Miller Tire had continued to recap tires after the expiration of the old contract meant that time was no longer of the essence to the State of satisfy the Department of Education's needs.

7. After considering all information available to it, State Procurement concluded that in view of the failure of the samples of Miller and White to meet the specifications, the excessiveness of the third lowest bidder's price, and the lack of an urgent need for the tires, all bids should be

rejected. The Director of State Procurement set forth in written document dated August 3, 1984, his conclusion that all bids should be rejected. A second bid solicitation was sent out several days later.

8. A letter dated August 14, 1984, Miller protested the resolicitation. The Chief Procurement Officer concluded that the rejection of all bids and the resolicitation were both proper, and Miller appealed that decision to the Panel.

CONCLUSIONS OF LAW

1. Section 11-35-1520(7) provides in part that: "The invitation for bids shall set forth the evaluation criteria to be used. No criteria may be used in bid evaluation that are not set forth in the invitation for bids."

2. The original invitation for bids, as previously mentioned, provided that "the contract will be awarded if the rubber passes the initial test." It is undisputed that neither Miller's nor White's rubber passed the initial test.

3. Section 11-35-1710 provides in part that "an invitation for bids . . . may be cancelled, or any or all bids or proposals may be rejected . . . when it is in the best interest of the State."

4. The Panel concludes that the language quoted above from the specifications made it impossible for State Procurement to accord any competitor a second chance at testing its product. A second test would effectively use criteria different from those set forth in the specifications in violation of §11-35-1520(7).

5. Miller contends that the State's consideration of a joint award to Miller and White constituted a waiver of the failure of Miller's product to meet the testing requirement. The panel, however, concludes that the only reason for the State to have considered such an arrangement was the perceived urgency of the needs of the Department of Education, rather than on any alleged immateriality of the product's failure to pass the first test. Had such an award been made, it would have fallen under §11-35-1570 (Emergency Procurements), and would have required only "as much competition as practicable under the circumstances." Among the reasons for requiring the product to pass the initial test was to preserve competition under the specifications as then issued.

6. The Panel further concluded that State Procurement did not abuse its discretion in determining the the failure of Miller's product to pass the initial test was not subject to waiver under Regulation 19-445.2080. That regulation permits the waiver by the State of "minor informalities or irregularities." Such variations, by the terms of the regulation, are those which are merely matters of form or those having "trivial or negligible effect" on the price, quantity, etc. of the goods to be supplied. The failure of a product to meet the express testing requirements cannot be classed with the insignificant matters listed in or suggested by the aforementioned regulation.

7. For the foregoing reasons, the panel concludes that State Procurement properly rejected all bids and properly resolicited bids. The protest is accordingly denied, and the decision of the Chief Procurement Officer is confirmed.

AND IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

/s/ Hugh K. Leatherman
Senator Hugh K. Leatherman
For the Panel

Florence, S. C.
October 26, 1984