

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1988-14

IN RE : )  
PROTEST OF PITNEY BOWES, INC. )  
\_\_\_\_\_ )

O R D E R

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on January 5, 1989, on the protest by Pitney Bowes, Inc., ("Pitney Bowes") of the award to Major Business Machines, Inc., of a contract to provide a mail management system to the College of Charleston (the "College").

Present at the hearing before the Panel were Pitney Bowes, represented by Daniel Marino, Esq., of Seyfarth Shaw Fairweather and Geraldson and Robert Knowlton, Esq., of Sinkler & Boyd; the College of Charleston, represented by J. Patrick Hudson, Esq., of the South Carolina Attorney General's Office; and the Division of General Services, represented by Helen Ziegler, Esquire. Major Business Machines was present but not represented by counsel.

FACTS

On August 5, 1988, the College of Charleston issued an invitation for bids to provide a mail management system to service all its departments and personnel. The bid specifications provided in pertinent part:

LOT A

#1 Mail Machine with Seventy (70) Pound Electronic Scale that will:

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D. Use Ink reservoir system.

\* \* \*

#2 Mail Accounting System, both Hardware and Software, which will:

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D. Generate daily, weekly, monthly, and yearly transaction and summary reports (dollar volume and piece count). Reports must note postal class, department accounts, and amounts.

(Record, p. 50).

The College received two bids which were opened on September 5, 1988. The protestant Pitney Bowes bid \$29,203.25 to provide a system manufactured by it; Major Business Machines bid to provide a Friden Alcatel system for \$17,331.00. (Record, p. 56). The College determined that Major Business Machines was the lowest responsive and responsible bidder and issued the Intent to Award on October 12, 1988. (Record, p. 115).

On October 13, 1988, Pitney Bowes protested to the Director of Procurement for the College, David Sadler. (Record, p. 17). Mr. Sadler denied the protest on October 20 (Record, p. 114) and Pitney Bowes appealed to the Panel on October 28. (Record, p. 12-15).

By Order dated November 7, 1988, the Panel remanded the case to the CPO for hearing which was held on November 23,

1988.<sup>1</sup> The CPO issued his decision in favor of the College on December 7, 1988, and Pitney Bowes again appealed to the Panel on December 15, 1988.

Pitney Bowes claims that Major Business Machines' bid was not responsive to the specifications in two ways. First, Pitney Bowes claims that the Friden Alcatel machine does not meet the specification that the mailing machine use an "ink reservoir system".

Mr. James Cosby, area sales representative for Pitney Bowes, testified that Pitney Bowes' machine uses what is known as an "ink reservoir" system to deliver ink to the plate which imprints the postal stamp on mail. According to Mr. Cosby, this system is distinct from the type of system used by the Friden Alcatel machine bid by Major. That machine uses what is termed an "ink cartridge" system to deliver ink.

In the ink reservoir system the ink is stored in a well; in the ink cartridge system it is impregnated in the ink pad. To replenish the ink supply in the reservoir system

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<sup>1</sup>The case was remanded because Pitney Bowes directed its protest to the Director of Procurement at the College rather than to the CPO, as is required by S. C. Code Ann. §11-35-4210 (1976). The error was compounded when the College exceeded its authority and undertook to deny the protest. The Panel cautions all agency and state procurement agents of the need to be familiar with all aspects of the Procurement Code, including the proper protest procedures.

one pours ink from a bottle into the well; in the ink cartridge system, one replaces the pad.

Mr. Cosby testified that in the mailing machine industry, the terms "ink reservoir" and "ink cartridge" have specific meanings and are not interchangeable.<sup>2</sup> Mr. Cosby stated that around the same time the bid solicitation was being prepared he demonstrated the differences between the two systems to the College. According to Mr. Cosby, when he saw the term "ink reservoir" in the solicitation, he believed that only the ink well system would meet the bid specification.

In contrast, Mr. Don Major of Major Business Machines testified that there was no industry standard which would prevent Friden from referring to its cartridge system as a "reservoir." Mr. Major testified that he believed that Major Business Machines was in compliance with the bid specifications when it bid the cartridge system.

The College acknowledges that the inking systems of the two machines are different. It argues, however, that it did not intend a technical or industry meaning when it used the term "reservoir." Mr. David Sadler, Director of Procurement for the College, and Mr. Richard Bennett, the Information

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<sup>2</sup>In the record is an excerpt from the publication, What to Buy In Business, Volume 2, Number 10, which compares various mailing systems. That publication distinguishes between the ink reservoir and ink roller or cartridge system. (Record, pp. 43-44).

Technology Buyer, both testified that the College intended "reservoir" to include any system which stored ink. According to Mr. Bennett, the College did not want a machine which used carbon.<sup>3</sup> Mr. Bennett acknowledged that, at the time the solicitation came out, he was aware that Pitney Bowes attached a different meaning to "reservoir" than the College.

The College further argues that, because §11-35-2730 of the Procurement Code prohibits restrictive specifications, the words "ink reservoir" should not be interpreted according to alleged industry standards but so as to allow maximum competition.

Pitney Bowes second argument is that Major Business Machines' bid is not responsive because the Friden mail accounting system cannot produce daily, weekly, monthly and yearly reports as required by the specifications. Pitney Bowes claims that the Friden system has the capability to produce any three of the daily, weekly, monthly and yearly reports. In the record is a letter from Major Business Machines to the College of Charleston, which states:

Concerning being able to generate basic reports on a daily, weekly, monthly, and yearly with the Friden Mail Accounting System (MAC), the College of Charleston is able to generate reports at any time you choose. With the Friden Mail Accounting System you will be able to clear for three different

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<sup>3</sup>Mr. Bennett testified that he later learned that there are no machines which use a carbon system.

periods. I recommend you clear these totals daily, monthly, and yearly.

(Emphasis added) (Record, p. 84). Pitney Bowes also points to Friden's sales literature as confirming that Friden can only generate three of the four reports mentioned in the specifications.

Mr. Bennett testified that under the College's interpretation of the specifications it is not a requirement that the four reports be produced simultaneously. Mr. Bennett stated that he considers the Friden Alcatel system capable of meeting the College's needs and the bid requirements as he interprets them. Mr. Sadler supported Mr. Bennett's liberal interpretation of the specifications and testified that, under one possible strict interpretation of the accounting system specifications, neither Pitney Bowes nor Friden could comply.<sup>4</sup> Mr. Major testified that to him a literal reading of the specification did not make sense but that he nevertheless understood what was meant and he believes that Major Business Machines is responsive.

Ron Moore, the Chief Procurement Officer, testified that, in his opinion, Pitney Bowes is not prejudiced even if the specifications are ambiguous because the mailing machine

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<sup>4</sup>The specification requires the generation of "daily, weekly, monthly and yearly transaction and summary reports." (Record, p. 50). The evidence shows that, despite the use of the conjunctive "and", there is no such thing as a daily summary report and a yearly transaction report would be prohibitively large.

bid by Pitney Bowes in this case is the only machine it has that meets all the bid requirements.<sup>5</sup> According to Mr. Moore, whether or not the specifications permit an ink cartridge system and production of only three reports, the additional specification of 190 pieces per minute prohibits Pitney Bowes from offering a machine other than the one bid. However, Mr. Moore testified that he believed that the specifications could be written to meet the College's needs and allow Pitney Bowes to bid another machine.<sup>6</sup>

#### CONCLUSIONS OF LAW

The Procurement Code requires that "all specifications shall be drafted so as to assure cost effective procurement of the State's actual needs and shall not be unduly restrictive." S. C. Code Ann. §11-35-2730(1976). Reg. 19-445.2140(B) provides:

The purpose of a specification is to serve as a basis for obtaining a supply, service, or construction item adequate and suitable for the State's needs in a cost effective manner . . . .It is the policy of the State that specifications permit maximum practicable competition consistent with this purpose. Specifications shall be drafted with the

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<sup>5</sup> The Panel is not persuaded that Pitney Bowes is not prejudiced by the ambiguity of the specifications. It is a fact of competitive bidding that vendors price their products, not simply at "rock bottom", but in relation to what they believe is being bid by the other offerors.

<sup>6</sup> Apparently Pitney Bowes has a smaller machine which can handle 185 pieces per minute. It is unclear whether this smaller machine is compatible with the required accounting system.

objective of clearly describing the State's requirements. All specifications shall be written in a non-restrictive manner as to describe the requirements to be met.

The Panel agrees with the College that specifications should be written to allow as many vendors as possible to participate in a solicitation. That, however, is a different question from how a specification should be interpreted. The Panel has held that when a specification is of uncertain meaning and can reasonably be interpreted in more than one way, it is ambiguous. When a specification is ambiguous it is proper to rebid the contract. In re: Protest of Warehouse Distributing Company, 1988-2.

In this case there is ample evidence to support Pitney Bowes assertion that the term "ink reservoir" has a specific meaning, not just to Pitney Bowes, but within the mailing machine industry. Pitney Bowes does not need to prove that the term is an industry standard set by an organization like Underwriter's Laboratory. It is enough that Pitney Bowes show that its interpretation of the term "ink reservoir" was reasonable.

The College has also shown that it reasonably attached a different meaning to "ink reservoir." Both Mr. Bennett and Mr. Sadler testified that when the College used the term it did not intend for it to be interpreted technically. According to both gentlemen, they consulted the dictionary and assured themselves that the term "reservoir" was appropriate for the College's needs using the general dictionary definition. Both Mr. Sadler and Mr. Bennett

stated that they were not experts in the mailing machine industry and were unaware of any standard regarding use of the term "reservoir."<sup>7</sup> Finally, Mr. Major testified that there was no legal prohibition on Major's referring to the Friden cartridge as a "reservoir" system.

The Panel finds that the term "ink reservoir system" as used in the bid solicitation in question is ambiguous.

The Panel also finds that the accounting system specification can reasonably be interpreted in more than one way. Mr. Major and Mr. Sadler both testified that no vendor could comply with a literal interpretation of the specification. The solicitation requires the generation of "daily, weekly, monthly, and yearly" reports. Pitney Bowes can generate all four reports simultaneously and interpreted the specification to require that. The College testified that it only needs a daily plus two other types of reports at any one time and it interpreted the specification to allow that.

The Panel finds that, because both the inking system and accounting system specifications are ambiguous, the proper remedy in this case is to rewrite the specifications to remove the ambiguity and rebid the contract. The Panel also advises the College of Charleston to consult with its

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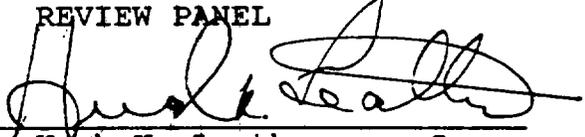
<sup>7</sup>Regrettably the College procurement office did not consult the end user (its mail room) or state procurement concerning the term.

mail room and with state procurement and to review all of the specifications involved in this solicitation to insure that they accurately reflect the needs of the College. To the extent that some specifications may reflect more than is needed, eg., the pieces per minute requirement, those specifications should be revised.

Wherefore, the Panel orders that the December 7, 1988 decision of the CPO be reversed and the contract in question be rebid.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

BY: 

Hugh K. Leatherman, Sr.  
Chairman

January 19, 1989  
Columbia, South Carolina