

STATE OF SOUTH CAROLINA)	BEFORE THE SOUTH CAROLINA
)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND)	CASE NO. 1988-15
IN RE: PROTEST OF KODAK AND XEROX)	
CORPORATION)	O R D E R
<hr/>		

This case came before the South Carolina Procurement Review Panel for hearing on December 14, 1988, on the protests by Kodak and Xerox Corporation of the decision by the Chief Procurement Officer ("CPO") that the sole source purchase of a Xerox 9900 high-speed copier by the Department of Mental Health ("DMH") was not justified.

Present at the hearing were Department of Mental Health, represented by Helen McFadden, Esq.; the Division of General Services represented by its General Counsel, Wayne Rush, Esq.; and Kodak represented by Robert Coble, Esquire.

FINDINGS OF FACT

On September 21, 1988, Kodak filed a protest with the CPO challenging the sole source procurement of a Xerox 9900 high-speed copier by DMH. (Record, p. 14). Pursuant to S.C. Code Ann. § 11-35-4210 (1976), the CPO held a hearing on October 21, 1988. DMH, Kodak and Xerox were all present at the hearing before the CPO. (Record, p. 10). The CPO issued his decision on October 31.

In his decision the CPO found that DMH was not justified in sole sourcing the copier for the following reasons:

1. The requirement of 120 copies per minute, which only Xerox can meet, was not justified because state production standards indicate that to produce 4 million copies per

year (DMH's actual output), a copy speed of 76.10 copies per minute is all that is required.

2. DMH could not produce documentation to substantiate the requirement that its copier needed to handle weights from 16-110#. Only Xerox can meet this standard.

3. DMH's records indicate that less than 1% of its total jobs require that greater than 50 but less than 61 sheets be stapled together. Only Xerox can meet this standard.

4. Kodak's copier can also perform the automatic chargeback functions required.

The CPO found that because the first three requirements were unduly restrictive and because Kodak could meet the fourth requirement, the sole source was not justified. Although he found that the copier contract should have been bid, the CPO gave awarded Kodak no relief.

On November 10, 1988, Kodak appealed the decision of the CPO to the Panel solely on the grounds that the CPO did not award it any relief. In the letter of protest dated November 8 and signed by William Holler, its Major Account Manager, Kodak requests that it be awarded either the equivalent of the revenues it would have derived from contract, the next contract to be solicited or whatever relief the Panel deems appropriate. (Record, pp. 2-3). In its supplemental letter of protest dated November 10 and signed by Charles Black, attorney for Kodak, Kodak requests that the Panel consider granting Kodak the relief of having the contract put out for bid. (Record, pp. 131-32).

Xerox appealed to the Panel on November 10, 1988, on the grounds that the CPO erred in concluding that the contract should

have been bid and the sole source purchase was unjustified. (Record, p. 133). In a letter dated November 10, 1988, DMH stated that it did not wish to appeal the decision of the CPO to the Panel, although DMH apparently did not agree with the findings and conclusions therein. (Record, pp. 138-40).

On December 5, 1988, prior to the hearing before the Panel, Xerox withdrew its appeal leaving only Kodak's appeal on the issue of relief pending before the Panel. (Record, pp. 137). Apparently upon learning that Xerox had withdrawn its appeal and the time to appeal having expired, DMH on December 8 moved the Panel to be allowed to present evidence that the decision to sole source was justified. (Record, p. 134). The Panel responded to DMH by letter of December 9, 1988:

As of the date of this letter, the Panel understands that the status of the participants is as follows: Kodak has appealed the decision of the Chief Procurement Officer raising only the issue to what relief, if any, it is entitled; Xerox has withdrawn its appeal of the CPO's decision effective December 5, 1988; and [DMH] by letter to Ron Moore dated November 10, 1988, specifically declined to appeal the CPO's decision. It would appear that all the participants in this hearing are bound by the decision of the CPO on the merits of this case.

* * *

[W]hile the Panel may choose to call and examine witnesses and otherwise receive evidence on the correctness of the decision to sole source in this case, except as the Panel requests, the parties . . . will be unable to present evidence on any issue save to what relief, if any, Kodak is entitled.

(Record, p. 135-336).

At the hearing before the Panel, DMH again moved to be allowed to present evidence that the decision to sole source was justified. The Panel advised the parties that, because the decision of the CPO was not appealed except as to relief, the Panel would accept the findings and conclusions of the CPO. The Panel further advised the parties that the only issue on appeal before the Panel was to what relief, if any, Kodak was entitled. DMH proffered the testimony it desired to introduce on the sole source issue and it was made part of the Record in case of appeal.

Kodak presented the testimony of William Holler that he, as a representative of Kodak, spent approximately 30 hours of time pursuing Kodak's rights in this case. At his hourly rate, Mr. Holler estimated this time was worth \$1000.00 to Kodak. Mr. Holler also testified that Kodak had retained the firm Nexson Pruet Jacobs & Pollard to assist it before the Panel.

As an alternative to money damages, Kodak requested that the contract be put out for bid.¹ Kodak asserted that the State would incur only minimal damages if bidding were ordered and referenced the present Lease Agreement between Xerox and DMH, which provides at paragraph 13, "This Agreement may be terminated by [DMH's] giving thirty (30) days prior written notice of such termination to [Xerox]. [DMH] shall negotiate reasonable termination costs, if applicable." (Record, p. 67).

1. At the hearing Kodak abandoned its assertion that it was entitled to award of the next state copier contract as relief.

DMH presented evidence that an addendum, signed by Xerox and the Division of General Services, exists which may alter the termination provision quoted above to provide for payment of the balance of the contract price upon termination by DMH. (DMH Ex. 3). Xerox representatives testified that Xerox considered the addendum to be part of the Lease Agreement. Mr. Colbert Campbell, DMH's Director of Procurement who signed the Lease Agreement for DMH, testified that he was unaware of a signed addendum to the Lease Agreement.

CONCLUSIONS OF LAW

Section 11-35-1560 of the Procurement Code provides:

A contract may be awarded for a supply, service, or construction item without competition when, under regulations promulgated by the board, the chief procurement officer, the head of the purchasing agency, or a designee of either officer above the level of procurement officer determines in writing that there is only one source for the required supply, service or construction item.

The regulations provide that sole source procurement is prohibited unless there is only one supplier. In case of reasonable doubt, competition should be solicited. Any solicitation by sole source must be accompanied by an explanation why no other product will be suitable or acceptable to meet the end. Reg. 19-445.2105. The regulations governing specifications also provide that specifications must be written in a "non-restrictive manner" to encourage "maximum practicable competition". Reg. 19-445.2140.

The CPO found that DMH did not justify its decision to sole source as is required by the Procurement Code and that three of

the four specifications at issue were unduly restrictive in violation of the Code. As stated earlier, DMH and Xerox chose not to appeal these findings and are, therefore, bound by them.³ Kodak did appeal asserting that it is entitled to some relief in this case.

Considering the findings of the CPO, the Panel concurs with his conclusion that the contract for DMH's high-speed copier should have been bid in the first instance. Justice requires, however, that the remedy fit the wrong. In this case, Kodak argues that ordering bidding of the contract would have minimal effect on state resources because the existing Lease Agreement provides for termination upon thirty days notice with only "reasonable" costs payable to Xerox.

The evidence suggests, however, that the termination clause in the Lease Agreement may have been modified by a subsequent addendum. There appears to be disagreement between the parties to the contracts on what costs are due upon termination. It is beyond the purview of the Panel on the evidence presented to it to determine whether the addendum applies to the Lease Agreement.

3. DMH argues that, because the hearing before the Panel is essentially de novo (§11-35-4410(5)), DMH is entitled to present all the evidence it chooses on the decision to sole source. If DMH had timely appealed the decision of the CPO as was its right as an adversely affected person (§11-35-4210(5)), its argument would have merit. However, if the time limitations on appeal are to have any meaning, DMH must be bound by its decision to accept the CPO's findings. Kodak did not, by applying for relief, open the door for DMH to relitigate its case.

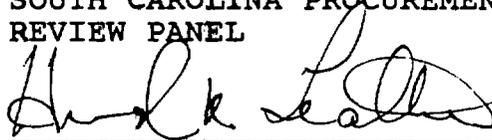
The possibility that it might is enough to weigh against ordering bidding of the contract.

For the reasons stated above, the Panel holds that the most equitable relief available to Kodak in this case is the payment by DMH of Kodak's costs and attorney's fees.

It is therefore ordered that DMH pay to Kodak the sum of One Thousand and 00/100 Dollars (\$1000.00) as costs and such reasonable attorneys' fees as may be awarded by the Panel. Kodak is hereby directed to submit to the Panel within fifteen (15) days of the receipt of this Order an affidavit setting forth its attorneys' fees in this case.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.

12.21-88, 1988