

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1988-2

IN RE:)
)
 PROTEST OF WAREHOUSE DISTRIBUTING) O R D E R
 COMPANY)
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on March 24, 1988, pursuant to S. C. Code Ann. §§ 11-35-4210 and -4410(1976) on the protest of Warehouse Distributing Company ("Warehouse"). Present at the hearing were the Protestant Warehouse represented by Walter Bailey, Esquire, and the Division of General Services represented by Helen Zeigler, Esquire.

After hearing the testimony of the various witnesses and considering all the evidence, the Panel issues the following findings of facts and conclusions of law.

FINDINGS OF FACTS

On or about November 12, 1987, the Division of General Services issued a Bid Invitation for the provision of school bus repair/maintenance parts for the Department of Education for the period January 1, 1988 through December 31, 1989. The section of the bid instructions at issue in this case provides as follows:

CATALOGS-PRICE LISTS-DISCOUNT SHEET-NET PRICES:

Price list(s) must be published and distributed to all parts consumers. Bids are to be submitted on a jobber or distributor list-plus or minus discount-or net basis, and all items included in the manufacturer's catalog are to be marked to indicate applicable discounts. Bidders should show which price category is to be used and applicable discount, if any, to price used.

NET PRICE MUST BE SHOWN ON ALL SPECIFIED PARTS SHOWN HEREIN

AFTER APPLICABLE DISCOUNTS HAVE BEEN TAKEN AND MANUFACTURER'S INTERCHANGEABLE NUMBERS MUST BE SHOWN IN SPACES PROVIDED. Discount must be taken from manufacturer's price sheet. No other price sheets will be accepted. Net prices are to be only for the purpose of determining low bids and all other items included in manufacturer's price list must be applicable to bidder's discount.

Award will be based on the net price bidder indicates on bid form and will be made separately for each lot.

(Bid Invitation, Page 14.)

Only two bidders responded to the Bid Invitation for the lots at issue here - Dixie Tool Distributors ("Dixie") and Warehouse. When the bids were publicly opened on December 7, 1987, Dixie had the lowest net price bid. Mr. James Harmon, President of Warehouse, attended the bid opening and made notes of the amounts bid by the other vendors. Although the only amounts announced at the opening were the net price figures, Mr. Harmon testified that, based on his familiarity with the product line, he suspected that the apparent low bidder, Dixie, had used multiple discounts on a single price sheet.

On December 17, 1987, General Services issued an Intent to Award the contract to Dixie. The discounts quoted by Dixie were listed on the Intent to Award.

On December 22, Mr. Horace Sharpe, who is employed by General Services as a Supervisor in Commodity Services, talked with Mr. Harmon on the telephone. Mr. Sharpe testified that he and Mr. Harmon discussed the award of the contract to Dixie and that Mr. Harmon indicated that he felt that Dixie's use of multiple discounts, rather than a single discount on one price sheet violated the section of the bid instructions

quoted above. Mr. Harmon testified that, although he does not remember the exact date, he did talk with Mr. Sharpe about Dixie's bid. Mr. Sharpe's telephone log indicates that he talked with Mr. Harmon on December 22 as he recalled. (Defendant's Ex. #2).

Mr. Harmon testified that he did not receive the Intent to Award until December 28, 1987, at which time he knew for certain that Dixie had used multiple discounts. According to Mr. Harmon, he wrote and mailed Warehouse's letter of protest on December 29, 1987 (Plaintiff's Ex. #1E). The letter is directed to "Mr. Charlie Webb, State of South Carolina, Division of General Services, Material Management, Columbia, SC." No street address, box number or zip code appears on the letter. Mr. Harmon testified that the address used on the letter was copied from the address printed by General Services on the Intent to Award. General Services received Warehouse's protest letter on January 5, 1988.

Mr. Charles W. Webb, a buyer for General Services, testified that he had a telephone conversation with Mr. Harmon on December 28 in which he advised Mr. Harmon that, if Warehouse wished to protest, it had to do so in writing to the Chief Procurement Officer. Mr. Webb stated that he never advised Mr. Harmon to direct the letter to him.

Mr. Sharpe testified that he spoke with Mr. Harmon on December 29 and advised him that General Services had decided that the specifications were ambiguous and could be interpreted to allow quotations of single or multiple discounts. Mr. Sharpe

stated that Mr. Harmon definitely did not agree with General Services' interpretation of the specifications.

After General Services received the letter of protest, Webb, Sharpe and their supervisor Virgil Carlson, State Procurement Officer, made the decision that, since the specifications were ambiguous, the contract should be rebid with revised specifications which allowed multiple discounts. Mr. Sharpe testified that Warehouse's Protest was never forwarded to the Chief Procurement Officer for hearing because he felt that the decision to rebid obviated the need for a hearing.

On or around January 19, Mr. Sharpe called Mr. Harmon's attorneys and advised them of the decision to rebid. Mr. Harmon's attorney did not object and Mr. Sharpe believed that the matter was resolved. Mr. Sharpe admits that Mr. Harmon never gave him the impression that he agreed with General Services' decision to rebid. Mr. Harmon testified that when he was advised of the rebid by his lawyers, he stated his dissatisfaction with the decision but was told General Services could do what it wanted and there was no reason to protest. Mr. Harmon stated he began searching for new counsel at that point.

A new Bid Invitation was issued on January 19, 1988. Warehouse participated in the rebid and this time it bid multiple rather than single discounts. In addition, according to Mr. Harmon, he lowered certain previously quoted prices. As a result, Warehouse, rather than Dixie, was the low bidder. Mr. Harmon estimated that Warehouse would lose approximately \$18,000 because

of the difference in its first and second bids. Mr. Harmon admitted that this figure was speculative.

On February 9, the bids were opened. On February 10, Mr. Harmon talked with Mr. Sharpe and inquired when Warehouse would get a hearing on its protest. Mr. Sharpe responded to Mr. Harmon in writing on March 1, 1988, and advised Mr. Harmon that Warehouse would receive no hearing. On March 9th Warehouse filed its protest with the Panel.

DECISION

A. Timeliness

General Services contends that the December 29 protest letter received by it on January 5 was not timely and, therefore, no jurisdiction exists for the Panel to hear Warehouse's appeal.

Section 11-35-4210 provides:

Any actual or prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer. The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

The statute requires that the protest be "submitted" within ten days of a person's knowing sufficient facts to give rise to a protest.

General Services urges that this section be construed to require that the Chief Procurement Officer actually receive a written protest within the time limits imposed. Warehouse argues that all that is necessary is mailing within the time.

The South Carolina Supreme Court has held in numerous cases that, when notice is required to be given and mailing is not excluded as a method of delivery, service is complete when deposited in the post office, properly addressed to the person to be served, with postage paid. See, e. g., Town of Honea Path v. Wright, 9 S. E. 2d 924(1940)(notice of appeal from municipal court); Craig v. United States Health & Accident Ins. Co., 61 S. E. 423(1908)(notice of claim); Walters v. Laurens Cotton Mills, 31 S. E. 1 (1898)(notice of appeal); Sullivan v. Speights, 12 S. C. 562(1879)(exceptions to circuit court order).

The panel sees no reason to apply a stricter construction to § 11-35-4210 than is required by the plain language of the statute. The dictionary definition of "submit" is "to commit (something) to the consideration or judgment of another." (American Heritage Dictionary). The Panel finds that a protest sent by mail is "submitted" within the meaning of the statute when it is deposited with the post office, properly addressed, with postage paid.

In light of this construction of the statute, Warehouse's protest, mailed on December 29, is timely even accepting General Services' assertion that Mr. Harmon knew of facts sufficient to file a protest by December 22.

General Services also contends that Warehouse's appeal to this Panel is untimely because rebid documents were issued on January 19 but Warehouse's appeal was not received until March 9. Section 11-35-4210 requires a person aggrieved by a written

decision of the chief procurement officer to appeal that decision within ten days of the decision. The Panel does not consider the January 19th rebid documents to be a "decision" under § 11-35-4210. The first written decision rendered by General Services is the March 1, 1988 letter from Mr. Sharpe. Warehouse's appeal to this Panel was filed nine days after this decision and is therefore timely.

The Panel is not persuaded by General Services argument that the initial protest letter is not valid because it was not addressed to the Chief Procurement Officer. Warehouse directed its letter(which clearly indicated that it was a protest) to the procurement officer listed on the Bid Invitation. That officer, Mr. Webb, testified that he was uncertain which one person in his office qualified as the CPO. The Panel finds that, under the circumstances of this case, Warehouse's letter was sufficient to satisfy the requirement that it be directed to the Chief Procurement Officer.

B. Waiver

General Services also argues that, even if the initial protest were timely, Warehouse waived its right to a hearing and decision on the protest because it participated in the rebid without objection. The Panel recognizes General Services' correct statement of the law in South Carolina that one may by his conduct waive rights he may otherwise have; however, the Panel does not find that Warehouse's conduct in this case amounted to such a waiver.

Mr. Horace Sharpe candidly testified that Mr. Harmon never

gave him the impression that Warehouse agreed with General Services' interpretation of the contract specification. Mr. Sharpe did state that, after talking with Warehouse's attorneys he thought there was no objection to the rebid.

Mr. Harmon explained that he learned of the decision to rebid on or about the same day as he received the documents. He also testified that when he learned of the rebid he went to his attorneys and was advised by them that he had no grounds to protest. According to Mr. Harmon, he did not accept this advice, but instead discharged his attorney and began looking for other counsel. In the meantime, in order not to be left out, Warehouse participated in the rebid and won the contract. Before accepting the contract, Mr. Harmon again attempted to get General Services to hold a hearing on his original protest.

Considering this conduct as a whole and considering that Mr. Harmon, with his new counsel, has vigorously pursued Warehouse's rights since the rebid, the Panel cannot say that Warehouse acted in a manner inconsistent with its rights to a decision on its protest or in such a way as to waive them.

C. Propriety of Rebid

The final questions presented to the Panel are whether the original specification relating to discounts was ambiguous and whether rebid of the contract was warranted. The Panel finds the answer to both these questions is "yes".

There was much conflicting testimony concerning the ambiguity of the specifications, the language of which has

apparently been the same for the last several years. Mr. Harmon, who has successfully bid on Department of Education bus parts contracts since 1963, testified that multiple discounts have never been allowed under the specifications in question. Mr. Harmon's position was supported by the Director and Assistant Director of the Department of Education's Office of Transportation in a letter dated February 8, 1988, which stated, "For many years, the Department's position has been to limit the discounts on any price sheet to one figure." (Plaintiff's exhibit #1G). Warehouse further argues that use of the word "discount" in the singular in the specs precludes a vendor from bidding multiple discounts.

On the other hand, Mr. Horace Sharpe, testified that a number of vendors, including Dixie Tool Distributing in this case, had bid multiple discounts on a single price sheet under the specs in question. As part of its case, General Services introduced into evidence several bids of winning vendors who bid multiple discounts (Defendant's Exhibit #3). Mr. Charles Webb testified that the Department of Education's Purchasing Office worked with General Services on the Bid Invitation in this case and never expressed an objection to multiple discounts. Indeed, Mr. Tracy Bedenbaugh, who is employed by the Purchasing Office, testified that he was not aware of any policy against multiple discounts and that, as far as his office was concerned, multiple discounts could be administered just as easily as single discounts and would result in savings to the State.

A word or phrase is ambiguous when it is of uncertain meaning and may be fairly understood in more than one way. See Carolina Ceramics, Inc. v. Carolina Pipeline Company, 251 S. C. 151, 161 S. E. 2d 179 (1968). The Panel finds that the specification at issue here is confusing and is fairly susceptible to more than one interpretation and that ambiguity warranted rebidding the contract.

The Procurement Code and regulations are clear that General Services may cancel a bid invitation prior to award provided it determines in writing with reasons set forth that the specs are ambiguous. S. C. Code Ann. § 11-35-1710(1976) and Reg. 19-445.2065. Mr. Sharpe testified that he made a memorandum to the file in this case in compliance with the Code. While this memorandum to the file may have been sufficient to satisfy the requirements of § 11-35-1710 and Reg. 19-445.2065(B), it was not sufficient to satisfy the requirements of § 11-35-4210(3),(4) that Warehouse's protest be forwarded to the Chief Procurement Officer and that a written decision be rendered and mailed or otherwise furnished to the protestant.

However well-intentioned the actions of General Services may have been in attempting to resolve this case, and however correct its decision to rebid, the fact remains that Warehouse was not afforded its rights in a timely manner. For this reason the Panel exercises its authority pursuant to § 11-35-4210(7) and awards Warehouse its costs and attorneys' fees

incurred in pursuing its rights in the action before the Panel and below. Warehouse is directed to submit to the Panel for approval within 30 days of receipt of this Order proof of its costs and attorneys' fees (including the fees of its original attorneys Williams & Williams). The Panel retains jurisdiction to consider these costs and fees and to order any additional reimbursement it finds to be in the interests of justice.

WHEREFORE, it is ordered that the protest of Warehouse be dismissed, that Warehouse be awarded the contract as rebid and that the Division of General Services and department of Education pay to Warehouse such costs and attorneys' fees as are approved by the Panel.

IT IS SO ORDERED



Hugh K. Leatherman, Sr.
Chairman
South Carolina Procurement Review Panel

Columbia, South Carolina

3-30-88, 1988