

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1988-5

IN RE: PROTEST OF CNC COMPANY)
 BID NO. 2-165/740-1105600-03/11/88-P) ORDER
)

This matter came before the South Carolina Procurement Review Panel ("Panel") for hearing on June 15, 1988 on the protest of CNC Company of the award of a contract to supply and install kitchen equipment at Denmark Technical College. Present at the hearing were the Protestant CNC, represented by Susan Lipscomb, Esq., the Division of General Services, represented by Helen Zeigler, Esq., Mr. Ed Philips of Southern Scale and Refrigeration Company, and Mr. & Mrs. James P. Armstrong of General Sales Company. After considering the evidence presented, the Panel makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

General Services issued a solicitation for furnishing, delivery and installation of cafeteria equipment at Denmark Tech. The original solicitation contained five pages of descriptions of the items required with a unit price and total price blank by each item. By amendment, General Services added three blanks to be filled in at the end of the item descriptions as follows:

Total Lot A-Equipment Cost...	\$	_____
*Add Installation Cost.....	\$	_____
TOTAL COST-LOT A...	\$	_____

*Installation Charges are not subject to the 5% S. C. sales tax

Mr. Horace Sharpe of the Division of General Services at an

on-site prebid meeting explained the importance of breaking out installation charges for tax purposes. CNC had a representative at that meeting though he arrived late.

General Services received only three bids in response to its solicitation. Southern Scale did not complete the installation charges blank and with its bid filed a protest concerning the charges. CNC did not complete the Total Lot A-Equipment Cost, Add Installation Cost or the TOTAL COST-LOT A blank. General Sales completed the three blanks in question but bid several alternate items to the ones specified. The alternate items bid by General Sales would meet the needs of the State in essentially the same manner as those specified.

At the bid opening, General Services determined that Southern Scale and CNC were unresponsive because of their failure to include or specify installation charges. General Sales was awarded the contract at \$59,936.76. When the total price columns are added, CNC's bid is \$57,156.20. Nowhere on CNC's bid are installation charges listed separately.

CNC timely filed a protest urging the state to waive its failure to list installation charges as a technicality. The Chief Procurement Officer found CNC's bid to be unresponsive. CNC timely filed an appeal to the Panel but raised for the first time in its notice of appeal the additional ground that General Sales' bid was unresponsive because it bid alternates to some items specified.

CONCLUSIONS OF LAW

Reg. 19-445.2080 provides that minor informalities or irregularities in bids may be waived by the procurement officer and the bidder given the opportunity to correct them. A minor informality or irregularity is "merely a matter of form or some immaterial variation from the exact requirements" which has no effect or a trivial or negligible effect on price, quality, quantity or delivery and the correction of which will not affect the relative standing of, or otherwise prejudice, the bidders.

The bid documents themselves provide in pertinent parts:

The State of South Carolina reserves the right to reject any and all bids and to waive all technicalities.

WAIVER: The State reserves the right to waive any General Provisions, or minor specification deviation when considered in the best interest of the State.

CNC claims that its failure to list separately its installation charges was not an omission which rendered its bid unresponsive but was rather a technicality which could be waived by the State. CNC argues that because installation was a requirement of the contract, it was required to include installation in its unit and total price for each item and was given the option to ignore the final "Add Installation Cost" blank. CNC urges that a simple calculation of the total item prices by the procurement officer would have revealed in its bid price.

While it is true that the State had the authority to waive minor irregularities in bids, the Panel cannot find that the

failure to list installation charges was such a minor irregularity that it had no effect on price or on the standing of the bidders.

Mr. Horace Sharpe, the procurement officer in charge of the bid testified that after the solicitation was originally issued, General Services realized that the cost of installation would be substantial and it became concerned about calculating South Carolina sales tax on the cost of the equipment. There is no sales tax on installation charges. Because of the sales tax calculation problem, General Services decided that installation charges had to be broken out and listed separately. General Services then issued an amendment to specifically require that installation charges be broken out. The procurement officer stressed that requirement to the bidders at an on-site prebid meeting.

It is clear that General Services considered the installation charges blank an essential part of the bid. It is also clear that General Services both orally and in writing communicated to the bidders (including CNC) that it considered separate installation charges essential.

There is nothing in the bid documents which gives the impression that filling in total installation charges is optional. There is nothing in CNC's bid to indicate that it included installation charges in its total unit prices. General Services could not assume that CNC's bid was the total of its total unit price and it could not contact CNC after the bids were opened for

clarification. To do so would have been patently unfair to the other bidders and in violation of § 11-35-1520(7) and (8). See In Re: Protest of Ohmeda Company, Case No. 1987-5, 8-13-87. Given this, the Panel finds that CNC's failure to complete the installation charges blank rendered its bid nonresponsive.

In its appeal to the Panel, CNC raised the issue whether General Sales' bid was responsive because it bid alternate items to several of those specified in the solicitation. General Sales did not bid as specified on at least six of fourteen items. CNC offered opinion testimony by two witnesses, Mr. Roy Smith and Mr. William Boggs Corbin, that two items, 3 and 11, were not equivalent to the items specified. General Sales' witness James P. Armstrong testified that the alternates bid by General Sales for items 3 and 11 did fulfill the requirements of the specifications.

CNC, as the protestant, had the burden of proving that General sales' bid was not responsive. Clearly, alternate or substitute items were allowed by the bid documents (pg. 21 of the Record), so the only way General Sales would be unresponsive is if its alternates did not "meet the needs of the State in essentially the same manner" as those specified. In Re: Protest of McKenzie Tractor Company, Inc., Case No. 1984-1, 5-8-84; In Re: Protest of General Sales Company, Inc., Case No. 1983-5, 7-21-83. The Panel finds that CNC has not shown that General Sales' alternates will not perform essentially as required by the State. General Sales bid is responsive.

Because CNC's bid was unresponsive, General Sales is the

lowest responsive and responsible bidder and is entitled to award of the contract. The May 26, 1988 Order of the CPO is affirmed and General Sales is awarded the contract.

IT IS SO ORDERED.



Hugh K. Leatherman, Sr.
Chairman

JUNE 23, 1988, 1988
Columbia, South Carolina