

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1989-12

IN RE:)
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)
) PROTEST OF INTREX DATA FORMS, INC.) O R D E R
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This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on September 14, 1989, on the application by Intrex Data Forms, Inc., ("Intrex") to rescind a contract to supply computer diskettes to the State Central Supply Warehouse mistakenly awarded to Dixie Speciality Company ("Dixie") and to reaward to Intrex.

Present at the hearing were Intrex, represented by Dalton H. Watkins, Esq., and the Division of General Services, represented by Helen Zeigler, Esquire. Also present was Dixie Speciality Company, represented by its President William T. Sanders.

FACTS

The underlying facts of this case are not in dispute and are as found the the Chief Procurement Officer in his decision dated July 20, 1989. Briefly summarized, the facts are as follows.

On April 18, 1989, the Information Technology Management Office ("ITMO") issued an Invitation for Bids to supply the state with computer diskettes. Bids were opened May 15 and, of ten bidders, Dixie was the lowest. The Notice of Intent to Award was issued to Dixie on May 25, 1989, and was to take effect June 12, 1989. Intrex, the

next low bidder, protested the award to Dixie on June 9, 1989.

By mistake, the State failed to rescind the Notice of Intent to award and the Notice became a binding contract which automatically went into effect on June 12. Recognizing the error, the Chief Procurement Officer sent a letter to Dixie on June 15 directing that it incur no additional expenses in support of the contract. A letter was also sent to State Central Supply Warehouse directing that the State place no orders with Dixie until the protest of Intrex could be heard. Mr. Steve Harvin of the State Central Supply Warehouse and Mr. William T. Sanders, President of Dixie, testified before the Panel that no expenses had been incurred by Dixie under the contract.

After hearing Intrex's protest, the CPO found that Dixie's bid was not responsive because it failed to list catalogue numbers by each diskette description as was required by the Invitation for Bids. The CPO found that this omission was not a minor technicality because the descriptions given by Dixie were general enough to apply to several disk types with different prices and, therefore, the omission potentially affected price. The CPO affirmed Intrex's protest but did not provide for any specific relief.

Intrex now applies to the Panel to enforce the CPO's decision by rescinding the contract mistakenly entered into with Dixie and reawarding to Intrex. Though notified, Dixie

did not attend the hearing before the CPO and did not appeal his decision to the Panel.

CONCLUSIONS OF LAW

The issue before the Panel is whether rescinding the present contract and reawarding it to Intrex is the appropriate remedy. Intrex argues that it is because Dixie is nonresponsive to the IFB, because the contract was awarded to Dixie by mistake and because there has been no performance under the contract and Dixie has incurred no expenses pursuant to the contract. Because it did not appeal the CPO's decision, Dixie is bound by the determination that it is not responsive to the IFB. Dixie nevertheless objects to the rescission and reaward of the contract as the proper remedy. General Services does not object to Intrex's position.

The Panel agrees with Intrex that, under the facts of this case, rescission and reaward of the contract is the appropriate remedy. In so holding, the Panel distinguishes this case from Logan v. Leatherman, 351 S.E.2d 146 (1986), in which the Supreme Court found that, even though Logan failed to list a subcontractor as required, the Panel's reaward of the contract was an unwarranted exercise of discretion and excessive in relation to the violation, especially considering the liability of the State. In the Logan case, performance of the contract was well under way when reaward was attempted and there was apparently no

termination without cause provision under which the State could escape liability for rescinding the contract.

In the case now before the Panel, the contract was entered into by mistake and there has been no performance and no costs incurred. In addition, there would appear to be no liability on the State's part if it terminates pursuant to section 10 of the contract which provides:

Termination: Subject to the provisions below, the contract may be terminated for any reason by the Materials Management Office providing a 30 day advance notice in writing is given to the contractor.

a. Termination for Convenience: In the event that this contract is terminated or cancelled upon request and for the convenience of the State without the required thirty (30) days advance written notice, then the State may negotiate reasonable termination costs, if applicable.

For the reasons stated above, the Panel affirms the decision of the Chief Procurement Officer dated July 20, 1989, and orders that the contract for the supply of computer diskettes to the State Central Supply Warehouse mistakenly awarded by the State to Dixie Speciality Company be rescinded and reawarded to Intrex Data Forms, Inc.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

Columbia, S. C.
September 25, 1989