STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS C/A NO. 90-CP-40-0348
GREGORY ELECTRIC COMPANY, INC., Petitioner, vs. SOUTH CAROLINA DEPARTMENT OF HEALTH & ENVIRONMENTAL CONTROL, et al. Respondents.	PROTEST OF GREGORY ELECTRIC CO. INC. O R D E R

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BARBARA A. SCOTT
C.C.C. & G.S.

This case comes before the Court on the petition of Gregory Electric Company ("Gregory") seeking judicial review pursuant to the Administrative Procedures Act, S.C. Code Ann. §§1-23-310 et seq. (1976), of a January 2, 1990, order by the South Carolina Procurement Review Panel.

FACTS

The facts as stipulated by the parties are that on August 23, 1989, the Budget & Control Board Division of General Services issued an Invitation for Bids for the installation of an uninterrupted power system at the facility of the Department of Health & Environmental Control (DHEC). At the request of DHEC, an additional section was added to the Instructions to Bidders, as follows:

> 10.1 BIDDERS' QUALIFICATIONS: Consideration will be given only to the Contractors who can provide conclusive evidence that they can meet the following requirements:
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> * * *
>
> 10.1.2 The Contractor must submit the following as part of his/her bid package:
>
> 10.1.2.1 A record of all previous UPS and generator systems installation experience by his

or her contracting firm (or subcontracted firm if prime bidder is not the electrical contractor).

10.2.1.2 The names of 5 clients with phone numbers and addresses where equipment of the make specified in the bid for DHEC has been installed and is operational. Projects shall be of comparable scope of the projects bid for DHEC.

10.1.2.3 These records must be submitted with the bid but in a separately enclosed envelope. Contractor experience will weight [sic] heavily in the selection of a successful bidder. Selection will not be based solely on the low bidder.

10.1.2.4 Bids that do not include this information will be considered nonresponsive.

The State solicited bids in accordance with the Consolidated Procurement Code, S. C. Code Ann. §11-35-3020 (1976), and received and opened responses from three bidders on September 19, 1989. Brock Electric Technology, Inc., submitted the low bid. The Petitioner Gregory Electric was the second low bidder.

Brock Electric's bid did not contain a separate envelope with the information required by subparagraph 10.1.2. Representatives of Brock and Gregory attended the bid opening on September 19, 1989, at which time Gregory called to the State's attention Brock's failure to submit references with its bid as required by Paragraph 10. Brock Electric submitted the required information several hours after the opening of bids. It is undisputed that Brock is qualified to perform the contract.[1]

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[1]At the hearing before this Court, the parties advised that the contract has in fact been performed to completion by Brock.

Gregory filed a protest pursuant to S. C. Code Ann. §11-35-4210(1), alleging that the State should not have awarded Brock the contract because it was not responsive to the requirement that qualifications be submitted with the bid. The respondent Division of General Services, acting through the Chief Procurement Officer, determined in a written decision dated November 13, 1989, that Brock's failure to timely submit its qualifications was a minor technicality and could be cured under Reg. 19-445.2080.

Gregory appealed the Chief Procurement Officer's decision to the Procurement Review Panel. After a de novo hearing, the Panel found that Brock's failure to submit qualifications with its bid was a minor technicality which had no effect on price, quality, quantity or delivery in this case because Brock submitted the references within hours of bid opening. The Panel also found no prejudice to the other bidders because the information required to be submitted, references and previous experience, would remain unchanged no matter when submitted. In its written order, dated January 2, 1990, the Panel upheld the Chief Procurement Officer's decision and awarded the contract to Brock Electric.

DISCUSSION

Because this is an appeal pursuant to the Administrative Procedures Act, S.C. Code Ann. §§1-23-310, et seq. (1976), the applicable standard of review is the standard enunciated by the South Carolina Supreme Court in

Lark v. BI-LO, Inc., 276 S.E.2d 304, 306 (1981), that a finding by an administrative agency will be set aside only if it is unsupported by substantial evidence. "Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action."

The issue here is whether substantial evidence supports the Procurement Review Panel's finding that Brock's failure to submit it qualifications with its bid could be cured as a minor technicality under Reg. 19-445.2080. That regulation provides:

> A minor informality or irregularity is one which is merely a matter of form or some immaterial variation from exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders. The procurement officer shall either give the bidder the opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive any such deficiency where it is to the advantage of the State. Such communication or determination shall be in writing. Examples of minor informalities or irregularities include, but are not limited to:
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> (1) failure of bidder to return the number of copies of signed bids required by the invitation;
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> (2) failure to furnish the required information concerning the number of the bidder's employees or failure to make a

> representation concerning his size status;
>
> (3) failure of a bidder to sign his bid but only if [certain conditions are met].
>
> (4) failure of a bidder to acknowledge receipt of an amendment to an invitation for bids, but only if [certain conditions are met].

Under the above regulation, the State may waive or cure a bidder's failure to meet exact bid requirements if the omission has no, or merely a negligible, effect on price, quality, quantity, or delivery of the required performance and if correction of the omission does not prejudice other bidders and is to the advantage of the State.

Gregory argues that Brock's failure to submit its references in a separate envelope at bid opening cannot be cured as a minor technicality under Reg. 19-445.2080 because the submission requirement was mandatory and the Instructions to Bidders state that, "Bids that do not include this information will be considered nonresponsive." (Section 10.1.2.4). Gregory contends that the Panel was without authority to allow Brock to cure its omission because the requirement that qualifications be submitted with bids is an "essential" requirement under Reg. 19-445.2070, which provides that, "any bid which fails to conform to the essential requirements of the invitation for bids shall be rejected."

Based on the testimony of DHEC's witness at the Procurement Review Panel hearing, the Panel found that

Brock's omission had no effect on the price, quality, quantity, or delivery of the uninterruptible power supply system. In its order, the Panel adopted its reasoning from an earlier Panel decision which construed Reg. 19-445.2080. In In re: Protest of National Computer Systems, Inc., Case No. 1989-13, the Panel reasoned:

> [B]ecause the Code requires rejection of a proposal when it fails to meet an essential requirement [Reg. 19-445.2070] but allows waiver of an immaterial variation from exact requirements [Reg. 19-445.2080)], a requirement is not "essential" if variation from it has no, or merely a trivial or negligible, effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured. Waiver or correction of a variance from such a requirement is appropriate under the Code when relative standing or other rights of the bidders are not prejudiced.
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> NCS and the CPO focus on the mandatory nature of the copying requirement of Section 2.06.03 as evidence that it is essential. However, a requirement is not "essential" simply because it is mandatory. The RFP in question states that sixteen copies of a proposal "must" be submitted (Record, p. 95). However, Reg. 19-445.2080 specifically lists the failure to do this as a minor informality. Completion of the affidavit of noncollusion in the American Sterilizer case . . . [Case No. 1983-2] was mandatory. Nevertheless, the Panel held that the bidder's failure to include a completed affidavit of noncollusion was a minor technicality because it had no effect on price, quality, quantity, or delivery of the required performance.

(September 5, 1989 Order of the Procurement Review Panel, pp. 8-9).

This Court agrees that Reg. 19-445.2080 applies in this case and that a mandatory requirement is not necessarily an

essential one.[2] The General Assembly, in approving Regulation 19-445.2080, intended that the State be given the flexibility to correct minor variations from exact bid requirements, whether or not the requirements are mandatory, so long as correction does not affect performance or prejudice the other bidders. The flexibility afforded by this regulation cannot be abrogated by apparently conflicting provisions in the bid solicitation documents.

The Panel's finding that Brock's failure to submit bid qualifications with its bid did not affect price, quality, quantity or delivery of the uninterruptible power source finding is supported by the substantial evidence in the record. (Tr., pp. 24-26). The record also amply supports the Panel's conclusions that the other bidders were not prejudiced because Brock's experience and references did not change during the several hour delay in submission and that it was to the advantage of the State to accept Brock's low bid. Under the standard of review applicable here, the Court must uphold the decision of the Panel.

As additional grounds of appeal, Gregory alleges that, even if Reg. 19-445.2080 applies here, the Panel's order violates the terms of the regulation and exceeds the Panel's statutory authority because there is no "communication or

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[2]"Essential" means "constituting or part of the nature of something; inherent." "Mandatory" means "required by or as if by mandate; obligatory." The American Heritage Dictionary 465, 761 (2d ed. 1985).

determination" in writing as required by Reg. 19-445.2080. Gregory claims that no evidence exists in the record of a written determination by a procurement officer that Brock's failure to submit qualifications could be cured. The Respondents point out that Gregory did not raise this issue before the Panel until closing arguments after the evidence was closed. (Tr., p. 33).

This Court concludes that Gregory did not raise this issue in writing within the time limits required by S. C. Code Ann. §11-35-4210(1)(1976). Even if Gregory were timely with this exception, the Court finds that it lacks merit. The written decision by the Chief Procurement Officer that Brock's omission is a minor technicality which can be cured more than meets the requirements of Reg. 19-445.2080. (Record, pp. 8-11).

Finally, Gregory claims that the decision of the Panel violates the purposes and policies set forth in the Consolidated Procurement Code that the Code is intended to permit the continued development of thoroughly considered procurement practices, to promote increased public confidence in the public procurement process, and to ensure the fair and equitable treatment of all vendors. §§11-35-20(b),(d), and (e)(1976). The Court recognizes Gregory's point that vendors who comply with all the requirements of a bid invitation have legitimate expectations that the requirements will be enforced. However, the General Assembly was mindful of the policies

behind the Procurement Code when it approved Reg. 19-445.2080 and limited its application to cases in which the other bidders are not prejudiced. This Court is not prepared to say that the application of the regulation in this case does violence to those policies.

To the extent that Gregory raises any other issues by way of its brief, I find that those issues are without merit.

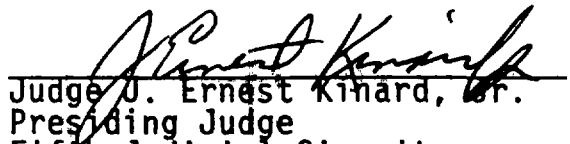
In addition to Gregory's appeal, the Court also has before it the motion of DHEC to be dismissed as a party to this action. DHEC argues that this dispute is between Gregory and the respondents General Services and the Panel over decisions made solely by those two respondents. Gregory advised in the hearing before me that DHEC was added as a party for the purpose of seeking a stay of the Panel's order because DHEC controlled the funds being spent on the contract. It is undisputed that Brock has completed performance of the contract and that DHEC has transferred the funds held by it to the Division of General Services.

The Court finds that DHEC is not a necessary party to this action. DHEC's motion to be dismissed as a party is granted.

For the reasons set forth above, the Court upholds the January 2, 1990 order of the Procurement Review Panel and orders that Gregory's Petition for Judicial Review be hereby dismissed. The Court further dismisses the Department of Health and Environmental Control as a party-respondent to

this action. The Order of the Court today is not intended to prevent Gregory from pursuing its application for costs and attorneys' fees under S. C. Code Ann. §§11-35-4210(7).

IT IS SO ORDERED.



Judge J. Ernest Kinard, Jr.
Presiding Judge
Fifth Judicial Circuit

Jan 31, 1991
Columbia, South Carolina

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