

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1989-19

IN RE:)
PROTEST OF CONSTABLES SECURITY PATROL, INC.) O R D E R
)
) APPEALED

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on January 8, 1990, on the appeal by Constables Security Patrol, Inc. ("Constables") of a decision by the Chief Procurement Officer ("CPO") that Constables' protest is untimely.

Present at the hearing before the Panel were Constables Security Patrol, Inc., represented by Henry P. Wall, Esq., and William Gary White, III, Esq., the University of South Carolina, represented by Lyn Hensel, Esq., and the Division of General Services, represented by Helen T. Zeigler, Esquire.

FACTS

On August 25, 1989, State Procurement issued an Invitation for Bids ("IFB") on a contract to provide unarmed security guard services to the University of South Carolina ("USC"). The bids were opened on September 19 and the protestant Constables Security Patrol, Inc., was revealed to be the low bidder.

According to Albert J. Samra, President and sole owner of Constables, he contacted Joe Fraley on October 3 and inquired about the status of the contract. Mr. Fraley advised him that the contract had not yet been awarded and that Constables should not expect award because it did not

meet the requirement that the winning bidder have completed a 10,000 hour contract.¹

Mr. Samra testified that he advised Mr. Fraley that Constables had in fact completed the same USC contract at issue here for 1985-86. Mr. Samra stated that, at Mr. Fraley's request, he researched that contract and arrived at a total of about 18,000 hours performed for USC. When advised of this, Mr. Fraley responded that Constables still was not going to get the contract to which Mr. Samra replied, "I don't think that's right."²

On October 4, 1989, Jim Culbreath, Mr. Fraley's superior at State Procurement, called Mr. Samra and advised him that Constables' bid was being rejected because Constables had not successfully completed a 10,000 hour contract. Again, Mr. Samra advised that Constables had in fact serviced the same USC contract for 18,000 hours. Mr.

¹The Special Provisions section of the IFB provides, "Successful contractor must have serviced a contract requiring a minimum of 10,000 hours annually." (Def.'s Ex. 1, p. 3). The Bidder Information section of the IFB requires a bidder to list three references of government agencies or private firms for whom the bidder provided services within the two years preceding the contract. (Def.'s Ex. 1, p. 13). Mr. Fraley testified that bidders were instructed at the mandatory pre-bid conference that performance of the 10,000 hour contract had to be within the past two years.

²Mr. Fraley testified that he advised Mr. Samra that Constables would not get the contract because it had not completed a 10,000 hour contract within the two-year limit. Mr. Fraley stated that Mr. Samra agreed that Constables could not meet that requirement.

Culbreath responded by going over a vendor performance summary for Constables' 1985-86 USC contract which indicated something less than successful performance of that contract. Mr. Samra also ended this conversation by expressing his feeling that Constables' rejection "wasn't right." According to Mr. Samra, he did not object in any stronger manner at that time because he did not want to "upset" the State.

On October 6, 1989, Mr. Samra wrote the following letter to Mr. Fraley:

Dear Mr. Fraley

On October 4th 1989 I received a call from Mr. Culbreath stating that Constables Security Patrols bid for U.S.C. was rejected in that we have not serviced a contract of 10,000 hours annually. As you know and Mr. Culbreath was advised we did in fact service the same contract in 1985-86 for 17,986 hours.

At this time I would like to request your rejection in writing [sic] and would like to know who was awarded the contract.

With Warmest Regards,

(signed Al Samra)

(Record, p. 12).

Mr. Fraley responded by letter of October 10th as follows:

I received your letter today requesting we state both our reasons for rejecting your bid response to provide security guard services for the University of South Carolina and identify the contractor who received the award.

I understand that Mr. Jimmy Culbreath explained to you in his October 4, 1989 conversation that your bid was rejected because you had not successfully completed a 10,000 hour contract. During your conversation, Mr. Culbreath detailed the vendor performance summary we have on file regarding your previous contract at the University of South Carolina.

I have attached a copy of the Intent to Award which identifies a rejection of bids statement as well as the successful contractor, Pinkerton's, Inc.

Should you require any additional information, please contact either Jimmy Culbreath or myself.

(Record, p. 10). Mr. Samra testified that he received this letter with the enclosed Intent to Award several days after October 10. The award to Pinkerton's, Inc., became effective on October 23, 1989.

According to Mr. Samra, he consulted an attorney several days prior to the effective date of the award.³ On November 6th, Mr. Samra's attorney wrote the CPO stating that Mr. Samra's October 6 letter to Joe Fraley was intended as a protest and asking the CPO to hear the matter.

The CPO found Constables' November 6th protest untimely on the grounds that Constables knew or should have known on October 4th after the phone conversation with Mr. Culbreath

³Constables' attorney wrote a letter to the Panel on October 30th allegedly appealing from the final decision of the CPO (presumably the October 10 letter from Joe Fraley). The Panel advised Constables that the Panel would not hear this matter until after the CPO had conducted his own hearing and rendered a decision.

that its bid was being rejected on the basis of failure to successfully perform a 10,000 hour contract. Constables appeals this determination to the Panel.

CONCLUSIONS OF LAW

There is no question that Constables knew on October 4 that its bid was rejected and the reasons therefor. Under S.C. Code Ann. §11-35-4210(1)(1976), it had ten days from that date to file a written protest with the Chief Procurement Officer. Constables' protest letter of November 6 to the CPO was not submitted within the ten-day limitation. Therefore, the only issue before the Panel is whether the October 6 letter of Mr. Samra to Mr. Fraley can be construed as a protest to the CPO within the meaning of §11-35-4210.

The Panel holds that, under its previous decisions, the October 6 letter cannot be considered a protest. In In re: Protest of AT&T Co., Case No. 1983-12, the Panel rejected the argument that a letter setting forth AT&T's dissatisfaction with the wording of an RFP was a protest since the letter did not say it was a protest and further indicated, "we welcome the opportunity to work with you to develop a better overall solution to the State's telecommunications requirements." (Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 96).

In In re: Protest of Computerland of Columbia, Case No. 1988-4, the Panel held that a letter from a vendor asking for an appointment and stating, "We have some questions

about the way in which this request for bids was evaluated" was not a protest. In so holding the Panel clarified what is required of a protest:

Nothing in the text of the letter alerts the reader that Computerland is invoking its right to protest a decision by General Services to award the contract to Dataprint or on what grounds such protest is based. The letter requests an "appointment" to "discuss" the award. The letter states that Computerland has some "questions" about the way the bids were evaluated. The letter requests that a Mr. Clark from General Services "sit in with us at this meeting." Contrast this vague, almost conciliatory language with the precise language of the March 16 letter - "Please accept this letter as our formal protest of your intent to award" Both letters were drafted without the aid of an attorney. The Panel has previously found that while protests are not to be judged by highly technical or formal standards, 11-35-4210 does require that the protest must in some way alert the parties to the general nature of the grounds for protest. [Citations omitted]. Surely, it must also alert the parties that the author is protesting. [Cite omitted]. The March 9 letter fails in both respects and cannot be considered a protest.

(Decisions of the South Carolina Procurement Review Panel 1982-1988, pp. 437-438).

Constables' October 6 letter falls short of even the failed protests in AT&T and Computerland cited above. Constables' October 6 letter contains no statement of disagreement or protest or anything to indicate that Constable is dissatisfied with the State's actions. It simply recites that Constables serviced the USC contract in 1985-86 for 17,986 hours. The letter does not request a

"meeting", "review", "hearing", "interview", "investigation", or "discussion" or require any further action on the part of the State except to send copies of certain routine information. As Mr. Fraley testified, requests for information are frequently received and routinely handled by the State under the Freedom of Information Act and are not treated as protests. Finally, the October 6 letter is not directed to the CPO and is not addressed to the address for filing protests plainly set forth in the IFB. (Def.'s Ex. 1, p. 14).⁴

Given these deficiencies, the October 6 letter cannot be considered a protest. The only protest filed by Constables was the November 6 letter which is untimely.

Constables makes the additional argument that, because the State allegedly failed to adhere to certain notification requirements of the Procurement Code, Constables should not be held to the Code's time limitation. Under §11-35-1810

⁴The failure to direct the protest to the CPO would not in and of itself necessarily prove fatal to Constables' claim. Mr. Fraley testified that it is the policy of State Procurement to forward clearly identified but misaddressed protests to the CPO. This practice is in keeping with an earlier case of the Panel, In re Protest of Warehouse Distributing Company, Case 1988-2, in which the Panel held that "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." (Emphasis added) (Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 411).

and Reg. 19.445-2125, before the State can award a contract, it must determine whether a bidder is financially or otherwise capable of performing the contract. The procurement officer may request information from a bidder about its capacity to perform the contract. The State must give written notice of its findings to a contractor found nonresponsive. There is no notice requirement when a contractor is determined to be nonresponsive, that is, when the contractor fails to meet the bid specifications or requirements.

Constables claims that the State rejected its bid because of its alleged failure to perform the previous USC contract in a satisfactory manner. Constables argues that this is a determination of responsibility which requires written notice. General Services claims that, because the IFB requires that a bidder have successfully completed a 10,000 hour contract within the last two years, Constables' failure to meet this requirement is a responsiveness issue.

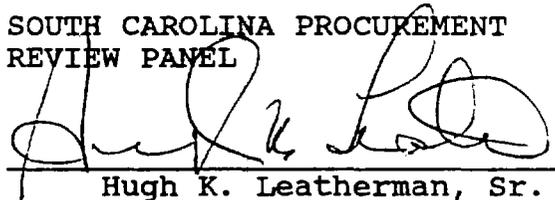
There are undoubtedly elements of both responsibility and responsiveness in the 10,000 hour requirement. However, the Panel does not find it necessary to this case to characterize the requirement as one or the other. There is no question but that Constables knew on October 4th the exact reasons for its rejection. Under the Panel's decision in the Oakland Janitorial Service case (Case No. 1988-13), Constables had to file its protest of that rejection by

October 14 or the CPO and the Panel would be deprived of jurisdiction to hear the case.

The Procurement Code does not make filing a protest contingent on the State's taking certain actions. Constables' time for filing a protest started running the moment it had notice of the facts giving rise to its protest. Constables would have been free to state as a grounds of protest the State's failure to give it proper written notification. It cannot claim this failure as an excuse for its own failure to meet the time requirements of section 11-35-4210(1).

For the reasons stated above, the November 13, 1989, decision of the Chief Procurement Officer is affirmed and the appeal of Constables Security Patrol, Inc. is dismissed.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K. Leatherman, Sr.
Chairman

1-10-90, 1990
Columbia, South Carolina