

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1989-20

IN RE:)
)
) PROTEST OF GENERAL SALES COMPANY, INC.) O R D E R
)
_____)

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on November 15, 1989, on the appeal by General Sales Company, Inc. ("General Sales") of a decision by the Chief Procurement Officer ("CPO") upholding the award to Southern Scale & Refrigeration, Inc., ("Southern Scale") of a contract for the provision of a walk-in cooler to Winthrop College.

Present and participating in the hearing were the protestant General Sales, represented by its President James P. Armstrong, and the Division of General Services, represented by Helen Zeigler, Esquire. Present but not participating were Winthrop College and Southern Scale.

FINDINGS OF FACTS

On July 25, 1989, State Procurement issued a invitation for bids to provide a walk-in cooler to Winthrop College. The invitation solicited a "WALK-IN COOLER WITH REMOTE REFRIGERATION SYSTEM 6' x 10' x 7'6", COMPLYING WITH ENCLOSED SPECIFICATIONS." A list of six acceptable brands was provided. In the original specifications there was a requirement that "interior walls and ceiling shall be .040 painted embossed aluminum - FDA approved." (Record, p. 26).

As a result of a prebid conference held on August 2, State Procurement issued Amendment #001 on August 7, 1989, changing the aluminum thickness requirement from .040 to .038, the range temperature from 36 to 28 degrees, adding electric defrost to coils and extending the bid opening date to August 23, 1989. (Record, p. 19). The amendment also provided:

OFFERORS MUST ACKNOWLEDGE RECEIPT OF THIS AMENDMENT PRIOR TO THE DATE AND TIME SPECIFIED IN THE SOLICITATION, OR AS AMENDED, BY ONE OF THE FOLLOWING METHODS: (A) BY SIGNING AND RETURNING ONE COPY OF THIS AMENDMENT; (B) BY ACKNOWLEDGING RECEIPT OF THIS AMENDMENT ON EACH COPY OF THE OFFER SUBMITTED; OR (C) BY SEPARATE LETTER OR TELEGRAM WHICH INCLUDES A REFERENCE TO THE SOLICITATION AND AMENDMENT NUMBER(S). FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE ISSUING OFFICE PRIOR TO DATE AND TIME SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER.

(Record, p. 19).

Bids were opened on August 23, 1989, as scheduled. Southern Scale bid a Bally cooler at \$7415.00. The protestant General Sales Company bid a Bally cooler at \$8577.00 and two alternates. The first alternate was of an unapproved brand. The second alternate was a Master-Bilt with an aluminum paint finish of .034 rather than the specified .038.

State Procurement found General Sales' first and second alternates nonresponsive and issued an intent to award to Southern Scale as the low bidder with the Bally model. General Sales protested to the CPO on the grounds that its second alternate, the Masterbilt bid, is responsive and that Southern Scale's bid of the Bally is nonresponsive because it failed to

acknowledge Amendment #001, failed to include a social security or federal employer identification number, and failed to specify which model Bally cooler was being bid.

The CPO found General Sales' challenge to its being declared nonresponsive untimely. The CPO further found that, although Southern Scale's bid had omissions, they amounted to minor informalities and were waivable under S.C. Code Ann., Reg. 19-445.2080 (1976). General Sales appeals the decision of the CPO to the Panel.

On the first ground, General Sales argues that the Masterbilt cooler bid by it as an alternate is equal to the coolers specified in cooling ability and that strict application of the .038 paint finish specification is too restrictive of competition. Mr. James P. Armstrong, President of General Sales, testified before the Panel that the Masterbilt cooler, notwithstanding its thinner aluminum finish, has the same refrigeration power as the Bally cooler bid by Southern Scale. Mr. Armstrong further testified that it is common in the industry to denote dimensions by use of the words "actual" for true measurements and "nominal" for approximate measurements. According to Mr. Armstrong, a measurement is assumed to be nominal if otherwise unspecified. General Sales argues that the .038 paint finish specification should be considered a nominal measurement which would allow a bid of something less than .038.

Mr. Armstrong also testified under questioning by the Panel that General Sales learned of the reduction of the paint finish specification to .038 at the prebid conference on August 2, 1989.

Mr. Armstrong admitted that General Sales was aware on August 2 that the Masterbilt it intended to bid only had a paint finish of .034.

On its second grounds, General Sales argues that Southern Scales bid is nonresponsive because it lacks a social security or federal employer identification number as required by the Notice to Bidders (Record, p. 112), an acknowledgment of Amendment #001 as required by the terms of the amendment itself (Record, p. 19) and a model number as required by the bidding schedule (Record, p. 86). General Sales contends that, because each of these requirements is mandatory and because the latter two are necessary to insure that the State receives what it asked for, the failure to include them in a bid cannot be waived as a minor technicality.

General Services argues that each of Southern Scale's omissions is a minor technicality which has no effect on the price, quality, quantity, or delivery of the walk-in cooler. Specifically, General Services contends that provision of a social security or federal employer identification number is not a requirement of the bid specifications. Mr. Virgil Carlsen of the State Procurement Office testified that the Notice to Bidders (Record, p. 112), which requires a bidder to provide the numbers, was prepared and routinely sent to bidders as part of a housekeeping measure when State Procurement put its bid forms and other information on computer. Use of the Notice was discontinued around the time of the procurement at issue here. Mr. Carlsen explained that the social security or federal

employer identification number does not affect the substance of a contract but is used by the State on purchase orders or invoices produced subsequent to the award of the contract.

Mr. Armstrong testified that General Sales received the Notice and it appears from the record that at least one other bidder, Sure-Temp, received the Notice. Mr. Wes Birden, Sales Representative, testified that Southern Scale did not. According to Mr. Carlsen, however, the State already had Southern Scale's federal employer identification number on file.

General Services further argues that the absence of a model number on the bidding schedule (Record, p. 82) does not affect the substance of the contract because it is otherwise clear from the context that Southern Scale is bidding a cooler which complies with State requirements.¹ General Services points to three different requirements in the bid solicitation documents that the bidder bid only as specified. Those requirements are:

On the cover page to the bid above Southern Scale's signature: "THE BIDDER HEREBY AGREES TO FURNISH ITEMS AND/OR SERVICES, AT THE PRICES QUOTED, PURSUANT TO ALL REQUIREMENTS AND SPECIFICATIONS CONTAINED IN THIS DOCUMENT" (Record, p. 82).

On the bidding schedule: "WALK-IN COOLER WITH REMOTE REFRIGERATION SYSTEM 6' x 10' x 7'6", COMPLYING WITH ENCLOSED SPECIFICATIONS" (Record, p. 86).

In the Instructions to Bidders: "6. By submission of this bid, you are guaranteeing that all goods and services meet the

¹Mr. David B. Collins of Collins Associates, Inc., a Bally representative, testified that Bally does not use model numbers to identify its walk-in coolers.

requirements of the solicitation during the contract period." (Record, p. 29).

General Services argues that these sections insure that the State will receive from Southern Scale a Bally cooler which meets the requirements of the bid whether or not Southern Scale also fills in a model number.

Finally, General Services argues that Southern Scale did adequately acknowledge Amendment #001 by changing the date of bid opening on its bid from "08/16/89" to "8/23". General Services contends that this change complies with Amendment #001's requirement that it be acknowledged by "acknowledging receipt of this amendment on each copy of the offer submitted." (Record, p. 19). In the alternative, General Services argues that, even if the date change is not adequate acknowledgment, it is sufficient to bring this situation under Reg. 19-445.2080(4)(a), which allow the State to waive the failure by a bidder to acknowledge a bid when the bid received clearly indicates that the bidder received the amendment.

CONCLUSIONS OF LAW

The first issue raised by General Sales is the responsiveness of its alternate bid. Essentially, General Sale's argument is that the requirement that the walk-in cooler have an aluminum finish .038" thick is too restrictive because aluminum thickness has no bearing on cooling ability. The CPO found that General Sales knew or should have known of its problem with the "restrictive" specification on July 25 when the original .040 requirement was published and certainly no later than August 7 when amendment #001 was issued reducing the requirement to .038.

Mr. Armstrong testified before the Panel that General Sales assumed that the thickness specification was nominal and that it would allow a bid of something less than .038 so it did not protest at that time.

The Panel does not find this argument persuasive. Mr. Armstrong testified that a representative of General Sales attended the August 2 prebid meeting and was aware that a written amendment was being issued which reduced the specification by .002. The need for a written amendment to make this change should have put General Sales on notice that the specification was not nominal and that the Masterbilt it intended to bid did not meet the specification. The least General Sales should have done at that time was question State Procurement about the restrictiveness of the specification. Instead, General Sales did not raise this issue until its protest of October 5th.

The Panel agrees with the CPO that General Sales has not met the time limitations of S. C. Code Ann. 11-35-4210(1)(1976), which requires that a protest be filed within ten days of the time a prospective bidder knows or should know of facts giving rise to its protest. General Sales' first grounds of protest is dismissed as untimely. See, eg., In re: Protest of American Telephone & Telegraph Company, Case No. 1983-12; In re: Protest of Amdahl Corporation and International Business Machines Corporation, Case 1986-6.

General Sales' remaining exceptions to the decision of the CPO go to responsiveness of Southern Scale's bid, specifically the lack of model number, social security and federal employer

identification number, and acknowledgment of Amendment #001. The CPO and General Services contend that all of these defects may be waived under the following regulation:

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:

* * *

(4) failure of a bidder to acknowledge receipt of an amendment to an invitation for bids, but only if

(a) the bid received clearly indicates that the bidder received the amendment, such as where the amendment added another item to the invitation for bids and the bidder submitted a bid thereon

Reg. 19-445.2080. The Panel's analysis of this issue in the past has turned on whether the omission had an effect on price, quality, quantity, or delivery of the required performance and whether correction of the omission prejudiced other bidders.²

²See, In re: Protest of American Sterilizer Co., Case No. 1983-2 (failure to include an affidavit of noncollusion in a bid was a minor technicality); In re: Protest of Miller (Footnote Continued)

Pursuant to this regulation, the CPO found that the failure to include FEIN or SSN was minor because these numbers are used by state procurement only after award for the purpose of issuing a purchase order and because in this case State Procurement already had Southern Scale's number on file from previous procurements. The Panel agrees with the decision of the CPO. It is apparent from the testimony before the Panel that the omission of these numbers does not affect the price, quality, quantity or delivery of the goods solicited.

Likewise, the Panel finds that the absence of a model number in this case does not affect the substance of the contract and is, therefore, a minor informality which may be waived. A representative of Bally testified that no model number exists which could have been filled in by Southern Scale. Further, an examination of the solicitation documents reveals at least three provisions, cited earlier, which would bind Southern Scale to

(Footnote Continued)

Tire Service, Case No. 1984-6 (failure of a product to pass a performance test on the first try was not minor since it did potentially affect the quality of goods); In re: Protest of CNC Company, Case No. 1988-5, (failure to include installation charges was not a minor technicality because it potentially affected price and because the State considered separate listing of the installation charges an essential requirement of the bid and clearly communicated that fact to the bidders); In re: Protest of Brown & Martin Co., Case No. 1983-4, and In re: Protest of ECB Construction Co., Case No. 1989-8 (failure to list subcontractors is not a minor technicality because the Procurement Code states that failure to list renders a bid nonresponsive); and In re: Protest of National Computer Systems, Inc., Case No. 1989-13 (failure to include xerox copies of student tests was a minor technicality because it did not affect price, quantity, quality or delivery of performance of contract.

furnishing the product as specified by the State in the Invitation for Bids even in the absence of a model number.

Finally, the CPO found and General Services argues that Southern Scale's failure to acknowledge Amendment #001 falls directly under Reg. 19-445.2080(4) because its bid "clearly indicates that the bidder received the amendment" in that Southern Scale changed the opening date on its bid from "08/16/89" to "8/23", the date specified in the amendment. (Record, p. 82). The Panel finds that, in this case, the mere change of date is insufficient to acknowledge receipt of the amendment as required by the amendment or to "clearly" indicate receipt of the amendment so that the failure to acknowledge can be waived.

In addition to changing the date, the amendment made three substantive changes in the technical requirements of the walk-in cooler. Mr. Carlsen of State Procurement was unable to state whether the overall change increased or decreased the cost of the cooler. However, all parties seemed to agree that the three changes other than date did affect the price and quality of the product being solicited.

The purpose of requiring that the bid on its face indicate receipt of an amendment is to insure that there is agreement between the State and a vendor on what is to be provided. This is particularly vital when an amendment makes changes which affect price, quality, quantity or delivery. General Services' argument that the only way Southern Scale could have known of the date change was by receipt of the amendment is not persuasive.

There are any number of other ways in which Southern Scale could have learned of this information, eg., incidental conversations with other bidders or with State employees. It is not necessarily true that because it learned of the date change, Southern Scale also knew of the other three substantive changes and bid so as to be bound by them. There is nothing in Southern Scale's bid to indicate that its bid incorporated any of the other substantive changes.

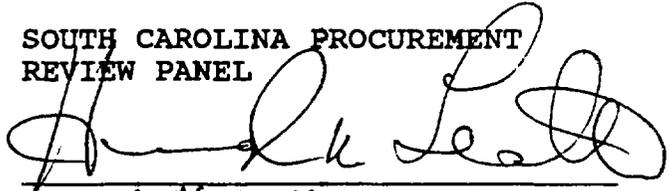
The Panel's decision is not changed by Mr. Wes Birden's testimony that Southern Scale attended the prebid meeting and did in fact receive the amendment. The regulation requires that only the face of the bid be considered in determining receipt of the amendment. It is also of no consequence that Southern Scale called State Procurement and spoke to an unidentified employee who advised him that changing the date was sufficient acknowledgment of the amendment. As the Panel has cautioned vendors in the past, oral instructions or changes by State employees are not sufficient to overcome the plainly written provisions of a bid solicitation. In re: Protest of Rigdon Office Supply, Case No. 1989-6.

Southern Scale's failure to acknowledge Amendment #001 cannot be waived pursuant to Reg. 19-445.2080 and, therefore, its bid is not responsive.

For the reasons stated above, the October 30, 1989, decision of the Chief Procurement Officer is reversed and it is hereby ordered that the contract in question be awarded to the next lowest responsive and responsible bidder as determined by State Procurement or, if there is no responsive and responsible bidder, that the contract be rebid.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Hugh K Leatherman, Sr.
Chairman

Columbia, S. C.

12-2- _____, 1989