STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1991-14

In re:

Protest of Wometco Food Services, Inc.) O R D E R

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on August 28, 1991, on the appeal by Wometco Food Services, Inc., ("Wometco") of a decision of the Chief Procurement Officer ("CPO") dismissing Wometco's protest of the award of a contract to provide food and vending services to Tri-County Technical College (the "College").

Present at the hearing before the Panel were Wometco, represented by Dwight F. Drake, Esq., and John E. Schmidt, III, Esq.; Atlas Food Systems and Services ("Atlas"), represented by Robert A. deHoll, Esq., and Tara Snyder, Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire.

FINDINGS OF FACT

On April 19, State Procurement issued a Request for Proposals ("RFP") for the provision of food and vending services at the campus of Tri-County Technical College. (Record, p. 15). The College requested the issuance of the RFP. (Defendant's Ex. #2). The College also prepared the initial draft of the specifications contained in the RFP.

The RFP provides in relevant part:

> Contractor shall provide at no expense to the college a convenient and complete fast food

> service, campus catering and vending service, including equipment . . . . (Record, p. 18).
>
> Contractor will provide at its own expense any additional equipment, not currently in place and not owned by the college, necessary to operate the food service operation. All equipment will be installed at no expense to the college. (Record, p. 19).
>
> All facilities, equipment and services to be provided by the contractor shall be at the contractor's expense.

(Record, p. 23). The RFP also contains the following provisions:

> The College will provide tables and chairs for customer use.
>
> College shall provide exterminating services in all food preparation areas. The College shall provide general exterminating services in the dining area and vending machine areas. . . .
>
> College shall provide without cost to the contractor electrical and water requirements to the extent reasonably required to permit the contractor to conduct efficiently the operations outlined herein.
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> The College shall be responsible for providing adequate security for the contractor's personnel, equipment, inventory and cash while on College premises . . . .

(Record, pp. 24-25).

The College uses county-appropriated funds to pay for the services it is required to provide under the agreement with the winning vendor. These funds are expended by the College through its normal expenditures budget. (Defendant's Ex. 5).

The catering services are to be provided to the College upon request and will be paid for by the College as

provided. Offerors were required to set forth prices and proposed menus for catering services. (Record, p. 19). The use of the winning vendor's catering service is neither guaranteed nor exclusive.

On May 21, proposals were opened. Only two vendors responded - Wometco, the incumbent, and Atlas Food Systems and Services. (Record, p. 78). Pursuant to S. C. Code Ann. Reg. 19-445.2135(G), the evaluation panel consisted of three persons representing the College, the Materials Management Office and the Commission on Higher Education.

The evaluators rated the proposals on four criteria, in order of importance: (1) soundness and effectiveness of offeror's approach and methodology; (2) proposed prices to be charged to staff, students and faculty; (3) the amount of the commission to be paid to the College on sales of food items; and (4) entity and personnel qualifications, experience and background. (Record, p. 28).

After scoring was done and the commission price component added in, Atlas received 287 of a possible 300 points and Wometco received 210 (pp. 78-83). State Procurement issued an intent to award to Atlas on June 5, 1991. (Record, p. 39).

On June 13, Wometco filed a protest of the award to Atlas stating as grounds that Wometco fulfilled the intent and spirit of the RFP by submitting a short proposal, that the evaluators failed to take into account Wometco's prior experience at the college, that the evaluators failed to

score other unnamed portions of the proposal correctly, and that Wometco's proposal offered the College the highest commission (14.9% vs. 12.67%). (Record, p. 12).

On June 14, the President of the College, Don Garrison, wrote a letter to the CPO requesting that the Notice of Intent to Award to Atlas be rescinded and praising Wometco for its past performance. As explained by Dr. Garrison, "It seems to me that our current food service contractor (Wometco) believed that our knowledge of their pricing, service, and ability to perform would be related to the members of the [evaluation] Panel by our representative. This, of course, was not the case as the instructions to Panel members did not allow this. Panel members reviewed the proposals as presented, and I believe had we been able to relate to the other Panel members our experience with Wometco the outcome would have been different. We must take into account this past performance as we take into account the proposed performance of an unknown." (Record, p. 14).

Apparently neither Wometco nor the President of Tri-County Tech were aware of the numerous mandates in the RFP that an offeror "include all applicable information" that the offeror wanted considered and that "all proposals must be complete and carefully worded and must convey all of the information requested in order to be considered responsive." (Record, pp. 17-18). The RFP also includes the warning that, "The State will not accept nor request

additional information of an offeror in order to determine responsiveness." (Record, p. 18).

The College's representative on the evaluation committee, Linda Teasley, commendably followed her instructions to evaluate proposals on the information contained therein and did not interject personal knowledge or opinions of Wometco into the evaluation process.[1]

At the hearing before the CPO on July 16, 1991, Wometco did not argue the merits of its case but instead chose to raise the single issue whether the Consolidated Procurement Code, S. C. Code Ann. §11-35-10, et seq. (1986) applies to this transaction. (Record, p. 7). The CPO held that Wometco did not timely file this protest under §11-35-4210 because it knew or should have known that the Procurement Code did not apply when it received the RFP.

On August 5, 1991, Wometco appealed the CPO's decision to the Panel raising the grounds listed and discussed below.

On August 19, Dr. Garrison wrote a letter to the Chief Procurement Officer attempting to reject all proposals and referring to his previous letter of June 14. (Plaintiff's Ex. #1). Dr. Garrison cites the RFP provision which states, "Tri-County Technical College reserves the right to reject

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[1] See In re: Protests of Sperry-Rand Corporation and Tandy Corporation, Case No. 1985-2, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 181 (Evaluator violated competitive sealed proposals procedure when she erroneously considered unsolicited information within her personal knowledge, such as whether vendors were present at trade conventions).

all proposals submitted under this request." (Record, p. 23).

On August 26, the CPO denied the College's attempt to reject all proposals as being untimely and lacking valid reasons. (Defendant's Ex. #1).

CONCLUSIONS OF LAW

At the outset the Panel finds erroneous the CPO's conclusion that the issue of whether the Procurement Code governs this transaction is untimely raised.[2] The question whether the Procurement Code applies in this case goes directly to the jurisdiction of the Panel and the Chief Procurement Officer to hear the case - if the Procurement Code does not apply, the Panel lacks jurisdiction. Therefore, this issue is timely raised at any point in the proceeding.

Wometco's first three issues are:

1. The transaction at issue here is not a contract, a procurement or a food service contract as defined by the Code.

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[2]The Panel agrees with the CPO that Wometco's fifth grounds, that "this transaction is exempt from the Code because it does not involve the expenditure of funds in excess of $2,500" is untimely. (Record, p. 3). The small purchase exception does not exempt a transaction under $2500 from the Procurement Code. It simply provides that any purchase under $2500 does not have to be made through General Services by competitive sealed bidding but may be made under small purchase regulations found at S. C. Code Ann. Reg. 19-445.2100. This issue is untimely raised because it does not go to the jurisdiction of the Panel under the Procurement Code. Wometco knew or should have known that the amount of the purchase here was under the threshold when the RFP was issued.

2. The Procurement Code is not applicable to this transaction because there is no expenditure of state funds.

3. The agency has no jurisdiction because this transaction is not covered by the Procurement Code.

By its terms, the Procurement Code applies to "every expenditure of state funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies . . . . (Emphasis added). §11-35-40(2).

Wometco argues that in this case the solicitation was for the provision of food and vending services to students and staff - in the words of the RFP - at "no expense to the College." (Record, p. 18). Indeed, the vendor pays the College a commission on its sales to students and staff. Wometco contends that this absence of payment to the winning vendor means there is no "expenditure of funds" as that term is used in §11-35-40(2).[3]

Atlas and General Services point to the requirement of the RFP that the College provide kitchen and dining room

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[3]Both Wometco and Atlas refer to "the expenditure of state funds" as the pivotal requirement of the Code. In fact, the language is "expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of funds . . . ."

Dr. Garrison testified that county funds were used to provide support services to the winning vendor. Defendant's Exhibit 5 and the testimony of Thomas Lewis, the Vice President for Finance of the College, indicate that these funds are part of the College's expenditure budget. Because the College is a governmental body, as defined in §11-35-310 (18), these county funds when spent through the College become "expenditures of funds by this State" as defined in §11-35-40.

facilities rent-free, certain dining and refrigeration equipment (Defendant's Ex. 4), electricity, water, security and exterminating services to the winning vendor as part of the agreement between the parties. (Record, p. 24-25). They contend that provision of the equipment and these services is an expenditure of funds by the College.

The Panel agrees with Atlas and General Services. While it may be true that making existing equipment (such as tables and chairs) available might not constitute expending "funds", the same cannot be said for repairing or replacing equipment and providing electricity, water, security and exterminating services. Payment for these items is from the College's normal expenditures budget. (See Defendant's Ex. #5).

Further, as Atlas and General Services point out, the RFP also covered catering services to be provided by the winning vendor at quoted prices. Although there is no guarantee that any catering services will be purchased from the winning vendor, if they are, the College will pay the vendor at the prices bid by it under the RFP. This also constitutes an expenditure of funds.

The question then becomes, "Is there an expenditure of funds "under contract" as that term is defined in the Procurement Code?" "Contract" means "all types of state agreements, regardless of what they may be called, for the procurement or disposal of supplies, services or

construction." § 11-35-310(8). To summarize, a contract is an agreement for the procurement of services.

"Procurement" is defined as "buying, purchasing, renting, leasing or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service or construction, including description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration." (Emphasis added). §11-35-310(22).

Wometco's second point that there is no expenditure under contract because there is no contract or procurement here must fail. In this case, there is an agreement whereby the College acquires or obtains food services for its students by providing the premises, certain equipment, utilities, security and exterminating services to the contractor. The requirement that the College provide the utilities and services is found in the RFP, that is, in the contract between the parties. An "expenditure of funds by this State under contract" clearly exists in this case.[4]

The Panel holds that the provisions of the Consolidated Procurement Code, §11-35-10, et seq., (1986) apply to this

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[4] See Opinion of the Attorney General, No. 84-8, January 24, 1984 (That government is not paying for a service itself but is passing the cost on to the users of the service does not thwart application of competitive bidding statutes if the policy reasons for having competitive bidding are present.)

transaction and that the Panel and the Chief Procurement Officer have jurisdiction over this matter.

Likewise, because this is a contract for food services, Reg. 19.445-2135 applies. That regulation mandates that all food service contracts be solicited under the competitive proposals method set forth in § 11-35-1530 and Reg. 19-445.2095. The Panel finds that General Services used the proper method of solicitation in this case.

Finally, the Panel notes that, even if this transaction does not fit into the technical requirements of the Procurement Code, the College voluntarily sought the assistance of State Procurement in soliciting this contract and drafted and approved the terms of the RFP, which references the Consolidated Procurement Code. The College chose the competitive sealed proposal method of the Consolidated Procurement Code as the form by which it would accept offers. The rules for the submission and evaluation of offers was set forth in the RFP. Atlas and Wometco agreed to these rules and to the competitive sealed proposals procedure when they voluntarily submitted offers to the College under the RFP.

Atlas won the contract under the rules and procedures agreed to by the parties. It would not be fair to Atlas to allow the College and Wometco to deny applicability of those procedures at this stage of the proceeding.

4. Award to Atlas cannot be made because the College has rejected all proposals pursuant to the authority stated in the RFP.

The RFP in this case has the standard clauses concerning the State's right to reject proposals "if it is in the best interest of the State to do so." (Record, pp. 15 and 33)

In addition, the RFP has the following provision under the caption, "FISCAL MATTERS":

> Tri-County Technical College reserves the right to reject all proposals submitted under this request.

(Record, p. 23).

Wometco argues that, under this provision, the College has an unqualified right to reject all proposals and that the College has exercised such right by Dr. Garrison's letters of June 14 (Record, pp. 13-14) and August 19 (Plaintiff's Ex. 1).

Atlas and General Services contend that the College's right to reject is qualified by the Procurement Code and must be for legitimate reasons. Further, they argue that Dr. Garrison's June 19 letter is not a rejection of all proposals, only of Atlas', and that the August 19 attempt to reject comes too late.

The Panel agrees with Atlas and General Services that the June 19 letter is not a rejection of all proposals but rather an attempt to have the award to Atlas rescinded. (Record, pp. 13-14). There is no basis in the RFP or in

fact for such rescission and the Chief Procurement Officer properly rejected the request.

As to the August 19 letter in which the College states its desire to reject all proposals (Plaintiff's Ex. 1), the Panel agrees with Atlas and General Services that the right to reject is not unqualified and that the College's rejection is unfounded at this stage in the proceeding.

The Procurement Code requires that award be made to the offeror whose proposal is the most advantageous to the State taking into account the evaluation factors. §11-35-1530(7). This section must be read together with § 11-35-1710 which allows rejection of all proposals when it is in the best interest of the State. Reg. 19-445.2065, provides that, unless there is a "compelling" reason to reject one or more bids, award will be made. In order to cancel a solicitation after opening but prior to award, Reg. 19-445.2065 requires the procurement officer to determine in writing that one of a number of conditions apply (eg., unreasonable prices, services no longer required, specifications are ambiguous, etc.), including that cancellation is clearly in the best interest of the State.

Finally, § 11-35-30 states, "Every contract or duty within this Code imposes an obligation of good faith in its negotiation, performance or enforcement. 'Good faith' means honesty in fact in the conduct or transaction concerned and

the observance of reasonable commercial standards of fair dealing."

The Panel finds that, although the right of the College to reject all proposals is stated in the RFP as unqualified, the provisions of the Procurement Code cited above must be read to place certain conditions on the right - the first and foremost condition being the obligation to exercise such right in good faith.

Dr. Garrison testified that the College desires to reject all proposals in this case because the losing vendor, Wometco, proposed the highest commission on food sales and because Wometco has a previous history of good performance which, in Dr. Garrison's opinion, was not considered by the evaluators.

Both performance and price are factors worthy of consideration in awarding this contract and both <u>were</u> properly considered at the outset. Both factors are listed in the evaluation criteria developed with input and approval of the College. The commission to be paid the College is weighted third of four criteria. Past performance and experience is weighted fourth. (Record, p. 28).

Atlas and Wometco submitted their proposals in accordance with the requirements of the RFP with the expectation that each proposal would be evaluated on the criteria stated in order of importance. Such evaluation was performed and Atlas scored 287 out of a possible 300 points. Wometco scored only 210 of 300 points.

Significantly though, Wometco scored higher on the commission factor and thus has already received credit in the evaluation process for its better price. Further, as pointed out by Atlas, although its quoted commission to the College is lower than Wometco's, the commission is based on total sales and Atlas' level of performance may exceed Wometco's and generate the College more commissions in the end.

The Panel holds that acceptance of Atlas' quote of a slightly lower commission is not a valid reason to reject all proposals in this case. Indeed, such an event is fully contemplated by the RFP process itself.[5]

The College's rejection is also based on Dr. Garrison's belief that Wometco's experience was not considered in the evaluation process because Wometco did not include complete information in its proposal concerning its experience. (Record, p. 14). By rejecting all proposals, the College is attempting to grant Wometco a reprieve from its failure to follow the plain and unambiguous requirements of the RFP that it include all information relevant to its experience. The Panel does not find this reason to be compelling or in

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[5]It is the distinguishing factor of the competitive sealed proposals procedure that price is not the only or even the primary basis for award. See In re: Protests of Sperry Rand Corporation and Tandy Corporation, supra Note 1, at p. 191. Allowing rejection of all proposals solicited under the RFP process simply because the lowest price does not prevail subverts the General Assembly's reason for selecting the RFP process for food service contracts in the first place.

the best interest of the State or in accordance with the College's obligation to act in good faith.

5. If Reg. 19-445.2135 can be read to apply to this transaction, it is void as ultra vires and any legislation authorizing its passage violates the prohibition against delegation of duties set forth in the South Carolina Constitution.

Wometco did not argue this issue at the hearing before the Panel but did include it in its brief. The Panel has held in the past that it lacks the authority to declare any provision of law unconstitutional. See In re: Protest of Smith Setzer and Sons, Inc., Case No. 1989-21 and Case No. 1990-2, citing, South Carolina Tax Commission v. South Carolina Tax Board of Review, 299 S.E.2d 489 (1983). Following its past decisions, the Panel presumes in this case that Reg. 19-445.2135 is properly promulgated by the General Assembly and is constitutional.

For the reasons stated above, the Panel holds that the Consolidated Procurement Code is applicable to this procurement, that the protest of Wometco lacks merit and should be dismissed, and that award of the contract to Atlas should proceed according to established procurement procedures.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: _____
Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.
September 2, 1991