

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND) BEFORE THE SOUTH CAROLINA
) PROCUREMENT REVIEW PANEL
) CASE NO. 1991-21

In re:)

PROTEST OF INTERNATIONAL BUSINESS MACHINES)
CORPORATION)

APPEALS BY INTERNATIONAL BUSINESS MACHINES)
CORPORATION and MOTOROLA, INC., MOBILE DATA)
DIVISION)

) O R D E R

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on October 22 and 23, 1991, on appeals by International Business Machines Corporation ("IBM") and Motorola Inc., Mobile Data Division ("Motorola") from a decision by the Chief Procurement Officer ("CPO") concerning a contract to provide a statewide mobile data communications system for use by law enforcement and other agencies.

Present at the hearing before the Panel were IBM, represented by Dwight F. Drake, Esq., and John E. Schmidt, III, Esq.; Motorola, represented by Richard Henderson, Esq., Elizabeth M. Crum, Esq., and Deborah A. Davis, Esq.; the Division of Information Resource Management ("DIRM"), represented by Craig K. Davis, Esq., and Brett A. Hickman, Esq.; the Department of Highways and Public Transportation, represented by Glennith C. Johnson, Esq.; and the Division of General Services, represented by Helen Zeigler, Esquire.

FINDINGS OF FACT

On November 7, 1990, the State Information Technology Management Office (ITMO) approved a plan by the Division of

Information Resource Management (DIRM) to solicit a five-year contract for the acquisition of a statewide mobile data communications system. When completed the system will consist of 5000 mobile data terminals ("MDTs"), which are in essence the computers and screens to be placed in all participating vehicles; a series of tower transmitters located all over the state; and a number of central computers located at the dispatch headquarters which receive and monitor signals sent from participating vehicles.

The Request for Proposals ("RFP"), issued on March 28, 1991, indicated that the undertaking would begin with 25 mobile data terminals for the Highway Department in Richland and Lexington counties and, if funds permitted, additional terminals for Greenville and Spartanburg counties. The solicitation additionally contemplated that all state agencies, municipalities, school districts, and even federal government agencies could purchase from this contract. (RFP, p. 1). However, no guarantee was given that any agencies other than the Highway Department would purchase from the contract.

On April 17, 1991, a preproposal conference was held to explain the details of the RFP and to answer questions. From April 22 to June 27, the State issued seven amendments (numbered 1, 2, 2A, 3, 4, 4A, 5) to the solicitation.

On July 12, 1991, proposals were opened. A committee of personnel from ITMO, DIRM, and the Highway Department evaluated the proposals for content without reference to the

pricing information. After the committee evaluated the merits of the proposals, price information was provided and factored into the evaluation scores. According to the terms of the RFP, the pricing component to be considered was for the statewide portion of the contract rather than just the Highway Department portion.

IBM's bid on the statewide portion of the contract was \$37,568,080.00. Motorola gave no grand total in its proposal.¹ Instead, Mr. William McClary, a Support Services Manager for DIRM, calculated Motorola's total price by extending unit prices found in Motorola's proposal, by assuming the maximum number of tower sites quoted by Motorola and by estimating certain future maintenance charges based on current prices. Performing these calculations, Mr. McClary arrived at a total figure of \$27,297,668.00 for Motorola's statewide proposal.

The State was forced to estimate Motorola's price in part because Motorola failed to provide the cost of maintenance for its mobile data terminals. The cost proposal form had a blank for "Five Year Maintenance Cost (per item)" which was to be filled in. Motorola neglected to complete this blank. (Record, p. 204).

¹For ease of reference, the Panel refers to Motorola, Inc., and MDI Systems, Inc., interchangeably as "Motorola." This designation is not meant to decide the question which entity submitted the proposal. That issue is addressed later in the Panel's order.

On August 28, Motorola wrote the State asking to correct its unilateral bid mistake by adding \$4.8 Million in maintenance charges to the total proposal cost. (Record, p. 216). The State refused to allow correction after bid opening and Motorola withdrew its request and indicated its willingness to provide maintenance as part of the originally calculated price. (Record, p. 221-222).

In addition, Motorola did not give a firm number of tower sites but indicated that between 30 and 40 would be required. (Record, p. 167). Finally, Motorola indicated that maintenance costs for an equipment upgrade would be determined based on the then current published price and software maintenance prices would be quoted at time of sale. (Record, pp. 198 and 208).

On August 13, a Notice of Intent to Award was issued to Motorola at the price calculated by the State. (Record, p. 215). On August 29, IBM protested the award to Motorola raising sixteen grounds of protest. (Record, p. 31-34). The award was stayed at that time and the contract is at present not awarded.

At the protest hearing before the Chief Procurement Officer on September 17 and 18, IBM withdrew three grounds of protest but filed an additional protest containing seven grounds on September 20. (Record, pp. 35-37). The new protest went to the discovery at the hearing that the Motorola entity which signed the proposal, MDI Systems, Inc., is no longer in existence. MDI Systems, Inc., a

former subsidiary of Motorola, Inc., was dissolved in August 1991 and taken into Motorola, Inc., as a division known as "Mobile Data Division".

The CPO in his order issued October 3 held Motorola's proposal not responsive in several key areas but dismissed a number of IBM's protest grounds as untimely. Both IBM and Motorola appeal to the Panel raising between them some 27 issues.

At the hearing before the Panel, the parties concentrated on several main issues and did not present evidence on or argue many of the lesser issues. Because the Panel finds the main issues dispositive, it addresses those below and does not reach the remaining issues.

CONCLUSIONS OF LAW

I. Standing of Motorola, Inc.

As a preliminary matter, IBM moves to dismiss the appeal of Motorola, Inc., Mobile Data Division, for lack of standing on the grounds that MDI Systems, Inc., a defunct corporation, is the offeror on this contract and not Motorola, Inc., and further, that Motorola, Inc., has no legal or direct interest in this proceeding.²

²This issue is separate from the seven grounds raised by IBM in its protest of September 20. Those grounds go to the responsibility of MDI Systems, Inc., to receive award of this contract in light of its status as a dissolved corporation. The Chief Procurement Officer found the seven grounds related to responsibility untimely raised. The Panel does not address these grounds in light of its ruling on other grounds raised by IBM.

IBM supports its argument by referencing portions of Motorola's proposal which indicate that MDI Systems, Inc., holds the copyright of the proposal and software offered, that the bid bond, cost certificate, debarment certificate, and drug-free workplace certificate are all executed solely by MDI Systems, Inc., as "contractor." (See, Attachments to IBM's Motion to Dismiss).

On the other hand, Motorola, Inc., points to the cover letter attached to the proposal which refers to the proposal as "Motorola's" and is signed "Motorola, Inc." by J. Harvey Wilson, District Sales Manager and Stan Cramner, Senior Account Manager, "Mobile Data Division." (Motorola, Exhibit #2). In addition, as Motorola, Inc. indicates, numerous references to "Motorola" as the offering party appear throughout the proposal. (See, Motorola Exhibit #2 and the entire proposal).

The question whether MDI Systems, Inc., alone or with Motorola, Inc., is the offeror is a close one. Certainly, the proposal on its face raises serious questions in that regard. The cover letter and other portions of the proposal indicate that Motorola, Inc., is the offeror but all of the important certifications, including the bid bond, are executed only by MDI Systems, Inc. The Panel does not find it necessary to resolve this question, however, in light of its holding in In re: Protest of Dictaphone Corporation, Appeal by Sudbury Systems, Inc., Case No. 1991-10.

In the Sudbury case the Panel for the first time addressed the question of who has standing to appeal to the Panel from a decision of the Chief Procurement Officer. As the Panel noted in Sudbury, although protestants under § 11-35-4210(1) must be either actual or prospective bidders or offerors, the class of persons who may appeal to the Panel is broader. Section 11-35-4210(5) provides:

Finality of Decision. A decision under this subsection (3) shall be final and conclusive, unless fraudulent, or unless any person adversely affected by the decision requests a review, in writing, setting forth the grievance, to the... Panel.

In Sudbury, the Panel interpreted "person adversely affected by the decision" to mean one who has some direct, legal interest in the outcome of the review process.

In Sudbury, the offeror was Digital Information Systems Corporation and the appellant was Sudbury Systems, Inc. The evidence indicated that, at the time of Sudbury's appeal to the Panel, the two corporations were separate and distinct and not related except that Digital was an authorized dealer in Sudbury equipment.

Although both corporations and the using state agency in Sudbury testified that everyone concerned knew that Sudbury was the party which would ultimately perform the contract, neither the RFP nor the proposal nor procurement law supported such a conclusion. On that basis, the Panel concluded that Sudbury did not have the direct, legal interest required for standing.

In the present case, MDI Systems, Inc., which was formerly a subsidiary of Motorola, Inc., has been dissolved as a separate corporation and subsumed into Motorola, Inc., as a division. Unlike in the Sudbury case, Motorola, Inc., is the only viable entity remaining. Also, unlike in Sudbury, the RFP contemplates this situation:

Any contract resulting from this solicitation shall incur [sic] to the benefit of, and be binding upon, the respective successors and assigns, if any, of the parties thereto, except that nothing contained herein shall be construed to permit any attempted assignment which would be unauthorized or void.

(Request for Proposal, § 2.39, p. 29).

The Panel believes that Motorola, Inc.'s legal interest in the outcome of this administrative review of the CPO's decision is sufficient to confer standing in this case.³

II. Responsiveness of Motorola's Proposal

IBM challenges the responsiveness of Motorola's proposal in several primary respects. First, IBM argues that Motorola altered the terms of the RFP by failing to guarantee 99% contour coverage and by offering instead 95% contour coverage.

³The Panel notes that Motorola, Inc., appeared at the hearing before the CPO and participated as a party and is, therefore, not a newcomer as was Sudbury. The Panel also notes that the proposal in part supports the notion that Motorola, Inc., is the offerer.

This issue concerns the requirement in the RFP related to the reliability of communication afforded by the mobile data communication system. Section 7 of the RFP provides:

SECTION 7: SYSTEM COVERAGE

7.1 DATA RADIO COVERAGE

Richland and Lexington Counties will be the coverage area to be used as a minimum acceptable area for this RFP, using a 99% coverage contour projection. A 99% coverage contour projection is required unless the vendor can provide documentation or evidence to demonstrate a sufficient error recovery capability that would guarantee 99% coverage.

Vendors shall provide detailed documentation regarding the coverage of their proposed systems. This should be provided in the form of plots of predicted coverage for each proposed site, as well as a composite plot showing the predicted statewide coverage. Vendors shall clearly indicate any areas that fail to meet the above criteria. Vendors will be required to guarantee the coverage of their proposed system

(Emphasis added) (Record, pp. 73-74).

Motorola's answer to this requirement is found in the Record at pages 162 through 167. In part Motorola responded:

. . . First, environmental fading makes it nearly impossible to provide 99% message error rate reliability without making the cost of the infrastructure prohibitive. This would manifest itself in the form of a prohibitive number of transmitter sites. Secondly, telephone lines are typically 97% reliable, so that type of reliability is not required. . . .

Motorola promises 95% contour (97% area) reliability Experience has shown this to be the proper balance between officer safety and coverage needs.

A system predicted to have 97% area coverage reliability is 97% reliable within the area encircled by the coverage contour. . . .

A significant coverage distinction, often overlooked, is the difference between Area Coverage reliability and Contour Coverage reliability.

What this means is that a 95% Area Reliable system can have 15% or more communication failures in the fringes of the covered area.

Motorola feels that contour radio coverage is the best means of defining coverage performance for public safety users.

Motorola has found that by designing communications systems to have 95% Contour Coverage Reliability, about 97% Area Coverage Reliability is achieved. This greater Area Coverage Reliability will result in 4% to 6% communication failures in the fringes. . . .

This RFP requires a guarantee of 99% coverage. Motorola guarantees this coverage by providing 97% area coverage reliability, 15% error correction recovery capability and automatic retries for up to an additional 3%.

(Emphasis added).

IBM produced two experts who testified that contour coverage reliability is different from area coverage reliability although the two can be related by use of a mathematical formula. IBM's experts opined that Motorola's guarantee of 97% area coverage reliability, 15% error correction recovery capability and 3% automatic retries is not equivalent to 99% contour coverage.

On the other hand, Motorola and DIRM introduced the testimony of two DIRM employees, who worked on the RFP in this case and are qualified as experts in the field of radio communications, that the State was satisfied with the

coverage offered by Motorola. Both DIRM witnesses referred to the language of §7 which requires 99% contour coverage "unless the vendor can provide documentation or evidence to demonstrate a sufficient error recovery capability that would guarantee 99% coverage." (Record, p. 73). DIRM's experts opined that Motorola's guarantee of 97% area coverage reliability, 15% error correction recovery capability and 3% automatic retries was sufficient to meet the State's need of 99% coverage.

The Panel believes that the apparent disagreement among four qualified experts can be explained by the ambiguity in the 99% contour coverage requirement. Section 7.1 is captioned, "Data Radio Coverage." The first sentence of 7.1 states that Richland and Lexington Counties will be the "minimum acceptable area for this RFP using a 99% coverage contour projection." The next sentence indicates that "99% coverage contour projection is required unless the vendor can demonstrate error recovery capability that would guarantee 99% coverage". (Record, p. 73).

All the experts agreed that there is a difference in "contour" and "area" reliability coverage. The dispute seems to center on what the State meant when it stated it would accept error recover capability that would guarantee "99% coverage." IBM obviously interprets "99% coverage" to mean "contour coverage." The Panel believes that this is a reasonable interpretation given that the only coverage spoken of in § 7.1 is contour coverage.

On the other hand, Motorola interprets "99% coverage" to mean area reliability coverage or something less than 99% contour coverage. The Panel also believes that this is a reasonable interpretation given the heading "radio data coverage" and the specific use of the modifier "contour" before the word "coverage" in every instance but the last reference to "99% coverage." One DIRM expert indicated that, while the RFP might be read to require 99% contour coverage, the State was in fact willing to accept 99% "data communications" coverage.⁴

The Panel believes that this ambiguity was unfair to both IBM and Motorola. Motorola should not be declared not responsive for reasonably concluding that it could provide "99% coverage" and IBM should have the opportunity to bid on something less than 99% contour coverage if the State is willing to accept less. All of the witnesses agreed, and the Panel so finds, that how one interprets the coverage requirement is directly related to the cost of providing the goods and services solicited.

The Panel finds that the ambiguity of §7.1 affected the fairness of this procurement and that resolicitation of this contract is the only cure. Resolicitation will give the State the opportunity to reassess exactly what coverage is

⁴See Testimony of Boykin Roseborough. Sgt. Mike Kelly, a State Trooper who was a member of the evaluation committee, indicated that, from a safety standpoint, he would be happy with 95% reliability.

required and to clearly state its requirements. Resolicitation will give the parties the opportunity to bid on the same requirements.

In addition to the coverage question, IBM also argues that Motorola's proposal was not responsive because it failed to locate specific base tower sites and coverage areas as required by the State in its answers to vendor's questions (Record, p. 64) and it failed to include maintenance upgrade charges on the mobile data terminals and left open to future pricing the maintenance charges on an upgraded computer and on certain software. Motorola either denies that it was required to provide the information indicated by IBM or argues that omission of such information is a minor technicality or informality which can be waived or cured under Reg. 19-445.2080.

Because the Panel finds that the RFP was ambiguous with regard to the 99% coverage requirement and that resolicitation is needed, it declines to address the above issues or any other issues raised by IBM or Motorola.

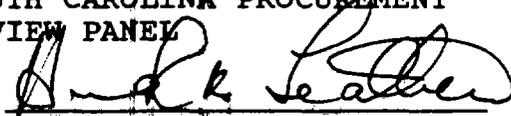
CONCLUSION

For the reasons stated above, the Panel reverses the October 3, 1991, decision of the Chief Procurement Officer and directs that the contract in question be resolicited with the understanding that the State may make such changes to the current RFP as it deems necessary in order to provide for the State's needs with regard to a mobile data communications system.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY:



Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.

10-29-, 1991