

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1992-19

IN RE:)
)
PROTEST OF GTE Vantage, Inc., Applied)
Campus Technologies Division;) O R D E R
APPEALS by GTE Vantage, Inc., Applied)
Campus Technologies Division and)
Institutional Network Communications.)
)
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on November 4, 1992, on the appeals of GTE Vantage, Inc., Applied Campus Technologies Division ("GTE") and Institutional Network Communications ("INC") from a decision by the Chief Procurement Officer ("CPO") ordering resolicitation of a contract to provide a campus video system to Clemson University.

Present and participating in the hearing before the Panel were GTE, represented by James L. Werner, Esq.; INC, represented by Helen T. McFadden, Esq., and the Division of General Services, represented by James W. Rion, Esquire. Clemson did not participate as a party.

FINDINGS OF FACT

On October 18, 1991, the Division of General Services Information Technology Management Office issued a Request for Proposals ("RFP") to provide a campus video communications system to Clemson University. The RFP required vendors to provide the State with pricing for a possible 5, 7, or 10-year term. (Record, p. 121).

On April 20, 1992, the State issued a Notice of Intent to Award a five-year contract to INC. On May 1, 1992, GTE Vantage protested the award to INC.

As a result of that protest, the State discovered it had incorrectly assigned points due to GTE to another offeror and had used incorrect numbers from GTE's proposal to calculate its cost. The parties agreed that the State would reevaluate the proposals and issue a new Notice of Intent to Award.

Recalculation of scores using the correct numbers yielded the following results:

<u>Term of Contract</u>	INC	GTE
5 years	85.60	86.60
7 years	85.60	85.31
10 years	85.60	83.68

(Record, p. 87).

After the new scores were revealed, Clemson petitioned for and received the Budget & Control Board's approval to award a 10-year multi-term contract to INC. Clemson had previously justified in writing the use of a multi-term contract. On August 13, 1992, the State issued a Notice of Intent to Award to INC for ten years. (Record, p. 88).

On August 24, 1992, GTE protested the award to INC on numerous grounds. The CPO discounted all of GTE's allegations except that INC failed to describe its remote testing and diagnostic capability as required by the RFP. The CPO found merit to that ground and ordered resolicitation of the contract. (Record, pp. 6-25).

On October 5, 1992, GTE appealed to the Panel that portion of the CPO's decision which denied GTE's grounds of protest and which ordered resolicitation as a remedy. (Record, pp. 2-3).

On October 7, 1992, INC appealed to the Panel that portion of the CPO's decision which held that INC was not responsive to the remote testing and diagnostics requirement and which ordered resolicitation. INC also raised for the first time issues related to the responsiveness of GTE's proposal. (Record, pp. 4-5).

CONCLUSIONS OF LAW

INC's Issues As To GTE's Responsiveness

GTE moves to dismiss INC's protest of GTE's proposal stated in INC's request for review filed with the Panel on October 7, 1992. (See Record, p. 5). Because INC raises these issues for the first time on appeal to the Panel, the CPO has not addressed them or issued a written determination concerning them. Under the South Carolina Supreme Court's decision in Hitachi Data Systems Corporation v. Leatherman, No. 23698 (S.C. Sup. Ct. August 10, 1992) (Davis Ad. Sh. #19), the Panel lacks jurisdiction to consider such claims and they are hereby dismissed.

Timeliness of INC's Appeal

GTE also moves to dismiss INC's remaining issues on the grounds that INC's appeal to the Panel is not timely under 11-35-4210(7), which provides that a decision by the CPO is final unless a person adversely affected requests a review

"within ten days of the decision." The CPO's decision is dated September 24, 1992 and INC received it on September 29. INC filed its request for review on October 7, 1992.

GTE contends that the plain words of § 11-35-4210(7) dictate that the ten-day period runs from the actual date of the decision rather than from the time the decision is received. If that is the case, INC's appeal is not timely filed.

INC contends that fairness and due process and the law in this area requires the conclusion that the ten-day time period runs from INC's receipt of the decision. If that is the case, INC's appeal is timely filed.

The Panel agrees with INC that the law requires that the time to request a review by the Panel under § 11-35-4210(7) runs from the date the decision is received.

In Hamm v. S.C. Public Service Comm'n, 287 S.C. 180, 336 S.E.2d 470 (1985), the South Carolina Supreme Court interpreted the Administrative Procedures Act requirement that appeal from an agency decision must be filed "within thirty days after the final decision of the agency" to mean that appeal had to be filed within thirty day after notice of an agency decision. The Supreme Court stated:

If time to appeal ran from the date a decision was actually made, an agency could preclude judicial review in all cases simply by concealing its decision until the thirty days had run. Such a result could not have been intended by the Legislature. We hold that under Section 1-23-380(b), a party has thirty days after receiving written notice to appeal an agency decision.

336 S.E.2d, at 471. The Panel believes that a similar interpretation of §11-35-4210(7) is appropriate. In this case, INC meets the ten-day requirement and its appeal is timely.¹

GTE's Protest Issues

1. Authority of State to Enter Ten-Year Contract. GTE contends that the decision to award a ten-year contract to INC violates the spirit and the letter of the requirements of the Procurement Code because the State failed to state in the RFP how the award would be determined and how prices would be compared in choosing the term of the contract and because the State waited until the scores were published to choose a ten-year term.

¹In its order reversing the Panel's decision in Data-Tec Business Forms, Case No. 1982-3, Decisions of the South Carolina Procurement Review Panel 1982-1988, p. 19, the circuit court noted that while it could not consider the timeliness of a protestant's appeal to the Panel because the date of receipt had not been put in the record:

Were the issue of timeliness of the appeal squarely before the Court, there is ample authority in South Carolina to determine the question as to when the time for filing appeal commences. See, for example, S.C. Department of Mental Health v. Glass, 269 S.C. 91, 236 S.E.2d 412 (1977); Brewer v. S.C. State Highway Dept., 261 S.C. 52, 198 S.E.2d 256 (1973)

The cases cited by the court hold that appeal rights run from receipt of a decision.

Under the Consolidated Procurement Code, (§11-35-2030), the State cannot enter contracts for a period of more than one year unless allowed by law. Reg. 19-445.2135 allows a maximum term of five years if certain conditions are met and when it is determined in writing by the agency that "a multi-term contract will serve the best interests of the state by encouraging effective competition or otherwise promoting economies in state procurement." The State may contract for terms longer than five years if the conditions are met but only if the Budget & Control Board approves.

Clemson University, the using agency, justified use of a multi-term contract in writing on October 2, 1991, prior to the solicitation date (Resp. Ex. #2). The Budget & Control Board approved its use on August 11, 1992, prior to award (Panel's Ex. #1). The Panel holds that the State has met the conditions for use of a multi-term contract in this case.

GTE also protests the failure of the RFP to state that a multi-term contract will be awarded and how prices are to be compared as is further required by Reg. 19-445.2135(E).

The Panel lacks jurisdiction to consider this issue of protest because GTE did not raise it within ten days of when it knew or should have known of the facts giving rise to this complaint.

The RFP was issued on October 18 and clearly stated under the heading "Contract Period", "The bidder should

submit prices for contract terms of five (5), seven (7), and ten (10) years." (Record, p. 121). The Procurement Code treats any contract for more than one year as a multi-term contract and sets forth the requirements for use, including that the solicitation state how prices are to be compared. GTE should have known when it received the RFP, sometime in October 1991, that the State intended to award a multi-term contract of either five, seven, or ten years, and that the RFP did not state how prices would be compared. Because GTE did not protest this issue until August 24, 1992, this issue is not timely raised under §11-35-4210(1).

2. INC failed to meet financial requirements. GTE also alleges that INC is not a responsible bidder because INC's proposal is unclear about its identity. GTE claims that, although INC identifies itself as a division of Communication Partners, it is in fact a separate corporation formed in Maryland.

INC presented evidence that the entity which submitted the proposal is not the same entity as the Maryland corporation, Institutional Network Communications, Inc., and that the INC which submitted the proposal is a division of Communications Partners.

The Panel holds GTE has failed to demonstrate that INC is not a responsible offeror. The Panel further notes that under the RFP, INC is required to submit both a bid bond and a performance bond, which conditions INC agreed to meet.

3. Failure to Meet Technical Requirements.

GTE claims finally that INC fails to meet the technical requirements of the RFP in two respects.

A. Remote Testing and Diagnostic Capability. The RFP in the maintenance category directs that the "vendor should describe remote testing and diagnostic capability." (Record, p. 120). Despite the "should" language, the RFP clearly make this a mandatory requirement (Record, p. 133) and states that the failure to meet it will result in rejection of the offeror's proposal. (Record, pp. 99, 113, and 132).

INC's response to this requirement is:

INC will provide on-site maintenance personnel at the University available to respond to maintenance calls . . . Remote testing and diagnostic capability will not be necessary at the time of installation since INC will be providing local service personnel. The expense of such capability is usually only necessary in much larger systems. However, these capabilities can be added on an as needed basis.

(Proposal of INC, Ex. 6, p. 8). GTE contends that INC fails to describe its remote testing and diagnostic capability and, therefore, has not met the requirements of the RFP.

INC contends that, because it proposes to provide on-site maintenance, which is allegedly superior to remote testing and diagnostics, it does not need to describe its remote testing capability.

The Panel does not agree. Although on-site maintenance might negate the need for remote testing and diagnostics,

INC is not relieved by the RFP from its obligation to at least describe its remote capabilities. Clemson asks each vendor to describe its capability to perform remote testing to the cable system. Inc was free to offer alternatives but only after it complied with the original specifications. Vendors may not rewrite specifications to tell the State what its needs.

Further, INC's proposal does not actually indicate that in Clemson's case no remote diagnostics will be necessary. INC states that usually only larger systems need remote testing and that, if needed in this case, "these capabilities can be added on an as needed basis." INC does not indicate in its proposal whether these capabilities will be added for no extra cost to the State.

The Panel holds that INC's response is not responsive to the requirements of the RFP.

B. Premium programming. GTE also contends that INC fails to meet the requirement concerning premium programming, as follows:

As described in Section III of the RFP, the vendor will serve as the University's agent for the procurement of commercial television programming during the contract period. There will be two (2) categories of programming: .
. . . (b) Premium Programming: Programming from networks or super stations for which the vendor will levy charges in addition to the System costs.

(Record, p. 168). Offerors were required to list which stations "can be made available" at additional costs, with the list to include twenty-four specified channels, among

which were American Movie Classics, Comedy Central, CNBC, Lifetime, Nashville Network, Nickelodeon, and the Nostalgia Channel. (Record, p. 168).

GTE claims that INC cannot provide access to the above listed channels without adding more satellite dishes and/or hardware than it specified in its proposal.

INC states in one place in its proposal that it would install one 4.5 meter dish and three 3.2 meter dishes and in another place that it would install one 4.5 meter, two 3.2 meter dishes and "a third 3.2 meter dish if the Nostalgia Channel is chosen as part of the Premium Programming line-up." (Technical Proposal of INC, pp. 3 and 16). INC offered a price for each of the twenty-four premium channels.²

Considering INC proposal as a whole, the Panel holds that INC has met the requirement that it list all the channels which can be made available, including the twenty-four channels specified.

Remedy

Because the Panel has determined that INC is not responsive to all of the material requirements of the RFP, resolicitation of the contract is required under the Panel's decision in In re: Protest of Carter Goble Associates, Inc., Case No. 1989-25.

²Pricing information is treated as confidential and is not made a part of the record in this case.

Conclusion

For the reasons stated above, the Panel affirms the decision of the Chief Procurement Officer as indicated and orders that this contract be resolicited. In so doing, the State may make whatever changes to the specifications the it deems desirable.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Gus J. Roberts
Chairman

Columbia, S.C.

11-17, 1992