

APPEALED

STATE OF SOUTH CAROLINA) IN RE: PROTEST OF INDUSTRIAL SALES CO.
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

CIVIL ACTION NO. 93-CP-40-2747

Cameron & Barkley Company,)
)
Petitioner,)

v.)

ORDER

South Carolina Procurement Review)
)
Panel; Medical University of South)
)
Carolina; The Budget and Control)
)
Board, Division of General Services,)
)
Materials Management Office; and)
)
Industrial Sales Co., Inc.)
)
Respondents.)

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BARBARA A. SCOTT
C.C.C. & G.S.

FILED

This matter comes before the court pursuant to the Administrative Procedures Act, S C. Code Ann. Section 1-23-310, et seq. (1986) on Cameron and Barkley Company's Petition for Review of an administrative decision by the South Carolina Procurement Review Panel.

FACTS

On December 15, 1992, the State issued a Request For Proposals (RFP) to furnish, warehouse and deliver maintenance/repair supplies and equipment to the Medical University of South Carolina (MUSC). The Budget and Control Board, Division of General Services, Materials Management Office (General Services), worked with MUSC in the process of procuring the required goods and services. The Cost Section of the RFP contains a "market basket" or sample list of the type of supplies to be provided under the contract. Amendment #001 to the RFP changed some items listed in the Cost Section market basket. None of the offerors protested any aspect of Amendment #001. The RFP required an offerors' response to the Cost Section, which included pricing the market basket, to be submitted separately from the remaining RFP response. General Services evaluates the Cost section and an agency

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evaluation committee evaluates the noncost criteria of the proposals submitted in response to the RFP.

The State opened the proposals submitted in response to the RFP on February 11, 1993. The State reviewed the proposals for responsiveness to the requirements of the RFP. Because of the changes to the market basket outlined in Amendment #001 to the RFP, Cameron & Barkley (C&B) submitted an original Cost Section market basket proposal in the amount of \$11,411.87 and an amended Cost Section market basket proposal of \$2875.49. However, the total amount of the original proposal and the amendment proposal could not simply be added together. Some items listed in the original market basket proposal were duplicated in the Amendment market basket proposal, requiring the State to delete the duplicated items and add the remaining items, to create a correct cost proposal. Industrial Sales Co., Inc. (ISC) submitted one cost section market basket proposal without duplicate items.

The proposals submitted by ISC and C&B were determined to be responsive and evaluated. The RFP lists the following four criteria for evaluating the proposals: cost of proposal, demonstrated understanding of the project, contractor profile, proposed method of prescheduled price adjustments. The State used a mathematical formula to determine the points received by the offerors for the cost criteria, based on the proposed costs. An evaluation committee composed of MUSC employees considered and scored the remaining noncost evaluation criteria. Based on evaluation scores, the State issued a Notice of Intent to Award to C&B on March 12, 1993. The Intent to Award was suspended on March 24, 1993 due to the protest of ISC. ISC amended its original protest letter.

The CPO conducted a hearing on ISC's protest on April 12, 1993 and issued a decision on April 21, 1993. The CPO received ISC's appeal to the

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South Carolina Procurement Review Panel (Panel) on May 3, 1993. The Panel held an administrative hearing on June 1 and 2, 1993. At the beginning of the Panel hearing, C&B renewed its written motion to dismiss the protest of ISC. The Panel sustained C&B's motion to dismiss ISC's protest issue concerning the evaluation of cost and denied C&B's motion to dismiss the remaining issues of ISC's protest. The Panel ruled repeatedly throughout the hearing that the issues under consideration were the issues contained in ISC's amended protest letter. The Panel issued its Order on June 30, 1993, finding that C&B was not responsive to the RFP because it submitted two proposals, an original, and an amended, with two different cost totals, which could not be evaluated in the form that they were submitted. C&B filed for a judicial review under the South Carolina Administrative Procedures Act on July 16, 1993, and amended its Petition on July 30, 1993.

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DISCUSSION

The issue in this case can best be characterized as whether the Panel considered new issues at its hearing, or merely new evidence relating to an issue previously raised by ISC in its protest.

The South Carolina Consolidated Procurement Code, S. C. Code Ann. Section 11-35-10, et seq., (1986) is the controlling law. Although the Government Accountability and Reform Act of 1993 revised the Procurement Code, the procurement involved in this case is governed by the law applicable prior to the revisions.

The Panel is created by S.C. Code Ann. Section 11-35-4410, which also grants the Panel, in part, authority to review "formal protests of decisions arising from the solicitation and award of contracts". Section 11-35-4410(5), entitled "Jurisdiction", grants the Panel "the authority to interview any person it deems necessary" and to "establish its own rules and procedures for the conduct of its

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business, including the holding of necessary hearings". Since its inception, the Panel has undertaken to provide *de novo* review of matters appealed from the CPO, as is evidenced from the decisions of the Panel. The *de novo* hearings are based on S. C. Code Ann. Section 11-35-4410(5). The Panel's review is similar to that of the Board of Health and Environmental Control described by the South Carolina Court of Appeals in National Health Corporation v. South Carolina Department of Health and Environmental Control, 298 S.C. 373, 380 S.E.2d 841 (S. C. App. 1989):

Black's Law Dictionary defines "trial de novo" as "a new trial or retrial had in which the whole case is tried as if no trial whatsoever had been had in the first instance." Black's Law Dictionary, (Fifth Ed., 1979). The proceeding before the Board had the "trappings" generally associated with a "trial de novo," i.e., the right to be heard, to present documents, to cross examine witnesses and have a decision of the merits. This is in accord with the requirements of the APA. However, it is recognized that the Board proceeding is still essentially an administrative "review" of a preliminary agency decision. [citation omitted].

With this in mind, it is understood that the Board proceeding, while encompassing many elements of a "trial de novo" is in some aspects "essentially appellate." See, Milliken and Co. v. S. C. Dept. of Labor, 275 S.C. 264, 269 S.E.2d 763, 764 (1980).

298 S.C., at 378-379, fn. 1, 380 S.E.2d, at 844, fn. 1.

Hitachi Data Systems Corporation v. Leatherman, 420 S.E.2d 843 (1992), holds that the Panel may not review procurement matters on its own initiative. In this respect, the Panel is an appellate body. However, Hitachi does not address the *de novo* status of the Panel's hearings. Hitachi does not restrict the Panel from conducting *de novo* hearings, at which any evidence relevant to the protest issues established in the initial protest letter, whether considered by the CPO or

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not, may be presented. The protestant is not allowed to present new issues, but any new evidence may be considered by the Panel in making its determination.

The Panel has adopted procedures whereby the materials submitted to the CPO at the CPO hearing are forwarded to the Panel upon a protestant's submitting an appeal letter to the Panel. The Panel numbers the materials and sends them to the parties as the record before the Panel. The materials from the CPO do not include a transcript as the testimony before the CPO is not sworn. A transcript of the CPO hearing was presented as evidence at the Panel hearing in this case. The Panel allows any new evidence to be presented, whether testimony or documents, during the Panel's *de novo* hearing.

C&B has not proven substantial prejudice by the conduct of the Panel hearing. C&B participated in both the CPO hearing and the Panel hearing. The record reveals that C&B was given notice of the issues, an opportunity to be heard, and the right to cross examine witnesses for the Panel hearing. Tall Towers v. Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987). In this case, the procedures adopted by the Panel have not affected the process with an error of law nor have the procedures violated the due process rights of C&B.

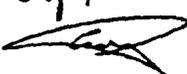
The facts of this case create unusual circumstances. In this case, documents were presented at the CPO hearing as the cost sheets submitted by C&B, when in fact they were not. These same documents were sent to the Panel and distributed as part of the Panel's record prior to the Panel's hearing. It was not until the hearing that the actual cost sheets submitted by C&B were revealed and became part of the record. At the hearing before the Panel, new evidence of C&B's alleged nonresponsiveness was revealed through the testimony of Mr. Bateman, an employee of C&B and C&B's witness. Mr. Bateman testified about how C&B submitted an original and amended proposal

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of the Cost Section of the RFP and Amendment #001, which contained duplicates. Further new evidence was revealed when the Panel requested a copy of the cost sheets submitted by C&B in its proposal, and it was revealed that the cost sheets submitted to the CPO as C&B's were not the cost sheets C&B submitted. This evidence, along with the testimony of Mr. Bateman that C&B submitted two different sets of cost sheets which contained duplicates, was evidence the Panel considered in its determination of the nonresponsiveness of C&B's proposal.

The standard of review applicable to this case is that enunciated by the South Carolina Supreme Court in Lark v. BI-LO, Inc., 276 S.E.2d 304, 306 (1981), that a finding by an administrative agency will be set aside only if it is unsupported by substantial evidence. "Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action." The evidence of this case would allow reasonable minds to reach the conclusion that the administrative agency reached.

The decision of the Panel did not violate the due process rights of C&B because C&B had a copy of the proposal it submitted and knew or should have known that the proposal provided to the CPO and the Panel as part of the official record was not in fact the proposal C&B had prepared. "When a person knows of a thing he has notice thereof, and no one needs notice of what he already knows", Walter v. Preacher, 185 S.C. 462, 194 S.E. 868, 870 (1938). The record reflects testimony from C&B as to the requirements of the Cost Section of the RFP and the requirements of Amendment #001, which amended the Cost Section of the RFP. C&B had notice that the proposal before the CPO and in the Panel's record was not the one which it had prepared. C&B's proposal was clearly at issue. C&B has failed to show any violation of its constitutional rights,

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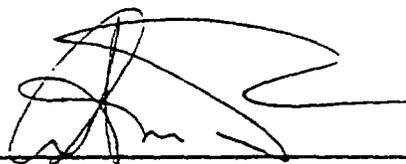
because C&B produced the evidence which the Panel considered in determining its nonresponsiveness.

The decision of the Panel did not constitute an abuse of discretion in that the evidence, in the form of documents and testimony, reveals that C&B submitted an original and an amended proposal, each having a separate price, which could not be evaluated as submitted. Under Consolidated Procurement Code Regulation 19-445.2070 if a proposal does not conform to the essential requirements of the RFP it must be rejected. Regulation 19-445.2080 provides an exception for nonconforming irregularities that have no effect on price, quality, quantity or delivery of the supplies or services being procured, and which will not prejudice other bidders if the irregularity is corrected. The ambiguity of the price contained in the two proposals submitted by C&B affects the determination of the most important criteria of the RFP, the Cost Section, which affects price, as well as, being prejudicial to other offerors in the manner the pricing irregularity was corrected. The Panel did not abuse its discretion in applying the appropriate regulations. The Panel's review is not limited to a review of the actions of the CPO for abuse of discretion. The Panel's hearing is *de novo*.

CONCLUSION

For the reasons outlined above, the Court finds that the Petition for Review of Cameron and Barkley Company lacks merit and hereby dismisses it.

AND IT IS SO ORDERED.



Costa M. Pleicones
Judge, Fifth Judicial Circuit

Columbia, SC

February 23, 1993

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