STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	CASE NO. 1996-13

In re:
Protest of Coca-Cola Bottling Co. Consolidated; Appeal by Coca-Cola Bottling Co. Consolidated.

This case came before the South Carolina Procurement Review Panel (Panel) on August 22, 1996, on the appeal of Coca-Cola Bottling Company Consolidated (Coke). Coke appeals the decision of the Chief Procurement Officer (CPO) finding Coke's proposal nonresponsive.

Present and participating in the hearing before the Panel were Coke represented by Rosemarie Bryan, Esquire and Office of General Services of the Budget and Control Board represented by Delbert Singleton, Jr., Esquire Cromer Vending Services was present but did not participate.

FINDINGS OF FACTS

On March 5, 1996, the Materials Management Office (MMO) of the Office of General Services (General Services) issued a Request For Proposals (RFP) on behalf of the Citadel for Beverage Vending Services. [Record p. 24-41]. A mandatory pre-proposal conference was held at the Citadel on March 19, 1996. [Record p. 25]. Questions raised at the pre-proposal conference were answered in Amendment No. 1 to the RFP. [Record p. 15-23]. No offeror raised questions that indicate a lack of understanding concerning the requirement to provide the percentage of commission offered on monthly gross sales. The first evaluation

factor in the RFP is the percentage of commission to be paid to the Citadel on monthly gross sales from the vending machines less state sales tax. The RFP requires an offeror to submit a minimum of 25 percent (%) commission.

Proposals received in response to the RFP were opened on April 5, 1996. Coke submitted a proposal containing a structured commission, based on the product sold. Coke's commission offer shows commission rates of 61.89% for 12 oz. cans, 14.75% for 11.5 oz. juice, and 25.26% for 20 oz. bottles. [Record p. 46]. MMO found Coke nonresponsive because the juice commission rate is below the 25% minimum. [Record p. 45].

The MMO buyer for this procurement, Doug Horton, testified that he was initially uncomfortable with the 14% figure for juice on Coke's commission offer, but decided to have the Citadel's procurement office review Coke's proposal. The Citadel came up with dollar figures for each offeror, based on previous sales, to compare Coke's structured percentages with single percentages proposed by other offerors. Cokes' proposal was considered by the Citadel's evaluation committee, and ranked as the highest offeror. Mr. Horton spoke with Coke employee, Jeffery Swoyer, after the proposals were evaluated and indicated that Coke was the highest ranked offeror, but the low percentage for the juices was a problem. Mr. Horton testified that he spoke to his supervisor, Jimmy Culbreath, about the low percentage for the juices, and after that consultation, Coke was determined to be nonresponsive.

On May 30, 1996, Coke was found to be nonresponsive and award was made to Cromer Food Services. [Record p. 44-45]. Coke protested MMO's

finding that it was nonresponsive on June 13, 1996, and on July 1, 1996, the CPO, after conducting a review, issued a decision finding Coke nonresponsive.

CONCLUSIONS OF LAW

Nonresponsive

Coke argues that it is responsive because the RFP does not require an offeror to propose a minimum 25% commission on each product, but a minimum commission of 25% on gross sales of products. Coke contends it provided a commission structure which exceeds the required 25% of gross sales, as well as being the highest offer at 56.71%. The RFP in Part VI, states, in pertinent part:

> [o]fferor must submit as a minimum the following information, and in the listed format (four copies of the information is required):
>
> ...
>
> 2. Provide percentage of commission to be paid to the College on monthly gross sales less S.C. State sales tax. Minimum commission acceptable is 25 percent.
>
> ...
>
> Bidders not bidding in accordance with this requirement will be considered nonresponsive.
> [Record p. 31].

The RFP does not require a commission percentage on each product, and neither does it prohibit a structured commission by product, if a single commission percentage is given. Coke admits that it did not provide a single commission percentage.

Coke contends that to honestly present the commission paid to the Citadel so that audited records reflect the commission in the bid, it had to structure the commission based on machine sales. The RFP under part IV,

Scope of Work, provides in part that "inventory control of reported inventory sales for route employees, after reconciliation to cash collections, shall be used as the basis to compute commissions payable to the College. Collections should be bagged and counted by machine, reconciled to reported inventory sales, and not co-mingled with changer funds." Coke explains that the structured commissions simply show internal procedures on how sales are determined by machine, and are provided to show what auditors would find upon inspection, but that one percentage of 56.71% is being offered. Coke argues that it's structured commission offer provides greater revenue than the single commission rate offered by Cromer Vending Service, the company awarded the contract. [Record p. 48].

MMO argues that the RFP clearly requires a single commission and not commissions on each product. MMO contends that since Coke chose to structure its commission by product, and one of the product's commissions is under the minimum 25%, then Coke is clearly nonresponsive. MMO argues that the RFP clearly states that one commission rate of over 25% is being solicited, and Coke did not provide an overall commission percentage.

The Panel agrees with MMO that the RFP clearly requires one commission rate of over 25%. The Panel sees no prohibition to Coke structuring its commission by product, as long as the RFP requirements are met. The RFP does not prohibit structuring the commission per products with percentages below 25%, if the single percentage of gross sales offered is over 25%. However, Coke did not provide one commission percentage over the minimum

25%. Coke admits it did not write on its commission offer one commission percentage of gross sales. The Panel finds that Coke is nonresponsive to the requirements of the RFP.

Minor Informality or Irregularity

Coke argues that its failure to show a single commission percentage is a clerical error and a single commission of 56.71% can be arrived at through simple math applied to the information provided on its commission offer. As a clerical error which MMO could correct by doing simple math, Coke claims the failure to provide the single commission percentage is a minor irregularity. Coke, through testimony, suggests that a meld of the product commissions provided with other information provided produces the single figure of 56.71% of gross sales being offered. Coke provides estimated income, based on projected sales, on its commission offer. Gross sales can be computed from multiplying the number of cases sold times the number of units per case times the product unit price, and subtracting the required sales taxes. The estimated income divided by the gross sales equals the percentage of commission to the Citadel.

The Panel notes that Coke does not use the 20 ounce bottles in computing the 56.71% commission it states as its offer, although it clearly includes this product on its commission offer. With the 20 ounce bottles included (assuming a case contains 24 bottles as does the 12 ounce can and juices), estimated income is $149,814.65 and gross sales after sales tax is $300,390.00, providing a single commission percentage of 49.87%. The RFP allows for the inclusion of 20 ounce bottles [Record p. 31], and Coke offers the

20 ounce bottle [Record p. 46], so they must be included in any calculations of a single commission percentage. Including the 20 ounce bottle also shows another flaw in Coke's reasoning that MMO should calculate the single commission Coke is offering. The number of units per case must be known to calculate the amount of gross sales, and while the number of cans per case can be found on the sheet attached to Coke's commission offer, the number of 20 ounce bottles per case is not provided. MMO cannot assume information. Converting Coke's commission percentages for each product into a single percentage of commission on monthly gross sales is not a matter of simply extending unit prices or adding figures provided to come up with a total, or even as simple as averaging the three percentages provided.

S. C. Code Ann. section 11-35-1520(13) provides that a minor irregularity "is some immaterial variation from the exact requirements of the invitation for bids having no effect or merely a trivial or negligible effect on total bid price". Clearly the commission offer is essential, and not providing a single commission offer, however it is arrived at, does not have a trivial effect on the price requirements of the RFP. Not providing a single commission percentage in this case is not an immaterial variation which can be corrected or waived. The Panel finds that Coke's failure to provide a single commission percentage is not a minor informality or irregularity.

The Panel's findings do not negate the mistakes made by the State in this case, but neither do the State's mistakes negate the fact that Coke's offer is nonresponsive. The Panel takes this opportunity to point out that the State

mistakenly began negotiations before making a decision concerning the responsiveness of Coke. Mr. Horton testified that he had a problem with the juice commission of 14.75%, which was always "in the back of his mind". However, in discussing with Coke possibly changing the percentage for juice, the State actually began negotiating prior to determining responsiveness. An offeror may not change its bid. The State cannot negotiate with a nonresponsive offeror. Only after a determination of being responsive can negotiations concerning the price begin with the highest ranked offeror. While there is no time limit in which the State must make a determination of nonresponsiveness, the State cannot begin negotiations with a nonresponsive offeror. As stated, the State's actions do not change the fact that Coke submitted a nonresponsive offer and do not effect the competitive process or outcome of this case.

Based on the foregoing, the Panel finds Coca Cola Bottling Company Consolidated nonresponsive to the RFP requirements, and upholds the CPO's decision in so far as it is in keeping with this Order.

IT IS SO ORDERED.

Gus J. Roberts, Chairman

Columbia, SC
September 3, 1996.