

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1996-3

In re:)

Protest of Blue Cross Blue Shield of South Carolina)
and Public Consulting Group, Inc.; Appeal by Blue)
Cross Blue Shield of South Carolina.)

ORDER

This case came before the South Carolina Procurement Review Panel (Panel) on March 14, 1996, on the appeal of Blue Cross Blue Shield of South Carolina (BCBS). BCBS appeals the decision of the Chief Procurement Officer (CPO) concerning the appropriate remedy after finding AdminaStar's proposal nonresponsive.

Present and participating in the hearing before the Panel were Blue Cross Blue Shield of South Carolina represented by David Robinson, II, Esq. and Dan Brailsford, Esq.; AdminaStar represented by Elizabeth Crum, Esq.; Public Consulting Group, Inc. represented by Melissa Copeland, Esq. and John Schmidt, III, Esq.; Department of Health and Human Services represented by Deirdra Singleton, Esq.; and Office of General Services of the Budget and Control Board represented by Delbert Singleton, Jr., Esq.

FINDINGS OF FACT

On August 21, 1995, the Information Technology Management Office (ITMO) of the Office of General Services issued a Request For Proposals (RFP) on behalf of the SC Department of Health and Human Services (DHHS) for "Third Party Liability Services and System". The RFP contains the following at page 15, section B:

B. TERM OF CONTRACT

The contract shall become effective upon notification of award by ITMO and shall expire June 30, 1998. This contract will automatically extend on the anniversary date at the prices, terms, and conditions

contained in the original solicitation. Said extensions may be less than, but will not exceed two (2) additional one (1) year periods.
[Record p. 41]

The pre-proposal conference and deadline for questions was October 5 & 6, 1995. [Record p. 16]. Amendment #1 to the RFP was issued on October 12, 1995. [Record p. 59]. Amendment #1 contains the following question and answer:

20. Pages 223-226. These sheets indicate a three year procurement with one and a half option years. Page 15 indicates two years with two option years. Please clarify. Please verify if the second option year is in fact only six months since this affects pricing structure.

State's Response:

Page 15, Section B, CONTRACT PERIOD, is amended to read: This contract shall become effective upon notification of award and shall expire June 30, 1999.

[Record p. 79]

As the question indicates, the term of the contract as set out in the RFP is not clear. Amendment #1 to the RFP contains a change to the contract period in that it amends the expiration date of the contract and does not include the two one-year options to extend the contract that are stated in the RFP. Also, Amendment #1 includes Schedule B.1, titled Fixed Operating Costs, which contains five columns with dates at the top, as follows:

07-01-96	07-01-97	07-91-98	07-01-99	07-01-2000
06-31-97	06-30-96	06-30-99	06-30-2000	12-31-2000

(sic)

[Record p. 81].

Schedule B.1 also indicates three years for the "Start-up Costs" and a total of four years and four months of costs.

Three proposals were received and were opened November 16, 1995, evaluated, and the Notification of Contract Award to AdminaStar (AS) was

posted on December 15, 1995. [Record p. 116]. The Cost Evaluation and Notification of Contract Award both indicate costs for Year 1 through Year 5. [Record p. 116-119]. DHHS brought a discrepancy in AS's proposal to the attention of ITMO on December 18, 1995. [Record p. 83-84]. The proposal of AS contains the following:

Our price assumes that once DHHS owns the imaging equipment and software (after the third contract year) that all maintenance and support is to be provided by DHHS directly or through a new subcontract for services.

[Record p. 121]

On December 19, 1995, ITMO advised AS of the problematic language, and AS agreed to take it out of the proposal. [Record p. 83-84]. On December 28, 1995, Blue Cross Blue Shield (BCBS) protested the notification of intent to award [Record p. 2], and Public Consulting Group (PCG) protested the intent to award by letter dated December 29, 1995.

CONCLUSIONS OF LAW

The facts, as found by the CPO, are not in dispute. BCBS argues that the CPO correctly found AdminaStar nonresponsive, but incorrectly ordered the solicitation canceled and resolicited, rather than awarding the contract to BCBS, the next highest ranked offeror. BCBS contends that any ambiguity in the contract term has no causal relationship to AS's nonresponsiveness so it cannot be used to cancel the solicitation. However, cancellation of an award under the Consolidated Procurement Code is provided for in Regulation section 19-445.2085(C), which provides:

Cancellation of award prior to performance. When it is determined after an award has been issued but before performance has begun that the State's requirements for the goods or services have changed or have not been met, the award or contract may be canceled and either reawarded or a new solicitation

issued, if the Chief Procurement Officer determines in writing that:

(1) Inadequate or ambiguous specifications were cited in the invitation;...

(7) Administrative error of the procuring agency discovered prior to performance, or

(8) For other reasons, cancellation is clearly in the best interest of the State.

BCBS argues that this regulation is not the proper regulation to apply, as award did not actually take place and therefore, Regulation 19-445.2065 concerning rejection and cancellation of bids should be applied. The notification of award, which is also referred to as the intent to award, is a notification of the State's intent to award the contract to the named party for the amount disclosed by a certain date unless the award is suspended or canceled. The notification of award, also known as the intent to award, is the award referenced in the regulation. It is provided, in compliance with Regulation 19-445.2090, prior to signing the contract. A notification of award was issued in this case, and therefore the proper regulation to be applied is Regulation 19-445.2085 which provides for cancellation of awards.

When Regulation 19-445.2085 is applied to the facts of this case, the cancellation of the award and the order to resolicit is justified. Clearly the RFP contains inadequate and ambiguous specifications. An ambiguous RFP will lead to an ambiguous contract, and the term of the contract is not a technical ambiguity but an essential part of the contract. Further, there is apparent administrative error involved in providing different times of duration for the term of the contract within the RFP, as well as between the RFP and the notification of award. The State's best interests are also a factor to be considered in this case. DHHS desired a three year contract with two optional one year extensions. The RFP, after Amendment #1, no longer included the two optional years, and the ambiguities as to the length of the contract make it uncertain as to

the duration of the contract. Terms as stated in the RFP become part of the contract and it is not in the State's interest, or any other party's interest, to enter a contract with ambiguous terms. The Panel finds that the award was properly canceled and resolicitation ordered in this case.

Regulation 19-445.2085 not only allows the award to be canceled but also allows either reaward or resolicitation. BCBS argues that there should be a causal link between the cause of the nonresponsiveness and the ambiguous contract term to justify resolicitation in this case. However, the Panel's decision in Case No. 1989-25, In re: Protest of Carter Goble applies to this case. In Carter Goble, the Panel was also faced with the issue of the proper remedy in the case, given that the highest ranked offeror is not responsive. The Panel held that "resolicitation is the appropriate remedy in this case." The Panel reasoned that

"in an RFP situation, award is made to the responsive offeror whose proposal is most advantageous to the State, taking into consideration price and the evaluation factors set forth in the RFP. Offerors must necessarily be evaluated in relation to each other and ranked on each criteria including cost. Simply deleting ATE's [nonresponsive offeror] scores from the process at this stage does not accurately reflect the result as it would have been if ATE had never been included. If ATE's proposal is removed, all evaluations in this case are invalid. Therefore, despite the problem of prior exposure of bid prices, the Panel believes that the fairest remedy in this case and the only way to insure the State gets the most advantageous proposal is to resolicit the contract in question here."

The Panel reinforced this decision that resolicitation is the appropriate remedy for a RFP that has a nonresponsive offeror, in Case No. 1992-15, In re: Protest of Transportation Management Services, Inc. and Case No. 1992-19, In re:

Protest of GTE Vantage, Inc. In GTE Vantage, the Panel concluded that "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."

In addition to the Panel's prior decisions concerning resolicitation as the appropriate remedy in an RFP situation of the top ranked offeror's nonresponsiveness, this case involves ambiguities in the duration of the contract, which affects the pricing structure. A problem in the process, such as this, can only be cured by cancellation and resolicitation.

For the foregoing reasons, the Panel dismisses and denies Blue Cross Blue Shield's protest and upholds the CPO's decision.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

BY: 
Gus J. Roberts, Chairman

Columbia, SC

April 13, 1996.