

STATE OF SOUTH CAROLINA )  
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COUNTY OF RICHLAND ) BEFORE THE SOUTH CAROLINA  
 ) PROCUREMENT REVIEW PANEL  
 ) CASE NO. 1992-4

IN RE: )  
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 ) PROTEST OF JUSTICE TECHNOLOGY, INC.)  
 ) APPEALS BY JUSTICE TECHNOLOGY, INC.) O R D E R  
 ) and UNISYS CORPORATION )  
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This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on March 19, 1992 on the appeals by Justice Technology, Inc. ("JTI") and Unisys Corporation ("Unisys") from a decision by the Chief Procurement Officer ("CPO") upholding the award to Unisys of a contract to provide and install a laboratory information management system for the South Carolina Law Enforcement Division ("SLED").

Present at the hearing before the Panel were JTI, represented by Al Nichols, Esq.; Unisys, represented by M. Elizabeth Crum, Esq.; SLED, represented by Barbara Heape, Esq., of the Office of the Attorney General; and the Division of General Services, represented by Helen T. Zeigler, Esquire.

#### FINDINGS OF FACT

On November 7, 1991, the Office of Information Technology (ITMO) issued a Request for Proposals ("RFP") on a contract to provide, install and maintain a laboratory information management system for the forensics science department of SLED. SLED's intent is to replace its current manual system of handling evidence with an automated one to

keep up with a criminal caseload that has doubled since 1986.

The new system's most important feature is its ability to record and generate complete chain-of-custody documentation on evidence in criminal cases. One of the primary functions of SLED's forensics laboratory is to analyze physical evidence received from local law enforcement units all over South Carolina. Such physical evidence includes everything from drug residue to hair or fibers to bullet fragments to blood samples.

The RFP was divided in to four lots. Lot A was for an offeror acting as a prime contractor providing the entire management system. Lot B contemplated the offeror acting as a project manager. Lot C concerned the hardware for the system and Lot D was for the software. A Lot C hardware offeror was required to bid also under either Lot A or Lot B. However, an offeror could make an offer on Lot D alone.<sup>1</sup> (Record, p. 77-189).

The State received seven proposals in response to the RFP on December 12, 1991. The evaluation committee consisted of forensics and computer experts from SLED. After the proposals were evaluated, the State issued a Notice of Intent to Award to Unisys Corporation on January 3, 1992. (Record, p. 59). A portion of Unisys' proposal

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<sup>1</sup>The RFP was designed this way as a result of problems encountered during the first Request for Proposals issued on this project.

(Lot D) was from Bill Deaton Systems ("BDS"). (Record, p. 317-334). It is that lot which is at issue here.

On January 7, JTI requested a copy of Unisys' proposal pursuant to the Freedom of Information Act. (Record, p. 375). The State mailed the information requested to JTI on January 14. (Record, p. 374). On January 17, the CPO received a "formal complaint" from JTI dated January 16, requesting that the state delay award to Unisys until JTI had time to receive and review Unisys' proposal. (Record, p. 46). The Notice of Intent to Award was accordingly rescinded. (Record, p. 58).

JTI received the requested copy of Unisys' proposal on January 18. (Record, p. 21). On January 21, the State received a formal protest letter from JTI dated January 20, in which JTI objected to numerous sections of Unisys' proposal without specifying the nature of its grievance. (Record, pp. 47-52).

JTI clarified and expanded its protest grounds by letter dated January 24, 1992. The mailed copy of this letter reached the CPO on January 31, 1992. (Record, p. 389). JTI had also faxed a copy of the letter which was received by the CPO on January 27. (Record, p. 390).

The CPO conducted his hearing on February 11 and, by decision dated February 20, 1992, found in favor of award to Unisys. (Record, pp. 14-28). Both Unisys and JTI appeal from various findings by the CPO. Those grounds of appeal are discussed below.

## CONCLUSIONS OF LAW

### A. Timeliness of JTI's Protest

1. Unisys and SLED's Motion to Dismiss. By way of pretrial motion, Unisys and SLED raised the issue of the timeliness of many of the grounds stated by JTI in its February 27 appeal letter to the Panel. (Record, pp. 7-12). After hearing arguments from all counsel, the Panel granted the Motion to Dismiss as to grievances 3, 7, 8, and 9 and as to portions of grievances 1, 4 and 5.

S. C. Code Ann. § 11-35-4210(1) (1986) provides:

Any actual . . . offeror . . . who is aggrieved in connection with the solicitation or award of a contract may protest to the appropriate chief procurement officer. The protest, setting forth the grievance, shall be submitted in writing within ten days after such aggrieved persons know or should have known of the facts giving rise thereto, but in no circumstance after thirty days of notification of award of contract.

A comparison of JTI's protest letters of January 20 and 24 with its February 27 appeal letter to the Panel reveals that grievances 3, 7, 8, and 9 were not raised before the CPO within thirty days of issuance of the notice of award. Grievances 1 and 5, insofar as they allege that the evaluation committee did not properly evaluate and score

Unisys' proposal, and Grievance 4 insofar as it concerns who is the offeror, are also untimely under the thirty day limit.<sup>2</sup>

2. JTI's January 24 Protest to the CPO. By way of appeal to the Panel, Unisys also challenges the timeliness of JTI's January 24 protest letter on the grounds that it was filed more than ten days after the date when JTI knew or should have known of the facts giving rise to the protest. (Record, pp. 3-5). Unisys concedes that JTI's time for protest begins to run from January 14, the date JTI received the copy of Unisys' proposal which it had requested under the Freedom of Information Act. Unisys also admits that the State received a copy of JTI's January 24 protest letter by fax on January 27, within the ten-day limit. Unisys argues that the faxed copy is not sufficient to constitute submission of a protest under the Procurement Code.

The Panel does not agree. The only requirements relating to formal protests are set forth in § 11-35-4210(1). Those requirements are that the protest be<sup>3</sup> in writing, that it set forth the grievance, and that it be submitted to the appropriate chief procurement officer within the applicable

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<sup>2</sup>JTI attempted to raise grievance 8 and the alleged improper scoring before the CPO by letter dated February 13, several days after it learned of these issues in the hearing before the CPO. (Record, pp. 53-54). The CPO properly ruled these issues untimely. (Record, pp. 29-30).

time limits.<sup>3</sup> No requirement exists that the protest be an original document or that it contain an original signature.

The purpose of requiring a written protest to be filed with the CPO no later than thirty days after award is to put the State on notice of the fact of a party's protest and the reasons therefor. This allows the State to take prompt action regarding the protest in order not to delay any longer than necessary the State's procurement of needed products and services.

The Panel believes that a faxed copy of a protest, when received by the CPO, serves this purpose as well as a mailed copy.

The Panel notes that, in this case, the State had ample warning of JTI's intent to protest the award to Unisys. JTI had already submitted one mailed formal complaint, which advised the State that JTI was going to protest, and one mailed protest letter received on January 21, which set forth some of the grounds of the protest. The January 24 letter was a follow-up protest expanding and clarifying JTI's previous grounds.

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<sup>3</sup>In a previous case, In re: Protest of Warehouse Distributing Company, Case No. 1988-2, Decisions of the Procurement Review Panel 1982-1988, p. 405, the Panel determined that a protest is "submitted" within the meaning of § 11-35-4210(1) when it is placed in the mail, properly addressed, with the proper postage affixed.

B. Responsiveness of Unisys' Proposal

Grievance #1. Failure to Follow Required Form and

Format. JTI claims that numerous sections of Unisys' proposal do not meet the RFP requirements that:

The OFFEROR'S proposal must . . . follow the RFP format, utilizing the same section titles and numbers . . . OFFEROR(S) shall respond to each specification. Each response shall clearly indicate whether the OFFEROR'S product complies (meets or exceeds) or does not comply (fails to meet) each specified requirement. OFFEROR shall explain in detail the method used to meet each requirement.

(RFP, section 1.1.7)(Record, pp. 81). JTI's complaint is that Unisys' proposal fails to follow the format by responding on a point-by-point basis citing section titles.

JTI presented little evidence on this point in hearing before the Panel. Nonetheless, after examining Unisys' proposal, the Panel concludes that any problem as to format in this case is a waivable minor informality under Reg. 19-445.2080. Mere failure to follow the prescribed format is waivable because such failure did not prevent the State from being able to understand and evaluate Unisys' proposal in this case.

Further there was no effect on the price, quality, quantity or delivery of the performance in this case. JTI admits this in its appeal letter when it notes that format

and form are not essential elements of the RFP. (Record, p. 7).<sup>4</sup>

Also as part of grievance #1, JTI alleges that numerous sections of Unisys' bid fail to meet the requirements of Section 1.1.7.2 of the RFP that:

Each affirmative response shall indicate that the OFFEROR'S proposal complies with a specific requirement by answering, "Yes, OFFEROR'S NAME proposal meets or exceed . . ." OFFEROR shall explain in detail the method used to meet each requirement.

(Record, p. 82).

After reviewing the sections of Unisys' proposal indicated by JTI in its January 24 protest letter, the Panel concludes that, while Unisys does not respond, "Unisys meets or exceeds" or "Unisys understands and agrees", Unisys does sufficiently indicate that it is prepared to comply with the essential requirements found in the RFP. The Panel holds that the failure to respond exactly as required by the RFP is a waivable technicality under Reg. 19-445.2080 in this case.

Grievance #2. Failure to Provide Reference Accounts.

JTI contends that Unisys failed to meet the following RFP requirement:

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<sup>4</sup>The key focus in analyzing minor informality cases is not whether the requirements which are not met are mandatory but whether they are essential. See Greggry Electric, Inc. v. DHEC, Case No. 90-CP-40-0348, Order of Judge Kinard, February 1, 1991; and In re: Protest of National Computer, Procurement Review Panel Case No. 1989-13.

OFFEROR(S) must provide three (3) different reference accounts for each Lot responded to by the OFFEROR, where the services offered were similar to the services requested in this RFP . . . . Intent is to show company experience in receiving contracts for and delivery of services similar to the ones proposed.

(RFP section 1.1.14)(Record, p. 84-85). JTI argues that the references listed by BDS (Record, pp. 404-406) are not for forensics laboratories or accounts which required BDS to furnish criminal chain-of-custody software capability.

The RFP at § 1.4.14 does not require that the reference accounts be identical to SLED's project or even from criminal laboratories. The RFP requires only that the accounts be for similar services.

A review of BDS' references indicates that the services furnished by BDS to those accounts involved the basic tracking of laboratory samples and the generation of reports. The Panel is not prepared to say, and JTI has not proved, that BDS' accounts are not for services similar to those requested by SLED.<sup>5</sup>

Grievance #4. Failure to Provide Cost for Consulting, Customizing, etc. JTI also contends that Unisys/BDS failed to respond to section D.4.3. of the RFP which requires:

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<sup>5</sup>Members of SLED's evaluation committee testified that no facility exists which uses the exact laboratory information management system solicited by SLED in this RFP. Further, JTI's President and CEO, Mr. Christopher Cogan, testified that he had no reason to believe that BDS could not develop from its existing software package the system required by SLED, though he doubted that BDS could meet the time frame required.

OFFEROR(S) must state a firm price for any consulting, customizing and/or tailoring of the application proposed in Attachment XI in order to meet SLED's requirements as set forth in this RFP.

(Emphasis added)(Record, p. 160-161). Unisys/BDS responded that it "considers the SLED requirements as a single entity" and "has no concept of consulting, customizing and tailoring when the application is considered a turnkey project." (Record, p. 330).

The Panel finds this response is sufficient because it indicates that BDS is not proposing any hourly customizing costs that will be extra to SLED. Rather, BDS indicates that it is proposing to install a system designed specifically for SLED for one stated fixed price.

Because no customizing or tailoring costs are proposed, there are none to report. The Panel holds that Unisys/BDS meets the requirement of D.4.3.<sup>6</sup>

Grievance #5. Failure to Specify When Monthly Maintenance Costs Become Effective and Cost for Hot-Line Service. JTI contends that Unisys failed to meet the following requirements of the RFP:

D.5.1 The OFFEROR(S) must provide firm, fixed prices for the following maintenance plan on the appropriate pricing page of this document. OFFEROR(S) must state whether monthly maintenance prices would become effective upon installation, testing and

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<sup>6</sup>SLED testified that this section was put in the RFP to satisfy certain accounting requirements imposed by the federal drug grant money being used by SLED to purchase the laboratory information management system.

acceptance by the State or after expiration of software warranties as stated by OFFEROR(S) in response to the RFP.

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D.5.1.2 OFFEROR(S) must specify and furnish the cost for "hot-line" services related to the proposed system products.

(Record, p. 161).

Unisys' response to the above sections is that it "understands and agrees to the terms or information set forth in sections D.5.1 - D.5.1.3." (Record, p. 331). In its response to D.5.2, however, Unisys states that its maintenance contract will begin after acceptance of the product and that "telephone support" is included in the maintenance contract price. (Record, p. 331).

Viewing D.5 as a whole, the Panel concludes that Unisys does include all of the requested information. Any failure to organize its response under the appropriate section headings is a waivable minor technicality in this case. (See Grievance #1 discussion above).

Grievance #6. Failure to Post Performance Bond. JTI claims that Unisys fails to meet the requirements of section D.7.0 of the RFP, which states:

The OFFEROR(S) must be prepared to post a performance bond in the amounts of the total prices for the proposed lot or lots . . . . OFFEROR(S) not agreeing to furnish performance bonds will not be considered. . . . As this performance bond guarantees offeror's successful delivery, installation, and completion of all goods and services under contract, in no event will the performance and acceptance interval

extend beyond the project completion date.  
(Record, p. 163).

Unisys/BDS response to this section is "BDS understands and agrees to the terms and information set forth in section D.7.0." (Record, p. 333). BDS continues, "BDS can only guarantee performance of source code written by BDS. BDS does not warrant performance of development tools, operating system, database, or any software part that is not under the sole and absolute control of BDS. BDS cannot warrant performance of any linked or imbedded code (source or binary) that is not the property of BDS." (Record, p. 333).

JTI contends that, because BDS/Unisys takes exception to warranting certain items, it has failed to meet the requirements of D.7.0.

The Panel holds that section D.7.0 concerns the posting of a performance bond prior to an offeror being awarded the contract. D.7.0 itself explains that the purpose of the requirement is to insure "successful delivery, installation, and completion of all goods and services under contract".

Section D.7.0 does not require the offeror to warrant its services and equipment. The warranty requirements are found elsewhere in the RFP. (See, eg., sections C.8.2 and D.5.2 (Record, pp. 131 and 161)).

BDS responds that it "understands and agrees" that it has to post a performance bond prior to receiving the contract. The Panel holds that BDS' subsequent reservations about warranting products not under its control do not

impair this affirmative acceptance of the requirements of D.7.0.<sup>7</sup>

As a part of its argument on this issue, JTI raises BDS' alleged failure to provide an unlimited license on the Informix software being supplied to SLED. (Record, p. 11). JTI points to D.4.1. which states, "The OFFEROR(S) must provide an unlimited license for the SLIMS application software." (Record, p. 160). BDS responds that it meets or exceeds the requirements of D.4.1. (Record, p. 330). JTI points out that despite this response, BDS only offers a 1-16 user license for the Informix software. (Record, pp. 347 and 366).

The Panel finds that (except as an example of the consequences of BDS' alleged failure to post a performance bond) this issue is untimely raised. Nevertheless, the Panel heard extensive evidence on this issue at the hearing and notes that, if the issue were timely and properly raised, the Panel would find against JTI.

Section D.4.1 requires only that SLIMS application software be accompanied by an unlimited license. BDS agrees to provide such unlimited license and does so in its cost summary. (Record, pp. 330 and 347).

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<sup>7</sup>The Panel notes that, under section 5.1 of the general RFP conditions, the contractor must pass an acceptance test prior to receiving payment for its products and services. (Record, p. 111). BDS agrees to this acceptance test in its proposal. (Record, p. 318).

Experts from SLED and Unisys explained that Informix is a database and not SLIMS application software. The RFP does not require database software to be accompanied by an unlimited license. SLED and Unisys experts further explained how BDS' system can support 160 users with the 1-16 license on the Informix.

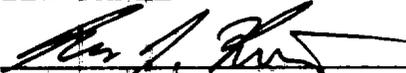
JTI presented the opinion of its President, Mr. Cogan, whom the Panel also considers an expert, that, in his experience, Informix is application software and its license should relate to the number of users or terminals. Mr. Cogan admitted that BDS' system setup would work as described but he felt that such a system would not meet SLED's chain-of-custody requirements.

The Panel is not prepared to substitute its judgment for the judgment of the expert evaluation committee on this issue. JTI has not demonstrated by a preponderance of the evidence that BDS' proposed system will not provide SLED with everything asked for. Further, the Panel accepts SLED and BDS' interpretation of D.4.1. that Informix does not fall thereunder because it is not SLIMS application software. This explanation reconciles BDS' agreement to follow D.4.1 (Record, p. 330) with its treatment of Informix on its cost summary (Record, p. 347).

The Procurement Review Panel finds as stated above and upholds the February 20, 1992 decision of the Chief Procurement Officer. The appeals of Justice Technology, Inc., and Unisys Corporation are hereby dismissed.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

By: 

Gus J. Roberts  
Chairman

March 20, 1992  
Columbia, S.C.